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Legal grounds for implementing the institution of recourse to the mediation procedure and the use of other alternative methods of resolving tax and customs disputes

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Abstract

In the research it is emphasized that, in some states of the European Union EU, tax mediation is already used and considered not only as an alternative method of dispute resolution, but also as a method used to prevent the occurrence of a tax dispute in the future. Thus, on the basis of legal methods of scientific knowledge, such as: dialectical, logical-formal, comparative-legal, etc., the article examined modern approaches to the characterization of mediation as a procedure for peaceful settlement of disputes, paying attention to its characteristic features and differences from other forms of alternative dispute resolution. The state of legal regulation of the mediation procedure in public disputes in general, and in tax disputes in particular, using the example of Latvia and Ukraine, is highlighted. It is concluded that the necessary condition for carrying out mediation in public disputes should be enshrined in the administrative procedural legislation, not only the powers of state and municipal authorities to initiate mediation should be, in addition, to recognize such a decision in the form of an administrative contract, from which legal consequences with the character of public law are derived.

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Bases legales para implementar la institución del recurso al procedimiento de mediación y el uso de otros métodos alternativos para resolver disputas tributarias y aduaneras

Resumen

En la investigación se enfatiza que, en algunos Estados de la Unión europea UE, la mediación fiscal ya se usa y se considera no solo como un método alternativo de resolución de disputas, sino también, como un método utilizado para prevenir la ocurrencia de una disputa fiscal en el futuro. Así, sobre la base de métodos jurídicos del conocimiento científico, tales como: el dialéctico, el lógico-formal, el jurídico-comparativo, etc., el artículo examin**ó** los enfoques modernos de la caracterización de la mediación como un procedimiento para la resolución pacífica de controversias, atendiendo sus rasgos característicos y diferencias con otras formas de resolución alternativa de conflictos. Se destaca el estado de la regulación jurídica del procedimiento de mediación en los litigios públicos en general, y en los litigios fiscales en particular, utilizando el ejemplo de Letonia y Ucrania. Se concluye que la condición necesaria para llevar a cabo la mediación en los conflictos públicos se debe consagrar en la legislación procesal administrativa, no sólo las facultades de las autoridades estatales y municipales para iniciar la mediación se debe, además, reconocer tal decisión en forma de contrato administrativo, del que se derivan consecuencias jurídicas con carácter de derecho público.

Palabras clave: disputas públicas; disputas fiscales; formas alternativas de resolución de conflictos fiscales; mediación en litigios fiscales; contrato administrativo.

Introduction

The construction of a fair tax system and a modern innovative taxation mechanism, which ensured the equality of all taxpayers before the law, are necessary conditions for simultaneously achieving such UN sustainable development goals as “Decent work and economic growth” and “Industry,

innovation and infrastructure". However, this is impossible without establishing an effective mechanism for resolving conflicts that inevitably arise in this area of taxation, both in the form of a fair trial and alternative ways of resolving public disputes.

Today, neither the administrative extrajudicial nor the judicial form of resolving tax disputes is free of certain problems during their implementation, which does not contribute to the establishment of fair justice and necessitates the search for ways and directions to improve their organizational and legal regulation. Therefore, the article aims to determine the legal grounds for implementing the institution of recourse to the mediation procedure and the use of other alternative methods of resolving tax and customs disputes.

1. Methodology of the study

The general design of the research is based on the universal general scientific and especially legal methods of scientific cognition: dialectical, formal-logical, formal-legal, historical-legal, comparative-legal, analysis and synthesis, logico-semantic, and method of legal modeling. Thus, the comparative legal method made it possible to reveal the peculiarities of the legal regulation of tax mediation in different countries. The application of the method of analysis and synthesis made it possible to determine the concept of "tax mediation" and its features, as well as problematic aspects. The formal-logical method and the method of legal modeling were used to determine the prospects for improving the tax mediation institute.

2. Results and Discussion

2.1. The place of mediation in the system of alternative ways of settling public disputes and the international principles of its conduct

Alternative methods of dispute resolution (settlement) developed due to dissatisfaction with the activity of the judicial system, and the formality of administrative appeal procedures that led to their transformation into an independent, additional form of dispute resolution, which is gaining wider distribution in the world.

Alternative resolution of public disputes is primarily based on a compromise, an agreement, rather than a power-coercive method of resolving a dispute, and therefore the use of such procedures meets the needs of subordinate subjects to a greater extent. In such a procedure, the

administrative body acts as a party to the dispute, and not as a jurisdiction to which a private entity applies for its settlement.

Consolidation of the concept of mediation made it possible to clearly distinguish it from other alternative means, and to perceive it not as a separate body, but only as a tool for facilitating the implementation by the parties of those rights and powers that are fixed for them in the legislation.

The ECHR determined that a non-judicial body under national law can be considered a court if it performs judicial functions and provides procedural guarantees provided for in Article 6 of the ECHR, such as impartiality and independence (European Court of Human Rights, 2013), otherwise, the extrajudicial body must be subject to supervision by a judicial body that has full jurisdiction and meets the requirements of Article 6 of the CE Convention on the Protection of Human Rights and Fundamental Freedoms (European Court of Human Rights, 1993). And therefore, mediation is subject to supervision by the court. The EU also encourages the use of mediation as an alternative measure.

Thus, the Mediation Directive (2008/52/EC) allows the use of mediation in cross-border disputes in certain civil and commercial matters, but it does not extend to questions of fees, customs, administrative matters, or disputes concerning the responsibility of the state (European Parliament and the Council, 2008). According to EU law mediation is described as a structured process in which disputing parties voluntarily attempt to settle with the help of a mediator.

The growing popularity of mediation as a potentially cost- and time-saving mechanism is prompting some states to introduce mandatory mechanisms (Lohvyn, 2020). The Council's recommendations are part of EU law, and therefore its members actively implement mediation, including administrative mediation. Ukraine is actively implementing the use of alternative means, including mediation in legal practice under Ukraine's obligations in the field of European integration (Lohvyn, 2020).

2.2. Mediation in tax disputes: the experience of European countries and the basis of its legal consolidation in Latvia and Ukraine

Mediation is gaining recognition and popularity in Ukraine and Latvia, where it is regulated. However, there is a pressing need for the development of legal provisions and the practice of administrative mediation, as well as the implementation of tax mediation.

In Latvia, legislation on mediation developed under the influence of European Union law. First, the concept of integration of mediation in the settlement of civil disputes was approved by the Resolution of the Cabinet

of Ministers of 18.09.2009 № 121 (Cabinet of Ministers of Latvia, 2009). Additionally, an action plan was formulated to implement this concept. On May 22, 2014, Latvia adopted the "Law on Mediation," which defined the parameters of mediation within the country (Saeima of Latvia, 2014).

This law provides a general framework for mediation that applies to disputes, not only in civil law but also in other areas. In Latvia, mediation (conciliation) is allowed in civil matters (Kaspars Freimanis Law Firm «VARUL», 2013), labor, administrative and criminal cases (Saeima of Latvia, 2005).

However, neither the law on mediation nor any other regulations directly provide for the possibility of mediation in an administrative process. But the researchers point out that such an additional legal framework is necessary since private legislation is based on the principle of private autonomy of individuals. Though, in public law, the legislator has a wider discretion to establish mediation rules, and they must be established in regulatory acts (Committee of Ministers of the Council of Europe, 1998).

In Latvia, the Law "On Mediation" includes the main principles of the mediation process (voluntary participation, confidentiality, equality and cooperation among parties, impartiality, and objectivity of the mediator).

It also covers the organization of the mediation process, types of agreements made for the mediation process and as a result of this process certification, and requirements for mediators, their rights and obligations, the activities of the Mediation Council, the influence of mediation on the statute of limitations, court actions based on mediation recommendations within the civil process and the procedural consequences of applying the mediation procedure (Kaspars Freimanis Law Firm "VARUL", 2013). Based on the Law of the Cabinet of Ministers, the rules for the certification of intermediaries and the certification procedure dated August 5, 2014, № 433 were approved.

In 2012, the Law of Latvia "On Administrative Procedure" was significantly amended, introducing a new tool in administrative cases - settlement, which, in particular, can be achieved with the help of mediation (Saeima of Latvia, 2001). It was a completely new concept of settlement in administrative processes. When examining a statement of dispute related to the Administrative Law, the institution (public administration body) must take into account the possibility of entering into a settlement before making any decision (Tvaronavičienė *et al.*, 2022).

If the institution agrees that a settlement is possible, it must inform the individual of the settlement process and agree on a friendly arrangement to allow the individual to express his or her views on the possibility of settlement (Saeima of Latvia, 2001). In addition, in the administrative procedure, if the Court examines the dispute, and the presiding judge considers that a

settlement may be possible, the court may explain to the participants in the case the possibility of entering into a settlement (administrative agreement), as well as offer possible conditions of any settlement. The court may explain the possibility of entering into a settlement in writing and at a court session and may convene a hearing only to discuss this issue (part 1 of Art. 107 of the Administrative Procedure Law, 2001).

In Ukraine, the parties usually turn to alternative ways of resolving public legal disputes both within the scope of pre-trial and court appeals. According to the general rule provided for in clause 56.1 of Art. 56 of the Tax Code of Ukraine, decisions made by the controlling body may be appealed in the order of administrative appeal or the procedure of administrative proceedings. The administrative appeal procedure is considered a pre-trial procedure for resolving a tax and customs dispute.

With its entry into force on January 15, 2017, the Code of Administrative Proceedings of Ukraine in the new version introduced the updated institution of reconciliation of the parties, aimed at settling the dispute based on mutual concessions and reaching an agreement between the parties to the dispute, in whole or in part, which is possible before the start of the consideration of the case on its merits, that is, before the completion of the preparatory proceedings.

According to Art. 190 of the Code of Administrative Procedure of Ukraine, the reconciliation of the parties may concern only their rights and obligations. The parties can reconcile on terms that go beyond the scope of the dispute if such terms of reconciliation do not violate the rights or legally protected interests of third parties. The terms of reconciliation cannot contradict the law or go beyond the competence of the subject of power.

In Ukraine, only on November 16, 2021, the Law of Ukraine "On Mediation" was adopted, which defines the legal principles and procedure for conducting mediation as an out-of-court conflict (dispute) settlement procedure. Adoption of this law normatively regulated the out-of-court dispute settlement procedure, which can be resolved in civil, economic, or administrative proceedings, also the provisions of the law can be applied in cases of administrative violations and criminal proceedings to reconcile the victim with the suspect (accused).

The Code of Administrative Procedure of Ukraine has been modified to allow for the resolution of public-law disputes, such as tax, customs, and disputes relating to the allocation and utilization of budget grants, as well as the payment of state social insurance funds, through mediation procedures. Thus, Article 47 of The Code of Administrative Proceedings of Ukraine (CAP of Ukraine) enshrines the right of the parties to reach reconciliation, including through mediation, at any stage of the court process, which is the basis for closing proceedings in an administrative case. However, the

practice of conciliation and mediation in the administrative justice system of Ukraine remains isolated.

Administrative appeals against decisions of controlling (tax and customs) bodies are carried out according to the rules of tax legislation, the composition of which is defined in Art. 3 of the Tax Code of Ukraine. Regarding the possibility of using alternative methods of resolving tax and customs disputes, certain provisions have already been established in the legislation.

Thus, Clause 1 of Subsection 9-2 of Chapter XX of the Tax Code of Ukraine establishes the possibility of clarifying tax obligations for corporate income tax and value-added tax during the application of the tax compromise - the regime of exemption from legal liability of taxpayers and/or their officials (officials) for underestimating tax liabilities from corporate income tax and/or value-added tax for any tax periods up to April 1, 2014, and the grounds for concluding a settlement agreement are set out in clause 17 of Subchapter 4 of Chapter XX of the Tax Code of Ukraine on issues of write-off of deferred payment of tax liabilities under the procedure regulated by the legislation on bankruptcy.

In turn, in Part 1 of Art. 521 of the Customs Code of Ukraine, which regulates public relations in the sphere of reaching a compromise in the case of a violation of customs rules, provides that "in the absence of signs of a criminal offense in the actions of a person who has violated customs rules, the proceedings in the case of this offense may be terminated using a compromise.

The compromise refers to concluding a peace agreement between the specified person and the customs body whose official conducts proceedings in the case". Also in part 5 of Art. 521 of the Customs Code of Ukraine stipulates that a person who has violated customs rules applies to the head of the customs authority with a statement of an arbitrary form with a request to terminate the case about this violation of customs rules using a compromise. The fact of submitting such an application is recorded following the procedure defined by parts three and four of Article 264 of the Customs Code of Ukraine.

Tax disputes have several features characteristic of public legal disputes (administrative, tax, customs, budgetary, etc.), one of the main ones of which is that the party endowed with authoritative powers is obliged to act only on the basis, within the limits of the powers and in a manner, provided by the Constitution and laws of Ukraine (Article 19 of the Constitution of Ukraine). Accordingly, tax mediation is conditioned by the specifics of tax disputes, the legal status of its parties and requires proper competence of the mediator, and states striving to minimize the occurrence of tax disputes should promote the practice of addressing them.

2.3. Features and legal limitations of tax mediation

Tax mediation involves neutrality and impartiality, voluntariness, joint fact-finding, confidentiality, self-determination, integrity, and, of course, compliance with applicable tax legislation. Tax mediation is recognized by most researchers as a civilized mechanism for out-of-court conflict resolution, and has prospects for application in Ukraine (Yasynovskyi, 2016).

In "tax and customs mediation", to achieve a compromise and balance interests, it is necessary to determine the public interest of the state and society, the role of the subject of authority in the implementation of tax control by the state, the initiative of the tax and customs authority in ensuring law and order, taking into account the State of the standard of mediation (mediation) social service, which stipulates that in the event of non-fulfillment of the obligations assumed by the party under the agreement, as a result of the mediation, the other party has the right to apply to the court following the procedure established by law for the protection of violated rights and legitimate interests.

To conduct mediation in public disputes, a necessary condition is to enshrine in the administrative procedural legislation not only the powers of state authorities and municipal bodies to initiate mediation and agree to participate in it as a party, to make a decision based on the results of its conduct, but also to recognize such a decision as a form administrative contract, based on which legal consequences of a public-law nature arise. In addition, the mediator must be able to help settle a public-law dispute, therefore the scope of his special knowledge in the field of public legal relations must correspond to the content of the public-law dispute, which should be enshrined in legislation (Ustinova-Boichenko and Nesterenko, 2022).

The peculiarity of tax mediation is that the agreement is concluded by the parties to the dispute themselves and is binding for them, and the following aspects are important for it: conducting mediation cannot be the reason for non-fulfillment by the taxpayer and the authority subject of the duties or powers (functions) assigned to them by law; the authority to sign such contracts should also belong to the competence of officials who conclude contracts based on the results of mediation (Sarpekova, 2018).

An important issue is the suitability of a tax dispute for mediation - its mediability. Thus, according to the law of the Netherlands, not all tax disputes are mediable - the main obstacle to mediation is the criminal punishment of the act, as well as the obstacle to mediation, are complex cases related to which there have not yet been court decisions in favor of one or the other party, i.e., unprecedented disputes, and as well as disputes regarding which the taxpayer (Podik, 2019b).

A. Lisko insists that mediation in cases where there are: 1) disputes between the subjects of power on the exercise of their competence in the sphere of management, delegated powers (Part 3 of Article 17 of the Code of Administrative Proceedings (CAP) of Ukraine); 2) disputes in cases regarding legal relations related to the electoral process or the referendum process (Part 5 of Article 17 of the CAP of Ukraine) (Krasylovska, 2015).

Instead, the media-apart proposes to consider the envisaged Part 1 of Art. 17 of the CAP of Ukraine disputes of individuals and legal entities with the subject of power to challenge its decisions (especially in the case of legal acts of individual action), actions or omissions, and provided for in Part 2 of Art. 17 CAP of Ukraine disputes over the acceptance of citizens for public service, its passage, dismissal from public service (Krasylovska, 2015).

N. Mazeraki proposes to consider the absolute criteria of the uniformity of the dispute: 1) the existence of a direct legislative prohibition on resolving a certain type of legal dispute in the order of mediation; 2) the contradiction of the subject and content of the dispute regarding moral principles and public order; 3) the presence in the dispute of the interests of third parties who do not participate in the mediation; 4) the impossibility of concluding a settlement agreement in accordance with the law; 5) the incapacity of the parties to mediation or lack of authority of their representatives to conclude a mediation agreement (Mazaraki, 2018).

A. Bortnikova distinguishes the following criteria for the mediability of the public-law dispute: 1) legitimacy-the lack of a direct prohibition on mediation. 2) legality-all rights and obligations, as well as actions (omissions) that underpin the mediation agreement as a result of the resolution of a public-law dispute must comply with legislation provided by the Verkhovna Rada of Ukraine; 3) special legal personality-the ability to be a participant in legal relations on the use of mediation as a way of resolving a public-legal dispute, that is, the presence of a person who has expressed a desire to participate in the mediation, authority to make decisions on the merits of the dispute, as well as for the appeal; 4) the presence of discretionary powers (administrative discretion) in the subject of power; 5) competence boundaries (framework); 6) the dispute does not affect the interests of persons who do not participate in the mediation; 7) the prospect of registration of the results of mediation in accordance with the rules of substantive and procedural law (the so -called criterion of effectiveness (execution) of the mediation agreement); 8) the goodwill of the sides (Bortnikova, 2017).

In the Netherlands, the main obstacles to mediation are criminal punishment of action and unprecedented disputes, for which there were no court decisions in favor of one or the other (Podik, 2019). These restrictions also apply to the field of tax mediation. The risks of tax mediation also include the general concern expressed in CEPEJ documents about the risk

of unequal treatment of taxpayers: resorting to mediation in a tax case can lead to a reduction in tax where simply following the rules would not (European Commission for the Efficiency of Justice, 2007).

The following conclusion is that mediation in "legally comprehensible cases" is not what should be done (European Commission for the Efficiency of Justice, 2007), and therefore such cases should not be recognized as mediatable. However, a tax dispute cannot be recognized as mediated if: the offense may result in a criminal penalty; the conflict can be resolved only through the evidentiary procedure; the purpose of the judicial process is directed exclusively to the solution of a certain legal problem (Muza, 2011).

Therefore, except for non-mediable tax disputes, tax mediation is permissible and its conduct is justified if: 1) there are difficulties in reducing the main points of disagreement between the parties; 2) uncertainty about the facts, or about which facts are relevant to the dispute; 3) there is a lack of clarity/understanding of the respective technical positions of the parties; 4) narrowing/clarification of the facts or issues in the dispute is required (Deloitte LLP, 2019).

Conclusions

Tax mediation is a promising civilized mechanism for out-of-court peaceful settlement of tax disputes, the introduction of which ensures the achievement of such a Global Goal of Sustainable Development as: "Contributing to the building of a peaceful and inclusive society for sustainable development, providing everyone with access to justice and creating effective, accountable and inclusive institutions at all levels", and also corresponds to the "good government" management model in the context of the widespread activity of non-governmental organizations and its features such as consensus, efficiency, and effectiveness, will strengthen the function of tax administrations to provide better tax service.

A necessary requirement for the recognition of the legality of mediation in tax disputes is a clear definition in the legislation of the main criteria and types of disputes subject to mediation, with the aim of avoiding cases of corruption and discrimination of individual taxpayers, an expanded interpretation of the norms of tax law, it also requires a clear delineation of the limits of the implementation of discrete powers of tax authorities and their officials.

Therefore, in the tax legislation of Ukraine, in particular in Art. 19-1 and 20 of the Tax Code of Ukraine, the functions and powers of tax and customs authorities as parties to tax mediation should be clearly established, the tax legislation of Latvia in this area needs similar adjustments.

The ability of a tax authority to initiate or agree to enter into a tax mediation procedure to settle a tax dispute, such a dispute must be free of corruption risks, and limits, and the method of exercising its powers in this area must be clearly defined and enshrined in legislation, and settlement agreements and tax treaties concluded according to the results of mediation should acquire signs of legal force and binding performance for both parties.

The introduction of the institute of tax mediation will relieve administrative courts of cases that can be resolved by the parties to the dispute, will save not only them, but also budget funds that are currently spent on ensuring the activities of the courts, will improve the relationship between public administration bodies and the private sector, will contribute to legal education and promotion legal culture of the population, and, ultimately, will create the basis for stabilizing the legal order in Ukrainian society.

Tax mediation needs institutionalization, establishment of competence requirements that a mediator must meet, tools for taxpayers' access to the mediator register, and the procedure itself.

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