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CRIMINAL LIABILITY AFTER A TAX AUDIT AND THE NEW CRIMINAL PROCEDURAL CODE OF UKRAINE

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A year after the new Criminal Procedural Code of Ukraine took force on November 20, 2012 the issue of criminal proceedings for white collar crimes remains acute. Particularly at issue is the risk of becoming criminally liable for tax evasion in Ukraine.

Introduction

The new Criminal Procedural Code has considerably changed things. Pre-trial investigation has seen especial changes: the stage in which a case is initiated and charges are brought has been cancelled, while a stage in which the suspect is notified that he or she is under suspicion has been added.

According to the previous Criminal Procedural Code, which dated to 1960, the initiation stage served as a barrier between pre-investigation procedures (which lasted 10 days) and the pre-trial investigation. In addition, the initiation of a criminal case could be appealed. This represented an effective instrument for protecting against investigations and against pressure on companies. According to Ministry of Internal Affairs statistics, up to November 20, 2012 the police had received 3,163,810 applications and crime reports, 79.1 % of which did not lead to criminal proceedings.

With the taking force of the new Criminal Procedural Code, the initiation stage was transformed into a stage during which data is registered in the Unified Register of Pre-trial Investigations. Now, after receiving an application or notification about a crime, the investigator or prosecutor is obliged to register data about it in the Unified Register within 24 hours, and to initiate an investigation. Refusal to accept or register an application or notification is not permitted. Nobody is notified about this registration or about the initiation of the proceedings, since the Unified Register has a limited range of users. This means that if there is no public investigation or, for instance, search or seizure of property, a taxpayer might find out about the criminal proceedings against it only when it receives a notification of suspicion.

One of the new Criminal Procedural Code's biggest drawbacks, then, is that it's impossible to contest the logging of data in the Unified Register and the initiation of an investigation. The new Code also conceals another danger: that criminal proceedings can "hang" in the Unified Register during the entirety of the term in which it's possible to bring a party to criminal responsibility (that term is 10 years according to part 3 of Article 212 of the Criminal Code of Ukraine). An investigator's or prosecutor's investigation, then, faces no temporal limits (except for those prescribed by the statutes of limitation for particular crimes).

If, in accordance with Part 1 of Article 219 of the Criminal Procedure Code, the pre-trial investigation period lasts two months from the date of the notification of suspicion, then the question remains: why do 84.1% of criminal proceedings (233 of them) end up with no result?

In practice any dispute with the tax authorities can result in criminal proceedings against a taxpayer's officials. There have even been instances of tax evasion proceedings that were initiated in the absence of a tax audit. A tax administration official might have come to his or her own conclusions about a company's having violated the law; he or she might even have gotten the supposedly incriminating information off the Internet. Criminal proceedings can thus be used as a way to pressure taxpayers.

Notification of suspicion represents the next stage in the process. The investigator has the right to notify the person under suspicion, presenting "sufficient evidence" of the person's "committing a criminal violation." At the moment of notification the person is considered "under suspicion" and enjoys the rights and guarantees envisaged by the new Criminal Procedural Code. Before the notification the person almost completely lacks procedural rights or avenues of defense. When the pertinent data is logged in the Unified Register, then, the person in question obtains witness status and possesses only minimal rights to self-defense, whereas the investigator and the prosecutor can investigate fully. Then, after the person is notified of suspicion, the investigator has two months to conduct the investigation. After this period (which a prosecutor can extend) the investigator either has to close the case or to bring it to court with a bill of indictment.

The scheme for pretrial investigation according to new Criminal Procedural Code looks like this:

Notification of the crime or if crime was detected personally by the investigator or the prosecutor

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Registering the data in the URPTI and the start of investigation

(From this moment the investigator has the right to:
Conductseizure, search, interrogations, audits and undercover investigations;
Carry calls and actuators;
Appoint expertise)

↓

Notifying the person of suspicion

From this moment the person receives the status of the suspected, Preventive measures (holding in detention or pledge) may be applied to the person, as well as seizure of property, the person may be suspended from its duties

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Drawing up the indictment

After this the person receives the status of the accused, the pretrial investigation is finished and the case is brought tj the court

Criminal liability for tax evasion

Tax evasion is the most common charge after big tax audits. Article 212 of the Criminal Code establishes the following types of criminal liability for intended tax evasion, when the actions in question have resulted in non-receipt of funds into the state budget or state trust funds:

- Part 1 of Article 212 of the Criminal Code envisages criminal liability for intended tax evasion if the actions in question have resulted in actual non-receipt of funds to the budget or to state trust funds in considerable amounts (a "considerable amount" means taxes, charges, or other obligatory payments exceeding the legislatively-prescribed tax-free minimum income a thousand or more times). This quantitative indicator changes annually; in 2013 it was UAH 573,500 (approximately $72,000).
- Part 2 of Article 212 of the Criminal Code envisages criminal liability for the same actions as described above when they are carried out in concert by a group of people or if they result in actual non-receipt of funds to the budget or to state trust funds in large amounts (a "large amount" means taxes, charges, or other obligatory payments exceeding the legislatively-prescribed tax-free minimum income three thousand or more times). This quantitative indicator also changes annually; in 2013 it was UAH 1,720,500 ($215,000).

- Part 3 of Article 212 of the Criminal Code envisages liability for the actions envisaged by the Article's part 1 and 2 when carried out by a person who has previously been sentenced for tax evasion or if they have resulted in actual non-receipt of funds to the budget or to the state trust funds in especially large amounts (an "especially large amount" means taxes, charges, or other obligatory payments exceeding the legislatively-prescribed tax-free minimum income five thousand or more times). This quantitative indicator changes annually; in 2013 it was UAH 2,867,500 ($358,000).

Taking into consideration the poverty line for an employable person and the social tax benefit, responsibility under Article 212 for 2013 is as follows:

UAH	2010	2011	2012	2013
Social tax benefit	434,5	470,5	536,5	573,5
Qualification under part 1 of Article 212 of the CCU (1000 * the social tax benefit)	434 500	470 500	536 500	573 500
Qualification under part 2 of Article 212 of the CCU (3000 * the social tax benefit)	1 303 500	1 411 500	1 609 500	1 720 500
Qualification under part 3 of Article 212 of the CCU (5000 * the social tax benefit)	2 172 500	2 352 500	2 682 500	2 867 500

Article 212 mandates the following penalties for tax evasion:

- A violation according to Part 1 of Article 212 brings a fine of UAH 17,000 to UAH 34,000 ($1,125 to $4,250) or prohibition from occupying certain posts or engaging in certain activities for two to three years;
- A violation according to Part 2 of Article 212 brings a fine of UAH 34,000 to UAH 51,000 ($4,250 to $6,250) and prohibition from occupying certain posts or engaging in certain activities for up to three years; and
- A violation according to Part 3 of Article 212 brings a fine of UAH 255,000 to UAH 425,000 ($31,800 to $53,125), prohibition from occupying certain posts or engaging in certain activities for up to three years, and forfeiture of property.

The sanctions currently envisaged by Article 212 are as follows:

Part of the Article	Primary punishment	Obligatory additionalpunishment
Part 1 of Article 212 of the Criminal Code of Ukraine	Fine of from UAH 17 000 to 34 000 UAH or deprivation of right to occupy some posts or to engage in certain activities for a term of from 2 to 3 years;	–
Part 2 of Article 212 of the Criminal Code of Ukraine	Fine of from UAH 34 000 to 51 000	Deprivation of the right to occupy certain posts or to engage in certain activities for up to 3 years;
Part 3 of Article 212 of the Criminal Code of Ukraine	Fine of from UAH 255 000 to 425 000	Deprivation of the right to occupy certain posts or to engage in certain activities for up to 3 years and forfeiture of property.

According to part 2 of Article 53 of the Criminal Code the fine for a violation under part 3 of Article 212 cannot be lower than the cost of the property damage that occurred as a result of the crime or than the income that the crime generated. In practice the property damage cost is the value of the tax liabilities that the tax authorities accrue. In calculating property damage caused by tax evasion, only unpaid taxes (as defined by the tax authorities) are taken into consideration, and not penalties or fines.

It should also be noted that if a person who has been sentenced under part 3 of Article 212 fails to pay the mandated fine, a court can jail him or her in line with part 5 of Article 53 of the Criminal Code and Articles 537 and 539 of the new Criminal Procedural Code.

The unpaid part of the fine will be proportionally substituted by a prison term according to the following formula: one day of imprisonment for every eight tax-free minimum incomes. In other words, an unpaid fine of UAH 136 ($17) will bring one day of imprisonment. In general, fines established by part 3 of the Criminal Code's Article 212 can be substituted by a prison term of 5 to 10 years.

Relief from criminal liability

There exists a statute of limitations with regard to bringing people to criminal responsibility for tax evasion. After a certain period, that is, one is relieved of criminal responsibility.

For tax evasion foreseen by part 1 and part 2 of Article 212 of the Criminal Code (that is, evasion of considerable and large tax amounts, respectively), which is considered a minor crime, the time limit is two years. That is, criminal liability for tax evasion vanishes in cases when two years pass between the date of the criminal conviction and the date on which the sentence takes legal force.

For felony tax evasion (as per part 3 of Article 212 of the Criminal Code) the time limit for imposing criminal liability is 10 years.

Relief from criminal liability due to the expiration of the statute of limitations does not apply automatically. The Criminal Procedural Code states that a court must rule whether there are grounds for removing criminal liability and stopping a criminal proceeding.

An offender may be exempt from criminal liability under part 4 of Article 212 of the Criminal Code if he or she pays the necessary taxes and fees (that is, compulsory payments) and repays the losses to the state that his or her delayed tax payment has caused (via imposition of financial penalties and fines) before he or she is brought to criminal liability (that is, before notification of suspicion is served). Still, granting relief from criminal liability is exclusively the province of a court. To restate: paying off taxes and financial sanctions does not automatically relieve a party of criminal liability.

There is one more way to safeguard against criminal prosecution. Paragraph 56.22 of Article 56 of the Tax Code states that when an administrative appeal of a controlling body's decision is filed with a higher controlling body and/or with a court, the notification of suspicion cannot be based on the decision under appeal until the administrative appeal proceedings have been finished or the court has issued its final decision.

Thus, if an accusation of tax evasion under Article 212 is based on a tax audit, the alleged offender will not be notified of suspicion until the administrative appeal of the tax authority's post-audit decision is finished and/or the Higher Administrative Court of Ukraine (and in some cases the Supreme Court of Ukraine) issues a decision against the taxpayer.

Please note that paragraph 56.22 of Article 56 of the Tax Code cannot apply if the notification of suspicion is not only based on the controlling body's decision, but is also confirmed by additional evidence. Such evidence might for instance be protocols from the interrogation of a witness or conclusions from an expert.

Conclusion

Given how often criminal proceedings are used to pressure taxpayers, protective measures are of great importance.

The administrative appeal procedure or court appeal of tax authority decisions will probably be the most effective ways to protect taxpayers' officials from criminal liability. As we discussed above, notification of suspected tax evasion cannot occur until a final court decision has been issued.

At the same time, being proactive in defense of taxpayers is always advisable. Taxpayers should exercise their right to appeal the resolutions and actions of investigators and prosecutors to the higher authorities or in court, either during pre-trial proceedings or later on.