

Are you waiting for renewed audits since July 1, 2023? But they are already "here" in many aspects

Do you expect renewed audits by tax officials and, probably, customs officers, since July 1, 2023, as announced? Legislative amendments have not yet been introduced. But many types of audits are already allowed and have been launched in practice.

1. Taxpayers have mainly already forgotten about any audits since over the recent years they have got used to living almost without them, but for some exceptions:

In March 2020, during COVID-19 quarantine (let me remind you that it is still there – by April 30, 2023, as yet, if it is not extended), the moratorium on documentary and actual audits was introduced, with the following exceptions (i) for documentary audits made upon the taxpayer's request, in case of company termination and in relation to budgetary refund and largely negative VAT value, and (ii) actual audits related to excise goods (spirit, alcohol, tobacco, fuel).

Then the list of exceptions started growing slowly. There were some attempts made to evade the ban on audits via Resolution of the Cabinet of Ministers of Ukraine No. 89 as of February 3, 2021 "On Reducing the Period of Limitation as Far as the Effect of the Moratorium on Certain Types of Audits Is Concerned". Thanks to courts that acknowledged this attempt to be illegal, and, following common court practice, including the practice of the Supreme Court, the results of such audits are considered to be null because of their illegal nature.

Then a new ground for the suspension of audits was the full-scale military invasion and the condition caused by it. Respective amendments were introduced to the legislation. Then they evolved from a complete ban up to the unblocking of certain types of audits. In fact, the most well-known of the ones "unblocked" in the summer of 2022 were, probably, audits of budgetary re-

fund and negative VAT value.

2. And now we are facing another regular wave of "relaunch" of certain types of audits and related activities – both with the initial experience of conducting them, and the issues of principle importance that have started arising.

Thus, Law 2719-IX as of November 3, 2022 "On Amendments to the Tax Code of Ukraine and Some Other Laws of Ukraine on the Privatization of State and Municipal Property That Is in Tax Lien and Ensuring Administration of Tax Debt Repayment", introduced, in particular, the following amendments to the Tax Code ("TCU"):

Subparagraph four, p. 52⁸, Sub-section 10 of the Transitional Provisions of the TCU has been set out in the following version:

52⁸. On a temporary basis, for the period to the last calendar day of a month (inclusively), which ends quarantine established by the Cabinet of Ministers of Ukraine throughout Ukraine to prevent the spread of the coronavirus disease in Ukraine, there is suspended statute of limitations determined by:

...

articles 73 and 78 of the present Code on the provision of taxpayers' responses to the inquiries made by the controlling bodies (but for the inquiries made by the controlling bodies concerning the legitimacy of declaration of the value-added tax and/or negative value-added tax claimed for budgetary refund; those related to taxation of legal entities or other non-residents carrying out their economic activity via permanent representation in the Ukrainian territory, income obtained by non-residents when the source of its origin is Ukraine; tax control under transfer pricing; tax control of non-resi-

dents (representations of non-residents); currency control in terms of compliance with the deadlines for payments under commodity export and import operations) given to taxpayers up to the last calendar day of the month (inclusively), which ends quarantine established by the Cabinet of Ministers of Ukraine throughout Ukraine to prevent the spread of the coronavirus disease in Ukraine.

{Subparagraph four, paragraph 52-8 of Sub-section 10, Section XX in the version of Law No. 2719-IX as of November 03, 2022}

The above amendments have considerably expanded the list of inquiries made by the controlling bodies, responses to which must be provided within the periods set by the TCU (that is for which the moratorium concerning deadlines is not valid), and the absence of a response by the set deadlines can respectively become the grounds for an unscheduled audit.

"Expansion" of the exclusion from the moratorium concerning deadlines, in particular, refers to inquiries related to:

- taxation of payments of non-residents' income when the source of its origin is Ukraine
- tax control over non-residents (permanent representations of non-residents)
- transfer pricing
- currency control in terms of timeliness of payments under export and import operations

And through these amendments, the possibility for documentary audits in these matters has been unblocked, since p. 69.2. of this subsection has been set out as follows:



“69.2. Tax audits are not launched, and audits launched are suspended, but for the following cases:

....

b) documentary unscheduled audits conducted upon the inquiry of the taxpayer and/or on the grounds determined by subparagraphs 78.1.2 (as far as control over transfer pricing is concerned), 78.1.5, 78.1.7, 78.1.8, 78.1.12, 78.1.14-78.1.16, 78.1.21 and 78.1.22 of paragraph 78.1, Article 78 of the Code, and/or documentary unscheduled audits of taxpayers for which tax information has been received on violations of currency legislation by the taxpayer as far as compliance with the deadlines for the arrival of goods under import operations and/or currency proceeds under export operations are concerned, and/or documentary unscheduled audits related to taxation of legal entities or other non-residents carrying out economic activity via their permanent representation in the Ukrainian territory, income obtained by non-residents when the source of its origin is Ukraine, and/or documentary unscheduled audits of non-residents (representations of non-residents);

{Subparagraph three of subclause 69.2, paragraph 69, Sub-section 10, Section XX in the version of Law No. 2719-IX as of 03.11.2022}

And the new year has already seen a real “burst” in the activity of tax officers in these matters: inquiries, audits.

So, something can already be said about audits, and not just about renewed audits that have already been announced but not yet voted on in general since July 1, but also about some issues arising from the process of “termination” of the moratoria.

3. Let us start with the issue of renewal of deadlines for responding to the inquiries. The law-maker has introduced changes into the COVID-19 provision the effect of which will anyway most probably finish soon.

But we still have the provisions of p. 69, Sub-section 10 of the Transitional Provisions of the TCU:

“69. To establish that on a temporary basis, for the period before the martial law is terminated or cancelled ...

...

69.9. For taxpayers and controlling bodies, there is suspended statute of limitations determined by the tax and other legislation control over compliance of which lies with the controlling bodies, but for: ...”.

And here the list of exceptions (“but”) does not include the above exceptions. So, it appears that the law-maker has removed the suspension of the deadlines for responding to inquiries under the list of exceptions (“but”) under c. 528, while no such exceptions are envisaged for suspension of statute of limitations under p. 69.9. of this very

Sub-section 10 of the Transitional Provisions of the TCU. The fact that the suspension of the statute of limitations “set by the tax legislation” is also valid for the periods for responding to the tax audit’s inquiries does not evoke any doubts since the respective periods are determined by the tax legislation – the TCU, p. 73.3., Art. 73, c.c. 78.1.1., 78.1.4. Art. 78, in particular.

How to settle the collision when some “brakes” have been removed, while other “brakes” related to the deadlines for the same cases have been left there. There could be different ways to try and settle the issue applied, but the overall conceptual approaches do not provide any clear solution. Thus, for example, while the “unblocking” of COVID-19 limitations is a “fresher” solution (though they are anyway to “disappear” soon when the COVID-19 quarantine is over), blocking over the period of martial law is more special.

Well, for this the TCU, among the core principles of tax legislation, contains the provisions on how to settle such issues: “4.1.4. presumption of legality of taxpayer’s decisions if the norm of the law or any other regulatory act issued under the law, or if the norms of different laws or different regulatory acts assume ambiguous (multiple) interpretation of the rights of taxpayers or controlling bodies, as the result of which it becomes possible to pass decisions in favor of both the taxpayer and the controlling body”.

That is why we have sufficient legal grounds to claim that the mandatory nature of the determined deadlines for responding to the respective tax audit's inquiries has not been re-established.

4. If we can leave an inquiry without any response so far, so does it mean that one can somehow get rid of the above audits? Are audits allowed to be conducted in a number of cases (see, for example, subparagraphs 78.1.1., 78.1.4., Art. 78 of the TCU) in case the taxpayer does not provide the adequate explanations and documents in response to the inquiry within the established period? So, if there is no response within the established period with the reference to the suspension of the statute of limitations, there is no audit?

Probably, everything is not exactly so, not everything is related to the inquiry: for audits related to transfer pricing (subparagraphs 78.1.2., 78.1.14. – 78.1.16.), preliminary inquiry does not constitute a precondition for appointing the audit, while as to the audits related to the compliance with the deadlines for payments under export and import operations, to taxation of non-residents' income, the wording of the unblocked audits is not related to specific subparagraphs of Art. 78 of the TCU, but are separated as a new, special category in the new revised version of paragraph 69.2, Sub-section 10 of the Transitional Provisions: "and/or documentary unscheduled audits of taxpayers for which tax information has been received on violations of currency legislation by the taxpayer as far as compliance with the deadlines for the arrival of goods under import operations and/or currency proceeds under export operations are concerned, and/or documentary unscheduled audits related to taxation of legal entities or other non-residents carrying out economic activity via their permanent representation in the Ukrainian territory, income obtained by non-residents when the source of its origin is Ukraine, and/or documentary unscheduled audits of non-residents (representations of non-residents)".

Does it mean that we will have to deal with some new, special category of audits not related to Art. 78 of the TCU? And then, what about Art. 78 of the TCU under which "Article 78. The procedure for conducting documentary

unscheduled audits

78.1. Documentary unscheduled audit shall be carried out in case at least one of the following grounds is available:".

And then comes an exhaustive list. So, if there is a new case not related to Art. 78, the issue of legitimacy of a documentary unscheduled audit arises in case it is conducted in the absence of the grounds envisaged by Art. 78. And under Art. 78, for the above cases there is rather the need for making a preliminary inquiry, for example: "78.1.1. tax information confirming violation of the currency, tax legislation by the taxpayer is obtained ..., control over compliance of which lies with the controlling bodies, in case the taxpayer does not provide any explanations and their documentary confirmation in response to the written inquiry of the controlling body, which mentions violations of the respective currency, tax and other legislation not regulated by the present Code control over compliance of which lies with the controlling bodies, within 15 business days from the day following the date the inquiry arrives".

This means that the inquiry is still required in the issues under consideration, while one may be responding to the inquiry over an indefinite period of time (the statute of limitations has been suspended), and thus the audit can be postponed.

5. The law-maker has really made the situation with deadlines absolutely confusing. It is difficult to get clear about this chaos.

Statute of limitations is not just about the deadlines for responding to the inquiries. Let us remind ourselves that under p. 69.9., Sub-section 10 of the Transitional Provisions of the TCU: "69.9. For taxpayers and controlling bodies, there is suspended statute of limitations determined by the tax and other legislation control over compliance of which lies with the controlling bodies..."

Control over compliance of currency legislation (as well as other legislation) as to the deadlines for making payments under export and import operations is the duty of the controlling (tax) bodies.

The deadlines have been set by currency legislation. Thus, p. 69.9. also suspends this statute of limitations for the completion of payments under export and import operations? Why not.

6. Deadlines, deadlines ... Suspension of the statute of limitations ...

We also have p. 102.9. of the TCU: "102.9. Over the period of validity of the legal regime of martial law, state of emergency introduced in Ukraine, the statute of limitations established by the present Code, other legislation control over compliance of which lies with the controlling bodies is suspended, but for cases envisaged by the present Code."

As far as this provision is concerned, the suspension is limited by the designation of Art. 102 "Limitation of action and its application". But why do we then need the mention of the statute of limitations established not just by the TCU, but by other legislation control over compliance of which lies with the controlling bodies in p. 102.9?

7. As we can see, even such limited analysis of just one "section" of the currency stage of termination of the audit moratorium can identify a number of non-correspondences that put to doubt current expansion of the controlling and examination measures taken by the tax inspection and may protect taxpayers. And the issue is not limited to the discrepancies considered above.

And what shall we have in case of full-scale renewal of audits, as promised since July 1? Not much time is left by that date, while the law on renewal of audits has not been adopted yet. From the considered partial renewal, we can see the "quality" of the legislator's work. There are hardly any grounds to expect any drastic improvements in the quality of legislator's work. That is why, in case audits are renewed in full scale by the indicated deadlines, we are in for many issues and aspects, and there will probably be disputes related to many procedural matters.



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