

# Top-10 Issues in 2012 Tax Dispute Resolution in Ukraine

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The purpose of this overview focused on the key court practice news in the area of tax litigation update, in our view, is to inform about the main peculiarities of tax disputes in 2012 with reference to some recent cases and clarifications of the High Administrative Court of Ukraine.

Pursuant to the official statistics of the tax authorities, the majority of cases were decided in favour of the Ukrainian tax authorities. At the same time, the recent court practice demonstrates that certain court decisions on tax disputes were made in favour of taxpayers. We hope that the positive trend of tax dispute resolution in favour of taxpayers will remain in 2013.

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## **1. Carrying forward of tax losses was confirmed by the High Administrative Court of Ukraine**

On 17 July 2012 the High Administrative Court of Ukraine confirmed the taxpayers' right to carry forward and utilize tax losses incurred prior to 1 January 2011. Under Judgment in case No. K/9991/32014/12 the High Administrative Court of Ukraine took a stand on legitimacy of including tax losses accumulated for previous tax periods into total costs of 1Q 2011, which may be carried forward to future tax periods. A little later the High Administrative Court of Ukraine issued Information Letter of 13 September 2012 No. 2019/12/13-12 summarizing the favourable court practice regarding losses carry forward.

## **2. Absence of consignment waybills does not trigger nullification of the supply agreement**

The High Administrative Court of Ukraine indicated that the fact of supply may be proved even in the absence of consignment waybills (*Judgment of the High Administrative Court of Ukraine of 02 October 2012 in case No. K/9991/22697/12*). Additionally, it was stated that mistakes found in the primary documents may not be considered as sufficient evidence for recognition of agreements null. (*Judgment of the High Administrative Court of Ukraine of 19 July 2012 in case No. K-30744/10 and Judgment of the High Administrative Court of Ukraine of 26 June 2012 in case No. K-27230/10*).

## **3. Nullification of agreements under the claims of the tax authorities**

At the end of 2012 the High Administrative Court of Ukraine clarified the following debatable issues:

- The tax authorities do not have the right to declare agreements void. If the tax authority identifies an agreement made in order to violate public order or state interests, it may apply to the court for confiscation of the object of such agreement. However, no conclusions regarding the nullification of the agreement can be made by the tax authority only via the court. In particular, the High Administrative Court of Ukraine noted that only courts are authorized to decide the nullification of agreements (*Judgment of the High Administrative Court of Ukraine of 14 November 2012 in case No. K/9991/50772/12 and Judgment of 19 November 2012 in case No. K/9991/49378/12*).
- The High Administrative Court of Ukraine declared the presumption of validity of agreements with reference to Article 204 of the Civil Code of Ukraine. Such position should preclude recognition of agreements by the tax authorities as null and void with reference to Article 228 of the Civil Code of Ukraine (*Judgment of the High Administrative Court of Ukraine of 14 November 2012 in case No. K/9991/50772/12 and Judgment of the High Administrative Court of Ukraine of 07 November 2012 in case No. K/9991/60736/12*).

## **4. Burden of proof in claiming agreements invalid was shifted from taxpayers to the tax authorities**

Recently the High Administrative Court of Ukraine supported taxpayers by imposing the burden of proof on the tax authorities. It stated that tax liabilities of business entities may be assessed in case of nullification of the agreement confirmed by the court decision (*Judgment of the High Administrative Court of Ukraine of 14 November 2012 in case No. K/9991/50772/12*). Additionally, the High Administrative Court of Ukraine explained that the tax authority, not a taxpayer, bears responsibility for proving the non-commodity nature of the transaction (*Judgment of the High administrative Court of Ukraine of 14 November 2012 in case No. K/9991/50772/12*).

## **5. On illegality of taxpayers' prosecution for the late payment through a bank fault**

The High Administrative Court of Ukraine has formed the court practice on the matter in favour of taxpayers. Pursuant to such practice, the taxpayer is not liable for late payment of taxes in case the servicing bank failed to transfer relevant taxes amount on time (*Judgment of the High Administrative Court of Ukraine of 24 November 2012 in case No. K/9991/144554/12 and Judgment of the High Administrative Court*

of Ukraine of 4 December 2012 in case No. 35236/09). The taxpayer is deemed to have performed all statutory actions to perform its obligations on time, as the payment is performed as soon as the bank accepts the payment documents for execution.

## **6. Taxpayers may claim the decisions of the central controlling tax authority in court**

Under Article 56.10 of the Tax Code of Ukraine a decision of the central tax controlling authority following the result of consideration of the taxpayer's claim is final and is not to be claimed through administrative procedures, but can be approved in the court proceedings.

The respective court practice has been controversial until recently (i.e., the courts dismissed the claims or terminated litigations under the tax authorities' motions). The positive trends appear in 2012: the appeal courts recognize the right to claim the decisions of the central controlling authority adopted as a result of consideration of the taxpayer's claim in the court (*Judgment of Kyiv Appeal Administrative Court of 15 February 2012 in case No. 2a-7223/11/2670*, of 22 February 2012 in case No. 12994/11/2670, of 22 March 2012 in case No. 2a-13882/11/2670).

## **7. Taxpayer is not obliged to verify the status of its business partners**

The High Administrative Court of Ukraine concluded that the tax authorities position on business entities' obligation to verify compliance of statutory documents of their counterparties with the legislation, to check authenticity of signatories is groundless.

The court took a stand that the taxpayers are not obliged to collect information about their counterparties and to determine whether they have the assets and technical support before they conclude the contracts or during their implementation (*Judgment of the High Administrative Court of Ukraine of 10 January 2012 in case No. K/9991/81953/11*).

## **8. Misapplication of legislation on the status of credit unions is terminated**

The court practice demonstrates that the tax authorities applied penalties to the specific category of taxpayers under the legislation which was not applicable thereto. There was a trend to apply penalties to the credit unions under Order of the President of Ukraine "On Application of Penalties for Violation of the Cash Regulation" and Regulation of the NBU "On Cash Transactions in the National Currency of Ukraine". However due to the fact that they are not-for-profit organizations such legislation was recognised as inapplicable to them. (*Judgment of Zaporizhzhia Region Administrative Court of 14 March 2012 in case 2a-0870/9102/11*)

## **9. The treatment of agricultural producers under special tax regime was clarified**

Court practice revokes the position of the tax authorities on the abolition of the special tax regime for agricultural producers based on illegal use of certain land plots under the lease agreements which have not passed the procedures of state registration given to the following: (i) non-registration of agreements of lease of land plots does not refute the fact of production on these lands, which should be considered when determining the total share of agricultural products cost in commodity production; (ii) failure to comply with the lease agreements registration procedure may trigger civil liability, but cannot serve as a basis for tax penalties; (iii) liability for violation of land legislation cannot give rise to an additional tax liability unless it is provided by law.

(*Judgment of Odessa Appeal Administrative Court of 15 November 2012 in case No. 2a-2561/12/1470*, *Resolution of Vinnitsa Circuit Administrative Court of 27 November 2012 in case No. 2a/0270/5141/12*, *Resolution of Dnepropetrovsk Circuit Administrative Court of 25 September 2012 in case No. 2a/0470/9674/12*)

## 10. Sale of goods below cost does not deprive from the taxpayer to enjoying tax credit formed in prior periods

The High Administrative Court of Ukraine ruled that the tax credit of the accounting period is determined based on the contract (contractual) cost of goods, which does not exceed the market price.

The court based its conclusion on the following:

- According to Article 190 of the Commercial Code of Ukraine the business entities are entitled to set prices on all types of goods independently and upon consent of the parties.
- Exceptions to the rule apply to prices on goods established by state. Thus, the sale of goods below its cost is not a prohibited transaction.
- The court also notes that business entities are free to do business at their own risk and are able to determine the cost of products independently.
- Intervention of state authorities into commercial activities apart from cases stipulated by the relevant legislation is illegal. (*Judgment of the High Administrative Court of Ukraine of 03 July 2012 in case No.2a-3524/10/0670*)

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