

ORGANIZATIONAL AND LEGAL BASES OF CUSTOMS AND TAX CONSULTANCY: A COMPARATIVE ANALYSIS

Customs and tax consultancy is an effective way to prevent crimes, improve communication and establish the partnership between public administration and business community. That is why both of them are important for the state economy, maintaining the authority and enhancing the credibility of the public bodies of Ukraine.

The purpose of the study is to analyze and compare the legal regulation and organization of the customs and tax administrations consulting activities in order to identify certain gaps, collisions and other related problems as well as to offer the ways of solving them.

As a result of the comparative analysis of the customs and tax consulting procedure it has been determined that the legislator approaches to legal regulation of both types of consultation are different. It has also been proved that some similar provisions of the Customs and Tax Codes are implemented quite differently. In fact, the first ones are not implemented at all.

This comparison made it possible to identify an incorrect determination of the subjects entitled to request a customs consultation as well as subjects providing such a consultation. The proposal to increase the range of the subjects requesting a customs consultation was made. The need to establish the standards of the request of a customs consultation, the content of the last one as well as the bases for refusing to provide a consultation were proved.

The absence of legal procedure of the generalized customs consultancy has been detected. It was proposed to adopt related Order by the Ministry of Finance following the example of the tax one.

Key words: customs consultation, tax consultation, consultancy, generalized customs consultation, generalized tax consultation, public administration.

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Introduction. Customs and tax systems of any country providing lion's share of the state budget incomes takes a key place in the state mechanism. The two have much in common, for example, the fiscal direction of their activities, the similar methods of administration, the proximity of the legal base and the same focal point. The such similarities confirm the thesis about close association between customs and tax services. In this regard our country progressed significantly in 2013 by uniting them into one department – at first the Ministry of Revenue and Dues that was transformed into the State Fiscal Service of Ukraine soon (Decree № 726/2012).

We recognize the commonality in organization, directions and legal regulation of the activities of both agencies keeping away from the discussions about the feasibility of customs and tax integration. In this case the consultancy provided by

the Customs and Tax Codes of Ukraine is a good example. It is an effective way of preventing crimes, performing educational function, improving communication and establishing the partnership between public administration and business. However, all of these achievements depend on quality of legislative regulation of the consultation process and its consequences. The objectives, format, implications of the customs and tax consultancy are identical proving the idea that legal bases have to be harmonized too. **The purpose of the study** is to analyze and compare the legal regulation of the customs and tax administrations consulting activities in order to identify certain gaps, collisions and other related problems as well as to offer the ways of their solving.

It is possible to achieve this goal by comparing the relevant legal provisions and the practice of its application within certain criteria. They are the subjects of the consultative relationship, the regulation of procedures and terms of consultation, as well as the consequences and evaluation of the consulting activities effectiveness.

The methodology of this study is determined by the comparative method, which makes it possible to compare the relevant norms of customs and tax legislation. The normative-logical analysis method allows us to evaluate the legal regulation of the procedure for providing consultations. The application of modeling, analysis and synthesis methods helps us to formulate proposals for improving existing legislation.

Subjects of appeal. According to the the Customs Code of Ukraine any entities and citizens moving goods and means of transport for commercial use across the customs border of Ukraine or running an activity, which is subject to the supervision of the customs authorities (stakeholders) under the Code can appeal for getting consultation free of charge on the application of certain provisions of the customs legislation of Ukraine(hereinafter – customs consultation) (Article 21, part 1).

Instead, the Tax Code defines that taxpayers may request a tax consultation (Article 52.1). The concept of a taxpayer is clearly defined in the Tax Code of Ukraine – at least it facilitates understanding who is entitled to receive tax consultation.

The same might not be said about the customs consultation's receivers. Following the Customs Code's thesis only those persons (natural or legal) who are currently moving goods and means of transport for commercial use across the customs border of Ukraine or running certain types of activity (supervised by customs authorities) at the moment of consultation request are entitled to receive a consultation. It is unlikely that such consultation is appropriate, since it is associated with spending additional time, and the Customs Code does not establish interruption in the timing of certain customs formalities by seeking consultation. It is obvious that customs consulting is useful at the preliminary stage of a particular foreign trade operation when the person is not moving goods across the customs border. The absence of the subject features outlined in the legislation may formally justify refusal to provide consultations. This could affect the image, confidence in the customs authorities, undermine the newly started partnerships with business structures. In this regard, we propose to simplify the definition of the subjects who can request a customs consultation and to increase their range in the Customs Code of Ukraine to all interested persons (natural or legal). Using the specific terminology of the Customs legislation, Article 21, part 1 of the Customs Code of Ukraine could be amended to read: «Following the requests of stakeholders (legal entities and natural persons), the customs authorities shall provide consultation free of charge on the application of certain provisions of the customs legislation of Ukraine».

Subjects of consultation. The Customs Code of Ukraine establishes customs consultations to be provided by: 1) the customs authorities at the places of location of the requesting entities (at the places of residence or temporary stay of the requesting citizens); 2) the central executive authority responsible for formulating and implementing the state tax and customs policy (it is the newly created State Customs Service of Ukraine) (Article 21, part 2). The legal implementation and application of the territorial principle for the subjects providing customs consultation is not appropriate. It is not clear who is responsible for proving the place of residence (or temporary stay) of the requesting citizens. The legislation imposes no additional requirements on this regard.

We consider entities and citizens should be consulted with the customs office where the consultation will be applied. That's why, in our opinion, the phrase «at the places of location of the requesting entities (at the places of residence or temporary stay of the requesting citizens)» should be deleted from Article 21, part 2 of the Customs Code of Ukraine.

In this context, the authors of the Tax Code of Ukraine followed the rational path without imposing territorial restrictions for obtaining consultations, but instead they differentiated the providers of consulting services depending on the required form of consultation. Individual tax consultation in written form is provided by The State Tax Service (STS) of Ukraine, the Main Department of the STS in regions and Kyiv city, including the Department STS in Kherson region, the Crimea and in Sevastopol city and Major taxpayers' office of the STS. Tax consultations in oral form are provided by all of the above-mentioned authorities as well as by the State Tax inspections (Article 52.4).

In addition to the previously discussed ordinary customs consultations, the Customs and Tax Codes of Ukraine establish the possibility of periodical generalization of consultations and publishing them in the form of orders.

Generalization is provided by the Customs Code of Ukraine for those consultations concerning a significant quantity of persons or significant amount of customs duties.

This obligation is also entrusted to the central executive authority responsible for formulating and implementing the state tax and customs policy. However, in this case, the responsible body is the Ministry of Finance of Ukraine – not The State Tax Service of Ukraine. This conclusion can be drawn only after factor analysis. Thus the Regulations on the State Customs Service includes only its authority to provide ordinary customs consultations (Resolution № 227, 2019). Instead, the Regulations on the Ministry of Finance of Ukraine includes its powers to generalize the practices of law enforcement within its competence (Resolution № 375, 2014). Finally, comparing with the relevant provisions of the Tax Code of Ukraine will allay doubts about the entity that have to generalize both tax and customs consultations and make them public. Paragraph 52.6. of this Code establishes: «The central executive authority responsible for the formulating and implementing the state financial policy shall periodically summarize individual tax consultations, as well as analyze the circumstances, which indicate the ambiguity of certain tax... legislation..., by providing general tax consultations..., that shall be approved by order of that authority».

Moreover, the order of the Ministry of Finance of Ukraine approved Procedure for providing general tax consultations which establishes a sequence of authorities acts for their preparation and publication (Order № 811, 2017). Currently there is no similar order for the customs consultations generalization as well as there is no any practice for generalizing them. Thus similar provisions of the Customs and Tax Codes are implemented quite differently, – in fact, the first ones are not implemented at all.

Procedure and timing. The procedure for providing customs and tax consultations depends on its form. Customs consultations under the provisions of the Customs Code of Ukraine may be available in oral, written or electronic form upon such person's request. The Tax Code of Ukraine does not provide electronic form of tax consultation. The time limits for consultations are also different. Customs legislation establishes a 30-day term, tax one – 25 days with the possibility of its extension up to 10 additional days.

The procedure for providing oral consultations is not regulated by customs or tax law. It is believed that their way of receiving depends on the format of request – personal audience with officials, telephone mode, etc.

Regarding the written consultations, the authors of the Tax Code of Ukraine have followed the detailed regulation of the consultation process in almost all of its stages. Thus, the Tax Code of Ukraine provides the content of the taxpayer request for individual tax consultation. In addition to personal information and standard requisites, it must contain an explanation of the practical need for tax consultation. The Code also stipulates the consequences of non-compliance with the requirements for such content (in this case, tax consultation is not provided, but the answer is sent according the Law of Ukraine on Citizens Appeals provisions).

Individual tax consultation in written form must include: 1) the title, 2) registration number in the unified database of tax consultations, 3) a description of the issues raised by the taxpayer, 4) justification the use of law, 5) a conclusion regarding practical application of such law provisions.

Individual tax consultation in written form have to be registered in the unified database of tax consultations and published on the official website of the State Tax Service of Ukraine guaranteeing confidentiality of taxpayer's personal data. It means that every given consultation is not only accounted, but made public. It ensures transparency and legality of the authority decreasing the quantity of typical requests. Ultimately the publication has an informative and educational effects for all those interested in tax issues (students, scientists, practitioners, etc.). However, for the consultation to be included in the mentioned register, it must pass a two-stage procedure for its adoption and approval by the State Tax Service.

At the same time the procedure for providing customs consultations (in written and electronic forms) is not regulated at all. The content and details of the appeal as well as the consultation were left out of the legislator attention. This problem has practical negative consequences embodied in the actual court decisions. Thus, Zaporizhzhia District Administrative Court has rejected person claim for elimination custom consultation provided by Zaporizhzhia Custom service. Among others it is stated in the judicial decision: "... the claimant did not raise the question of clarification on the practical application of certain provisions of the tax and/or customs law that is defining feature of the request for tax consultation. According to the Court, [claimant's] appeal cannot be considered a request for the tax consultation" (Order in Case No. 808/4075/15). The lack of objective criteria for determining whether a particular request for the tax consultation can provoke abuses by the customs administration. Solution to the issue is left to the discretion of the courts but only in case of an appeal.

By the way the ground for refusal to provide customs consultations is not defined by law. However, in accordance with Article 22 of the Customs Code of Ukraine "The officials of customs authorities shall be held legally liable for the provision of incorrect information, unlawful refusal to provide the requested information..."

Obviously, this provision of the Customs Code is not completely working since it is not possible to understand which refusal is legitimate and which is not.

The detailing of the tax consultation procedure, its multi-stage nature and publicity minimizes problems with their poor quality and avoidance. It rather facilitates a dialogue between taxpayers and tax administration, which is relevant under the conditions of Ukraine becoming a service-oriented state. Instead, the legal regulation deficiency of the customs consultation procedure makes it impossible or minimizes the use of consultations in customs practice which negatively affects the formation of a “new” customs image.

Consequence and effectiveness. One of a few legal regulation similarities of both customs and tax consultations is the consequence of their application. Both Codes provide the immunity for acts based on consultation. It means no person who acted in line with the [customs or tax] consultation as well as summary consultation shall be held liable, in particular if based on the fact that such consultation was subsequently altered or cancelled. This is stated in Article 53 of the Tax Code of Ukraine and in part 5 of Article 21 of the Customs Code of Ukraine.

It should be added that for a person to be relieved out of responsibility counseling must be provided in written (electronic) form and tax consultation have to be entered in the register. The immunity is also provided when the person acted in line with a generalized consultation. Obviously, it is impossible to apply the relevant provisions of the Customs Code due to the lack of generalized customs consultations.

Both codes set out the possibility of appeal for the consultation provided in written form. The Tax Code provides judicial appeal of the consultation as an individual legal act which is a contrary to the rules of content of the relevant tax or fee up to the taxpayer.

The Customs Code of Ukraine establishes both judicial and administrative appeals if, in the opinion of a person, a consultation is a contrary to the law. The result of such an appeal may be the cancellation of the relevant consultation, which is the basis for a new one in the light of the court’s findings.

It should be noted that the case law on appealing tax consultations is quite indicative in respect of their importance for taxpayers. The case law on appealing for customs consultations is much less.

The Tax Code of Ukraine additionally provides for the possibility of a judicial appeal against an order approving a generalized tax consultation while the Customs Code does not. The absence of a special rule on appeal does not mean that it is impossible. Everyone can appeal to any decision of the public administration including a generalized customs consultation.

On the one hand customs or tax consultation is an individual act. It means that act (decision) of the authority issued under the procedure of administrative services relating to the rights or interests of a particular person. On the other hand, the consultation itself does not create person rights and obligations, does not oblige them to do so as specified therein, and will have legal consequences only if the person will decide to use it.

At the same time, it should be noted that tax consulting is a very popular type of services provided by tax bodies. This is evidenced by even cursory review of the register of individual tax consultations where dozens of them are published every day. This in turn confirms the importance, relevance and practical value of the tax administrations consultancy activity.

Unfortunately, this cannot be said about customs consultations. The lack of statistics on consultations provided, generalized, and appealed, as well as consultations that were applied in customs practice does not make it possible to conclude on the effectiveness, efficiency and general expediency of customs-consulting activity to date.

Conclusions. The comparative analysis of legal regulation and organization of providing customs and tax consultations showed the differences between the legislator approaches to the

regulation of identical activity of two equivalent entities. In spite of the fact of being managed by one central executive authority for a long time the State Tax Service activity has been regulated significantly better.

The comparison tax and customs consultancy made it possible to more clearly delineate the complex of problems in the legal regulation of customs consultancy. In particular, the main gap in this regard is almost total absence of procedural rules that would establish the actions sequence for the customs authorities: from the acceptance of a request, to the delivery of a consultation or a decision to refuse to the addressee. Moreover, the Customs Code of Ukraine lacks provisions with clear requirements for the form and content of both the request for advice and the consultation itself. The solution of this problem will minimize the number of appeals at least on formal bases. The unsettled generalization of customs consultations calls for immediate intervention by all relevant bodies. Firstly, the subject of such generalization (Ministry of Finance of Ukraine) must be clearly defined in the Customs Code of Ukraine. Secondly, the procedure for the provision and publication of generalized consultations has to be developed and adopted. Thirdly, it's necessary to ensure availability of the subject of the generalization (registry, open data, etc.).

These measures are urgent as they can activate customs consultancy institution and discover its potential. We hope that reforming the customs system as well as final disintegration with the tax service will give impetus to a new round of its development.

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ОРГАНІЗАЦІЙНО-ПРАВОВІ ЗАСАДИ МИТНОГО ТА ПОДАТКОВОГО КОНСУЛЬТУВАННЯ: ПОРІВНЯЛЬНИЙ АНАЛІЗ

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Митне та податкове консультування є ефективним засобом попередження правопорушень, покращення комунікації та встановлення партнерських відносин між відповідною публічною адміністрацією та бізнес спільнотою, саме тому вони обидва мають важливе значення для економіки держави, підтримання авторитету та підвищення довіри до державних органів України. Мета статті полягає в тому, щоб на підставі порівняльного аналізу стану правової регламентації організації та здійснення консультаційної діяльності у митній та податковій галузях виявити проблеми та недоліки правового регулювання, які знижують ефективність цієї діяльності, та запропонувати шляхи їх подолання.

В результаті порівняльного аналізу порядку надання митних та податкових консультацій визначено, що законодавець по-різному підходить до їх правового регулювання. Доведено, що аналогічні норми Митного та Податкового кодексів України реалізуються абсолютно по-різному, точніше, перші не реалізуються взагалі. Дане порівняння дало змогу виявити некоректне визначення суб'єктів, які мають право звертатися за митними консультаціями, а так само суб'єктів, як надають такі консультації. Запропоновано розширити коло можливих запитувачів митних консультацій. Доведено необхідність законодавчого закріплення вимог як формального, так і змістовного характеру, щодо запитів на отримання консультації з питань практичного застосування окремих положень митного законодавства, а також підстав для відмови у їх наданні. В ході дослідження виявлено практично повну відсутність правового регулювання порядку узагальнення митних консультацій та запропоновано Міністерству фінансів України розробити та затвердити своїм наказом відповідну процедуру за прикладом узагальнення податкових консультацій.

Ключові слова: митна консультація, податкова консультація, консультування, узагальнена митна консультація, узагальнена податкова консультація.