

TAX PLANNING AND THE NEED FOR ITS NORMATIVE-LEGAL REGULATION IN THE LEGISLATION IN ORDER TO DISTINGUISH BETWEEN LEGITIMATE TAX BEHAVIOR OF TAXPAYERS AND TAX OFFENSES

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Abstract. *The article is devoted to the analysis of tax planning as the main tool of tax liability management and the necessity of its detailed normative-legal regulation in the legislation in order to distinguish between legitimate tax behavior of taxpayers and tax offenses. In the conditions of globalization of the economy, constant changes in tax legislation and practice of law enforcement, the issues of tax planning acquire special importance for the effective organization of financial and economic activities of physical and legal entities. Tax planning by its very structure is a rather complex behavior of a taxpayer, as it includes a number of different actions related to the taxpayer’s assessment of all possible variants of his expected tax liabilities depending on the decisions taken by him in the course of his financial and economic activities. The essence of tax planning is the development of a set of measures aimed at the development and adoption of managerial decisions in the field of finance of the organization in order to optimize its tax expenditures by legal methods. However, despite the opportunity to use legal methods of tax planning, taxpayers use «borderline» methods of tax planning, which are on the verge of a tax offense, or illegal methods to optimize tax liabilities. Based on the analysis of international and national tax legislation, as well as practices regulating issues of legal and illegal behavior of the taxpayer in the implementation of tax planning of its financial and economic activities, the authors have analyzed the types of tax behavior used by the taxpayer in the planning of its financial and economic activities, identified the peculiarities and characteristics of legal and illegal methods of tax planning, as well as determined the definition of legal and illegal methods of tax planning. In the course of the study, the authors proposed recommendations for the improvement of tax legislation.*

Keywords: *tax planning, financial and economic activities, optimization of tax burden, tax offenses, tax loopholes.*

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САЛЫҚ ТӨЛЕУШІЛЕРДІҢ ЗАҢДЫ САЛЫҚТЫҚ МІНЕЗ-ҚҰЛҚЫ МЕН САЛЫҚТЫҚ ҚҰҚЫҚ БҰЗУШЫЛЫҚТАРДЫ АЖЫРАТУ МАҚСАТЫНДА САЛЫҚТЫҚ ЖОСПАРЛАУ ЖӘНЕ ОНЫ ЗАҢНАМАДА НОРМАТИВТІК-ҚҰҚЫҚТЫҚ РЕГЛАМЕНТТЕУ ҚАЖЕТТІЛІГІ

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Аннотация. Бұл мақаласалықтық жоспарлауды салықтық міндеттемелерді басқарудың маңызды құралы ретінде және салық төлеушілердің заңды салықтық мінез-құлқы мен салықтық құқықбұзушылықтарды ажыратуға бағытталған оны егжей-тегжейлі нормативтік-құқықтық реттеудің қажеттілігін талдауға арналған. Экономиканың ғаламдануы, салық заңнамасының тұрақты өзгерістері мен құқық қолдану практикасының өзгеруі жағдайында салықтық жоспарлау мәселелері жеке және заңды тұлғалардың қаржылық-экономикалық қызметін тиімді ұйымдастыру үшін ерекше маңызға ие болып отыр. Салықтық жоспарлау өзінің құрылымы бойынша салық төлеушінің күрделі мінез-құлқы болып табылады, себебі ол салық төлеушінің қаржылық-экономикалық қызметін жүзеге асыру барысында қабылдаған шешімдеріне байланысты болашақ салықтық міндеттемелерінің барлық мүмкін нұсқаларын бағалауға қатысты түрлі іс-әрекеттерді қамтиды. Салықтық жоспарлаудың мәні – заңды әдістермен салықтық шығындарды оңтайландыру мақсатында ұйымның қаржы саласында басқарушылық шешімдер қабылдау және әзірлеуге бағытталған іс-шаралар кешенін әзірлеу болып табылады. Алайда, салықтық жоспарлаудың заңды әдістерін қолдануға мүмкіндік болғанына қарамастан, салық төлеушілер «шекаралық» салықтық жоспарлау әдістерін, яғни салықтық құқықбұзушылықпен шектесетін немесе заңсыз әдістерді қолдануда. Халықаралық және ұлттық салық заңнамасын, сондай-ақ салық төлеушінің салықтық жоспарлау барысында заңды және заңсыз мінез-құлқымен байланысты мәселелерді реттейтін тәжірибені талдау негізінде авторлар салық төлеушінің қаржылық-экономикалық қызметін жоспарлау кезінде қолданатын салықтық мінез-құлықтың түрлерін, заңды және заңсыз салықтық жоспарлау әдістерінің айырым белгілері мен ерекшеліктерін анықтап, сондай-ақ заңды салықтық мінез-құлық пен салықтық құқықбұзушылық арасындағы шекарада орналасқан салықтық жоспарлау әдістерінің аясын белгіледі. Зерттеу барысында авторлар салық заңнамасын жетілдіруге қатысты ұсыныстар әзірледі.

Түйінді сөздер: салықтық жоспарлау, қаржылық-экономикалық қызмет, салықтық ауыртпалықты оңтайландыру, салықтық құқықбұзушылықтар, салықтық тесіктер.

НАЛОГОВОЕ ПЛАНИРОВАНИЕ И НЕОБХОДИМОСТЬ ЕГО НОРМАТИВНО-ПРАВОВОЙ РЕГЛАМЕНТАЦИИ В ЗАКОНОДАТЕЛЬСТВЕ В ЦЕЛЯХ РАЗГРАНИЧЕНИЯ ПРАВОМЕРНОГО НАЛОГОВОГО ПОВЕДЕНИЯ НАЛОГОПЛАТЕЛЬЩИКОВ И НАЛОГОВЫХ ПРАВОНАРУШЕНИЙ

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Аннотация. Данная статья посвящена анализу налогового планирования как важнейшего инструмента управления налоговыми обязательствами и необходимости его детальной нормативно-правовой регламентации в законодательстве с целью разграничения правомерного налогового поведения налогоплательщиков и налоговых правонарушений. В условиях глобализации экономики, постоянных изменений налогового законодательства и правоприменительной практики вопросы налогового планирования приобретают особое значение для эффективной организации финансово-хозяйственной деятельности физических и юридических лиц. Налоговое планирование по своей структуре является достаточно сложным поведением налогоплательщика, так как включает в себя ряд различных действий, связанных с оценкой налогоплательщиком всех возможных вариантов своих предполагаемых налоговых обязательств в зависимости от принимаемых им решений в ходе осуществления своей финансово-хозяйственной деятельности. Суть налогового планирования заключается в выработке комплекса мероприятий, направленных на подготовку и принятие управленческих решений в области финансов организации с целью оптимизации её налоговых расходов законными методами. Однако несмотря на имеющуюся возможность применять законные методы налогового планирования, налогоплательщики используют «пограничные» методы налогового планирования, находящиеся на грани с налоговым правонарушением, или незаконные методы оптимизации налоговых обязательств. На основе анализа международного и национального налогового законодательства, а также практик, регулирующих вопросы, связанные с правомерным и неправомерным поведением налогоплательщика при осуществлении налогового планирования своей финансово-хозяйственной деятельности авторами были проанализированы виды налогового поведения, которое использует налогоплательщик при планировании своей финансово-хозяйственной деятельности, выявлены отличительные особенности и черты правомерных и неправомерных методов налогового планирования, а также определён состав методов налогового планирования, находящихся на грани между правомерным налоговым поведением и налоговым правонарушением. В ходе проведённого исследования авторами были предложены рекомендации по совершенствованию налогового законодательства.

Ключевые слова: налоговое планирование, финансово-хозяйственная деятельность, оптимизация налогового бремени, налоговые правонарушения, налоговые лазейки.

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Introduction

One of the key concepts of financial and economic activity of individuals and legal entities is tax planning. Despite the fact that the term “tax planning” has no legal consolidation

and no official definition, today tax planning is an integral part of both the general planning process of financial and economic activity, and in the process of its direct realization.

Tax planning is a rather complex in its

structure behavior of the taxpayer, as it includes a number of different actions related to the assessment by the taxpayer of all possible variants of its expected tax liabilities depending on the decisions taken by it in the course of its financial and economic activities.

In general, tax planning is a legitimate behavior of taxpayers. The purpose of tax planning, as noted by Bepalov M.V., is to optimize tax payments, minimize tax losses for a particular tax or a set of taxes, increase the volume of working capital, increase the real opportunities for further development of the organization, increase the level of efficiency of its research [1].

Considering that tax planning is carried out within the framework of financial and economic activities of the taxpayer, which are usually regulated by private law, before the tax liability arises, the general rule of private law applies to tax planning: "Everything that is not forbidden is permitted". In this regard, the state should be more concerned about the definition in punitive branches of law, in the objective side of the elements of administrative and criminal offenses of those illegal actions of the taxpayer, which from the point of view of protection of the mechanism of taxation is prohibited by law at the stage of implementation of financial and economic activities of the person before or during the execution of its tax obligations (in the determination of the objects of taxation, calculation and payment of taxes and submission of tax returns). Therefore, there is no urgent need to strictly formulate the concept and specifically define the content of tax planning carried out by the taxpayer independently and at its own discretion within the legal framework without violating the prohibitions established by law. However, in order to clearly distinguish between lawful and unlawful conduct of a taxpayer in the performance of its tax obligations, the general contours of tax planning as a lawful activity of a taxpayer should also be outlined. The right of everyone to freedom of entrepreneurial activity, free use of property for any lawful entrepreneurial activity, provided for in paragraph 4 of Article 26 of the Constitution of the Republic of Kazakhstan², should be supplemented by the right to freedom to plan this activity in the most advantageous way for oneself in a lawful manner, including in terms of saving on expenses (including excessive tax expenses with a legal possibility of not paying

them or paying them in a smaller amount), i.e. the right to tax planning.

In order to understand and deal with the peculiarities of tax planning and taxpayers' actions, it is necessary to classify this phenomenon.

Tax planning can be classified in different ways:

Depending on the time of tax planning organization:

- organization of tax planning can be carried out before the beginning of financial and economic activity;
- organization of tax planning can be carried out during the performance of financial and economic activities;
- organization of tax planning can be carried out before the occurrence of any desirable or undesirable results of financial and economic activity.

Depending on the goal (what result the taxpayer wants to achieve when organizing tax planning):

- minimization is a type of taxpayer's behavior in the sphere of taxation when it is planned to reduce the amount of tax liabilities by reducing tax payments separately for each tax in isolation from the analysis of the totality of taxes paid by the taxpayer.
- maximization is a type of taxpayer's behavior in the sphere of taxation when it is planned to increase the amount of tax liabilities by increasing tax payments in order to reduce the effectiveness and efficiency of financial and economic activities of the taxpayer as a whole, to reduce the amount of its profits, to increase its losses in order to use the financial results of its activities in its future financial operations;
- optimization is a type of taxpayer's behavior in the field of taxation when it is planned to reduce the amount of tax liabilities by using all techniques and methods provided by law for reducing tax payments, as well as existing gaps in the tax legislation, in order to improve the efficiency and effectiveness of financial and economic activities and without increasing the degree of tax risk of the taxpayer according to the results of its categorization by the tax authorities. During the optimization process, the total amount of taxes payable by the taxpayer to the state budget is analyzed.

3. Depending on the type of conduct used by the taxpayer to achieve the objective:

- illegal behavior. In legal literature, unlawful

² Конституция Республики Казахстан (принята на республиканском референдуме 30 августа 1995 года). // URL: https://online.zakon.kz/Document/?doc_id=1005029#activate_doc=2 (дата обращения: 11.11.2024).

behavior of a taxpayer is correlated with such a concept as “tax evasion”, which is a legally established unlawful behavior of taxpayers, for which administrative and (or) criminal liability is provided.

- legitimate behavior. The basic principle of such behavior is the principle “everything that is not prohibited by law is allowed”. In legal literature, legitimate behavior of a taxpayer is correlated with such a concept as “tax avoidance”, which is a permissible and not contrary to the current tax legislation behavior of a taxpayer.

The above classification of tax planning is only theoretical, there is no legislative consolidation. This has certain negative consequences both for the effective functioning of business and for the tax system as a whole.

A particularly negative effect of this legal uncertainty can be seen in the classification of tax planning depending on the type of behavior of the taxpayer (legal or illegal) and the criteria for their differentiation.

As a result of ambiguous interpretation of tax legislation, the criteria of legality of tax planning, the limits of permissible and possible behavior of the taxpayer are among the most controversial issues in the relationship between tax authorities and business. The main reason for the emergence of this phenomenon is the absence in the Tax Code of the Republic of Kazakhstan of the concept of the category “tax planning”, criteria of legality of tax planning and implementation of legal tax optimization.

In connection with the above, there is a corresponding need for legislative consolidation of the concept of “tax planning”, as well as the criteria for distinguishing between acceptable and unacceptable tax behavior.

In this article the authors will substantiate the need for legislative consolidation of the concept of “tax planning” and criteria for distinguishing acceptable and unacceptable tax behavior, as well as determine how the limits of acceptable tax behavior in the implementation of tax planning are established by the state in accordance with current legislation.

Materials and methods

In the study the authors used the comparative legal method, which allowed to analyze the types of tax behavior used by the taxpayer in planning its financial and economic activities, to identify the peculiarities and characteristics of legitimate and illegitimate methods of tax planning, as well as to determine the composition of tax planning methods that are on

the borderline between legitimate tax behavior and tax offense.

The study is based on the analysis of international tax legislation and practice, which regulates issues of legitimate and illegitimate behavior of a taxpayer in the implementation of tax planning of its financial and economic activities.

Within the research the authors pay special attention to the comparative analysis of criminal, administrative and tax legislation of Kazakhstan and Germany as one of the representatives of developed countries - strategic partners of the Republic of Kazakhstan in foreign trade and economic cooperation.

Results and discussion

Successful activity of the enterprise is impossible without successful management of financial resources, because the effective activity of the enterprise is determined not only by its profitability, but also by the amount of tax expenses. Proper management of financial resources, their optimization is carried out on the basis of financial planning, a component of which is tax planning [2].

The necessity of appropriate tax planning of financial and economic activities is justified by the following factors: the severity of the tax burden for the enterprise, as well as the complexity and variability of tax legislation. It should be noted that the tax legislation already provides reasons for tax planning by the taxpayer: different tax regimes, different methods of calculating the tax base and various tax benefits are offered.

In this case, a number of questions arise: whether this list of tax planning methods is exhaustive or subject to broad interpretation, whether taxpayers may use other methods “not expressly prohibited by law,” what is the limit of legitimate tax planning, and at what point legitimate tax planning becomes illegal activity.

Thus, the absence in the legislation of a definition of the category of “tax planning” and criteria of legitimate and illegitimate tax planning leads to certain negative consequences:

- The emergence of legal uncertainty and legal risk. Without a clear definition of tax planning, businesses face the risk of arbitrariness on the part of tax authorities. The lack of transparent criteria for what constitutes legitimate and illegitimate tax planning can lead to litigation, additional charges and fines for organizations;

- Violation of the principle of tax equity. In the absence of clear criteria for the legitimacy of tax planning, large companies can use complex

schemes to minimize their tax liabilities, while small and medium-sized enterprises, which do not have sufficient resources to develop such schemes, bear a heavy tax burden. This violates the principle of tax equity;

- Tax evasion. In the absence of clear criteria for determining tax planning and its limits, there are opportunities for taxpayers to use “aggressive tax schemes” bordering on legality or illegal schemes to optimize tax liabilities [3]. This leads to a decrease in tax revenues for the budget and unfair competition;

- Difficulties in monitoring tax compliance. Without clear criteria to distinguish between legitimate and illegitimate tax planning, tax authorities may have difficulty conducting audits and combating aggressive tax evasion schemes. This reduces the effectiveness of tax control.

Based on the above, it can be concluded that the lack of criteria for the legality of tax planning in the Tax Code of the Republic of Kazakhstan, as well as the complexity in the interpretation of legislation, creates a lot of legal and economic risks for business, which requires more detailed elaboration of legislation and the introduction of clear and accessible criteria for tax procedures.

It can be assumed that in the course of financial and economic activities, natural and legal persons, as well as individual entrepreneurs, apply a variety of tax optimization schemes, which can be divided into:

- legal methods of tax planning, directly provided for by tax legislation;
- illegal methods of tax planning, the use of which results in legal liability: criminal or administrative;
- “borderline” methods of tax planning, which are on the verge of a tax offense, which the taxpayer justifies by the principle “what is not prohibited by law is allowed” and are formally legal.

Legal methods of tax planning are ways of tax liability optimization directly provided by tax legislation. They include the possibility of choosing the organizational-legal form of a legal entity, entrepreneurship and economic activity, the choice of taxation system, accounting

methods and the use of various preferences (tax exemptions, special tax regimes, etc.) provided by the legislation. For example, in Kazakhstan, in accordance with article 678 of the Tax Code, a special tax regime applies to small businesses and agricultural producers³. In Germany, some taxpayers are subject to special tax rules [4], so according to section 180 of the Fiscal Code of Germany, a separate determination of the tax base is carried out for income from agriculture and forestry, business or self-employment⁴.

The second category includes illegal methods of tax planning - these are legally prohibited ways of optimizing tax liabilities, the use of which is subject to criminal or administrative liability.

The Criminal Code and the Code of Administrative Offenses provide for appropriate types of taxpayer behavior that are unlawful and for which appropriate types of legal liability are provided.

In Kazakhstan, the main legislation determining liability for tax offenses is the Criminal Code⁵. In Germany, the main legislative act determining liability for tax offenses is the Fiscal Code of Germany,⁶ promulgated on October 1, 2002. It is important to note that the Criminal Code of Germany practically does not contain any provisions on liability for tax offenses, except for the provisions on punishment for falsification of tax stamps and disclosure of tax secrecy. In case of competition between the criminal law provisions of the Fiscal Code of Germany and the Criminal Code of Germany, the legislator, in accordance with section 369 (2) of the Fiscal Code, gives priority to the special norm of the Fiscal Code [5].

The Criminal Code of Kazakhstan provides for three main elements of criminal offenses that contain signs of illegal optimization of tax liabilities: article 216 “Commission of actions on invoicing without actual performance of works, rendering of services, shipment of goods”, article 244 “Evasion of the citizen from payment of the tax and (or) other obligatory payments to the budget” and article 245 “Evasion of taxes and (or) other compulsory payments in a budget with organization”⁷.

³ Кодекс Республики Казахстан от 25 декабря 2017 года № 120-VI «О налогах и других обязательных платежах в бюджет (Налоговый кодекс)». // URL: https://online.zakon.kz/Document/?doc_id=36148637 (дата обращения: 11.11.2024).

⁴ THE FISCAL CODE OF GERMANY as on 25 May 2018. // URL: https://www.bundesfinanzministerium.de/Content/EN/Downloads/Resources/Laws/2018-03-26-fiscal-code.pdf?__blob=publicationFile&v=1 (date of reference: 11.11.2024).

⁵ Уголовный кодекс Республики Казахстан от 3 июля 2014 года № 226-V. // URL: https://online.zakon.kz/Document/?doc_id=31575252 (дата обращения: 11.11.2024).

⁶ THE FISCAL CODE OF GERMANY as on 25 May 2018. // URL: https://www.gesetze-im-internet.de/englisch_ao/englisch_ao.html (date of reference: 11.11.2024).

⁷ Уголовный кодекс Республики Казахстан от 3 июля 2014 года № 226-V. // URL: https://online.zakon.kz/Document/?doc_id=31575252 (дата обращения: 11.11.2024).

The German Fiscal Code contains only one offense that includes the elements of illegal minimization of tax liability: section 370 “Tax Evasion”⁸.

Article 216 of the Criminal Code of Kazakhstan provides for criminal liability of subjects of private entrepreneurship for committing actions on issuing invoices without actually performing work, rendering services, shipping goods with the purpose of extracting property benefits, causing significant damage to a citizen, organization or the state⁹.

Articles 244 and 245 of the Criminal Code of Kazakhstan and section 370 of the Fiscal Code of Germany provide for criminal liability for evasion of taxes and (or) other compulsory payments in a budget.

Article 244 of the Criminal Code of Kazakhstan provides for criminal liability of citizens for evasion of taxes and (or) other compulsory payments in a budget. An important feature of the objective side of the criminal offense is the occurrence of consequences in the form of non-payment of tax and (or) other obligatory payments to the budget in a large amount¹⁰.

Article 245 of the Criminal Code of Kazakhstan provides for criminal liability of taxpayers - organizations for evasion of taxes and (or) other compulsory payments in a budget¹¹. The disposition of article 245 of the Criminal Code provides for a criminal offense identical to the disposition of article 244, only the ways of committing it are specified. The consequences of committing an unlawful act resulting in criminal liability under article 245 of the Criminal Code of Kazakhstan are identical to those of article 244, i.e. non-payment of taxes and (or) other compulsory payments in a large amount exceeding 50,000 MCI¹².

For a uniform interpretation and correct understanding of the meaning and content of article 245 of the Criminal Code of Kazakhstan, the Scientific Practical Commentary to article 245 of the Criminal Code of the Republic of Kazakhstan provides an interpretation of the

terms and concepts used in the disposition of the article [6].

An important aspect of articles 244 and 245 of the Criminal Code of Kazakhstan is the existence of a “note” in which the grounds for exemption from criminal liability is specified¹³. In case of voluntary payment of tax arrears and (or) other compulsory payments to the budget, as well as a penalty, the person is exempt from criminal liability.

Thus, it can be concluded that the list of criminal acts (“omissions to act/actions”) and ways of committing them, specified in articles 244 and 245 of the Criminal Code of Kazakhstan, is exhaustive and not subject to wide interpretation. All criminal acts not included in this list are either administrative offenses or legal “omissions to act /actions” on the part of the taxpayer.

Section 370 of the Fiscal Code of German provides for the criminal liability of “any person” for tax evasion¹⁴. The subject of criminal liability for tax evasion under German law (sections 33-36 of the Fiscal Code of German) is the taxpayer, the taxpayer’s legal representative, the manager of the taxpayer’s property, the taxpayer’s authorized representative [5].

The disposition of Section 370 of the German Fiscal Code provides for three types of criminal acts for which criminal liability is imposed¹⁵. The result of committing the above crimes is to understate taxes or derive unwarranted tax advantages for himself or for another person. Section 370 of the German Tax Code also provides for the qualifying features of the criminal offence¹⁶.

Like the Criminal Code of Kazakhstan, the Fiscal Code of Germany provides the grounds for exemption from punishment, which are regulated in section 371¹⁷. Such circumstances are the addition or correction of documents submitted to the tax authorities or the provision of previously concealed information; voluntary repayment of previously concealed amounts in the case of illegal tax benefits.

⁸ THE FISCAL CODE OF GERMANY as on 25 May 2018. — URL: https://www.gesetze-im-internet.de/englisch_ao/englisch_ao.html (date of reference: 11.11.2024).

⁹ Уголовный кодекс Республики Казахстан от 3 июля 2014 года № 226-V. // URL: https://www.unodc.org/uploads/icsant/documents/Legislation/Kazakhstan/3_Penal_Code_of_the_RK.pdf (дата обращения: 11.11.2024).

¹⁰ Там же

¹¹ Там же

¹² Уголовный кодекс Республики Казахстан от 3 июля 2014 года № 226-V. // URL: https://www.unodc.org/uploads/icsant/documents/Legislation/Kazakhstan/3_Penal_Code_of_the_RK.pdf (дата обращения: 11.11.2024).

¹³ Там же

¹⁴ THE FISCAL CODE OF GERMANY as on 25 May 2018. // URL: https://www.gesetze-im-internet.de/englisch_ao/englisch_ao.html (date of reference: 15.11.2024).

¹⁵ Ibid

¹⁶ Ibid

¹⁷ Ibid

Thus, it can be concluded that the number of acts covered by criminal offences in the Fiscal Code of Germany is much wider than in the Criminal Code of Kazakhstan.

In Kazakhstan, the main normative act defining administrative responsibility for committing administrative offences in the field of taxation is the Code of the Republic of Kazakhstan «On Administrative Infractions», which provides for six separate sets of administrative offences (Articles 275-280-1)¹⁸.

Germany also has the Act on Regulatory Offences of 19 February 1987, but the legislator recommends, in accordance with section 377(2) of the Fiscal Code of Germany, that the provisions of Second Chapter of the Fiscal Code, entitled “Provisions on administrative fines”¹⁹, be used as a guideline. Thus, the priority of the provisions of the Fiscal Code with regard to administrative tax offences is established and their duplication is eliminated.

Article 275 of the Code of Kazakhstan of Administrative Infractions provides for administrative liability for concealment of objects of taxation and other property subject to reflection in tax reporting²⁰. The disposition of the article provides for five types of acts that may be punishable by law. The list of “omissions to act/actions” for which administrative liability is provided under article 275 of the Code of Kazakhstan of Administrative Infractions is also exhaustive²¹. For a correct understanding of the meaning and content of the article, the circumstances that must be taken into account when incriminating an article, as well as the interpretation of some terms used in the provision of the article in question, are outlined in the “note”.

Article 278 of the Code of Kazakhstan of Administrative Infractions provides for administrative liability for undervaluation of tax amounts and other compulsory payments into the budget²². The disposition of the article provides three types of possible criminal acts, an

important feature of each of which is the absence of a criminal offence provided for in the Criminal Code of the Kazakhstan. For the correct interpretation of the meaning and content of the article in “note” are indicated the circumstances under which are “counted/not counted” tax amounts when incriminating the article 278 of the Code of Kazakhstan of Administrative Infractions²³.

According to the Fiscal Code of Germany, administrative tax offenses include seven offenses (sections 377-383 of the Fiscal Code of Germany)²⁴.

Section 378 of the Fiscal Code of Germany provides for administrative liability for reckless understatement of tax. Administrative liability under this article is incurred in the case of a taxpayer recklessly commits one of the acts described in section 370(1) of the Fiscal Code of Germany “Tax evasion”²⁵. In this case, reckless understatement of tax is the main characteristic that distinguishes a criminal offense from an administrative offense.

Section 378(3) of the Fiscal Code of Germany provides that the penalty shall not apply if the perpetrator corrects or supplements incorrect or incomplete information provided to the tax authority, or provides previously omitted information, before he or his representative has been notified of the initiation of criminal or administrative proceedings as a result of unlawful acts²⁶.

Section 379 of the Fiscal Code of Germany regulates administrative liability for general minor tax fraud²⁷. Such as, issuance of documents that do not correspond to reality; release of documents into circulation for a fee²⁸.

Having analyzed the articles of criminal legislation and legislation on administrative offences of Kazakhstan, as well as tax legislation of Germany, we have determined the types of illegitimate actions of a taxpayer for which criminal or administrative liability is incurred.

¹⁸ Кодекс Республики Казахстан об административных правонарушениях от 5 июля 2014 года № 235-V. // URL: <https://adilet.zan.kz/eng/docs/K1400000235> (дата обращения: 15.11.2024).

¹⁹ THE FISCAL CODE OF GERMANY as on 25 May 2018. // URL: https://www.gesetze-im-internet.de/englisch_ao/englisch_ao.html (date of reference: 15.11.2024).

²⁰ Кодекс Республики Казахстан об административных правонарушениях от 5 июля 2014 года № 235-V. // URL: <https://adilet.zan.kz/eng/docs/K1400000235> (дата обращения: 15.11.2024).

²¹ Там же

²² Там же

²³ Там же

²⁴ THE FISCAL CODE OF GERMANY as on 25 May 2018. // URL: https://www.gesetze-im-internet.de/englisch_ao/englisch_ao.html (date of reference: 15.11.2024).

²⁵ THE FISCAL CODE OF GERMANY as on 25 May 2018. // URL: https://www.gesetze-im-internet.de/englisch_ao/englisch_ao.html (date of reference: 15.11.2024).

²⁶ Ibid

²⁷ Ibid

²⁸ Ibid

This list of illegitimate actions of taxpayers in the field of taxation is directly established in the criminal, administrative and tax legislation, is exhaustive and is not subject to wide interpretation. It also implies that all other actions of the taxpayer in the framework of tax planning, which are not recognized as illegal, are legal and should not be subject to condemnation by the state and the occurrence on its part of negative consequences for the taxpayer.

At the same time, in the judicial practice there are often cases when in civil cases, without preliminary establishment of the facts of administrative or criminal offenses in criminal proceedings or proceedings on cases of administrative offenses, the courts independently establish the facts of bad faith of taxpayers and (or) their abuse of their rights as violations in implementing tax planning in their financial and economic activities. For example, the Specialized Interdistrict Economic Court of Almaty, in its decision on a civil case, noted that «the above facts indicate that the above legal entity was created on a «front man» to hide the amount of turnover and taxable income, which confirms the lack of intention to carry out entrepreneurial activities in accordance with the current legislation of the Republic of Kazakhstan, as well as its actions caused significant damage to the state budget». This is largely facilitated by the absence in the legislation of the Republic of Kazakhstan of clear criteria for recognizing taxpayers' actions as being in bad faith or even as an abuse of rights in tax planning²⁹.

The legislation of each of the states has some common features and some special features:

- the legislation of Germany differs from the legislation of Kazakhstan by the fact that responsibility for administrative and criminal offenses is provided mainly in the Fiscal Code of Germany;

- a peculiarity of the criminal legislation and legislation on administrative offenses of Kazakhstan is the presence in the articles of the “note”, where the interpretation of terms and concepts contained in the disposition of the article, as well as the circumstances to be taken into account when incriminating the relevant rule of law is given;

- the offences covered by criminal and administrative liability are different. Thus, the elements (составы) of criminal offenses provided in the legislation of Germany are much wider than in the Criminal Code of Kazakhstan;

- a common feature of the legislation of Kazakhstan and Germany is the presence in the disposition of the article of the Fiscal Code (Germany) and in the note to the articles of the Criminal Code (Kazakhstan) of grounds for exemption of a person from criminal and administrative responsibility.

Having established legal and illegal methods of tax behavior when a taxpayer carries out planning of financial and economic activities, let us consider some ways of formally legal methods, which cannot be called legal, as they are not directly provided by the tax legislation, and yet cannot be recognized as illegal, as they have no signs of criminal or administrative offense.

In international practice, this type of tax behavior is often referred to as “tax avoidance”. As noted by David Fernandez and Kerry Sadik, tax avoidance is a rather controversial political and social phenomenon because taxpayers use loopholes in the tax laws to reduce their tax burden [7].

In this way, the “borderline” methods of tax planning can be taken into account:

- transferring profits to low-tax jurisdictions (tax havens); keeping money in offshore accounts or in countries with low or zero income tax to reduce the overall tax burden;

- use of different tax regimes. This method is used when the organization has customers who are subject to the general tax system (VAT payers) and special tax regimes (non-VAT payers). In this case, the sales flows are split through a specially created organization applying a special tax regime. Accordingly, all contracts with non-VAT payers are concluded with an organization applying a special tax regime, and contracts with VAT payers are concluded with an organization applying the common system of taxation, thereby minimizing VAT and income tax for organizations [3].

international companies use a variety of schemes to reduce their tax liabilities: they use complex financial structures to reduce tax payments. For example, an international company may use a scheme in which one of its subsidiaries issues high-interest bonds. These interest payments are made to a low-tax country, and the company itself writes off the interest as waste, reducing its taxable profit.

The existence of “borderline” methods of tax planning creates a threat to the tax system of the state, because:

²⁹ Decision of the Specialized Interdistrict Economic Court of Almaty dated 08.12.2021 on civil case No. 7527-21-00-2/10101, left unchanged by the decision of the Almaty City Court dated 11.10.2022.

- There is an imbalance in the development of society. The use of complex tax schemes to minimize tax liabilities creates a situation where only large economic entities with financial and legal resources can use these methods. As a result, small and medium-sized businesses remain in a disadvantageous position, which increases the inequality of economic opportunities and reduces competition in the market;

- Undermines taxpayers' trust in the state and the tax system. When "borderline" tax planning practices become widespread, it undermines public confidence in the tax system and state institutions, which reduces the efficiency of public administration and contributes to the growth of corruption. There is a perception in society that the rich and powerful can avoid tax obligations, while ordinary citizens are obliged to pay taxes in full;

- There is an "erosion" of the tax base. Massive use of "borderline" tax planning techniques can lead to tax base erosion, where a large part of the economy is outside tax control. This creates difficulties for the tax authorities, which cannot collect taxes efficiently, and leads to the need to increase tax rates for the remaining taxpayers, which in turn further increases social inequality.

Thus, "border" tax planning methods, although partly legal, often provoke criticism from society and negative reactions from the State and its organs, because their frequent use can cause significant damage not only to the tax system but also to the economy as a whole. This leads to a loss of confidence in the tax system, increased inequality and economic instability, as well as market competition. To combat this phenomenon, many countries are developing new controls and legislation aimed at reducing the use of tax loopholes.

Conclusion

Today in the legislation of many states there is no normative definition of the concept of tax planning, there are no criteria to distinguish and differentiate legitimate (legal) tax planning from illegal (illegal) behavior of taxpayers, as well as there is no classification of them.

This legal uncertainty leads to questions concerning the criteria of legality of tax planning, limits of permissible and possible behaviour of the taxpayer, as a result of ambiguous interpretations of tax legislation remain uncertain and controversial [8]. Moreover, these circumstances make it difficult to implement and define the line between

tax planning and tax evasion, which in turn encourages an increase in disputes between tax authorities and taxpayers. This gap in the legislation also makes it impossible to clearly understand which types of tax behaviour in the financial planning of a taxpayer's economic activities can be applied internationally - legal mechanisms provided for in double taxation treaties (conventions).

At present, tax legislation contains norms regulating legal methods of tax planning, while criminal and administrative legislation provides for illegal methods of tax planning as an objective side of tax crimes, for the commission of which there is corresponding legal liability.

The "borderline" methods of tax planning, which lie on the borderline between legal tax behaviour and a tax offence, remain unregulated. In international practice, the legal category "tax avoidance" is used to refer to such methods. Widespread use of "tax avoidance" by taxpayers can have serious negative consequences for the economy, society and public finances.

First, it undermines the credibility of the tax system.

Second, it contributes to widening the gap between large and small companies. Large companies with tax planning opportunities (e.g. through the use of offshore or transfer pricing) can significantly reduce their tax liabilities, while small and medium-sized enterprises, which cannot use such schemes, pay taxes at the full rate.

Third, it can lead to a lack of funding for essential social programmes and public infrastructure, which in turn can lead to economic instability. Governments may be forced to raise taxes on the population or cut spending in important areas such as health, social security, culture, science and education.

Fourth, it violates fair competition in the marketplace. Companies that use tax loopholes can reduce their costs and increase their profits by minimizing their tax payments, giving them a non-competitive advantage over companies that pay the full tax rate.

Fifth, it could have some international implications. Countries that lose revenue through tax avoidance may come into conflict with other countries where companies use tax loopholes. For example, many countries are trying to crack down on tax havens and offshore companies where companies and individuals hide their profits. But such actions can lead to diplomatic and economic problems if countries cannot agree on global measures to tackle tax loopholes.

As a result of the study, we believe that it would be appropriate to normatively define and consolidate the concept of tax planning, to define and consolidate the criteria for distinguishing legal (legitimate) from illegal (illegitimate) tax behavior of taxpayers. As well as introducing changes in tax legislation to eliminate the loopholes that allow taxpayers to use “borderline” methods of tax planning - “tax avoidance”. For example, imposing additional taxes on schemes used solely to minimize

tax liabilities: transactions between offshore companies or financial instruments used to reduce tax. This will help to create a fairer and more transparent tax system that will promote economic growth, reduce inequality, increase tax revenues and improve public confidence and market competition. The state must create conditions for taxpayers in which tax evasion becomes unprofitable and unethical and the tax system supports a fair distribution of the tax burden among all citizens and companies.

Authors' contributions

The authors declare that they have contributed equally to the conception, development, and writing of this article. This article is the outcome of joint intellectual effort. Each section of the article was jointly discussed, critically revised, and unanimously approved by both authors prior to submission.

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