

GENERAL ANTI-AVOIDANCE RULE INCORPORATED INTO THE TAX CODE OF BELARUS

S. Y. Baranau

Belarusian State University, Minsk;

bse98@tut.by;

supervisors – Y. P. Hayrylchanka, T. V. Kovalionak

The article is devoted to general anti-avoidance provisions implemented into the Tax Code of the Republic of Belarus. The author describes legal grounds for rejecting unjustified tax benefits and charging additional sums of taxes. Based on the interpretation of the legal grounds made by the Supreme Court of the Republic of Belarus, the author draws attention to the most critical issues regarding application of general anti-avoidance rule and makes suggestions for its improvement. The author concludes that following the recommendations suggested will lead to improvement of legal regulation of taxation in Belarus, as well as establish and strengthen the balance of public and private interests.

Key words: general anti-avoidance rule; distortion of information; principal purpose test; business purpose; fake transaction; substance over form; due diligence doctrine.

In 2019, a new edition of the Tax Code of the Republic of Belarus (hereinafter referred to as the Tax Code) entered into force. The edition contains new provisions aiming at combating tax evasion, as well as impermissible tax avoidance. The provisions, known as general anti-avoidance rule (hereinafter referred to as GAAR), deal with unjustified tax benefits gained by unscrupulous taxpayers.

According to Paragraph 4 of Article 33 of the Tax Code, tax benefit (s) shall be deemed unjustified and additional sums of taxes shall be charged if at least one of the following is present:

- distortion of information related to economic transactions or objects of taxation or;
- gaining tax benefits constitutes principal purpose of economic transaction (principal purpose test) or;
- economic transaction is fake [1].

These provisions, especially a principal purpose test, have raised a number of concerns among taxpayers and tax administrations. Due to this fact, the Supreme Court of the Republic of Belarus (hereinafter referred to as the Supreme Court) published the interpretation of GAAR on May 3, 2019 [2].

Based on the provisions of Belarusian tax legislation and the interpretation provided by the judiciary, we have revealed several issues described further.

According to the opinion of the Supreme Court, it is possible to charge sums of taxes even if distortion of information is the result of unintentional error, including computer program error. In our opinion, such possibility contradicts the principle of presumption of taxpayer's good faith. Since it is likely

that tax authorities will adhere to this judicial interpretation of GAAR, a scrupulous taxpayer faces the risk of paying even more taxes and facing administrative or criminal liability in the process.

The second issue that contradicts the principle of presumption of taxpayer's good faith is the following. According to the Instruction adopted by the Committee for State Control, a scrupulous taxpayer shall obtain an offer to adjust a tax base and pay additional sums of taxes if their business partner gained an unjustified tax benefit. This raises the question whether a taxpayer cannot refuse this offer. According to the Instruction, a taxpayer may refuse such an offer. However, as a consequence of such refusal, an unscheduled inspection of the taxpayer may be appointed. As a result, an innocent taxpayer may be made to pay additional taxes anyway [3].

It is not clear whether provisions about distortion of information and fake transactions cover the "*substance over form*" doctrine. The latter point is that tax authorities and courts may neglect a legal form of the transaction and analyze its economic substance. If the legal form does not match the economic substance, then the taxes charged are based on the latter, which is the implied real transaction [4].

A principal purpose test is new to Belarusian law and has no established criteria that tax authorities and taxpayers may adhere to. The Supreme Court only stresses that gaining tax benefits cannot be recognized as business purpose.

It is uncertain whether tax reconstruction is applicable. Tax reconstruction is an instrument that allows tax authorities and courts to determine the true extent of a taxpayer's liability to tax and, therefore, charge sums of taxes that would correspond to transaction's economic substance or terms of transaction that would not pursue tax purpose as a principal one [5].

It is not well marked whether it is necessary for a taxpayer to check their potential business partner before conducting a transaction with the latter. Such necessity constitutes the "*due diligence*" doctrine. The position of the Supreme Court is highly contradictory. On the one hand, it confirms that a taxpayer is entitled, but not obliged, to conduct preliminary checking of their business partner. On the other hand, careless choice of such partner may lead to additional sums of taxes being charged and taxpayers facing administrative or criminal liability. Furthermore, taxpayers may have to pay additional sums of taxes even if they had no intention to conduct a fake transaction or did not check their counterparty for economic risks.

However, we believe that it is impossible to do so unintentionally. If a contract is not fulfilled by a party, the second party will be interested in its fulfillment and payment of fines by a violator. Thus, a fake transaction may be

conducted only intentionally. Yet the Supreme Court did not take this into consideration.

There is a risk that the authorities may recognize an economic transaction as fake based on insufficient evidence, like violation of tax legislation by a taxpayer's business partner, match of the parties' IP-addresses, signing of accounting documents by unidentified or unauthorized person.

All the covered aspects may influence Belarus' investment climate negatively, for they may lead to decrease of capital inflows and consumer spendings.

Based on these statements, we suggest several ways for GAAR improvement.

- A taxpayer shall be liable for conducting a fake transaction only if such intention has been proven.

- The Instruction adopted by the Committee for State Control should be amended and include a rule that an obligation to pay additional taxes may be fulfilled only if it has been proven that a taxpayer deliberately participated in transactions aimed at gaining unjustified tax benefits.

- Paragraph 4 of Article 33 of the Tax Code should be amended by a new provision about applicability of "*substance over form*" doctrine.

- Criteria for business purpose test should be implemented into the same article in order to analyze transactions more thoroughly. We believe that the following criteria will suffice:

- expenses are directly or indirectly aimed at getting income;
- sums of expenses are economically reasonable;
- economic effect of a transaction is likely to occur.

It should be noted that there is no guarantee that a taxpayer will get this income. Business is done at risk. It is the direct or indirect aim to get income that matters [6].

- Provision about applicability of tax reconstruction must be implemented into the Tax Code in order to ensure just taxation of companies and individuals.

- It is necessary to implement additional guarantees in order to protect scrupulous taxpayers from unfounded recognition of a transaction as fake or having tax purpose as the principal one. To be more specific, signing of accounting documents by unidentified or unauthorized person, violation of tax legislation committed by a taxpayer's business partner, having an opportunity to gain similar economic effect through other transactions do not by themselves constitute that tax benefits are unjustified.

We believe that following these recommendations will lead to improvement of legal regulation of taxes (including development of judicial practice), as well as establish and strengthen the balance of public and private interests.

Bibliographic references:

1. Налоговый кодекс Республики Беларусь (Общая часть) [Электронный ресурс] :19 дек. 2002 г., № 166-З: принят Палатой представителей 15 нояб. 2002 г: одобр. Советом Респ. 2 дек. 2002 г.: в ред. Закона Респ. Беларусь от 29.12.2020 г. // КонсультантПлюс. Беларусь / ООО «ЮрСпектр», Нац. центр правовой информ. Респ. Беларусь. – Минск, 2021.
2. Об отдельных вопросах применения пункта 4 статьи 33 Налогового кодекса Республики Беларусь [Электронный ресурс]: разъяснение Верховного Суда Респ. Беларусь, 3 мая 2019 г. // КонсультантПлюс. Беларусь / ООО «ЮрСпектр», Нац. центр правовой информ. Респ. Беларусь. – Минск, 2021.
3. О мерах по реализации Указа Президента Республики Беларусь от 18 апреля 2019 г. № 151 [Электронный ресурс]: постановление Комитета гос. контроля Респ. Беларусь, 9 июля 2019 г., № 3 // КонсультантПлюс. Беларусь / ООО «ЮрСпектр», Нац. центр правовой информ. Респ. Беларусь. – Минск, 2021.
4. Колесникова Е. Н. Злоупотребление правом в целях извлечения налоговой выгоды // Налоговая политика и практика. 2019. № 3 (195). С. 76–80.
5. Быкова Ю. Р. Право на «налоговую реконструкцию» на современном этапе // Научный электронный журнал «Меридиан». 2020. № 5 (39). С. 198–204.
6. Коломейцев Я. А. Деловая цель как инструмент налогового контроля // Вестн. Рос. экон. ун-та им. Г. В. Плеханова. 2014. № 3. С. 49–56.