

THE DYNAMICS OF THE COLLECTION OF THE MANDATORY STATE PENSION FUND CONTRIBUTION (WITH THE EXAMPLE OF THE FORMATION OF JUDICIAL PRACTICE)

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Abstract. The *subject* of the study is the conceptual, theoretical, methodological and applied provisions of mandatory state pension insurance in Ukraine through the lens of its regulatory framework and judicial application. *Methodology.* General scientific methods were used in the research process. The method of comparison was used to generalise the judicial approaches of different levels of courts to the main dominants of law enforcement regarding the payment of state pension insurance contributions. Analysis was used to determine the quantitative and qualitative parameters of current and previous legislation and court practice. Synthesis was used to determine the main features of court practice. The historical-legal method was used for the purpose of researching the historical retrospective of the development of legislation and judicial practice on the given problem. The *aim* of the article is to analyse the past and current judicial practice regarding the application of exemptions from mandatory state pension insurance contributions in Ukraine, comparing the approaches to the regulatory framework before and after the normative reform of the relevant institution. The *results* of the study have shown that in order to ensure the effectiveness of the benefit from the payment of the mandatory state pension insurance contribution, it is necessary to transform the current judicial practice and change its vector from a pro-fiscal orientation to the creation of foundations for ensuring the legal rights and interests of private individuals. *Conclusion.* The recent case law of the Supreme Court regarding the application of the relevant exemption for first-time home purchases is not consistent. In fact, the burden of proof for the first-time purchase of housing is placed solely on the private individual, while the state itself has access to the necessary data to establish the priority of the purchase of housing. Furthermore, the very possibility of refunding funds paid in error (without justification) by a person entitled to the exemption is disputed. In summary, the highest court in the system of general jurisdiction has taken a purely fiscal position on this issue. As for the legal innovations in the regulation of the payment of the mandatory state pension insurance contribution, they are of a somewhat inconsistent nature. In practice, there is an attempt to place the burden of proof for the initial acquisition of a dwelling on the parties to civil legal relations, i.e. the person who acquires the dwelling and the notary who formalises such a legal transaction, despite the fact that the state also has effective mechanisms for establishing the existence of relevant legal facts. As a result, the effective mechanism for the implementation of the exemption under consideration is reduced.

Key words: mandatory state pension insurance contribution, judicial practice, by-laws, historical retrospective, payer of the contribution, benefit.

JEL Classification: H20, H30, H50

1. Introduction

Financing the needs of pension insurance is one of the fundamental tasks of the state. This can be

achieved by various means, which are the subject of a separate field of study. In the context of regulating tax relations, it is crucial to find the form that ensures

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the most efficient accumulation of funds for the pension fund. Currently, the dynamics of legislative understanding and regulation of such relations appear to be quite contradictory and inconsistent.

The beginning of the legislative regulation of the compulsory state pension insurance contribution is associated with the Law of Ukraine "On Pension Provision" (The Law of Ukraine "On Pension Provision", 1991) and a series of legislative acts that detailed the regime of collection of such contributions. Traditionally, contributors included companies, institutions and organisations, as well as citizen-entrepreneurs who employed hired labour. The tax base included actual labour costs or untaxed income. Depending on the category of contributor, the rate ranged from 32 % to 4 % or 1 %. If in 1993 the Soviet legislation was practically unchanged and there was no regulation of the tax relations of this type of contribution, a decisive event occurred in 1994 (The Law of Ukraine "On the Taxation System", 1994). In the 1994 version of the Law of Ukraine "On the Taxation System", Article 14 introduced the Pension Fund of Ukraine as an element of the system of national taxes and contributions, which remained in place until 1996 (The Law of Ukraine "On the Taxation System, 1996). At the same time, a permanent conflict arose between the terminological aspect of the distinction between the categories "fee" (used in special legislation) and "contribution" (introduced by tax legislation). This led to the search for and definition of a common denominator and, ultimately, to the transition to the category of "contribution".

Later, in 1997, a separate specialised Law of Ukraine "On the Mandatory State Pension Insurance Contribution" came into force (The Law of Ukraine "On the Mandatory State Pension Insurance Contribution", 1997). The legislator decided not to make any fundamental changes. Payers of the mandatory state pension insurance fee remained: 1) legal entities engaged in entrepreneurial activity, regardless of the form of ownership, their associations, budgetary, public and other institutions and organisations, associations of citizens and other legal entities, as well as individual entrepreneurs using hired labour; 2) branches, departments and other separate units of taxpayers, not having the status of legal entity, located on the territory of a territorial unit other than the contributor; 3) individuals who are business entities and do not use hired labour, lawyers, private notaries; 4) individuals working under employment agreements (contracts) and individuals performing work (services) under civil law contracts, including members of creative unions, artists who are not members of creative unions, etc. The tax base remained the same: actual labour costs, taxable income (profit), and total taxable income. Thus, the system of rates ranging from 32 % to 4 or 1 % has been preserved.

The same regime for the collection of this payment remained in place until the Tax Code of Ukraine came into force. At the end of 2010, a decision was made to remove social contributions of a tax nature from the system of national taxes and fees. They were not completely abolished, but from 1 January 2011, a separate institution called "quasi-taxes" was introduced, which combined the mandatory state pension insurance fee ("On the Mandatory State Pension Insurance Contribution", 2011) and the single contribution to the mandatory state social insurance ("On Collection and Accounting of the Unified Contribution for Obligatory State Social Insurance", 2011). Thus, the set of obligations for the taxpayer remained the same, but was divided between tax legislation and separate specialised legislation. The latter also regulates the collection of payments that have the nature of taxes administered in tax regimes. This situation can hardly be considered positive.

2. Regulatory Framework for the Provision of Benefits

The obligation to pay the mandatory state pension insurance contribution arises in various cases. One of these cases is real estate transactions. "The payers of the obligatory state pension insurance contribution are enterprises, institutions and organisations, regardless of the form of ownership, and individuals who acquire real estate, with the exception of state enterprises, institutions and organisations acquiring real estate at the expense of budgetary funds, institutions and organisations of foreign states enjoying immunities and privileges under the laws of Ukraine and international treaties whose binding force has been approved by the Verkhovna Rada of Ukraine, as well as citizens who acquire housing and are in the queue to receive housing or acquire housing for the first time." (The Law of Ukraine "On the Mandatory State Pension Insurance Contribution", 2023) On November 3, 1998, the Cabinet of Ministers of Ukraine issued Resolution No. 1740, which approved the procedure for payment of this contribution.

At the same time, the obligation to pay this contribution is not universal. As is the case with most taxes and contributions, it is possible to grant certain preferences and exemptions. According to paragraph 15-2 of Resolution No. 1740, the contribution to the mandatory state pension insurance from real estate transactions is not paid when a person buys a home for the first time. This creates an interesting situation. There has always been a provision at the legislative and, in fact, by-law level that exempted those who "buy a home for the first time" from paying the relevant contribution. At the same time, the Resolution

of the Cabinet of Ministers of Ukraine No. 866 dated September 23, 2020 (The Resolution of the Cabinet of Ministers of Ukraine "On Amendments to the Procedure for Payment of the Compulsory State Pension Insurance Contribution on Certain Types of Business Transactions", 2020), which amended the Procedure for Payment of the Compulsory State Pension Insurance Contribution on Certain Types of Business Transactions (the amendments came into force on September 26, 2020), can be considered a kind of regulatory "watershed" in the functioning of such an exemption. Key changes were made to paragraphs 15-2 and 15-3 of Resolution No. 1740.

In fact, prior to the adoption of the Resolution No. 866, paragraph 15-2 did not contain any constructive provisions on how a person could confirm the fact of buying a home for the first time, and paragraph 15-3 unambiguously stated that notarial acts regarding the purchase of a home were performed by a notary only after the buyer presented a payment order for the payment of the relevant contribution. In other words, there was no procedural specification of the mechanism for exempting first-time buyers from paying the contribution at the by-law level.

To some extent, the situation changed after the amendments introduced by Resolution No. 866 came into force. These amendments provided for the following:

- a) List of information/documents confirming the purchase of housing for the first time: 1) a statement by an individual that he/she does not have and has not acquired ownership of housing; 2) information from the State Register of Real Property Rights on the absence of registered ownership rights to housing for such an individual; 3) data on non-use of housing vouchers for privatisation;
- b) provisions on the conditions for exemption from the requirement to confirm the payment of pension contributions in the case of notarised real estate purchase and sale agreements.

Thus, at the sub-legal level, there was a certain procedural 'specification' of the rules for applying the exemption for the purchase of a dwelling for the first time. However, the term "specification" is used conditionally, because in practice the exemption as it existed before and continued to exist, but the burden of proof regarding the eligibility for such exemption was placed on the private individual (citizen buying a home for the first time), and the functions of primary control over the legitimacy of such documentation confirmation were assigned to a notary. The "conditional" nature of the "specification" is also due to the somewhat limited description of specific data that serve as a tool to confirm the legitimacy of the privilege for a particular payer (this includes data related to the non-use of housing certificates for privatisation).

3. Case Law: Past and Present

In addition, it is proposed to consider the relevant issues through the prism of judicial practice. This case law can be divided into two stages:

- a) Cases where the actual circumstances were regulated by the provisions of Resolution No. 1740 before their "clarification" (before 26 September 2020);
- b) Cases where the actual circumstances are regulated by the provisions of Resolution No. 1740 after their "clarification" (after 26 September 2020).

Judicial practice before the by-law "specification"

The initial court practice was shaped in such a way that it primarily protected the interests of private individuals. This is quite understandable, as the absence of an effective mechanism for confirming the first purchase of housing should not lead to additional burdens for individuals. The actual procedure was as follows: a person paid a pension contribution – a notary certified the sale and purchase agreement for the real estate – the person applied to the relevant department of the Pension Fund with a request for reimbursement of the erroneously paid pension contributions and a request to submit a corresponding application to the State Treasury of Ukraine for reimbursement of the erroneously paid pension contributions – the Pension Fund rejected the person's application – the person appealed against the rejection to the Administrative Court – the Administrative Court satisfied the person's claims. However, even this algorithm cannot be called consistent, because:

- Artificial administrative procedures were created that burdened both the person paying the pension contribution and the state authorities;
- the artificial nature of administrative procedures inevitably led to the emergence of "technical" court proceedings;
- an additional burden on the state budget, as despite the fact that pension contributions were unlawfully withheld by the state for a certain period of time, these contributions were eventually returned, and, in addition, the plaintiff (an individual) was compensated for the court fee and legal aid costs.

Moreover, such a situation gave rise to completely unjustified legal fictions, such as the situation where the contributor had to claim the "erroneous" payment of the pension contribution, even though the payment was intentional, because it was conditioned by artificial administrative obstacles in exercising the contributor's rights and interests regarding the statutory exemption from paying the pension contribution when purchasing a first home.

The judicial practice during the first period (when the courts granted claims of pension contribution payers) was substantiated in the following legal position: in the Resolution of the High Administrative

Court of Ukraine of April 16, 2015, case number K/9991/37325/11-C; in the Decision of the High Administrative Court of Ukraine of February 8, 2017, 2017, case number K/800/40236/14; and in the Decision of the Supreme Court composed of the panel of judges of the Administrative Cassation Court of July 15, 2021, case number 826/4789/17.

The courts have formulated the following position:

"...in the absence of an appropriate legal mechanism for verification of information on the first-time acquisition of real estate, it is the state, represented by the Pension Fund of Ukraine as an authorised subject of state authority, which is obliged to prove that in each individual case the person obliged to pay the contribution to the obligatory state pension insurance has not acquired a dwelling for the first time. When introducing a certain mechanism of legal regulation of relations, the state is obliged to ensure its implementation. Otherwise, all the negative consequences of the lack of proper legal regulation will be borne by the state.

The lack of a unified system of registration of property rights to real estate in Ukraine and the inability of the Pension Fund of Ukraine and its territorial units to determine the acquisition of certain apartments by certain persons for the first time cannot be attributed to any individual's fault, since the failure to establish a procedure for the implementation of the norms established by law cannot lead to the violation or restriction of the rights of citizens who are endowed with such rights." (The Decision of the Supreme Court composed of the panel of judges of the Administrative Cassation Court of May 14, 2019).

In essence, a clear and legitimate conclusion was made: deficiencies in the legal framework (essentially, the lack of an adequate mechanism for proving the fact of the first purchase of housing) cannot lead to a violation of the rights and interests of individuals. This conclusion is fully consistent with the fundamental principles of the rule of law.

Court practice after the by-law "specification"

The relevant judicial practice began to take shape only after the so-called "specification" of the procedure for confirming the acquisition of housing for the first time. The Supreme Court, in its decision as part of the panel of judges of the Administrative Cassation Court of November 25, 2021 (case No. 280/9714/20), drew attention to the fact that the procedural mechanism for confirming the acquisition of a dwelling for the first time had been supplemented:

"Effective from September 26, 2020, a mechanism has been established whereby a first-time buyer does not pay the mandatory state pension insurance contribution on the sale and purchase of real estate (housing) when notarising the sale and purchase agreement. The provisions of paragraph 15-2

of Procedure No. 1740 (as amended by Resolution No. 866) clarify the meaning of the term "acquires housing for the first time", which should be understood to mean that an individual did not have and did not acquire ownership of housing, including through privatisation." (The Decision of the Supreme Court composed of the panel of judges of the Administrative Cassation Court of November 25, 2021)

At the same time, after the "specification" of the relevant legal mechanism, judicial practice underwent a significant change. The courts' legal positions began to focus primarily on the public interest, and they began to reject the claims of the actual payers of the pension contribution.

The public law case law in the relevant category of disputes reached its peak in case No. 160/20055/22. This case has already passed all levels of court proceedings:

First instance – the Decision of the Dnipro District Administrative Court of February 20, 2023 (case No. 160/20055/22). The key legal position of the court of first instance was as follows:

"Thus, starting from September 26, 2020, as part of Procedure No. 1740, the state has created a fully effective mechanism, provided that an individual who purchases a dwelling for the first time and, accordingly, is not a payer of the mandatory state pension insurance contribution on the sale and purchase of real estate does not pay the contribution when notarising the sale and purchase agreement. If a person mistakenly paid the contribution when notarising a property sale and purchase agreement, they may apply to the Pension Fund of Ukraine for a refund from the budget on the basis of Procedure No. 787. However, when applying for a refund of funds mistakenly paid after September 26, 2020, a person must provide evidence confirming that he or she made a mistake in paying the contribution. Therefore, the applicant must provide the Pension Fund of Ukraine with documents confirming that he or she purchased the property for the first time, as provided for in subparagraph 'B' of paragraph 15-2 of Procedure No. 1740. The court sees no reason to shift the burden of proving a person's mistake to the state, which, since September 26, 2020, has created a fully accessible and effective mechanism for proving this circumstance (purchasing a dwelling for the first time)." (The Decision of the Dnipro District Administrative Court of February 20, 2023)

Second instance (appeal) – the Decision of the Third Administrative Court of Appeal of July 05, 2023 (case No. 160/20055/22). The key legal position of the second instance court was as follows:

"Thus, it is the notary who is responsible for verifying that the payer has the information and documents specified in subparagraphs 'B' and 'T' of paragraph 15-2 of this Procedure, and in the absence

of such documents, documentary evidence of payment of the mandatory state pension insurance contribution on transactions of purchase and sale of real estate... This Procedure does not provide for any other algorithm for exemption from the mandatory state pension insurance contribution on transactions of purchase and sale of real estate, nor does it provide for the authority of the Pension Fund of Ukraine to make decisions on exemption from the mandatory state pension insurance contribution on transactions of purchase and sale of real estate... For example, the applicant did not even specify whether the amount of the mandatory state pension insurance fee paid by him on the sale and purchase of real estate was an 'unreasonably paid fee' or 'erroneously credited funds'." (Decision of the Third Appellate Administrative Court dated July 05, 2023)

Third instance (cassation) – the Resolution of the Supreme Court, presided by a judge of the Administrative Cassation Court, of August 21, 2023 (case No. 160/20055/22). In fact, the court of cassation refused to open cassation proceedings due to the lack of formal grounds for its opening and the "insignificance of the case".

The key points made by the courts in the relevant proceedings include the following:

- Following the entry into force of Resolution No. 866 of the Cabinet of Ministers of Ukraine dated September 23, 2020, the procedural mechanism for proving the fact of purchase of housing has changed for the first time, making the previous case law irrelevant;
- the notary is responsible for verifying the ownership of documents confirming the purchase of housing for the first time, and the Pension Fund does not have such powers, and therefore should not determine the originality of the purchase of housing;
- only full documentary evidence can provide proper proof of a first-time home purchase;
- the category of relevant cases is considered insignificant and is not subject to review in cassation proceedings.

In this sense, not only the conclusion, but also the logic of the reasoning behind the decision made by the courts in the relevant case seems rather strange.

4. Conclusions

Thus, the current court practice is quite professional in nature.

Firstly, the decision emphasises that the obligation to confirm the preferential status, the existence of the relevant right, is imposed on the individual through the submission of documents specified by the legislation in force. According to the court's position, the burden of proving the existence of relevant grounds is placed on the claimant, which is in direct contradiction with Article 77(2) of the

Code of Administrative Procedure of Ukraine, which stipulates that the burden of proving the legality of its decisions/actions lies with the subject of the authority. In addition, the competent authority did not prove the legitimacy of the refusal to refund the mistakenly paid contribution to the plaintiff. The Court of Appeal noted that, in accordance with the claim, the plaintiff had not determined whether the amount was an "unjustifiably paid contribution" or "erroneously credited funds". However, in the statement of claim, the plaintiff clearly requests a refund of the erroneously paid contribution. Moreover, the law does not distinguish between the methods of refunding an "unreasonably paid contribution" and "erroneously credited funds".

Secondly, the court draws attention to the relevant information available from the State Register of Real Property Rights and the Register of Property Rights to Real Estate, the State Register of Mortgages, and the Unified Register of Prohibitions on Alienation of Real Estate Objects in relation to the subject matter of the dispute. However, such information is already proper evidence. At the same time, the court draws the opposite conclusion that this is not sufficient to confirm the circumstances of the plaintiff's first acquisition of housing.

Thirdly, for a long time, the court practice was based on the fact that in this category of disputes, citizens' claims were consistently satisfied. This position was based on the absence of a legislative mechanism for proving the circumstances of the first-time purchase of an apartment at the stage of notarisation of the apartment purchase and sale agreement. It was impossible to perform notarial acts without paying such a contribution. Given that the notary is responsible for verifying the availability of the necessary documents, the Court of Appeal stated that the law does not provide for the Pension Fund of Ukraine to make decisions on exemption from the mandatory state pension insurance contribution in transactions involving the sale and purchase of real estate. However, the Court of Appeal noted that it was aware of the Supreme Court's decisions requiring the Pension Fund of Ukraine to submit applications to the State Treasury Service for the refund of erroneously paid amounts of the mandatory state pension insurance fee on real estate transactions to the plaintiffs. However, this practice is ignored by the courts as irrelevant.

Fourthly, the court ruled that a person who mistakenly paid the contribution may apply to the Pension Fund of Ukraine for a refund from the budget, but it is the person who must provide evidence to prove that he or she made a mistake in paying the contribution. The court stated that there are no grounds for shifting the burden of proving a person's mistake to the state. Moreover, in its

decision dated 15 July 2021 in case No. 826/4789/17, the Supreme Court stated that a person is exempt from paying the mandatory state pension insurance contribution on transactions of purchase and sale of real estate if he or she purchases a home for the first time, and the contribution mistakenly paid by him or her when concluding the apartment purchase and sale agreement is subject to refund. In addition, the responsibility for unlawful inaction in this case rests with the Pension Fund of Ukraine, to which the person applies.

Thus, the ability of a person to protect their violated rights in a situation where they are legally entitled to such assistance is fundamentally undermined. A taxpayer with this privilege cannot purchase an apartment without paying the contribution (from which he is exempt in this situation), as

such a taxpayer will be denied notarisation of the agreement without prior payment of the pension contribution (due to the regulatory framework). Then, when applying to the pension fund for a refund of the erroneously paid contribution, they are denied this right. Filing a lawsuit with an administrative court, which was created to protect the rights and interests of parties to legal relations from state arbitrariness, leads to an unlawful decision in favour of the state. Moreover, given that this category of cases is a category of cases of minor complexity, they are considered under the rules of simplified action proceedings¹, and the decision of the court of appeal is final.

It has been established that the consistency of court practice does not contribute to the recent regulatory transformations in the legal mechanism for implementing the analysed benefit.

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¹ Code of Administrative Court Procedure of Ukraine (Bulletin of the Verkhovna Rada of Ukraine, 2005, No. 35-36, No. 37, Art. 446)

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