

Legal content of a present as an item of violations of statutory on receiving presents

Юридичний зміст подарунка як предмета порушення встановлених законом обмежень щодо одержання подарунків

Olha Bondarenko

Key words:

corruption, present, money, property, official present, personal present, entertainment expenses.

Ключові слова:

корупція, подарунок, грошові кошти, майно, офіційний подарунок, особистий подарунок, представницькі витрати.

Formulation of the problem. Corruption was, is and will be one of the most important problems of the existence and development of society. Corruption is multifaceted and therefore with the aim of a comprehensive counter and fight of this destructive phenomenon, the legislator highlights corruption offenses (acts, that contain elements of corruption), and offenses related to corruption, that is an act that does not contain direct elements of corruption, but violate established by the Law of Ukraine "On prevention of corruption" (hereinafter – the Law) requirements, prohibitions and restrictions by persons authorized to perform state functions or local government entities, which are committed by: people who are authorized to performance the state or local government functions; people who are equal to people who are authorized to performance the state or local government functions for purposes of this Law or persons who permanently or temporarily occupy positions related to the implementation of organizational administrative or administrative economic duties, or specially authorized to perform such duties in legal entities of private law, regardless of the organizational legal forms; and other persons who are not officials and persons that perform work or providing services under contract with the enterprise, institution, organization – in cases stipulated by this law, for which the law provides criminal, administrative, disciplinary and/or civil responsibility¹. Offenses which are related to corruption are included: violation of restrictions on combining with other species of activities; violation of financial control; violation on prevention and settlement of conflict of interest; failure to take measures to combat corruption; illegal use of the information has become known to the person that is in connection with authority; violation of the prohibition on sports betting related to the manipulation of official sports competition and breach of statutory restrictions on receiving presents.

State research problems. The issue of corruption and corruption-related offenses and the legal nature of present investigated, in particular, such scientists as A. Banchuk, A. Bedenko-Zvarydchuk, A. Kryshevych, A. Savchenko, J. Ryzak and others.

We offer a special focus on violations of statutory requirements for receiving presents as an offering of presents is considered historically the first and (in spite of the position of the legislator, which limits the term "corruption" and accordingly does not consider gifting of officials as the act of corrupt) is the most common in our society form of corruption.

The purpose of the article is comprehensive description of the legal content of present as an item of a violations of statutory restrictions on receiving presents (Article 172-5 of the Code of Ukraine on Administrative Offences).

Presenting main material. According to Article 1 of the Law "present" is cash or other property, advantages, benefits, services, intangibles which give/get for free or at a price below the minimum market price². For the most complete analysis of the legal content of this concept the most important is to characterize each of its

¹ Про запобігання корупції : Закон України № 1700-VII від 14.10.2014 р. ; ред. станом на 01.01.2016 р. // Відомості Верховної Ради України. – 2014. – № 49. – Ст. 3186. – [Electronic resource]. – Access mode : <http://zakon5.rada.gov.ua/laws/show/1700-18>.

² Ibid.

elements. Thus, the first of them is money, which under Article 192 of the Civil Code of Ukraine is legal tender, mandatory for acceptance at face value throughout the Ukraine³.

This definition, in our opinion, has a general nature, while specific is definition that is set out in paragraph 4 Section 1 of the Regulations (standard) accounting in the public sector 101 "Presentation of Financial Statements", approved by the Ministry of Finance of Ukraine № 1541 of December 28, 2009, under which money is cash, money on the accounts in the State Treasury in banks and deposits⁴. This interpretation has "narrower" content; it defines the essence of "money" only in the public sector. However, the question which definition should be taken into account during the qualification analyzed act of offense? Thus, analyzing the scope of these regulatory acts – the first must apply to the private sphere and the second – to the public.

Regarding the kinds of money, in our opinion, they are a part of the term "present" in coins, notes, electronic money and currency values. Coins is put into circulation by the National Bank as legal tender metallic money, with the established form, characteristics, geometrical dimensions, which distinguish the front side (obverse), reverse direction (reverse) and edge (band), which show small state Emblem of Ukraine, inscriptions of security features, denomination, name of the state, year. Banknotes is put into circulation by the National Bank as legal tender paper money, with rectangular fixed size and are made on special paper with security features, which have specified information (denomination, year, series and number), and other elements of design and protection⁵.

Electronic money according to the Article 15 of the Law of Ukraine "On Payment Systems and money transfer in Ukraine", is unit of value stored on an electronic device and is accepted as means of payment by persons other than the person who produces it, and is the monetary obligations of this person executed in cash or cashless forms. This law also stipulates that right of issuance of electronic money in Ukraine have banks only⁶.

In our opinion, the next kind of money, regardless of the position of the legislator, which refers to this kind to the special types of property, are currency values. Currency values according to Article 1 of the Law of Ukraine "On the National Bank of Ukraine" is the material objects defined by the laws of Ukraine about currency regulation as a means of monetary and financial relations, such as the currency of Ukraine, foreign currency, precious metals ect⁷.

We believe that kind of money does not affect the qualification of breach of statutory restrictions on receiving presents, because regardless of the specific features of each type of money has the generic, which is crucial in the process of qualification.

As for the essence of the concept of "property" then it is a separate thing, a set of things and property rights and obligations. According to civil law, the thing is the subject of the material world, for which there may be civil rights and duties⁸. Things may be moving and still; divisible and indivisible; consumer and non-consumer, etc., that kind of stuff that does not have an effect on qualification of socially harmful acts and the kind of money.

Another part of the concept of "property" is property rights (a measure of possible behavior) and property obligations (a measure of good behavior), which is essentially a legal fiction, as is aimed to completing the picture of the legal reality (unbroken interconnection between the thing and the right to it).

³ Цивільний кодекс України № 435-IV від 16.01.2003 р. ; ред. станом на 01.01.2016 р. // Відомості Верховної Ради України. – 2003 – № 40–44. – Ст. 356. – [Electronic resource]. – Access mode : <http://zakon3.rada.gov.ua/laws/show/435-15>.

⁴ Про затвердження Положення (стандарту) бухгалтерського обліку в державному секторі «Подання фінансової звітності» : наказ Міністерства фінансів України № 154 від 28.12.2009 р.; ред. станом на 15.09.2015 р. // Офіційний вісник України. – 2010. – № 7. – Ст. 211. – [Electronic resource]. – Access mode : <http://zakon5.rada.gov.ua/laws/show/z0103-10>.

⁵ Про затвердження Правил визначення платіжних ознак та обміну банкнот, розмінних та обігових монет національної валюти України : постановою Правління Національного банку України № 422 від 23.10.2013 р. // Офіційний вісник України. – 2013. – № 91. – Ст. 101. – [Electronic resource]. – Access mode : <http://zakon3.rada.gov.ua/laws/show/z1942-13>.

⁶ Про платіжні системи та переказ коштів в Україні : Закон України № 2346-III від 05.04.2001 р. ; ред. станом на 23.07.2015 р. // Відомості Верховної Ради України. – 2009. – № 21. – Ст. 137. – [Electronic resource]. – Access mode : <http://zakon5.rada.gov.ua/laws/show/2346-14>.

⁷ Про національний банк України : Закон України № 679-XIV від 20.05.1999 р. ; ред. станом на 01.01.2016 р. // Відомості Верховної Ради України. – 1999. – № 29. – Ст. 238. – [Electronic resource]. – Access mode : <http://zakon4.rada.gov.ua/laws/show/679-14>.

⁸ Цивільний кодекс України № 435-IV від 16.01.2003 р. ; ред. станом на 01.01.2016 р. // Відомості Верховної Ради України. – 2003 – № 40–44. – Ст. 356. – [Electronic resource]. – Access mode : <http://zakon3.rada.gov.ua/laws/show/435-15>

The following categories that are part of the concept of “present” or are not interpreted by the legislator in general, or are not responsive to the anti-corruption field. Therefore, we suggest, firstly, determine the advantages as conditions that make exclusive rights to anything for specific individuals. They can be given to a person who either has no legal grounds to receive them or if there are no grounds at the moment. Also, provision or receipt of these advantages should violate the interests of others or threaten of such violations.

Second, we offer to comment *benefits* as a right of a person for simplified execution or non performance of duty in general, and for getting more opportunities comparing to other people, who arise from a person in connection with its distinct professional, social status, age or gender identity.

Third, we think that the *services* must be understood as an activity of the executants directed to the commission in favor of the customer or third parties certain actions or refrain from committing them.

Intangible according to subparagraph 14.1.120. § 14.1. Article 14 of the Tax Code of Ukraine are the ownership of intellectual activity, including industrial property rights and other similar rights which are considered as the object of property rights (intellectual property), the right to use property and property rights of the taxpayer in accordance with legislation rights to use natural resources, property and property rights⁹

Also important is the fact that the present can be as free (without any compensation to its value) and at a price below the minimum market price. Legislator does not clarify the concept of “price below the minimum market”, so you have to look at the analysis of legislation.

Thus, in accordance with paragraph 14.1 14.1.219 points Article 14 of the Tax Code of Ukraine, market price is the price at which the goods (works, services) are transferred to another owner, provided that the seller wants to transfer these goods (works, services), and the buyer wants to get them on a voluntary basis, both parties have mutually independent and in fact, have sufficient information about these goods (works, services), and also prices prevailing in the market of identical (and in their absence – homogeneous) goods (works, services) in comparable economic (commercial) condition¹⁰. So, the price lower than a minimum market price is necessary to consider the likely lower the price at which assets, intangible assets sold and services, advantages, benefits are provided.

In practice it is difficult to determine the legality or illegality of the present. In view of this, seems compelling the position of O. Banchuk, that offers to consider as illegal presents which are derived by officials for: the decision-making; an action or inaction in the interests of the donor; for mediation in helping in the decision-making; commission of the acts or omissions of other officials and authorities in the interests of the donor; from officials who are being in authority, regardless of the purpose of the present¹¹.

Thus, all other presents must recognize legitimate if they do not exceed the statutory limit of price. However, A. Bedenko-Zvarydchuk offers to consider permitted presents that could be accepted by officials as the business presents (souvenirs), hospitality (invitation for coffee, tea, dinner) in a modest scale that is commonly used to establish good business relationship. The terms of adoption of these presents are that they are not permanent and do not make influence on decision-making by public officials or not create the impression that they could affect their decisions¹².

We believe that this explanation contains some significant drawbacks. Firstly, it applies only to officials of public law and therefore non clear is the question of granting officials of private law and, secondly author operates estimated concepts too widely, in particular, using a definition of “modest scale”. So, depending on the scope and wealth, modest scale may be different, because this category should be outlined. Because trying to be hospitable, one person can take action that will be regarded as improper presents or generally as undue advantage by another person.

Regarding the types of presents as item of violation of statutory on receiving presents, then they are, first, official presents – presents to the state, local community, state or municipal institutions or organizations. These

⁹ Податковий кодекс України № 2755-VI від 02.12.2010 р. ; ред. станом на 01.01.2016 р. // Відомості Верховної Ради України. – 2011. – №№ 13–14, 15–16, 17. – Ст. 112. – [Electronic resource]. – Access mode : <http://zakon5.rada.gov.ua/laws/show/2755-17>.

¹⁰ Ibid.

¹¹ Банчук О. Запобігання і протидія корупції в органах місцевого самоврядування : [практ. посіб.] / О. Банчук. – К. : ТОВ «Софія-А», 2012. – С. 23.

¹² Беденко-Зваридчук О. Винагорода медичним працівникам та антикорупційне законодавство / О. Беденко-Зваридчук // Журнал головної медичної сестри. – 2012. – № 3. – С. 18.

presents are being received during official events, which are protocol events of international, national and local level, conducted with the participation of officials of relevant authorities or events occurring in connection with official duties by listed entities, taking in accordance with generally accepted international and national regulations and traditions¹³. Moreover it is important to take account of the historical-cultural and religious practices. But sometimes, despite the general ideas of an official presents, among them there are quite extraordinary ideas. Particularly in China sometimes pandas can be given as a present. In addition, often the first persons of the state are being gifted with something that according to the giver could be associated with a political image of politician in international community. An authorized person, who had received an official present, is obliged to submit that present to the authority within a month. However, this procedure is necessarily accompanied of making an act of acceptance and transfer.

Secondly, personal presents, which according to the guidelines of the Ministry of Justice of Ukraine on Prevention and Combating Corruption in government and local authorities are presents received from close persons, old friends, good friends on the occasion of personal celebrations, such as birthday or a recognized holiday (New year, Christmas, etc.), in case if they do not affect the decision making by a person authorized to perform state or local government functions, and by some people who are equated to them¹⁴. In addition, the Verkhovna Rada's of Ukraine committee on combating organized crime and corruption clarifies that a person covered by the restrictions on receiving presents has to refuse to get the present even in case of the slightest threat of impression of undue influence, because it may call into question its integrity, impartiality and impartiality in decision making¹⁵.

Unclear in the context of the interpretation of the present as a display of entertainment expenses a place of hospitality (expense enterprises of reception and service of other companies that come for negotiations to sign mutually beneficial contracts) that exist in enterprises and organizations in all civilized countries market economies, such as costs for transport services, the costs associated with the organization of official receptions (breakfast, lunch and buffet maintenance) translating services¹⁶. Considering wealth of certain private businesses, it is difficult to "approximate" the amount of real hospitality under regulatory restrictions. Thus, if one of the contractors pays for hotel accommodation for another contractor and in case of their joint dinner the following host can actually be regarded as improper present if they will be contracted.

Conclusions. In view of the above, present as a subject of violation of statutory restrictions on receiving presents substantially affects the qualification of socially harmful acts, and therefore its correct interpretation and understanding is very important. For this it is necessary to supplement the legislation with terms that are part of the concept of "present": the advantages, benefits, services, price, below the minimum market.

Summary

The article describes the main components the term "present". The types of presents: the official and personal. The author focuses on the problematic aspects that may affect the qualification of violations of statutory on receiving presents, including legality of present, entertainment expenses.

¹³ Савченко А.В. Злочини у сфері службової діяльності та професійної діяльності, пов'язаної з наданням професійних послуг: науково-практичний коментар до розділу XVII Особливої частини Кримінального кодексу України / А.В. Савченко, О.В. Кришевич ; за заг. ред. В.І. Шакуна. – К. : Алерта, 2012. – С. 26.

¹⁴ Про запобігання і протидію корупції в державних органах та органах місцевого самоврядування: методичні рекомендації Міністерства юстиції України від 16.10.2013 р. [Electronic resource]. – Access mode :<http://zakon4.rada.gov.ua/laws/show/n0020323-13>.

¹⁵ Лист Комітету Верховної Ради України з питань боротьби з організованою злочинністю і корупцією № 04-12/12-1341 від 13.06.2013 р. [Electronic resource]. – Access mode : <http://zakon.gbb.com.ua/regulations/8447/8449/466605/>.

¹⁶ Ризак Я. Предмет комерційного підкупу за Кримінальним кодексом України / Я. Ризак // Вісник Національної академії прокуратури України: проблеми сьогодення, теорія, практика, життя академії. – 2012. – № 1. – С. 124.

Анотація

У статті охарактеризовано основні складові елементи поняття «подарунок». Визначено види подарунку: офіційний та особистий. Автор акцентує увагу на проблемних аспектах, що здатні вплинути на кваліфікацію порушення встановлених законом обмежень щодо одержання подарунків, зокрема правомірності подарунку, представницьких витратах.

Literature:

1. Про запобігання корупції : Закон України № 1700-VII від 14.10.2014 р. ; ред. станом на 01.01.2016 р. // Відомості Верховної Ради України. – 2014. – № 49. – Ст. 3186. – [Electronic resource]. – Access mode : <http://zakon5.rada.gov.ua/laws/show/1700-18>.
2. Цивільний кодекс України № 435-IV від 16.01.2003 р. ; ред. станом на 01.01.2016 р. // Відомості Верховної Ради України. – 2003 – № 40–44. – Ст. 356. – [Electronic resource]. – Access mode : <http://zakon3.rada.gov.ua/laws/show/435-15>.
3. Про затвердження Положення (стандарту) бухгалтерського обліку в державному секторі «Подання фінансової звітності» : наказ Міністерства фінансів України № 154 від 28.12.2009 р. ; ред. станом на 15.09.2015 р. // Офіційний вісник України. – 2010. – № 7. – Ст. 211. – [Electronic resource]. – Access mode : <http://zakon5.rada.gov.ua/laws/show/z0103-10>.
4. Про затвердження Правил визначення платіжних ознак та обміну банкнот, розмінних та обігових монет національної валюти України : постановою Правління Національного банку України № 422 від 23.10.2013 р. // Офіційний вісник України. – 2013. – № 91. – Ст. 101. – [Electronic resource]. – Access mode : <http://zakon3.rada.gov.ua/laws/show/z1942-13>.
5. Про платіжні системи та переказ коштів в Україні : Закон України № 2346-III від 05.04.2001 р. ; ред. станом на 23.07.2015 р. // Відомості Верховної Ради України. – 2009. – № 21. – Ст. 137. – [Electronic resource]. – Access mode : <http://zakon5.rada.gov.ua/laws/show/2346-14>.
6. Про національний банк України : Закон України № 679-XIV від 20.05.1999 р. ; ред. станом на 01.01.2016 р. // Відомості Верховної Ради України. – 1999. – № 29. – Ст. 238. – [Electronic resource]. – Access mode : <http://zakon4.rada.gov.ua/laws/show/679-14>.
7. Податковий кодекс України № 2755-VI від 02.12.2010 р. ; ред. станом на 01.01.2016 р. // Відомості Верховної Ради України. – 2011. – №№ 13–14, 15–16, 17. – Ст. 112. – [Electronic resource]. – Access mode : <http://zakon5.rada.gov.ua/laws/show/2755-17>.
8. Банчук О. Запобігання і протидія корупції в органах місцевого самоврядування : [практ. посіб.] / О. Банчук. – К. : ТОВ «Софія-А», 2012. – 88 с.
9. Беденко-Зваридчук О. Винагорода медичним працівникам та антикорупційне законодавство / О. Беденко-Зваридчук // Журнал головної медичної сестри. – 2012. – № 3. – С. 16–22.
10. Савченко А.В. Злочини у сфері службової діяльності та професійної діяльності, пов'язаної з наданням професійних послуг: науково-практичний коментар до розділу XVII Особливої частини Кримінального кодексу України / А.В. Савченко, О.В. Кришевич ; за заг. ред. В.І. Шакуна. – К. : Алерта, 2012. – 160 с.
11. Про запобігання і протидію корупції в державних органах та органах місцевого самоврядування: методичні рекомендації Міністерства юстиції України від 16.10.2013 р. [Electronic resource]. – Access mode : <http://zakon4.rada.gov.ua/laws/show/n0020323-13>.
12. Лист Комітету Верховної Ради України з питань боротьби з організованою злочинністю і корупцією № 04-12/12-1341 від 13.06.2013 р. [Electronic resource]. – Access mode : <http://zakon.gbb.com.ua/regulations/8447/8449/466605/>.
13. Ризак Я. Предмет комерційного підкупу за Кримінальним кодексом України / Я. Ризак // Вісник Національної академії прокуратури України: проблеми сьогодення, теорія, практика, життя академії. – 2012. – № 1. – С. 121–127.

Olha Bondarenko,

*Ph.D. in Law, assistant of the Chair of Criminal Law and Procedure
of the Academic and Research Institute of Law of Sumy State University*