

# Jurisprudence of unscheduled audits on financial activities in the criminal process in Ukraine

## Правова практика позапланових перевірок з фінансової діяльності в кримінальному процесі в Україні

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### Key words:

*audit, criminal proceedings, jurisprudence, State Audit Service of Ukraine*

### Ключові слова:

*аудит, кримінальне провадження, юриспруденція, Державна аудиторська служба України.*

In reason for analysis judicial practice of judges which systematically denied the request of investigators / prosecutors for permission to conduct unscheduled audits and inspections through unregulated procedural Criminal Procedure Code of Ukraine<sup>1</sup> order submission and consideration of petitions, Author selected judges of Solomyansky District Court of Kyiv (which in most cases considered a petition in criminal proceedings for investigative jurisdiction National Anti-Corruption Bureau of Ukraine) A. Bukin and A. Demydovska.

In open access by an author 77 decisions accepted in the period of 2015-2016 by judge-investigator Demydovska were found, what it was promulgated in the Single state register of court decisions. It is found out that after 74 decisions to make decision about a refuse in given to permission on realization of provided for by *unscheduled on-site audit* and only in 3 decisions made decision about the grant of such permission.

Symptomatically was that in all decisions after that by judge Demydovska was said no to the investigator/ public prosecutor in granting permission on realization *unscheduled on-site audit* a basic ground judge marked the following:

*«Regulation Code of Ukraine does not belong to the competence of the investigating judge deciding whether to grant permission for the inspection, Art. 132 CPC of Ukraine does not provide for such an event of criminal proceedings, does not regulate the procedure for considering such requests, the volume of evidence in considering such an application, the criteria by which the judge-investigator must determine the sufficiency of the grounds for granting permission for inspection. Regulations Code of Ukraine does not provide authority to appoint an judge-investigator checks»(with decision<sup>2</sup> of 14.09.2016 in the case №760/13039/16-к).*

Yes indeed, as of 2016 year provisions of the Code of Ukraine the issue of granting permission to conduct audit/verification is not attributed to the competence of the judge-investigator. However, under the second paragraph of Art. 1 Criminal Procedure Code of Ukraine - consists legislation including other laws of Ukraine, which include the "Main principles of state financial control in Ukraine" Law of Ukraine<sup>3</sup>. According to p. 8 art. 11 of said entity that initiates an unscheduled audit sues written justification for reasons such revisions and dates of beginning and end, also the documents in accordance with paragraphs five and seven of this article suggest any reasons for such a revision and at the request of the court - other information. Thus, according to the author, the judge-investigator has sufficient legal grounds and legal powers of the Settlement requests investigator / prosecutor to grant permission to conduct unscheduled audits in criminal proceedings.

<sup>1</sup> Criminal Procedural Code of Ukraine / Ukrainian Parliament - Access to resources: <http://zakon.rada.gov.ua/laws/show/4651-17>

<sup>2</sup> Court decision of Solomyansky District Court of Kyiv of 14.09.2016 in case №760/13039/16-к / Single State Register of Court Decisions - Access to resources: <http://reyestr.court.gov.ua/Review/62482480>

<sup>3</sup> Main principles of state financial control in Ukraine' Law of Ukraine / Ukrainian Parliament - Access to resources: <http://zakon0.rada.gov.ua/rada/show/2939-12>

Such legal analysis confirmed by decision<sup>4</sup> of 6.9.2016 in case №760/8385/16-K for which the same judge Solomyansky District Court of Kyiv Demydovska having considered the request investigator of the National Bureau of the Third Division detectives Second Division Detective Chief Detective Division National Anti-Corruption Bureau of Ukraine D. Rudnik for permission to conduct unscheduled audits on the basis of preliminary investigation materials submitted to the Unified Register of pre-trial investigations №4201500000001349 on 07.07.2015 approved detective request.

*In the reasoning of the decision the judge said: 'From the materials of the criminal proceedings it appears that on 09.02.2015, the tender committee of the Ministry of Internal Affairs of Ukraine decided to use negotiation procurement procedure for the purposes of the Ministry of subject - backpacks ... Further, the results of the 09/02/2015 16.02.2015 negotiation and procurement procedures between the Ministry of internal Affairs of Ukraine and FOP Plyhachov in 24.02.2015 contract to purchase 1,000 backpacks (lot number 4) amounting to 2.1 million UAH and 25.02.2015, the contract with 'Dniprovend' on the purchase of 5,000 backpacks (lot number №1-3) amounting to 14,495,000 UAH. Choosing these winners was held by the personal intervention of former Deputy Interior Minister Serhiy Chebotar... Now, there is reason to believe that the purchase of said product was made at inflated prices, and the goods were not delivered in full. Thus the pre-trial investigation, there is reasonable suspicion that the officials of MIA of Ukraine by prior agreement with officials of 'Dniprovend' (enterprise code 36296623) have entered into a fictitious transaction in order to capture public funds in a large scale and their further legalization...'*

*According to p. 6. Art. 11 above the law unscheduled inspection can be carried out only if the grounds for conducting a court decision. Unscheduled audit institutions scrutiny can not be done more than once a quarter. According to p. 8 Art. 11 of law body or entity that initiates an unscheduled audit sues written justification for reasons such revisions and dates of beginning and end, the documents in accordance with paragraphs five and seven of this article suggest any reasons for such a revision and at the request of the court - other information. Considering the above, checking the material submitted the request, examining the evidence for these materials, the investigating judge finds there are grounds for the request is».*

In general, from 3 judge decisions that during the years 2015-2016 Judge A. Demydovska gave permission to conduct unscheduled audits - 2 of them (of 10.05.2016 and 09.06.2016) concerning the above case №4201500000001349 concerning violation of the law in stage of purchasing backpacks for the needs of MIA of Ukraine.

Such sample indicates the presence of facts of possible political grounds, unequal application of one and the same judge rules Code of Ukraine, the 'Main principles of state financial control in Ukraine' Law of Ukraine in terms of the presence or absence of powers of the judge-investigator in dealing with such requests of investigator or prosecutor in criminal proceedings.

The opposite situation is an example of judicial practice another judge-investigator of the same Solomyansky District Court of Kyiv – A. Bukin. Author found 8 court decisions adopted in the period of 2015-2016 by the judge A. Bukin. It was released in the Unified state register of judgments, found that 6 rulings decide for permission to conduct unscheduled audits (inspections) and only 2 cases decisions on dismissal of the respective requests.

According to mutually established practice of law investigating judges in time of consideration investigator's or prosecutor's requests for permission to conduct unscheduled audits / inspections on example of Solomyansky District Court of Kyiv - the author was found several cases where the investigator, prosecutor within a series of criminal proceedings had to repeatedly treat the same request to the various investigative judges Solomyansky district court of Kyiv to obtain the appropriate allow in the unscheduled audit. So when one investigating judge refused to grant such a permit with the wording on the absence of authority to appoint an judge-investigator checks over time for the same request in the same criminal proceedings another judge-investigator granted the necessary permission.

So decision<sup>5</sup> on 28.10.2016 in case №760/18316/16-K judge-investigator of Solomyansky district court of Kyiv L. Kizyun rejected a detective's request, finding that: *'By investigating judge of Solomyansky District Court of Kyiv received a request detective department of the First National Bureau detectives First Division detectives Main Unit detectives National Anti-Corruption Bureau of Ukraine Zhidkov VL the extension of the State Financial Inspection in*

<sup>4</sup> Court decision of Solomyansky District Court of Kyiv of 06.09.2016 in case №760/8385/16-к / Single State Register of Court Decisions - Access to resources: <http://reyestr.court.gov.ua/Review/62482340>

<sup>5</sup> Court decision of Solomyansky District Court of Kyiv of 28.10.2016 in case №760/18316/16-к / Single State Register of Court Decisions - Access to resources: <http://reyestr.court.gov.ua/Review/62521104>

Zaporizhia region unscheduled audits of specific issues of financial and economic activity of JSC (JSC) 'Zaporizhyaoblenergo' for five days in the criminal proceedings №5201600000000235.

The request justified by the fact that October 4<sup>th</sup> of 2016 Solomenskiy district court of Kyiv detective request the appointment of an unscheduled inspection documentary OAO (JSC) 'Zaporizhyaoblenergo' for granted and documentary unscheduled tax audit (check) in the period from 17.10.2016 period 15 working days. October 25<sup>th</sup> of 2016 State financial inspection in the Zaporozhye region informed NABU about the need for extension of unscheduled tax audit of JSC (JSC) 'Zaporizhyaoblenergo' due to the large volume of payment, contract and other documents subject to investigation during the unscheduled audit complete control measure within a specified period (fifteen days) impossible, so in order to fulfill the tasks of criminal proceedings detective asks extend verification...

Regulation Code of Ukraine does not provide to the competence of the investigating judge deciding whether to grant permission for and extension of the audit, Art. 132 Code of Ukraine does not provide for such an event of criminal proceedings, does not regulate the procedure for considering such requests, the volume of evidence in considering such an application, the criteria by which the investigating judge must determine the sufficiency of the grounds for granting permission for inspection. Regulations Code of Ukraine does not provide authority to appoint an investigating judge and extend the audit».

But after a few days by the decision<sup>6</sup> of 11.03.2016 in case №760/13 575/16-K judge-investigator of Solomyansky district court of Kyiv V. Kytsyuk satisfied another same detective's request, finding as follows: «According to Art. 11 of the 'Main principles of state financial control in Ukraine' Law of Ukraine unscheduled inspection can be carried out only if the grounds for conducting a court decision ... Body or entity that initiates an unscheduled audit, submit to the court a written justification of the reasons for the revision and the date of its beginning and end, the documents in accordance with paragraphs five and seven of this article suggest any reasons for such a revision, and at the request of the court - other information. The duration of unscheduled audit must not exceed 15 working days. Extending the timing of planned or unscheduled audit is possible only by court order for a period not exceeding 15 working days for the planned on-site audit and 5 working days for unscheduled audit ...

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Detective department of the First National Bureau detectives First Division detectives Main Unit detectives National Anti-Corruption Bureau of Ukraine Zhidkov VL request - please. To extend the state financial inspection in the Zaporozhye region, with the assistance of experts of the National Commission for state regulation in the energy and utilities, unscheduled audits of specific issues of financial and economic activity of JSC (JSC) 'Zaporizhyaoblenergo' (enterprise code 00130926) to claim five days...».

Otherwise, the decision<sup>7</sup> of 14.09.2016 in case №760/13039/16-K judge-investigator of Solomyansky district court of Kyiv A. Demydovska dismissed the petition NABU senior detective for permission to conduct on the basis of criminal proceedings №5201600000000236, made in the Unified Register of pre-trial investigations 11.07.2016 on the grounds of criminal offenses under p. 5 of Art. 191 of the Criminal Code of Ukraine<sup>8</sup> unscheduled audit of JSC 'Cherkasyoblenergo'. However, the decision<sup>9</sup> on 12.10.2016 in case №760/14794/16-K judge-investigator of Solomyansky district court of Kyiv A. Bukin granted a similar detective's request setting: «From the materials of the criminal proceedings appears that officials of JSC 'Cherkasyoblenergo' and other entities acting intentionally, by prior agreement by a group of persons by contract to transfer debt provision of returnable financial assistance and services, took possession of another's property (money, the said appropriate energy supplier) on a large scale... during 2015 concluded a number of agreements on the transfer of debt (including №№ 18-500, 1344-202, 183-202, 287-202, 301-202, 140-202, 141-202, 142-202), under conditions which changed the procedure of calculations on the wholesale electricity market and JSC 'Azot' broadcast, and the JSC 'Energomerezha' took on the debt to JSC 'Cherkasyoblenergo' for delivered electricity totaling 315365497UAH. This PJSC 'Energomerezha' received from JSC 'Azot' used the money for personal needs and calculate JSC 'Cherkasyoblenergo' is not conducted, as evidenced in the results of PJSC 'Energomerezha' search.

<sup>6</sup> Court decision of Solomyansky District Court of Kyiv of 03.11.2016 in case № 760/13575/16-к / Single State Register of Court Decisions - Access to resources: <http://reyestr.court.gov.ua/Review/62452439>

<sup>7</sup> Court decision of Solomyansky District Court of Kyiv of 14.09.2016 in case №760/13039/16-к / Single State Register of Court Decisions - Access to resources: <http://reyestr.court.gov.ua/Review/62482480>

<sup>8</sup> Criminal Code of Ukraine / Ukrainian Parliament - Access to resources: <http://zakon.rada.gov.ua/laws/show/2341-14>

<sup>9</sup> Court decision of Solomyansky District Court of Kyiv of 12.10.2016 in case №760/14794/16-к / Single State Register of Court Decisions - Access to resources: <http://reyestr.court.gov.ua/Review/62191345>

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*Give the permission to conduct criminal proceedings №5201600000000236 on 07/11/2016 unscheduled audits of specific issues of financial and economic activity of JSC 'Cherkasyoblenergo' (enterprise code 22800735, address registration, Cherkasy region, Cherkasy, Gogol Street, Building 285) for the period from 01/01/2015 to 09/19/2016, of which instruct the state financial inspection in Cherkasy region, with the possibility of involvement of specialists of the National Commission for state regulation in the energy and utilities services in the period from 10/10/2016 to 31/10/2016 (ie 15 days)...». According to the court decision of 27.10.2016 on the extension of the said unscheduled audit from 11/01/2016 to 11/07/2016 - established is the fact that inspectors of audit service to carry out effectively the said unscheduled audit, which would begin 10.10.2016 under provided authorization decision of 12.10.2016.*

However, according to p. 2.4. of 'The interaction of state control and revision service of the prosecution, Interior, Security Service of Ukraine'<sup>10</sup> - court permission to conduct unscheduled audits 5 working days before the start of the audit mentioned in the court decision granted SASU (State Audit Service of Ukraine) relevant authority. Furthermore Art. 11 of the 'Main principles of state financial control in Ukraine' Law of Ukraine stipulates that in case of audits on business entities not related to this law controlled institutions (which are JSC 'Cherkasyoblenergo') officials of state financial control entitled to proceed to an audit if - as the date and grounds reporting suspicion of a criminal offense. However, given the absence of a court order from 12.10.2016 information on reports of suspicion in the relevant criminal proceedings, and the fact determining the start date of 10/10/2016 unscheduled audits - would have indicated to prevent the withdrawal of financial inspectors at the facility control. So the fact of the withdrawal of state financial control inspectors to the object in this case was carried out with gross violations of the law, even taking into account existing permit judge-investigator. In addition, by ruling that granting such permission to conduct unscheduled audits judge-investigator could not know about the actual impossibility of such a fiscal audit by the legislation in order to claim a violation p. 2.4. of 'The interaction'.

Regarding this case, the State Audit Office, with the assistance of the author was sent a letter<sup>11</sup> to obtain clarification reasons of violation of procedure of 'The interaction' between officials of the State Financial Inspection in Cherkasy region. On State Audit Service of Ukraine were received response<sup>12</sup> of 26.04.2017 №15-11/397 under which stated that workers State Financial Inspection and NABU together with employees in working order prior to the audits worked all issues step by step and agreed terms agreed their actions. It was found that 99.6585% of shares of JSC 'UkrESCO', which is the majority shareholder of 'Cherkasyoblenergo' belongs to the state, ie as of 01/10/2016 71% shares of PJSC 'Cherkasyoblenergo' by JSC 'UkrESCO' belonged to the state, so PAT 'Cherkasyoblenergo' was controlled institution in sense of Law. However, the State Audit Service of Ukraine failed in this letter properly explain the circumstances of the violation claim p. 2.4. of 'The interaction' on deadline for submission of the court, which should be at least 5 days, saying only that 'the need to provide the court for 5 days was not' - which is not a legal justification for the legality of the decision to conduct unscheduled audits appropriate authority State Financial Inspection. However, as stated in the letter of reply unscheduled tax audit of JSC 'Cherkasyoblenergo' did not take place, as drawn up on the impossibility of auditing from 21/10/2016 through failure to control the necessary documents subject to verification, which was also notified NABU.

It should be noted that according to the report on the state of interaction with law enforcement SASU by 2016<sup>13</sup> of 1152 complaints regarding audits (audits) of them were actually executed 573 - representing 49.7% of such calls. These data indicate that every second of this request for a copy of the court for permission to conduct unscheduled audits - by the state financial control is not actually performed on audit. Sometimes such situations were a combination of factors repeated appeals investigating a petition to the court for permission to conduct unscheduled audits, and in the event that the court did decision to grant permission - by the state financial control for some reason did not actually carried out unscheduled audit. Analyzing the circumstances under which adopted relevant decisions shall show some examples.

<sup>10</sup> Order of the Main Control and Revision Office of Ukraine, Ministry of Internal Affairs of Ukraine, Security Service of Ukraine, the Prosecutor General Ukraine of 19.10.2006 N 346/1025/685/53 / Ministry of Justice of Ukraine - Access to resources: <http://zakon.rada.gov.ua/laws/show/z1166-06>

<sup>11</sup> Letter of 27.03.2017 №1016-2/762 from MP of Ukraine to the State Audit Service of Ukraine to obtain clarification of the interaction causes of abuse by officers of financial inspection in Cherkasy region during the unscheduled audit of JSC 'Cherkasyoblenergo' / Ukrainian Parliament - Access to resources: restricted

<sup>12</sup> Letter of 26.04.2017 №15-11/397 from the Chairman of the State Audit Service of Ukraine to provide information to conduct unscheduled audit of JSC 'Cherkasyoblenergo' / State Audit Service of Ukraine - Access to resources: restricted

<sup>13</sup> Excerpts from the report on the state of interaction SASU with law enforcement for 2016 / State Audit Service of Ukraine - Access to resources: restricted

By the decision<sup>14</sup> of 27.05.2015 in case 725/2866/15-K judge-investigator of Pervomaisky District Court of Chernivtsi in criminal proceedings №12014260020000660 number of 05.07.2014 by the grounds of a criminal offense under p. 1 Art. 364 CC of Ukraine was denied a request for permission to employees of the State Financial Inspection in Chernivtsi region to conduct unscheduled audit of financial activities PE 'Zhytloservis' during charging and charging of customers for services. Substantiating such waiver Court stated: *«pre-trial investigation, referring to the court with this request did not indicate the start and end unscheduled tax audit, and therefore the request does not meet the requirements of Art. 11 of the 'Main principles of state financial control in Ukraine' Law of Ukraine»*. Upon receipt of the that decision the second time investigator filed a similar request and decision<sup>15</sup> from 6.4.2015 in case 725/3133/15K another judge-investigator of Pervomaisky District Court of Chernivtsi was also denied this request satisfied the investigator. This time the investigator Kucheriaviy V. has been listed start date and end unscheduled tax audit, however, reportedly due to request the judge-investigator stated: *«investigator said not one of the circumstances under which must be carried out unscheduled tax audit, does not have a reason to justify the need for such revisions. As an investigator in trials does not appear, though timely and duly informed the court was about the time and place of the hearing, the reasons for default judgment has not informed, given that the request from the content of the investigator and the annexed documents not meeting the requirements set Art. 11 of the 'Main principles of state financial control in Ukraine' Law of Ukraine»*. Referring to the court with request in third time investigator got decision<sup>16</sup> of 07.28.2015 in case 725/4053/15-K with permission to conduct unscheduled audits of 15 working days from the 03 to August 21, 2015 year, but according to information<sup>17</sup> of SFI(State Financial Inspection (was reorganized to State Audit Service of Ukraine)) about unscheduled audits on the authorities denied National police in 2015 year, SFI in Chernivtsi region in conducting this audit was denied because of the lack of a court order and give information on the basis of paragraph suspected of a criminal offense, given that the business entity (PE 'Zhytloservis') does not apply to controlled institutions provided p. 14 Art. 11 of the 'Main principles of state financial control in Ukraine' Law of Ukraine.

In another case, the decision<sup>18</sup> on 28.08.2015 in case №642/4420/15-K judge-investigator of Leninsky District Court of Kharkov in criminal proceedings №12015220010000047 of 11.03.2015, on the grounds of a criminal offense under p. 1 Art. 294 Criminal Code of Ukraine was denied a request to conduct unscheduled audit of SFI in the Kharkiv region. Substantiating such waiver Court stated: *«investigator in the study request to the court not shown evidence of that higher authority of the state financial control in order control the accuracy of the findings of the lower body of the state financial control checks carried out acts of audits drawn downstream by the state financial control, and showed their inconsistency with the law»*. The peculiarity of the criminal proceedings was fact that it did not concern economic and official crimes which result in any damage caused by anyone, and according to qualification - organizing mass disturbances, accompanied by violence. According to this case it came on the following circumstances: *«late winter - early spring of 2014, when Ukraine occurred events of social and political nature in the plant №60 PJSC 'Turboatom' under the guidance of senior master working station was a meeting of workers, which was announced at PJSC 'Turboatom' units of so-called 'self-defense'; allegedly to prevent the penetration of plant outsiders (among factory workers have been prepared in accordance lists). Later these individuals were involved in the mass actions in the Kharkiv city, namely the end of February 2014 at the 'Palais des Sports' by Marshal Zhukov in support of current Mayor Kernes GA, and in spring 2014 Liberty Square including during the rally 13.04.2014 year»*. Issues that should be found during in-site audit related circumstances calculating payroll department employees of №60 PJSC 'Turboatom' for the period from 01.01.2014 until 01.05.2014, ie at the time of the riots in Kharkiv city. The answer to these questions according to the investigator would likely confirm or deny conditions for participation, the organization of certain persons in the riots. However, referring again with the same request to the court, investigator got decision<sup>19</sup> of 23.09.2015 in case 642/4420/15-k with permission to conduct unscheduled audits, but according to SFI of unscheduled control measures which authorities denied National police in 2015 year SFI in the Kharkiv region in conducting this audit was denied because of the lack of

<sup>14</sup> Court decision of Першотравневий районний суд м. Чернівців of 27.05.2015 in case №725/2866/15-к / Single State Register of Court Decisions - Access to resources: <http://reyestr.court.gov.ua/Review/55582719>

<sup>15</sup> Court decision of Pervomayskiy District Court of Chernivtsi of 04.06.2015 in case №725/3133/15-к / Single State Register of Court Decisions - Access to resources: <http://reyestr.court.gov.ua/Review/53967622>

<sup>16</sup> Court decision of Pervomayskiy District Court of Chernivtsi of 28.07.2015 in case №725/4053/15-к / Single State Register of Court Decisions - Access to resources: <http://reyestr.court.gov.ua/Review/55582336>

<sup>17</sup> Information from SFI of unscheduled audits on the authorities denied National Police in 2015 / State Audit Service of Ukraine - Access to resources: restricted

<sup>18</sup> Court decision of Leninsky District Court of Kharkiv of 28.08.2015 in case №642/4420/15-к / Single State Register of Court Decisions - Access to resources: <http://reyestr.court.gov.ua/Review/53302804>

<sup>19</sup> Court decision of Leninsky District Court of Kharkiv of 23.09.2015 in case №642/4420/15-к / Single State Register of Court Decisions - Access to resources: <http://reyestr.court.gov.ua/Review/52430780>

a court order to give early revision, lack of coordination with the state financial control audit start dates, circumstances that previous unscheduled audit of JSC 'Turboatom' held from 12.05.2015 to 06.12.2015. After checking the text of this decision for permission to conduct unscheduled audits author agrees with the reasoning of SFI as regards the failure to give early revision of the court order, but the requirements of Article 11 of the 'Main principles of state financial control in Ukraine' Law of Ukraine determined that the unscheduled audit scrutiny institutions can not be done more than once a quarter. Given that previous that unscheduled inspection was conducted in the second quarter of 2015, and a court decision to grant permission audited was taken in the third quarter of 2015 - these circumstances in this part of the justification for not audited the side of SFI in the Kharkiv region is illegal. Also worth noting that the relevant court order stated that the decision can be appealed to the Appeals Court of Kharkiv region for five days after its announcement. Article 309 CPC of Ukraine indicated court decision does not refer to the list of decisions judge-investigator may be challenged on appeal. The judge-investigator of the Leninsky District Court of Kharkov Olkhovskiy EB adopted a decision, which in addition to the fact that contrary to the provisions of Art. 11 of the 'Main principles of state financial control in Ukraine' Law of Ukraine did not indicate the start date and end date of the audit and violated Art. 309 CPC of Ukraine regarding the possibility of appeal.

There are also cases of refusal of state financial control carried out unscheduled audits for court decisions by giving permission to conduct audits of less than 5 working days prior to the audit. Thus the investigative judges who render decisions following the date of the revision is less than 5 working days after the proclamation of the decision must be understood that paragraph 2.4. 'The interaction of state control and revision service of the prosecution, Interior, Security Service of Ukraine's' law enforcement agency identified the relevant requirements, so in case of violations - impossible actual implementation of the relevant decisions of the judge-investigator.

By a decision<sup>20</sup> of 05.27.2015 in case 537/2420/15K judge-investigator of Kryukiv District Court of Kremenchuk Poltava region in criminal proceedings №12015170410000015 grounds of a criminal offense provided for in p.1 of Art. 358 of the Criminal Code of Ukraine was granted a request for permission to employees of State financial inspection in the Poltava region of unscheduled audit of financial activities in a secluded section 'Locomotive depot' SE 'Southern Railway' information on time out of the depot and west of the locomotive depot that led to increase hours worked and receive salaries in excess of the actual amount, and therefore the material damage suffered SE 'Southern railway'. Court was granted permission to conduct the audit during the period from 05.27.2015 (date of adoption of the decision) on 06/17/2015, but according to SFI in conducting this audit was denied due to lack of specific issues in the court order to be checked by the supervisory authority and direction initiated the revision court after court-appointed date of commencement of the unscheduled audit.

By a decision<sup>21</sup> of 27.01.2015 in case of 639/336/15-K judge-investigator of October District Court of Kharkiv in criminal proceedings №12014220680001007 grounds of a criminal offense under p. 2, Art. 367 of the Criminal Code of Ukraine was granted a petition for permission to employees of state financial inspection in the Kharkiv region of unscheduled audit of financial activities utility 'Kharkov underground' during the bidding in 2014 for the purchase of railway rails, broad gauge. The reason served as deputy treatment of MP Ukraine received by investigate depart. Of Kharkiv-Passenger mail 27/08/2014 year and contain information, that 'Kharkiv Metro' on June 17, 2014 through open bidding has concluded an agreement with 'Loska' company on the purchase of spare parts worth 6.14 million UAH. Most part of the contract amount - 5.41 million UAH clung to purchase 220 tons of rails R-50. The purchase price amounted rails 24600 UAH/t. The website 'Our money' announces the availability of publicly available data on the sale of rail 13410-13855 UAH/t., and the rack manufacturer 'Azovstal' can be purchased for 12500 UAH/t. Court was granted permission to conduct the audit during the period from 27.01.2015 (date of adoption of the decision) within 15 working days, but according to SFI in conducting this audit was denied due to lack of resolution of the investigator appointing audit, lack coordination begun date of the audit and referrals initiated audit court is not 5 working days before the start of the audit. However, the Law of Ukraine from 1697-VII 14.10.2014<sup>22</sup> was excluded the right of the prosecutor, investigator set resolution for audit and inspection as prescribed by law, so the reasons for refusal audited in this part of the side SFI were not justified.

<sup>20</sup> Court decision of Kryukiv District Court of Kremenchuk of 27.05.2015 in case №537/2420/15-к / Single State Register of Court Decisions - Access to resources: <http://reyestr.court.gov.ua/Review/57681480>

<sup>21</sup> Court decision of October District Court of Kharkiv of 27.01.2015 in case №639/336/15-к / Single State Register of Court Decisions - Access to resources: <http://reyestr.court.gov.ua/Review/46447727>

<sup>22</sup> Law of Ukraine 1697-VII 'On Prosecution' of 14.10.2014 / Ukrainian Parliament - Access to resources: <http://zakon.rada.gov.ua/laws/show/1697-18>

Despite the fact that the harmonization approximate date of commencement of the audit defined order of interaction that approved the relevant joint order of the concerned ministries and departments, which in turn registered with the Ministry of Justice of Ukraine, namely the provisions of Law stipulates the right of the investigating judge to set a start date and end audits for submission dates side of the body or person that initiates an unscheduled tax audit. Moreover, even the most of the interaction is not set as the reasons for the refusal to conduct the audit by the court - the lack of coordination of the approximate date of commencement of the audit. Thus the refusal to conduct such an audit by the state financial control not only on the grounds negotiation starting date of the audit of state financial control authority is not legitimate and may indicate signs of abuse of power on the side of responsible persons.

By a decision<sup>23</sup> of 21.01.2015 in case 444/114/15-K judge-investigator of Zhovkva District Court of Lviv region in the criminal proceedings of 12.10.2014 №42014140240000029 into the embezzlement of funds by officials SE Rava-Ruska forestry, on the grounds of committing criminal offenses established in p. of Art. 191 of the Criminal Code of Ukraine was granted a request for permission to employees of state financial inspection in the Lviv region of unscheduled audit of financial and economic activity SE Rava-Ruska forestry information regarding allocation of forest areas, services for game management and other services and activities. Court was granted permission to conduct audits that begin from 30.01.2015 year, but according to SFI in conducting this audit was denied because of 'not negotiating terms of control measures'. By a decision<sup>24</sup> of 16.06.2015 in case 461/6744/15K judge-investigator of Galician District Court of Lviv in criminal proceedings №42015140400000026 on the grounds of a criminal offense under p. 5 of Art. 191 of the Criminal Code of Ukraine was granted a request for permission to employees of state financial inspection in the Lviv region of unscheduled audit of financial and economic activity SE 'Lviv radioremontniy factory' for making the 102 model contracts for the purchase of special assets totaling 8,857.9 thousand UAH of which paid 7,794.00 thousand UAH, for allegedly posed inventories TDG 'Brendooboronmarket'. Court was granted permission to conduct the audit within 15 working days, starting from 01.07.2015 year, but according to SFI in conducting this audit was denied because the timing of control measures agreed with the representative SFI in Lviv region.

Regarding the possibility of appellate review of relevant decisions of the judge-investigator for permission to conduct the audit, the purpose of the documentary (tax) audits, Article 309 CPC of Ukraine defined list of decisions that can be challenged during the preliminary investigation and which did not include these decisions. Of this Article stipulates that complaints against other decisions judge-investigator not subject to appeal and their objection may be submitted during the preparatory proceedings in court. However, for the jurisprudence of the European Court of Human Rights in Article 6<sup>25</sup> which provides for the right to a fair trial is not set requirements for states to establish appellate or cassation courts. Where such courts exist, guarantees contained in that article must comply also ensure effective access to these courts (p.25 ECHR decision in the case 'Delkur v. Belgium' from 10.17.1997 and p.65 ECHR decision in the case 'Hoffman v. Germany' from 11.10.2001). By a decision<sup>26</sup> of 11.04.2017 in case 757/11320/17-K Kyiv Court of Appeal in criminal proceedings №32014100090000181 of 12/01/2014, on the grounds of a criminal offense under p. 1 Art. 212 of the Criminal Code of Ukraine was granted the appeal of a citizen who is a deputy of Ukraine, Zhurzhiy AV, under which reversed decision of Pechersk district court of Kyiv from 02.28.2017 on the appointment of an unscheduled inspection documentary citizen Zhurzhiy AV on compliance with tax, currency and other legislation for the period 2013-2016. The decision of the Kyiv Court of Appeal stated: *«addressing the merits request judge-investigator stated that the court of appeal comes from the fact that, under Part 1 of Art. 370 CPC of Ukraine court decision must be lawful, justified and motivated. Part 2 of this article indicates that there is a legal decision taken by a competent court under the rules of substantive law in compliance with the requirements for criminal proceedings under this Code (Code of Ukraine). The impugned judgment does not meet these requirements. Judge-investigator referred to the Art. 78 Tax Code of Ukraine, according to which documentary unscheduled inspection carried out in the presence of at least one of the following circumstances: 78.1.11 obtained a court judgment (judge-investigator) the appointment of inspection or ruling authority conducting investigative operations, investigator, prosecutor, the recommendation made by them under the law. Set rate refers to the Law of the procedure which must be obtained by the said judgment and the procedural*

<sup>23</sup> Court decision Zhovkva District Court in Lviv region of 21.01.2015 in case №444/114/15-к / Single State Register of Court Decisions - Access to resources: <http://reyestr.court.gov.ua/Review/53189332>

<sup>24</sup> Court decision of Galician District Court of Lviv of 16.06.2015 in case №461/6744/15-к / Single State Register of Court Decisions - Access to resources: <http://reyestr.court.gov.ua/Review/45091284>

<sup>25</sup> European Convention on Human Rights / Ukrainian Parliament - Access to resources: [http://zakon.rada.gov.ua/laws/show/995\\_004](http://zakon.rada.gov.ua/laws/show/995_004)

<sup>26</sup> Court decision of Kiev Court of Appeal of 11.04.2017 in case №757/11320/17-к / Single State Register of Court Decisions - Access to resources: <http://reyestr.court.gov.ua/Review/66139077>

order is defined CPC of Ukraine. However, solving the judge-investigator these requests not covered by its mandate, which should be implemented in a manner consistent with the procedural law, do not relate to activities or provision of the criminal proceedings or to the investigation or to the undercover investigation. Thus, the CPC of Ukraine does not provide rights prosecutor to appeal to the judge-investigator with a request to use tax audit, moreover, the CPC has no procedural review process this type of requests. According to the legal position set out in the ECHR decision 'Mikhailyuk and Petrov v. Ukraine' dated 10.12.2009 states that the expression 'according to law' first requires that the impugned interference had a basis in domestic law, it also relates to the quality of legislation and needs, it has to be accessible to the person who, in addition, shall provide its consequences for him, and this legislation must meet the rule of law. The same rationale and references relating to the judge-investigator to the provisions of Part 2 of Art. 93 CPC of Ukraine, because the rule provides that the prosecution collects evidence by the investigation and covert investigations, requesting and receiving documents, information, expert opinions, findings of audits and acts of inspections of other proceedings provided for CPC of Ukraine and not contains individual rights prosecutor, investigator judge-investigator to handle the data request. So, given the above, the college of judges came to the conclusion that the judge-investigator considered the request of the prosecutor of the appointment of an unscheduled inspection of documentary on the merits in this case acted in a way that is not based on the requirements of procedural law».

Given the fact that the findings of audits, inspection acts of criminal procedural law, together identified as documentary sources of evidence and the right to their destination as the Tax Code of Ukraine<sup>27</sup> in the case of inspections and the 'Main principles of state financial control in Ukraine' Law of Ukraine in the case of revisions during the preliminary investigation within the jurisdiction of the court (judge-investigator), and the circumstances that in the reasoning of the court decision and refers cases to get findings audits - a precedent as the decision of Kyiv Court of Appeal to repeal the decision to conduct an unscheduled inspection can be applied in judicial practice investigative judges when making decisions at the request of investigators for permission to conduct unscheduled audits.

These examples show the lack of a proper level of experience and knowledge of the legislation for pretrial investigation members, prosecutors which should make agree on a request of the investigator, which if courts decisions are made to meet such requests, but state control bodies are not made appropriate revisions due to reasons non-compliance Investigation of a given document. In some cases, which are noted most employees of state financial control wrongly denied an audit by a court on the grounds that can not be considered sufficient for non-auditing, or reason not to conduct audits that are justified add those that do not may be valid reasons for refusing audited. In other specified examples when during the preliminary investigation of the criminal proceedings investigator receives conflicting decisions of judges (to refuse to allow, to permit), and most audits are carried out with violations of the relevant legal framework enable the defense during the trial relevant conclusions unscheduled audits, testimony of experts and specialists who participated in such unscheduled audits / inspections, quite simply prove the inadmissibility of such findings as evidence in proof of guilt of the accused, which in turn may lead to strengthening the position of defense and the court's acquittal.

In order to determine the legal procedure for appointing unscheduled audits / inspections during the preliminary investigation in the criminal proceedings, including the aforementioned precedent as the Court of Appeal decision from 04.11.2017 to cancel the decision of the Pechersk district court of Kyiv appointing unscheduled documentary (tax) checking in criminal proceedings and other cases given judicial practice the author, who, along with some MPs indicated in the authors list, was prepared and registered a draft law on amendments to the Criminal Procedure Code of Ukraine and other laws of Ukraine (regarding the appointment of unscheduled audits, inspections)<sup>28</sup> which proposed:

- to complete the second part of Article 131 of the Code, paragraph 10) the appointment of unscheduled audits, unscheduled inspections;
- after chapter 18, adding Chapter 18-1 Assignment unscheduled audit, unscheduled inspection with articles 213-1 - 231-5 where define the procedure for consideration and decision of judge-investigator requests for appointment audits, inspections in criminal proceedings;
- article 11 of the 'Main principles of state financial control in Ukraine' Law of Ukraine to make changes that will resolve the issue legally negotiation starting date unscheduled audit.

<sup>27</sup> Tax Code of Ukraine / Ukrainian Parliament - Access to resources: <http://zakon.rada.gov.ua/laws/show/2755-17>

<sup>28</sup> Draft Law on Amendments to the Criminal Procedural Code of Ukraine and other laws of Ukraine (regarding the appointment of unscheduled audits, inspections) / Ukrainian Parliament - Access to resources: [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?id=&pf3511=61845](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?id=&pf3511=61845)



According to described in this article jurisprudence, such legislative changes in case of adoption by the Ukrainian Parliament will correct existing shortcomings of current legislation, which (flaws) do not allow investigating judges to effectively address the appointment of unscheduled audits, inspections.

### Summary

According to Ukrainian law - unscheduled on-site audit of business entities (companies) conducted by the state financial control over the judicial decision taken in the criminal proceedings. The result of audit becomes documented source of evidence in criminal proceedings. This article highlights the current judicial practice decision making about granting permission for unscheduled audit according to the request of the investigator, the public prosecutor to the judge-investigator during the pre-trial investigation in criminal proceedings. According to the results of the analysis of the following decisions of the Division according to various criteria (impact, reason) and analysis of the actual performance of the State Audit Service of Ukraine, the author comes to certain conclusions, author offers specific steps to change the national legislation, according the Court practice. These steps should clearly define the procedure for the appointment of unscheduled audits, inspections during pre-trial investigation in criminal proceedings.

### Анотація

Згідно з українським законодавством, позапланова перевірка на місці господарюючих суб'єктів (підприємств) проводиться державним фінансовим контролем за судовим рішенням, прийнятим у кримінальному процесі. Результатом аудиту стає документальне джерело доказів у кримінальному судочинстві. У даній статті освітлюється сучасна юридична практика приймання рішень щодо надання дозволу на позапланову перевірку на клопотання слідчого, прокурора до судді-слідчого в ході досудового слідства у кримінальному процесі. За результатами аналізу таких рішень Відділу за різними критеріями (вплив, причина) та аналізу фактичних результатів діяльності Державної аудиторської служби України, автор приходить до певних висновків. Автор пропонує конкретні кроки для зміни національного законодавства відповідно до судової практики. Ці кроки повинні чітко визначити порядок призначення позапланових перевірок, інспекцій під час досудового слідства у кримінальному процесі.

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