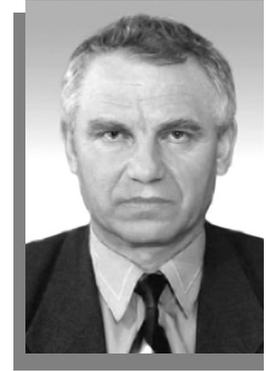


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## **THE LEGAL REGULATION OF LAND FEE: THE PAST AND THE PRESENT**

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According to the current law the land fee is one of the fundamental principles of the legal rational use and protection of land. The essence of this principle is that the use of land in Ukraine is carried out for a fee. Its implementation is manifest in the fact that the land tax is seen as a duty of land owners and land users, as a part of economic incentives for sustainable land use and protection, as a method of regulating land relations and as the main source of revenue. It should be noted that a fee applies only to the special use of land in Ukraine, so as a general use of land is free.

The payment for land, as an independent legal institution in the system of land law, combines the set of legal norms that regulate social relations between landowners and land users. It also regulates relations with state and local authorities on the definition of size and order of payments for using land and use of proceeds coming from payment for land, the liability of payers, control over the correct calculation and collection of

land payments.

Some general problems of the legal regulation of land fee are always in sight of representatives of legal and economic sciences. Among them the names of V. Hohulyak, I. Krynytska, N. Vorotin, M. Kucheryavenko, P. Kulynych, A. Miroshnichenko, V. Nosik and other representatives of the financial and land legal sciences can be called. However, the question concerning the historical and legal problems of land fee hasn't been investigated objectively and comprehensively.

The land fee is a historical category. The use of land in the Soviet period was free. Art. 8 of Fundamentals of the Land Legislation of the USSR and the Union republics (Art. 14 LC Ukrainian SSR) provided that the land was given to collective farms, state farms and other state, cooperative, public enterprises, institutions, organizations and citizens of the USSR for free. Any charging for the use of land was proclaimed illegal. However the free use of land didn't exclude

claim compensation of costs related to the management of land, keeping it in good condition, protection, improvement and so on.

A discussion about the necessity of introduction of paid land use in order to improve its effective and efficient use was started in 1970.

For the first time the land fee has been provided at the federal level in the Fundamentals of the USSR and Union Republics on land in 1990. In Ukraine, the legal basis of land fee ownership and land use were established by the Land Code of the USSR in 1990. Article 35 of the Code proclaimed land ownership and land use became paid. The land fee under the Code had to be paid annually in the form of land tax or lease payment that determined depending on the quality and location of land, based on cadastral valuation of land. The order and rate of land tax as well as the size limits of lease payment had to be defined by the Supreme Soviet of USSR. According to the Article 37 of the Land Code the payments for the land came to the budgets of the village, town or city council, in which the land was located.

The Land Code of Ukraine in edition of 1992 except land tax and land lease payment also determined the fee for acquisition of land in property. The Article 35 of the Land Code Ukraine established that the transfer of land ownership for a fee in cases proclaimed in the Code was carried according to the normative price, which was determined by the legislation of Ukraine. In the Article 36 it was underlined that the lessee pays the land lease payment, the amount of which had

to be set by the agreement of the sides in the lease agreement.

Establishment of the order of taxing, average rates of land tax, as well as limit of the amount of lease payment for the land was taken to the jurisdiction of Verkhovna Rada of Ukraine. Some changes in comparison to the Land Code of the Ukrainian SSR in 1990, concerned the revenues of payments to the budget. In particular, part of the funds of the payment for the land was transferred to the state, republican and regional budgets in order and amounts that the established by the laws of Ukraine. Finally, it was found that the money from the land tax were used only for purposes that are determined by the laws of Ukraine, and expanded the list of exemptions in the payment for land.

In the future, all given the provisions of the Land Code of Ukraine were detailed and specified in the special Law of Ukraine «On Land Payments» from 03.07.1992 №2535-XII (which expired because of the adoption of the Tax Code of Ukraine in 2010). It was found that the land fee had to be paid in the form of land tax or lease payment that determined depending on standard valuation of land plots.

The land tax has been classified by the Law of Ukraine «On taxation system» as a state tax Its size was determined by a percentage of the standard valuation of land plots and didn't depend on the results of the economic activity of land owners and land users. The Land tax was determined as a compulsory payment which individuals and legal entities had to pay for land use exclu-

sively in cash. Land owners and land users, except lessees had to pay the land tax, and for the land granted on lease, lease payment had to be paid.

The law of Ukraine «On Land Lease» found that the lease payment was a payment that lessee paid to the lessor for the use of the land. Unlike the land tax the lease payment may be established in cash, natural or labor form. The lessee and lessor can provide in lease agreement the combination of these forms or define other forms of payment. But there is an exception – the lease payment for state and municipal land plots has to be charged only in cash.

The lease payment with indicating of its size, indexing, forms of payment, terms, procedure for making and viewing and responsibility for its failure to pay is one of the essential conditions of the land lease agreement between a lessor and a lessee. Public relations in the sphere of establishing and changing of the size of lease payment were the subject of regulation by civil law, combined with specific land law.

Most of the land lease agreements concluded between a lessor and a lessee, contained a condition of setting of the size of lease payment not in absolute numbers but as a percentage of standard valuation of land plots.

The taxable item is the land plot leased. The payer of lease payment is the lessee of the land plot.

It should be noted that the lease payment for the use of state and municipal property has always been an important and reliable source of cash revenues to local budgets. The law of Ukraine «On

taxation system» from 31.03.2005 assigned the lease payment for state and municipal land to the tax payments. Since making these changes the administration of this payment to budgets became one of the main tasks of the State Tax Service of Ukraine.

With the adoption of the Tax Code of Ukraine in 2010, the mechanism of charge of the lease payment for state and municipal property has suffered significant changes, but this payment in its essence has remained tax.

The current Land Code of Ukraine (Art. 206) provides that the land fee should be charged according to the law. The Tax Code of Ukraine is known as such law. According to it the taxpayers are owners of land plots, land shares and land users. Article 270 proclaims that the taxable items are owned or used land plots and owned land shares. Thus there is a situation created where the land is actually set under a double taxation: the land tax should be paid at the same time and for the land, and the right to land (share), the object of which is recognized land. This underlined in the legal literature [2, p. 500].

The subjects of the land tax under the current legislation of Ukraine doesnot recognize persons – landusers, which use the land on other bases than the ownership right, right of permanent use and lease. It comes in particular, the persons who use the land by the right of perpetual lease, superficies, easement or land sublease.

Before the adoption in 2010 of the Tax Code of Ukraine legal basis for regulation of the land tax was a series of

legislative acts, namely: Land Code of Ukraine (2001), Budget Code of Ukraine (2001), Laws of Ukraine «On Land», «On Land Lease», «On taxation system» and others.

With the introduction of the Tax Code the Law of Ukraine «On Land», «On taxation system» and others have lost their validity. A special place in the system of legal regulation of social relations regarding payment for land, particularly for its calculation and collection occupy the laws that are made for each calendar year dedicated to the State budget.

According to the Budget Code of Ukraine (Art. 2) the law of the State Budget of Ukraine – is the law, which establishes the powers of public authorities for execution the State Budget of Ukraine during the budget period.

The Law of Ukraine «On State Budget of Ukraine» determines for the specific year the specific features of calculation and collection of the land tax in the current year, land tax, provides the indexing of its size, sets the collecting for land and order of transferring it the budget and so on.

The introduction of land fee in Ukraine was intended to ensure the rational use of land resources and their preservation, equalization of socio-economic conditions of management on land of different quality, financing for functioning costs of land cadaster, land management and land monitoring, land reform and the development of infrastructure of settlements and more. It was assumed that the proceeds from the land tax would be used strictly for the intend-

ed purpose. However, in the current financial crisis, land fee used only as one of the main forms of replenishment of total revenues.

Payment for land, being one of the key elements of the economic and legal mechanism of state regulation in land relations, in market conditions should encourage landowners and land users for effective and efficient use of land. At the same time land fee in the form of land tax and rental fees for land plots of state and municipal property acts as a kind of tax payment. The legal value land fee is that it not only acts as a source of replenishment of local budgets and is the foundation of realization of economic interests of the owner, but also stimulates the efficient and rational use and land protection.

In the absence of a legal definition in law of the term land fee in the literature was rightly suggested to consider as a pay for the land a regular payment, which the landowner (land user) under the law or contract contributes to the budget or in favor of the landowner for the use of the relevant land plots<sup>1</sup>.

The literature sometimes conclude that understanding the concept of land fee is much wider than stipulated in the Tax Code of Ukraine. According to representatives of the land – legal science, the composition of this notion must also include compensation for losses of agricultural production related to the with-

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<sup>1</sup> Земельне право України: підруч. [Г. І. Балюк, Т. О. Коваленко, В. В. Носік та ін.; за ред. В. В. Носіка. – К.: Видавничо-поліграфічний центр «Київський університет», 2008. – С. 267.

drawal of agricultural land, as well as fines for violation of land legislation<sup>1</sup>.

The approach to the components of the term «payment for land» seems debatable. The feasibility of attributing compensation for «losses» to the payment for land seems in the broad sense appropriate. As highlighted in the land and legal literature, it would have removed an existing legal uncertainty regarding the nature of the payments and allowed to apply to the «losses» adjusted mechanism of calculation and collection of tax payments<sup>2</sup>.

As for the suggestion, which concerns the inclusion in the composition of land fee of fines for violation of land legislation should be made certain reservations.

Taking into account the legal nature of fines as penalties for violations of the rights of the owner or user of land plots would hardly be right to regard them as part of the land tax.

The land fee in the broad sense is generally considered legally provided a set of legally binding land payments which are necessary during the realization of the right of ownership and use of land plots, which can get and pay the state, municipalities, individuals and legal entities, the purpose of getting

which is to stimulate owners and users of land for use according to the special purpose, rational and efficient land use and protection.

Paying of land use should not be mixed with paid means acquiring of land plots or rights to them in the order foreseen by the current legislation of Ukraine and local regulatory legal acts. In case of acquisition of land rights, for example, on a competitive basis or on a civil transactions subjects of land relations are not exempted from the obligation to make payment for the land in the manner prescribed by law.

The collocation «payment for land» is usually understood as a fee for its use, which is levied in the form of land tax and lease payment for the land. Thus before effective Law of Ukraine «On Land» in term of «payment for land» united land tax and lease payment for any land. But given approach changed the Tax Code of Ukraine. According to Article 14 of the Code payment for the land was considered nationwide tax that levied in the form of land tax and rental fees for land plots of state and communal property.

Land tax – a compulsory payment levied from the owners land plots and land particles (shares) and permanent land users. Lease payment for land plots of state and communal ownership was considered a mandatory payment that the lessee payed to the lessor for using the land.

The subordination by legislator lease payment for land plots of state and communal property of regime of mandatory payment, inherent nationwide tax and

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<sup>1</sup> Лисанець О. С. Правове регулювання плати за землю / О. С. Лисанець // Земельне право: підручник / М. В. Шульга, Н. О. Багай, В. І. Гордєєв та ін.; за ред. М. В. Шульги. – Х.: Право, 2013. – С. 295.

<sup>2</sup> Мірошниченко А. М. Науково-практичний коментар Земельного кодексу України / А. М. Мірошниченко, Р. І. Марусенко. – 5-те видання, змінене і доповнене. – К.: Алерта, 2013. – С. 503.

distribution on rent the same order and timing as land tax, and the regime of responsibility for failure to make the lease payment on time raises certain concerns.

As rightly emphasized in the literature, described approach of the legislator to determine the regimerent for land plots o state and municipal property is false<sup>1</sup>. The mechanism of transferring to budgets land tax and rental fees for use of land of state and municipal property may not be identical. Indeed, in the first case it comes to payment of tax liabilities in the second – the implementation of treaty obligations by lessee.

It should be noted, that the classification by the law of rent payments to the mandatory payments contrary to the legal nature of the treaty, such as lease relations, which are the relations that should be based on the principles of legal equality of the parties. Perhaps in this regard, the Plenum of the Supreme Economic Court of Ukraine of 17.05.2011 p. Number 6 (as amended on 12.17.2013 g.) (P. 13) states that the lease payment for the land, which is owned by the state or is in municipal property, has a dual legal nature, because on the one hand, it is provided for payment of land lease agreement, the lessee to the lessor for using the land for making use of the land on the other – a form of land fee as state land tax along with tax.

As is known, in connection with widespread leased land using in Ukraine

the rent for the land gradually turned into one of the most powerful sources of revenues to the local budgets. These circumstances prompted the local authorities and the Tax Authorities to implement measures designed to increase revenues from rent for the use of state and municipal property. These measures, as noted in the literature<sup>2</sup>, aimed in particular at increasing the actual amount unilaterally, outside the established order resolving contractual disputes.

Mode of rent for use of land under lease is characterized by private ownership and contractual basis, based on the norms primarily land and civil law. Significant changes in land tax made to the Tax Code of Ukraine by the Law of Ukraine of 12.28.2014 № 71 «On Amendments to the Tax Code of Ukraine and some other legislative acts of Ukraine on tax reform.

In particular, land fee from the list of state taxes and fees was removed and as a part of the tax on real property transferred to the list of local taxes. This Law also abolished a number of special land tax rates that have been established within the individual categories of land and taxpayers. Thus the left only four limiting size of bets of land tax.

Changes made to the current legislation regarding land taxation laid the foundation for empowerment of village, town and city councils regarding how the bidding of land tax, and to provide

<sup>1</sup> Мірошніченко А. М. Науково-практичний коментар Земельного кодексу України / А. М. Мірошніченко, Р. І. Марусенко. – 5-те видання, змінене і доповнене. – К.: Алерта, 2013. – С. 499–502.

<sup>2</sup> Бахуринська М. М. Практичні проблеми правового регулювання встановлення та зміни орендної плати за землю / М. М. Бахуринська // Бюлетень Міністерства юстиції України. – 2015. – №2. – С. 78.

exemptions from land tax. In addition, local councils got the right to establish land tax rates within the size limits set by the Tax Code of Ukraine.

The obligation to timely payment of land tax or lease payment law relied on traditional carriers of land rights since the emergence of these rights.

Article 22 of the Land Code of the Ukrainian SSR (1990) provided that ownership or right to use on given land arises after installation by land surveying organizations this site boundaries in nature (on ground) and obtaining the document certifying that right. Right of possession or the right of permanent use of land was certified by the state acts that were issued and registered by village, district and city councils. The right of temporary use of land (including a lease) was proceed by the agreement, the form and order of registration which established the Council of Ministers of the USSR.

Under the current Land Code of Ukraine by the (Art. 125) emergence of property rights on the land plot and the right of permanent use and land lease right associated with moment of state registration of these rights. As we see, some property rights on land by this Article are not named (perpetual lease, superficies, servitude). Thus registration of real rights on land (ownership, permanent use, perpetual lease, superficies, easement, lease and mortgage) carried out in accordance with the Law of Ukraine «On State Registration of Rights to Real Estate and Their Encumbrances».

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