

REFORMING OF TAX LAW ENFORCEMENT IN MODERN RUSSIA

The first stage of the taxation reform in Russia at the turn of the 20th and 21st centuries was marked by the acceptance of Part 1 and Part 2 of the Tax Code of the Russian Federation and global reorganization of the Russian tax legislation. The accumulated experience of application of this updated legislation leads both politicians and scientists to a conclusion about the necessity of correction of separate institutions of the modern Russian fiscal law. We ought to refer to one of these rather important institutions, i.e. the institution of tax process, which is the system of procedural norms providing tax law enforcement.

Undoubtedly, the acceptance of Part 1 of the Tax Code of the Russian Federation became a major step on the way to the provision of formal clarity of tax rules of law. Meanwhile, the points of order in the first edition of the Code were settled extremely poorly. This situation allowed tax bodies to make use of an excellent possibility to strain powers in the process of law enforcement.

The President of Russia in his messages to the Russian parliament in 2002 and 2005 paid attention to the existence of excessive administrative pressure upon business and even “terrorism” on the part of supervising bodies. In reply to these reasonable remarks the Russian parliament accepted the Federal Law No. 137-FZ of 27.07.2006. The majority of provisions of this law were procedural ones; they seriously changed the procedure of tax law enforcement fixed in the Tax Code of the Russian Federation. At the same time, many provisions of the given law did not so much offer some decisions as generated new collisions. Procedural regulation of tax law enforcement in Russia has not achieved a respectable level yet.

The research carried out by Ernst & Young at the end of 2007 showed that 54 % of foreign companies characterized the influence of the Russian taxation system on an investment climate in the country as “negative”. As the respondents believe, in order to improve the tax regime it is necessary to specify separate tax procedures and to eliminate ambiguous formulations allowing tax bodies to apply the legislation

electively¹. Ilya Trunin, Director of the Tax and Customs Tariff Policy Department of the Ministry of Finance of Russia confirms that the basic complaints of taxpayers do not so much concern the tax system arrangement as the practice of law enforcement in Russia².

Let's try to understand the reasons for the described situation and possible ways of reforming of the procedural tax legislation in Russia.

It is necessary to note that procedural powers of tax bodies in Russia were defined neither in the independent normative legal act nor even in a separate section of the Tax Code of the Russian Federation³. Therefore, revealing of the regularities of law enforcement activity of tax bodies and formulation of the purposes and the common principles of tax process are essentially complicated. Undoubtedly, this situation hinders the application of the law in a uniform procedural form.

Meanwhile, the world experience shows that only uniform rules can assure the greatest guarantee against abuses of authority. Thus for example in Switzerland, there is the Federal law of administrative procedures as well as certain laws of administrative procedures of the cantons which are establishing the procedures of adopting, changing and canceling the enforcement authorities' orders and their appeal, and formulating common procedural principles⁴.

In the Tax Code of France the procedural aspects of the activity of tax bodies (including tax control) are clearly contained in "The Book of Tax Procedures", which in essence represents the Tax Procedural Code⁵.

The fact that tax procedural rules are not systematized in Russia causes absence of consolidation of principles of law enforcement activity of tax bodies at a legislative level, which has a negative effect on the uniformity of law enforcement practice and state of legality in the tax sphere. Thus, it is highly necessary to develop the concept of tax procedures in Russia and systematize them in the Russian legislation.

We believe that law enforcement activity of tax bodies can be effective and provide balance of individual and public interests only under the condition of its conformity to the generally recognized principles of a tax process.

Principles of procedural activity are stated in the legislation of many foreign countries. In French tax laws this is the principle of economic feasibility, equality

1 Refer to: С. Сухова Не мытарьте! // Itogi. 2007. No. 50(600). P. 37.

2 Ibidem P. 40.

3 Refer to: А.А. Копина К вопросу о соотношении понятий «налоговый процесс» и «налоговая процедура»// *Finansovoe Pravo*. 2005. No. 10. P. 17; Т.Ю. Сащихина Понятие и признаки налогово-правовых процедур // *Finansovoe pravo*. 2005. No. 11. P. 7.

4 К. Экштайн, Р. Шафхаузер, С. Вершинин Как упорядочить отношения гражданина и чиновника? Административные процедуры на примере законодательства Швейцарии. Moscow 2000. P. 9.

5 Н.А. Попоньева Налоговые органы во Франции // *Finansy*. 2002. No.1. P. 75.

of the parties and some other⁶⁴. In German - the interdiction of abuse of imperious powers (any executive body cannot appoint or carry out any measures which are within the framework of its imperious powers but serve exclusively the purposes of infliction of injury on the citizen), the principle of proportionality and some other⁷.

In the law of the USA a predominating procedural principle is the principle of “proper legal procedure” (obligatoriness of strict and exact observance of the procedures fixed in the legislation and impossibility of exceeding the limits of such procedures)⁸.

Principles of administrative procedures received a detailed regulation in the legislation of Switzerland. The common procedural principles are classified as the constitutional principles; the principles fixed in laws (so-called “written procedural principles”); unwritten common procedural principles (such principles which by virtue of their evidence to all citizens did not find reflection in the law)⁹. Some separate subprinciples elicited by the Federal Court of Switzerland from the constitutional principle of equality are of interest. In particular, these subprinciples are the prohibition of an abuse discretion (the decision is arbitrary if it obviously contradicts a basic sense of the law, is self-contradictory or obviously contradicts a principle of justice) and the principle of belief and trust.

In our opinion, introduction of some specified principles in the Russian legislation can be effective in suppression of unconscientiousness of tax bodies and can promote further strengthening of a mode of legality.

Only at present time many of the generally recognized procedural principles were fixed in the norms regulating tax process¹⁰. The principle of legality is indirectly reflected in Item 1 of Article 32 of Part 1 of the Tax Code of the Russian Federation, which speaks about the duty of tax bodies to observe the legislation on taxes and tax collections. The principle of procedural equality is elicited from the content of Item 9 of Article 32 of Part 1, Item 2 of Article 101 of the Tax Code of the Russian Federation: tax bodies are obliged to inform the taxpayer on time and place of consideration of his/her case, to send him/her copies of the tax inspection act and the tax body decision. The principle of the presumption of innocence according to which nobody can be considered guilty of a tax offence while his/her guilt is not

6 *Н.А. Попонова* Ibid. P. 73, 76.

7 *К Гюнтер* Контроль за решениями, принимаемыми в рамках административного усмотрения: германский опыт / Edited by S.G. Peryaev. Moscow, 2006. P. 185-186.

8 С.В. Берестовой Налоговые процедуры в Российской Федерации и Соединенных Штатах Америки: Сравнительно-правовой анализ. Synopsis of a thesis ... of the Cand. Sc. (Law). Moscow, 2005. [WWW document] // Juridical Russia – Educational legal portal// URL: <http://law.edu.ru/script/cntSource.asp?cntID=100080616> (February 10, 2007).

9 *К. Экштайн, Р. Шафхаузер, С. Вершинин*. Ibid. P. 11-15.

10 *В.Н. Иванова* Соотношение правовых категорий “налоговый процесс” и “налоговое производство” и особенности их реализации в Налоговом кодексе РФ // *Yurist*. 2001. No. 2. P. 67.

established under a valid judgment, was directly fixed in Item 6 of Article 108 of the Tax Code of the Russian Federation before 2006. Now the content of this rule of law has been changed, which causes reproaches in its anti-constitutionality: now guilt of the person in commitment of a tax offence is established not by the court decree but by the tax body decision.

Separate aspects of the principle of distribution of the burden of evidence are realized in other rule of law of Item 6 of Article 108 of the Tax Code of the Russian Federation, which says that “the tax bodies are entrusted with the responsibility to prove circumstances confirming the fact of a tax offence and guilt of the person who has committed it”. The principle of superformalism interdiction was fixed in Item 14 of Article 101, Item 12 of Article 101.4 of the Tax Code of the Russian Federation. Therefore not any infringements of procedural rules of the Tax Code of the Russian Federation but only those which are determined by the law or court in a specific case as essential can be considered the basics for a cancellation of the decision of the tax body. Some principles are reflected not in the legislation but in judicial practice. For example, in Item 3 of the Decree No. 14-P of July 16, 2004 the Constitutional Court of the Russian Federation formulated a principle of inadmissibility of excessive application of measures of the tax control¹¹.

Introduction of other principles of tax law enforcement in practice will promote a correct solution of legal cases and removal of social intensity in relations between taxpayers and tax administration. For example, official application of the principle of belief, trust and safety would allow excluding inconsistent or “unclear” explanations of tax and financial bodies by inquiries of taxpayers about application of some or other provisions of the legislation on taxes and tax collections. For example, Russian Tax Code as well as laws in the USA and in France oblige tax bodies to give written answers to the questions of a taxpayer, who can use these answers for the protection against possible penalties. Meanwhile, very often it is a case in practice that a tax or financial body answering a concrete question of a taxpayer is limited to citing the Tax Code of the Russian Federation or using some general words not allowing receiving precise and unambiguous interpretation of a disputable norm. Such actions are not formally forbidden by the Russian legislation but, obviously, contradict the principle of belief and trust of tax relations participants.

In Russia the official application of the principle of belief and trust would also allow to oblige tax bodies to inform a taxpayer on forthcoming field inspection (if it cannot impede carrying this inspection out). Such duty is established in many countries as a normative but is not known to the Russian tax laws. Thus, in France

11 Постановление Конституционного Суда РФ от 16.07.2004 г. № 14-П «По делу о проверке конституционности отдельных положений части второй статьи 89 Налогового кодекса Российской Федерации в связи с жалобами граждан А.Д. Егорова и Н.В. Чуева» // Code of Laws of the Russian Federation. 2004. No.30. Article 3214.

a taxpayer should be warned about a forthcoming inspection at least 8 days before it, in Germany - 1 week, in Canada - 5 days. Such notice is not made only in case if there are authentic data that the enterprise evades payment of taxes¹².

It is also necessary to fix the principle of publicity in the Russian tax laws. One aspect of this principle is the duty of tax bodies to inform taxpayers of all revealed circumstances and possible consequences, if it does not damage the purposes and a course of the check. Such duty is established, for example, in Germany¹³. This principle is quite necessary as in Russia tax bodies do not very often inform taxpayers even about fulfillment of control measures during the inspection, for example about the purpose of expert examination. Accordingly, a taxpayer is deprived of the opportunity to assert his/her procedural rights and to supervise the observance of procedure in taking such control measures.

Some researchers reasonably consider that it is necessary to fix the principle of legality in legislation as the basis of tax bodies' activities because the actions of tax bodies beyond the frameworks of their powers are frequently proved by the fact that there is no any corresponding interdiction in the legislation¹⁴.

Non-application of the principle of legal certainty in the Russian legislation has a negative influence on the term of field tax inspections. Practically the terms of field inspections in Russia are not limited as they include only the time of actual presence of inspectors on the territory of a taxpayer, which actually cannot be defined. What is more, a tax body has the right to stop the inspection unrestricted number of times. It is necessary to notice that in the majority of other countries with developed legal systems (for example in France, Germany and Canada) such terms are precisely fixed (but in France this has nothing to do with large taxpayers)¹⁵.

We should estimate positively the innovations of the Federal Law No. 137-FZ of 27.07.2006 which stated that it is necessary to provide a person in respect of whom the act was made with a possibility to participate in the consideration of materials personally and (or) through a representative, as well as with a possibility to present explanations. In case these rights are not provided, a decision of the tax body is certainly subject to cancellation. Such position is in consonance with one of the rules of the principle of just procedure: nobody should be condemned unheard. This principle is widely applied in Great Britain¹⁶.

12 *М.А. Суворов* Процессуализация налоговых проверок: проблемы и пути совершенствования. Moscow, 2007. P. 75-79.

13 *Ibid.* P. 78.

14 *М.В. Гуров* Конституция РФ и решения Конституционного Суда РФ – основа совершенствования нормативного регулирования отношений в сфере налогового контроля / Tax law in decrees of the Constitutional Court of the Russian Federation of 2004 / Edited by S.G. Pepelyaev. Moscow, 2006. P. 201.

15 *М.А. Суворов* *Ibid.* P. 75-79.

16 *Административное право зарубежных стран: учебное пособие.* Moscow, 1996. P. 52.

The attention of developers of the Federal Law No. 137-FZ of 27.07.2006 to the procedure of pre-judicial administration of complaints of taxpayers deserves approval. The stage of the pre-judicial appeal (which becomes obligatory since 01.01.2009 in Russia) allows realizing a principle of observance of the rights and legitimate interests of the participants of tax legal relations, providing efficiency of supervising activity of tax bodies and optimizing work with taxpayers¹⁷. Besides pre-judicial consideration of disputes, it helps to reveal the most typical infringements in work of tax bodies. At the same time points of order of pre-judicial administration of complaints in the law mentioned above are not reflected sufficiently enough.

In this aspect the experience of foreign countries is quite interesting, for example of Great Britain, where the whole mechanism of consideration of tax disputes by the General and Special Commissioners (quasi-judicial bodies) is in details registered in statutory acts, which practically excludes extensive interpretation of the rules of law and provides effective guarantees of observance of the rights of taxpayers. The stage of the process of tax disputes resolution in Great Britain consists of the following procedures settled in details: 1) preparation of hearings; 2) coordination of documents; 3) preliminary hearing; 4) hearing of a case; 5) rendering of decisions; 6) notification of the parties on awarded decision; 7) revision of awarded decisions; 8) the appeal of awarded decisions; 9) execution of the Commissioners' decisions¹⁸.

Such order of activity is quite logical and provides the right of taxpayers with effective legal protection. Consolidation of this scheme seems correct and well founded in the subordinate legislation, which would be especially devoted to the procedural order of administration of taxpayers' complaints if not in the Tax Code of the Russian Federation.

Nevertheless, it should be said that the state realizes the importance of this issue and undertakes attempts of ordering the form of action of law enforcement activity of tax bodies as evidenced by the fact of adoption of the Federal Law No. 137-FZ of 27.07.2006.

At the same time, it is necessary to note that during preparation of the project of the given law, the offers which seem positive and are directed at the achievement of a reasonable balance between individual and public interests in tax process were discussed but were not embodied in the final text of the law for undefined reasons¹⁹.

17 С.В. Гвоздев Правовые формы контрольно-надзорной деятельности налоговых органов. Synopsis of a thesis ... of the Cand. Sc. (Law). Moscow, 2004. [WWW document] // Juridical Russia – Educational legal portal // URL: <http://law.edu.ru/script/cntSource.asp?cntID=100072011> (February 10, 2007).

18 И.А. Гончаренко Механизм разрешения налоговых споров в Великобритании и ЕС. Synopsis of a thesis ... of the Cand. Sc. (Law). Moscow, 2001. [WWW document] // Juridical Russia – Educational legal portal // URL: <http://law.edu.ru/book/book.asp?bookID=103518> (February 10, 2007).

19 Refer to: Пояснительная записка к проекту Федерального закона "О внесении изменений в часть первую Налогового кодекса Российской Федерации в связи с осуществлением мер по совершенствованию налогового администрирования" // Reference retrieval system "Konsultant-Plus".

In particular, among the offers on the tax administration system reforming prepared by a working group of the administration of the President of the Russian Federation were the following ones: “In the frameworks of the Federal Tax Service of the Russian Federation a vertical of the appeal commissions will be built, which will consider taxpayers’ complaints against decisions of tax bodies before court proceedings. However, each subordinate commission will submit not to the head of tax inspection but higher appeal commission. The supreme appeal commission will be formed by the Ministry of Finance to which this vertical will be subordinated as a whole. Moreover, it is supposed that the inspection of any significant additional charges of taxes concerning any payer should be carried out by the head of the higher inspection”²⁰. It is thought that the given offers should be estimated positively as this detailed elaboration of the procedural form of tax control proceeding and procedure on appeal of decisions substantially promotes the increase of responsibility of officials of tax bodies in the realization of law enforcement activity.

Creation of the system of appeal commissions independent of divisions of Federal Tax Service of Russia would promote realization of the above mentioned principle of just procedure, which is widely applied in Great Britain. The second important rule of this principle says that “nobody can be judged in his/her own case”, in other words, it is inadmissible that the supervising body estimates the legality of actions of its employees. In the existing organization of pre-judicial appeal in Russia there is the situation which cannot provide effective protection of the rights of taxpayers. If there are no changes, the introduction of a duty of pre-judicial appeal since 2009 will not lead to the reduction of load on the courts, but will only entail additional charges of taxpayers for the protection.

Thus, reforming of the tax process in modern Russia should not be limited to the acceptance of the Federal Law No. 137-FZ of 27.07.2006.

Development of the concept of tax procedures in Russia and their systematization in the Russian legislation should become an obligatory and priority element of the tax reform. It is necessary to pay special close attention to the analysis of procedural principles used in European countries and their reasonable incorporation in Russian legal system during the process of taxation reforming.

20 Refer to: Г. Ляшенко В налоговую пришли с инспекцией // Коммерсант. March 4, 2005. P. 8.

Streszczenie

Artykuł został poświęcony problemom przestrzegania prawa podatkowego w Rosji. Analizie poddano stan obecny oraz możliwe sposoby przeprowadzenia reform w tym zakresie. Jednym z podstawowych założeń tych reform jest przebudowa istniejących regulacji podatkowych i ich systematyzacja. Należy również zwrócić uwagę na zasady proceduralne funkcjonujące w krajach europejskich i rozważyć ich wprowadzenie do rosyjskiego systemu podatkowego.