

THE COMPLEXITY OF REFERENCES TO THE TEMPORARILY SUSPENDED NORMS OF INTERNATIONAL TAX TREATIES

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Subject. The article is devoted to the theoretical aspects of the use in the tax legislation of references to the tax treaties provisions, the effect of which was suspended by Decree of the President of Russia dated August 8, 2023 No. 585.

The purpose of the study. The purpose of the article is to assess the consequences of the suspension of certain provisions of tax agreements by Decree of the President of Russia dated August 8, 2023 No. 585, as well as the effectiveness of the decisions taken on the introduction of compensatory tax regulation. The essence of this regulation consists in the provision from August 8, 2023 by the Russian tax agent to apply reduced tax rates or non-taxation when paying income, if such rules are provided for by tax treaties, the validity of which is partially suspended.

Methodology. The preparation phase included the following research methods: formal-logical analysis, system-based analysis, description, juxtaposition, synthesis and summarizing.

Conclusions. The article concludes that the absence of a suspension procedure in agreements on the avoidance of double taxation (if there are rules on denunciation) is not an unconditional reason to consider it unlawful (in plus stat minus). At the same time, suspension should not be prohibited by the treaty and cannot be incompatible with its object and purposes. With regard to the partial suspension of tax treaties, the content and structure of tax conventions based on the OECD and/or UN model tax conventions allows (subject to certain conditions) the divisibility of contractual provisions according to the criterion of the type of income to which the distributive rules apply. The compensatory legal mechanism laid down in amendments to the Tax Code of the Russian Federation, adopted by Federal Law No. 539-FZ of November 27, 2023, is complex in nature and is aimed at entities that were entitled to expect reduced rates or non-taxation in Russia as a source of income, but lost this opportunity due to the suspension of certain provisions of international treaties. A reference norm is a norm, the constructive feature of which is the algorithm for combining normative prescriptions (internal and external in relation to the reference norm). The reference in the Tax Code of the Russian Federation to the norms of Russian tax agreements is a unilateral legislative decision of a Contracting State (Russia), although implemented based on the provisions of an international treaty. The author concluded that tax legislation does not exclude the possibility of using legal structures of a reference nature that require reference to the norms of an international tax treaty, provided that these structures are formulated with a sufficient degree of clarity that allows taxable persons to conform their behavior to them.

1. Introduction

It would be possible to draw less attention to the appearance of references to the norms of double taxation treaties (DTTs) in the Russian Tax Code if it wasn't about the norms of 38 treaties, which have been suspended by the Order of the Russian President of August 8, 2023 № 585 (hereinafter – Order 585)¹.

Generally speaking it's not uncommon for the Russian Tax Code to contain several norms, which are associated with observance of international treaties. However traditionally those aren't specific treaties, but the so-called "relevant international treaties of the Russian Federation concerning taxation". For instance income tax, paid in a foreign jurisdiction according to foreign legislation by an individual who is a Russian tax resident, provided the income originated in a foreign jurisdiction are not taken into account when paying taxes in Russia, unless other rules are provided by the relevant international treaty of the Russian Federation concerning taxation (p. 1 of article 232 of the Russian Tax Code). This legislative maneuver never caused any serious issues. However the calm image of legal application was shaken by the suspension of DTTs. Therefore, we start analyzing with the relevant assessment, as the discussion over possible unilateral suspension of DTTs, which emerged in 2022 is still going on [1,2,3,4,5,6,7]. We need certainty because it forms the basis of the study (base point): the consequences of not applying the provisions of international treaties due to their suspension are different from not applying international legal norms, which have not been officially suspended. Thus it affects the legal evaluation of the reference maneuver in relation to provisions of tax conventions.

¹ The Order of the President of the Russian Federation of August 8, 2023 № 585 "On the suspension of certain provisions of international treaties concerning taxation by the Russian Federation".

2. On the discussion over suspension of DTTs

A surge in interest to the issues of suspensions arose among both lawyers and scientists as soon as Latvia on May 16, 2022 announced the suspension of a 2010 treaty with Russia². Russia in turn also suspended the treaty by the means of the Presidential Order of September 26, 2022 № 668³. Emergency procedure was used, provided by p. 4 of article 37 of the Federal Law of July 15, 1995 № 101-FZ "On international treaties of the Russian Federation": a Russian international treaty may be suspended by the President of the Russian Federation in cases requiring urgent action followed by immediate reporting to the Federal Council and the State Duma and presentation of a relevant draft law before the State Duma⁴. In February 2023 two laws were adopted – one on the suspension of the treaty⁵ and the other on its denouncement⁶. Eventually the treaty with Latvia was terminated on January 1, 2024.

In denouncing the treaty Russia utilized its article 31: any Contracting State may terminate the treaty by submitting a written notification of

² On May 16, 2022 Latvia by an official letter informed Russia on the suspension of the treaty (letter of the Russian Ministry of Finance of August 23, 2022 № 03-08-05/82048).

³ The Order of the President of the Russian Federation of September 26, 2022 № 668 "On the suspension of the Treaty between the Government of the Russian Federation and the Government of the Latvian Republic on double taxation and prevention of tax evasion in relation to income tax and capital tax".

⁴ If the State Duma rejects the draft law – the international treaty in question should be resumed immediately.

⁵ Federal Law of February 28, 2023 № 39-FZ "On the suspension of the Treaty between the Government of the Russian Federation and the Government of the Latvian Republic on double taxation and prevention of tax evasion in relation to income tax and capital tax".

⁶ Federal Law of February 28, 2023 № 40-FZ "On the denouncement of the Treaty between the Government of the Russian Federation and the Government of the Latvian Republic on double taxation and prevention of tax evasion in relation to income tax and capital tax".

termination by diplomatic channels not later than 6 months prior to the end of a calendar year after the expiry of a 5-year period from the day the treaty entered into force. Similar rules are specific to treaties based on the OECD Model Tax Convention⁷ and the UN Model Tax Convention⁸. However they don't provide rules for suspension, which is a well-known Achilles' heel of international treaties in general [8].

The prevailing reaction to Latvian initiatives from expert community was criticism of the treaty model itself, which had no rules of suspension whatsoever. Moreover, the reason proclaimed by the Latvian party was political in nature and had no direct connection with the treaty⁹. Pointing at the fact that the treaty with Latvia doesn't provide for a mechanism of unilateral suspension S. Kalinin concluded that "A treaty may only be suspended on the basis of mutual consent. If there is no such consent, then one country may only denounce it"¹⁰.

An interesting opinion on the subject matter is presented in the article by S.A. Sosnovskiy, who has undertaken some academic research:

⁷ OECD Model Tax Convention on Income and on Capital 2017 (Full Version). URL: <https://www.oecd.org/ctp/treaties/model-tax-convention-on-income-and-on-capital-condensed-version-20745419.htm> (retrieved: 24.06.2024).

⁸ UN Model Double Taxation Convention between Developed and Developing Countries [2021]. URL: <https://financing.desa.un.org/document/un-model-double-taxation-convention-between-developed-and-developing-countries-2021> (retrieved: 24.06.2024).

⁹ This is how B.Ya. Bruk commented the situation: "The Vienna Convention justifies unilateral suspension of a treaty only by violation of the treaty in question, not by violation of other international obligations. Therefore, the actions of Latvian authorities on suspending the Treaty are not based on international law and should be seen as illegitimate" [1, p. 141].

¹⁰ See: Latvia suspended a tax treaty with Russia. Commentary by S. Kalinin for "Vedomosti". URL: <https://epam.ru/ru/media/view/latviya-priostanovila-dejstvie-nalogovogo-soglasheniya-s-rossiej-or-lessemgreater-kommentarij-sergeya-kalinina-dlya-vedomosti-lessemgreater> (retrieved: 01.08.2024).
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does the suspension of the treaty by the means of the Russian Presidential Order contradict the requirement to establish taxes by the means of a law, which emanates from the article 57 of the Russian Constitution? According to his opinion "the suspension of a DTT excludes norms, which set elements of tax from the legal system", so there are grounds for applying "higher standards to the formal requirements of the act", by the means of which Russia gives or withdraws consent to include the relevant provisions into the legal system [6, p.32].

The conclusion on inability to suspend DTTs by the means of a Russian Presidential Order challenges the achievement of suspension effects (since August 8, 2023). The opinion that DTTs haven't really been suspended was expressed by the United Kingdom¹¹, which claimed that the treaty doesn't provide for unilateral suspension actions¹². Providing commentary to the UK opinion experts mentioned that as the United Kingdom see the treaty as effective, they cannot refer to the article 60 of the Vienna Convention on the Law of Treaties 1969 in order to suspend or terminate a treaty due to the presence of a restriction provided in the article 45 of the named Convention. However they may terminate the treaty with Russia in accordance with the article 29 of the treaty [9].

The absence of suspension rules in DTTs (along with the presence of rules for their denouncing) doesn't necessarily mean their illegitimacy. We

¹¹ URL:

<https://www.gov.uk/government/publications/russia-tax-treaties#:~:text=Russia%20has%20suspended%20substantially%20all%20of%20the%20UK%2DRussia%20Convention,has%20not%20been%20fully%20suspended> (retrieved: 01.08.2024).

¹² The UK retain the right to take countermeasures according to the letter of August 15, 2023 №009/23. See: Information from the Russian Ministry of Finance on the status of international treaties on double taxation (as of 01.07.2024) // https://www.consultant.ru/document/cons_doc_LAW_376715/ (retrieved: 01.08.2024).

have expressed that opinion [7, p.25] based on the principle of *in plus stat minus*, which was considered valid by Eduardo Jiménez de Aréchaga¹³, however (and it's of great importance) – suspension should not be forbidden by a treaty and may not conflict with its aims and objectives. We assume legitimate suspension of DTTs according to emergency procedure (by the means of a Presidential Order) followed by adoption of a federal law¹⁴. As of partial suspension which is also not without doubts [10] – the structure and contents of tax conventions, based on model tax conventions of the OECD and the UN allows (under certain circumstances) severability of legal provisions based on the type of income which is covered by distributive rules [11].

This construction is clearly seen in the article 28 “Subsequent legislative changes” of the US Model Tax Treaty 2016¹⁵. If changes (i.e. rate fluctuations) are introduced into the tax legislation of a contracting state after the treaty has already been signed and provided consultations aimed at recovery of due distribution of rights according to the treaty all fail, then the following articles are suspended: article 10 (dividends), article 11 (interest), article 12 (royalty) and article 21 (other income sources) [12, p. 98-99]. Here comes one more example. The US-Netherlands Antilles Income Tax Convention 1987¹⁶ provided for a rule

(article XXVII) that each of the states is empowered to terminate the treaty in a whole or partially by submitting a notice of termination of all or part of the Treaty [13,14].

3. Has the legislature “revived” tax treaties?

On November 27, 2023 the Federal Law № 539-FZ (Law 539) was adopted¹⁷. It is aimed at mitigating consequences of the suspension, grounds for which are provided in paragraph 3 of the Order № 585¹⁸. Article 310 of the Russian Tax Code was supplemented with subparagraph 11 of paragraph 2 and with paragraph 3.1, according to which until December 31, 2025 calculation and payment of taxes isn't performed or is performed at lower tax rates, if the relevant conditions were provided by norms of suspended treaties. Those novelties are applied in relation to income paid by Russian tax agents since August 8, 2023¹⁹.

Thus, according to subparagraph 11 of paragraph 2 of article 310 of the Russian Tax Code calculation and withholding of tax isn't conducted when the tax agent pays “types of income, that weren't subject to taxation in the Russian Federation according to Russian treaties on taxation before the order was adopted” specified in the legal provision, which are paid to foreign organizations, located on territories of states, where specific provisions of treaties have been suspended by the Order № 585. The mentioned income must correspond with several requirements:

- basic: no interconnection between

¹³ Extract from the Yearbook of the International Law Commission. 1966. Document A/CN.4/SR.861, vol. I (2). Topic: Law of Treaties. URL: https://legal.un.org/ilc/documentation/english/summary_records/a_cn4_sr861.pdf (retrieved: 01.08.2023).

¹⁴ On December 19, 2023 the Federal Law № 598-FZ “On the suspension of certain provisions of international treaties concerning taxation by the Russian Federation” was adopted.

¹⁵ United States Model - Tax Treaty (2016). URL: <https://www.irs.gov/businesses/international-businesses/united-states-model-tax-treaty-documents> (retrieved: 01.08.2024).

¹⁶ Now ineffective

¹⁷ Federal Law of 27.11.2023 № 539-FZ “On amendments to part one and two of the Russian Tax Code and to certain legislative acts of the Russian Federation, and on repeal of certain provisions of Russian legislative acts”.

¹⁸ It provides for securing measures aimed at mitigating the impact of suspended international tax treaties with Russia on the Russian economy.

¹⁹ Paragraph 6 of article 6 of the Law № 539-FZ.

organizations²⁰ (income from the use and/or entitlement to use audiovisual compositions, from the selling of sea vessels, registered in the Russian international register of vessels and present on the Russian territory, etc.);

- additional: conclusion of the treaty before the Order № 525 was adopted (in particular this requirement applies to interest income, paid to foreign expert leveraged agencies and foreign organizations conducting banking activities according to their domestic law);

- special: for rental income (leasing) of aircraft.

4. As you call the ship, so it will float

The situation is far from being simple, taking into account multileveled interconnections between rules of international and internal nature, which is mentioned by various researchers [15,16,17,18].

The compensatory tax law mechanism, provided by the Law № 259-FZ has complex nature and is oriented towards subjects that were entitled to lower tax rates or to being taxed in Russia as the state of their income, but lost this ability due to suspension of certain provisions of international treaties.

In analyzing the contents of subparagraph 11 of paragraph 2 of article 310 of the Russian Tax Code we should pay attention to the phrase “types of income, which were not subject to taxation in the Russian Federation according to Russian treaties on taxation ...” followed by names of income – for instance “interest income”. A similar approach is implemented in p. 3.1 of article 310 of the Russian Tax Code.

In our opinion it is impossible to identify the types of income, not taxable in the Russian Federation according to DTT without the DTT in question. There are several rules in treaties on this matter – general definitions (p. 1 of article 3)²¹, rules for interpreting a term not

defined by the DTT (p. 2 of article 3), definitions of articles dedicated to certain types of income. The Russian Tax Code and DTTs may define types of income differently. The reference made in the article 310 of the Russian Tax Code to distributive rules of article 11 “interest” of a DTT, which allow non-taxation of income or taxation at lower rates imply that the definition “interest income” should emanate from the same article as well. For instance according to article 11 “interest” of the treaty between Russia and Finland of 1996, which provides for exclusive distributive rule (interests are taxed in the resident state only) the definition of “interest” mean in the context of article 11 income from debt claims of all types independently of mortgage collateral and of the right to participate in debtor’s income, and in particular income from government securities, bonds and debt obligations, including bonuses and wins of securities, bonds and debt obligations.

Mentioning “types of income” is important from the viewpoint of their definition (according to the provisions of a specific treaty). Otherwise the subject scope of effective DTTs might include the ones, who wouldn’t have been entitled to taxation in Russia as the state of income and to lower rates. The opposite is also true – the right to use compensatory provisions would be hindered for the ones, whose tax obligations emerged upon the Order № 585.

5. Theory of reference

S.N. Boldyrev sees reference norms as norms, which are formulated by the means of a reference maneuver used in legal engineering [19, p. 27]. V.M. Baranov defines legislative reference as “a means of legal engineering, which provides for normative unity and regulatory interconnection between structural elements of legislative provisions by determining precise location of each element (unit) along with conditions, forms and

²⁰ Interconnection is defined according to article 105.1 of the Russian Tax Code.

²¹ Hereinafter the numbering of articles follows the OECD Model Convention
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consequences of implementation”²² [20]. There is a different approach as well: “reference norms (separate elements of a legal norm are expressed in other articles of the legal act in question), blanket norms (references in legal acts to norms of other legal acts)” [21, p. 90]. In our opinion reducing the contents of reference norms to retelling certain elements of the norm in other articles of the same law means downgrading this legal engineering maneuver greatly. Undoubtedly norms introduced into the Russian Tax Code by the Law №539-FZ have referential nature.

The issue of possible references to suspended norms is far from being easy and has been raised many times in academic literature. Thus, according to S.A. Sosnovskiy, the Order № 585 “excluded several norms, suspended by DTTs from the domestic legal system”. Answering the question of which source of law now determines taxes the scientist states that “we observe a very uncommon maneuver of legal engineering: the legislator instead of reflecting the whole norm in the text of the Russian Tax Code gives a reference to a different document (not a source of law!)” [5, p. 35, 40, 41]. We may agree with the author that the referential maneuver is possible despite the bizarre construction. At the same time it is disputable that treaties, whose separate provisions have been suspended are not treated as sources of law, that the mentioned provisions are “excluded from the domestic legal system” and we should also consider the author’s initial assessment of interaction between DTT norms and the Russian Tax Code: “the tax element (tax rate) is composed by the system of norms from two sources” [5, p.35].

Taxes are set by the law²³, this principle covers all basic elements of the tax legal design (elements of taxation), while the tax rate is

one of the elements [22, p. 383]. We couldn’t find any valid methodology that would allow straying from this rule in relevant academic dispute so far. Separation of tax jurisdictions with the use of exclusive²⁴ or “parallel” distributive rule when rates are limited doesn’t mean their establishment. We should also note that DTTs, whose norms have been suspended by the Order № 585, still remain international treaties of the Russian Federation and serve as a part of its legal system²⁵. They are not excluded from the national legal system, which has no “substitutes’ bench” for such occasions.

6. If treaties are denounced

The Russian Tax Code doesn’t “freeze” relationships between states and clearly doesn’t prevent them from denouncing DTTs, which by itself may have consequences that are hard to ignore. However the question is mostly theoretical. At the time of this writing we only know of the Lithuanian initiative: on June 26, 2024 the Lithuanian Government made a decision to denounce a 1999 treaty with Russia²⁶. Therefore, taking into account the “June stipulation” in the suspension rules, it is quite possible for us to meet the year 2025 without denounced tax treaties. Yet still...

A referential norm is a norm, whose construction features include the algorithm of connecting legal provisions (internal and external to the referential norm). In terms of a reference the “action” of certain norms may be not caused by the “action” of other ones. In this case we are dealing with a national norm, which has a reference to a convention norm, which has been suspended. References to the norms of Russian tax treaties, included into the Russian

²² Consultant Plus Citation

²³ Regulation of the Russian Constitutional Court of March 19, 1993 № 5-P.

²⁴ For instance taxation in the resident state only

²⁵ Generally accepted principles and norms of international law and Russian treaties are parts of its legal system (part 4 of article 15 of the Russian Constitution).

²⁶ The draft law is yet to be introduced before the parliament. URL: <https://regfollower.com/lithuania-approves-termination-of-tax-treaty-with-russia/> (retrieved: 01.08.2024).

Tax Code is a unilateral legislative action, taken by a Contracting State (Russia), however it is implemented on the basis of international provisions of a treaty. Denouncing a DTT independently of the initiator should not result in failure to apply compensatory norms (subparagraph 11 of paragraph 2 and subparagraph 3.1 of article 310 of the Russian Tax Code). During the established term (until December 31, 2025) a tax agent is protected by tax law principles and norms with no account to the specific nature of the latter.

7. The Danish dilemma

The Danish issue stands alone in the whole situation. The fact is that before the Order № 585 was adopted - Denmark had officially informed the Russian party on the denouncing of a 1996 DTT (according to article 29) by sending a letter of June 19, 2023 № 27/23. The treaty ended on June 1, 2024. However, due to the inclusion into the Order № 585 its separate provisions became ineffective as early as August 8, 2023²⁷. So the possible application of the provisions of this treaty after the suspension is very doubtful, since making amendments to the Russian Tax Code was triggered by mitigating negative consequences of suspending certain treaty provisions according to the Order № 585. Speaking of the DTT the denouncing procedure has already been launched by the Danish party, therefore it was understood that according to the treaty terms it will end on January 1, 2024. Therefore, objectively negative consequences emerged in a timeline from August 8, 2023 till December 31, 2023, as during this period the treaty would be effective unless it has been suspended by the Order № 585.

8. Specific features of referential norms being analyzed

According to the opinion of D.A. Kerimov

“every referential article may be converted to a defined one by infusing the parts of articles being referenced to – into its own content” [23, p. 47]. But the case we consider doesn’t follow this logic. And still it would be obvious just to list taxation rates in the Russian Tax Code referring to specific DTTs – this move wouldn’t reach the goal set by the Order № 585 (mitigation of consequences of its adoption). Every treaty is unique in its own way (subject scope²⁸, definitions, additional requirements, investment criteria, etc.) Therefore, a “mechanical” solution (implying simple statement of tax rates) would be flawed. Is it even possible to fit the whole treaty content into specific numbers? The answer is obvious.

The correlation mechanism between international and national norms is associated with the stage of application (legal application priority)²⁹. Compensatory norms, introduced by the Law № 539-FZ do not result from the joint will of the Contracting States. Due to referential norms the subjects of national law (Russian tax agents) are empowered by the state to use the rules of international treaties for the regulation of relationships in frames of the Russian legislation on taxes and fees.

8. Conclusions

“In real situation – states I.I. Kucherov – there are two systems of law – internal state law as a system of national norms specific to certain states and international law with its specific objects and subjects of regulation” [25]³⁰. The unity of logical and legal engineering structure of a legal norm is traditionally recognized well in legal doctrine; however the approach, chosen by the

²⁷ This is the only treaty, which was included into the Order № 585 while denouncing initiatives were in progress

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²⁸ For instance the treaty with the UK excludes partnerships from the subject scope

²⁹ N.V. Mironov disavowed the theory of international law supremacy and wrote that “being independent and self-sustaining legal categories, national and international law as well as their norms have no hierarchical link between them” [24, p. 40].

³⁰ Consultant Plus Citation

legislator in this case allowed not only avoiding overburdening the Russian Tax Code, but also revealing clearly the essential link between the legislation on taxes and fees, provisions of tax treaties and naturally the Order № 585. This link is shaped by the current legal timeline (novelties began working on August 8, 2023 and will last until December 31, 2025).

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