

JUDICIAL PRECEDENT AS A SOURCE OF TAX LAW

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The subject. The article is devoted to analysis of the role of the judicial precedent in the system of sources of tax law.

Aim. The aim of this paper is to analyze the essence of national and international judicial precedents in the area of tax law.

Methodology. The author uses methods of theoretical analysis, particularly the theory of integrative legal consciousness, as well as legal methods, including formal legal method and methods of comparative law.

Results, scope. The role of judicial precedent in the system of sources of modern tax law is considered in the article. Although the precedent in the Russian Federation as a source of law is not formally recognized, but actually used, its role in tax law is very high. The judicial precedent can be confidently recognized as the source of the tax law of Russia. In this case, courts often take on not only the role of interpreters of law, but their decisions act as a legal doctrine.

Conclusions. The author comes to the conclusion that the role of decisions of courts, especially the highest courts, is growing, up to giving them signs of a precedent interpretation.

1. Introduction.

The tax regime finds a normative fixing in the sources of the tax law. The system of these sources, according to S.G. Pepelyaev, is structurally divided into two parts: sources that are of a national nature, and international legal sources. Domestic (national) sources play a decisive role in tax law [1. P. 150]. I.A. Krivykh divides sources of tax law into the main (normative legal act and international agreement on tax issues) and auxiliary ones, containing the legal position on tax issues: decisions of the Constitutional Court of the Russian Federation, decisions of international courts and regulatory explanations of the competent executive authorities [2. P. 7].

We believe it is possible to single out the judicial precedent as a source of modern tax law.

2. The role of court decisions in the tax law system.

It is impossible not to note the changing role of courts in the legal system of Russia. M.V. Karaseva identifies normative act and judicial precedent as sources of tax regulation in Russia and also notes that as a result of the development of the judicial system of Russia during the first decade of the 21st century, tax legislation in Russia, traditionally the main source of tax law, transformed into a system of objectively formed sources of tax law [3. P. 75].

Although "the precedent as a source of law is not formally recognized, but actually used" [4] in the Russian Federation, its role is very important in tax law. The judicial precedent can be confidently recognized as the source of the tax law of Russia. Thus, A.V. Golovkin distinguishes

the following types of judicial precedents in relation to the tax law branch: decisions of the Constitutional Court of the Russian Federation; the decisions of the Supreme Arbitration Court of the Russian Federation (hereinafter referred to as the Supreme Arbitration Court of the Russian Federation); Decisions of the Supreme Court of the Russian Federation; information letters from the RF Supreme Arbitration Court; judicial acts of arbitration courts of districts; judicial acts of other arbitration courts [5. P. 7].

The question of the role of the acts of the Constitutional Court of the Russian Federation in tax law provokes the least number of disputes. A.V. Demin notes that the Constitutional Court, in the absence of sufficient legal foundations in the post-Soviet period, assumed the functions of forming the legal foundations of the tax system [6]; N.S. Bondar believes that it was the practice of the Constitutional Court of the Russian Federation to resolve tax disputes that determined the further development of legislation on taxes and fees [7. P. 105]; M.N. Kobzar-Frolova refers acts of higher courts to sources of tax law [8. P. 23].

There is also an opposite position. For example, K.A. Sasov does not recognize the precedents as sources of tax law and believes that the legal position of the Constitutional Court is "a legal justification for a decision in a case that serves as a mandatory benchmark for the court itself in making subsequent decisions, and for other law enforcement agencies - a convincing (but not mandatory) judicial precedent" [9. P. 17]. We believe that the application of such an approach will only lead to legal uncertainty. A.O. Yakushev rightly points out that "the precedent way of regulating tax relations should either be applied in all understandable generally binding rules or not at all, but the use of precedents in legal regulation is an objective and inevitable phenomenon" [10. P. 22].

Since the Supreme Court is not so active in formulating a uniform judicial practice, as the Constitutional-legal assessment of the RF Tax Code, abolished by the RF Supreme Arbitration Court, becomes the main method of legal improvement of legislation and enforcement, accessible to taxpayers. This role is growing in the context of the adoption by the courts of decisions aimed at maximum replenishment of budget revenues, when even obvious imperfections in the tax legislation can be rectified only by the body of constitutional normative control. The Constitutional Court of the Russian Federation introduced the concept of a bona fide taxpayer, interpreted the concept of tax optimization, substantiated the precedent normatively significant character of acts of the supreme judicial bodies and so on.

As for judicial acts adopted by arbitration courts and courts of general jurisdiction, especially the RF Supreme Arbitration Court, their recognition of sources of tax law is necessary and possible.

A classic example of the formation of a legal position is the Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation of October 12, 2006 No. 53 "On Evaluation by Arbitration Courts of the Justification of Receiving a Tax Benefit by a Taxpayer". With its help, the term "tax benefit" was officially recognized, the reasonableness of which is the key object of proof for a large part of tax disputes. In the opinion of E.V. Taribo, "in fact, these are the rules that are applied on a par with laws" [11. P. 13].

3. The role of judicial practice in resolving disputes in the field of corporate taxation

Current trends in the sphere of Russian taxation (especially corporate taxation) can be most clearly seen through analysis of law enforcement practice. It is practically impossible for the legislator to ensure the absolute quality of legal equipment with the known dynamics of changes in tax legislation. As a result, gaps and conflicts appear in the legislation, which are resolved by the courts. In this case, courts often take on not only the role of interpreters of law, but their decisions act as a legal doctrine.

For example, in 2017, the Supreme Court of the Russian Federation or the prepared two reviews of the practice of considering by courts cases arising from tax disputes. The first of them is a review of the practice of courts considering cases involving the application of the provisions of the Tax Code of the Russian Federation on tax control in connection with transactions

between interdependent persons prepared for the consideration of the court practice and questions received from the courts in order to ensure a uniform approach to the resolution of disputes relating to the application of the provisions of Chapter V.1, paragraphs 2 - 4 of Article 269 of the Tax Code. Part of the Survey concerns "fine capitalization" and cross-border taxation. July 12, 2017 Presidium of the RF Armed Forces has a firm review of the practice of courts considering disputes related to the protection of foreign investors, a significant part of which concerns taxation: paragraphs 8 - 16 are devoted to the tax aspects of the activities of foreign companies in the Russian Federation.

Another example is the Resolution of the Presidium of the Supreme Arbitration Court of the Russian Federation of November 15, 2011 No. 8654/11 in case No. A27-7455 / 2010, known as the case of "Severnny Kuzbass", which became the basis for resolving disputes over issues of "thin" (insufficient) capitalization. The problem posed to the Presidium of the Supreme Arbitration Court of the Russian Federation was not connected with the interpretation of the fine capitalization rules as such, but with the conflict between these rules and the provisions of the DTTs concluded by the Russian Federation. When considering such disputes, the courts formed approaches to taxation of cross-border transactions. In them, the topic of discrimination in tax legal relations was raised with regard to the possibility of applying national rules on insufficient capitalization when paying interest on debt to foreign creditors. The Supreme Arbitration Court of the Russian Federation concluded that the fine capitalization rules do not contradict the principle of non-discrimination.

In the conditions of globalization, according to A.V. Demin, you can talk about the establishment of such a source of law, as an international judicial precedent [12. P. 167]. This statement characterizes the role of courts of integration associations. In recent decades, the focus of European jurisprudence has shifted from EU secondary law to the practice of the EU Court of Justice in direct taxation cases [13-15]. Legal uncertainty and lack of coordination among EU member states have markedly increased the workload of the EU Court of Justice in matters of direct taxation and the role of the practice of the EU Court: this gives grounds to argue that the supranational system of EU law, originally created on the basis of the Romano-Germanic system, to the common law system.

4. Conclusions.

Thus, one can come to the conclusion that the role of decisions of courts, especially the highest courts, is increasing, up to giving them signs of precedent interpretation. The dynamics of the development of tax law and changes in tax legislation is very high, which entails the appearance of gaps and collisions. In this regard, judicial practice is an optimal tool for adapting the tax legislation to actually developing public relations, especially such complex ones as cross-border tax relations. Moreover, returning to the question of the elements of the legal regulation mechanism, one of which is traditionally an act of the application of law - an official document based on the rule of law issued by a state body or an official containing an individual power order addressed to a person (a taxpayer) and having a single entry act, - it can be stated that the role of this element in the structure of the taxation regime of profits and incomes is transformed due to the tendencies discussed above .

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