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BUSINESS SPLITTING: COMPLIANCE WITH THE PRINCIPLE OF TAX CERTAINTY IN LAW ENFORCEMENT PRACTICE**

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The subject. The problems of business splitting, when several new business entities are created on the basis of an existing organization in order to maintain a preferential special tax regime, are considered in the article.
The aim of this paper is to find out criteria of unjustified tax benefit in the cases concerning business splitting.
The 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 analysis of recent judicial practice.
The main results, scope of application. The problems of assessing the circumstances of cases involving the application of a business splitting scheme by the taxpayer are inextricably linked to the assessment of the validity of the tax benefit. According to the author, splitting schemes should not be considered as tax evasion, but as an abuse of law. In addition, in order to substantiate the conclusion that a taxpayer has applied a business splitting scheme, the tax authority must have evidence that will indicate that the taxpayer has committed deliberate concerted actions together with persons under its control, aimed not so much at dividing the business as at obtaining an unjustified tax benefit as a result of using such a scheme. Judicial practice is quite ambiguous.
Conclusions. The author comes to the conclusion that ehe key concept subject to criticism is the blurred criteria for obtaining tax benefits for taxpayers and the definition of the edge when it passes into the category of unjustified tax benefit.

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1. Introduction

The problem of subjective assessment of the taxpayer's actions when considering tax disputes remains unresolved in Russian law enforcement practice. One of the ways of tax optimization is business fragmentation, in which several new organizations are created on the basis of an existing organization in order to maintain a preferential special tax regime. The problems of assessing the circumstances of cases involving the application of a business splitting scheme by a taxpayer are inextricably linked to the assessment of the validity of the tax benefit, which is considered not as abuse, but as a tax evasion scheme. According to V. M. Zaripov, such cases are probably in second place after disputes about relations with organizations that have signs of "one-day firms" [1].

2. The Ruling of the Constitutional Court of the Russian Federation of July 4, 2017 No. 1440-O and its role in law enforcement practice

An important milestone in practice was the Ruling of the Constitutional Court of the Russian Federation No. 1440-O of July 4, 2017. The reason was the complaint of Buneev, the head of LLC "Master-Tool" and to challenge the provisions of the Tax Code, which, in the opinion of the applicant, allow law enforcement agencies to include in the tax base under the value added tax and tax on profit of organizations the funds received by the taxpayer and its contractors, formally justifying this split of business without establishing the relationship of these persons, without contesting their transactions and, in fact, in the absence of the object of taxation. The constitutional Court of the Russian Federation refused to accept the complaint of Buneev for consideration.

In a separate opinion to this definition, judge Aranovsky pointed out that when considering the bankruptcy case of Master-Tool LLC, the court considered that the case materials confirm the reality of the relationship between the participating companies: "this at least casts doubt on the conclusions about the imitation of the economic activity of Master-Tool LLC with the participation of related persons... in judicial practice, the interdependence of the transaction participants also does not in itself give grounds for recognizing the tax benefit as unjustified." This opinion received a mixed assessment. Artyukh comments on a special opinion regarding the right of a taxpayer "not to overpay taxes" only for fear of a tax audit: on the one hand, it is certainly true, on the other – the payment of taxes should be based on the law and should not be accompanied by abuses and violations that distort both the economic meaning of the taxpayer's operations and their tax consequences [2].

Despite all the contradictions of the special opinion we agree with the following statement: "similarly, there are no signs of an offense "creating an artificial situation" either in business or in tax relations. This means only deliberate activity (instead of spontaneous) with deliberate (at its own discretion) entering into legal relations, which in any case create some "artificial situation". It would be even strange to discuss all this and would hardly be worth it if the emphasis on intent with "purposeful fragmentation" in an "artificial situation" did not resemble the description of the crime and did not participate in the justification of legal responsibility for the offense, the composition of which, however, is not provided for in the named features of the tax law."

In this regard, it is important to point out the perception of Russian law enforcement agencies of foreign practice in assessing the artificiality of tax structures. Based on the results of the tax audit of Master-Tool LLC, the

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tax authority concluded that the business was artificially divided (by creating a group of interdependent organizations and individual entrepreneurs). As a result of such practices of interpretation by the courts of the concept of "purely artificial" constructions, distinctions between those who legally did business and filed reports to the tax authorities (as in Buneev case), although it violated the principle of legal compliance forms content operations, those who hide profits, used forged documents, created shell companies, etc. We consider it obvious that in this case there is discrimination against a taxpayer who had a business purpose and carried out its activities since 2005, and the tax authorities were aware of the schemes of this activity, moreover, they did not raise questions from the tax authorities in terms of legality.

3. The fragmentation of business and the concept of unjustified tax benefit

Federal law No. 163-FZ of July 18, 2017 "on amendments to part one of the Tax code of the Russian Federation" established a norm prohibiting taxpayers from reducing the tax base and (or) the amount of tax payable as a result of misrepresentation of information about the facts of economic life (a set of such facts), objects of taxation that are subject to reflection in tax and (or) accounting or tax reporting of a taxpayer. Introduction to the tax code of the Russian Federation of article 54.1, as noted by S. A. Arakelov, "was consistent with international practice and recommendations of the BEPS Plan, and was also a necessary measure in the fight against tax evasion" [3].

Test business purpose under paragraph 9 of the Resolution of Plenum of the RF № 53 and is enshrined in article 54.1 of the tax code, consistent with international practice of legal regulation of relations in the sphere of fight against tax abuse. In particular, the commentary to article 1 of the OECD MC notes that the doctrine of priority of substance over form can be applied in conjunction with the business purpose rule: tax abuse occurs if the civil construction (form) is used by the taxpayer exclusively or primarily to obtain tax benefits provided for by double taxation agreements.

Nevertheless, we agree with V. M. Zaripov: the text of Article 54.1 contains serious flaws. First, it is the introduction of the concept of "distortion of the facts of economic life", the content of which is not specific, and therefore can be interpreted arbitrarily in any direction. The second dangerous innovation is the presumption of an unjustified tax benefit if the person obligated under the contract has not fulfilled its obligations under it. In other words, if the transaction is real, there are no tax claims against the participants, but the actual performer was a third party – the taxpayer loses the right to receive tax benefits for it. This presumption, as can be seen from the law, is irrefutable" [4]. D. V. Vinnitsky also believes that Article 54.1 does not meet a number of expectations [5, p.46].

Returning to the topic of business fragmentation, we note that it is an example of how the principle of tax certainty is violated in Russian tax practice. The concept of legal certainty "in addition to the requirements for the legal and technical presentation of legal norms also includes the need for their uniform interpretation and application in practice" [6, p. 25]. The implementation of these classical postulates is possible "only in the conditions of guaranteed certainty of the law, in which the individual has the opportunity to plan their own behavior in private life and in business" [7, p. 115]. What do we observe in practice?

In a letter dated October 31, 2017 № ED-4-9/22123@ of the FTS of Russia said that article 54.1 of the tax code is not a codification of the rules set forth in the resolution of the Plenum

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№ 53, and represents a new approach to the problem of abuse of taxpayer of their rights, taking into account the major aspects formed judicial practice. The essence of the changes is that the legislator defines specific actions of the taxpayer that are recognized as abuse of rights, and the conditions that must be met by the taxpayer to be able to account for expenses and claim tax deductions for transactions (operations) that took place. We believe that these tasks are performed with the help of resolution of the Plenum № 53, according to which the establishment of court business, the actions of the taxpayer shall be based on the assessment of the circumstances testifying to its intentions to receive economic effect from the real business activities.

Article 54.1 of the Tax Code of the Russian Federation, effective from August 2017, was intended to eliminate gaps in judicial practice and establish criteria for recognizing a tax benefit as unjustified. In practice, the opposite effect was obtained: the application of article 54.1 of the tax code of the Russian Federation led to an increase in additional charges after inspections [8]. The practice of tax collection has become confiscatory in nature, when violators who reported their income to the state and paid taxes are put in a less favorable position compared to those who do not keep tax records and do not submit any documents to the tax authorities.

Resonance the letter of the Ministry of Finance of Russia from December 13, 2019 № 01-03-11/97904 cemented the Agency's position on the issue of tax reconstruction: "the provisions of article 54.1 of the code in contrast is formed on the basis of the resolution of Plenum of the Supreme arbitration court of the RF from 12.10.2006 № 53 "On evaluation by arbitration courts of validity of reception by the tax bearer of tax benefit" the court practice do not allow the determination of tax liabilities of taxpayers in case of abuse of their rights by calculation".

The practice of tax control and support of legal disputes shows that, along with the consideration of cases on "one-day" firms, disputes on business fragmentation are the most common [9].

There is an opinion in the literature that the main difficulties in a clear understanding of the criteria for splitting a business are due to objective factors. So, in contrast to the use of "one-day firms", business splitting schemes have important features: 1) there are real relationships between business entities (goods are delivered, services are provided, work is performed), and not formal document flow; 2) participants in the sane scheme are in most cases interdependent with respect to each other; 3) interdependent persons often pay all the necessary taxes, fees and payments, as well as have their own employees, movable and immovable property, as well as other funds necessary for independent business activities; 4) taxpayers in most cases do not realize the illegality of their actions, and under the imputed illegal scheme of business splitting understand only a legal way to optimize their own expenses and simplify business [10].

The judicial practice that supported the tax authorities in recognizing artificial business fragmentation was formed when one or more participants in this business applied a special tax regime. The purpose of the tax authorities in this case is to recalculate tax obligations under the General tax regime and impute these obligations to the business participant who is its main link.

Accordingly, the courts, based on the doctrine of the inadmissibility of abuse of law, are guided by the recognition of a tax benefit as unjustified, in particular, in cases where the taxpayer incorrectly reflects the operations (transactions) performed or there is clearly no business purpose in them. Therefore, additional taxes are charged according to the rule, as if the

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subjects of rights actually reflect the results of their economic activities, i.e. they would not abuse the right [11, p.270].

But even if the business is divided into organizations and individual entrepreneurs that apply only the General tax regime, the mechanism for calculating and paying taxes for these participants will differ (the tax rate for corporate income tax is 20%, for personal income tax for individual entrepreneurs-13%). In addition, " for the abusing taxpayer, the profit tax is re-formed into an income tax. In property terms, the concept of punitive integrity repeatedly increases the taxpayer's punishment in addition to the already existing overcompensation model for restoring budget losses (accrual of arrears, penalties, 20-40% of the fine)" [8].Therefore, it cannot be excluded that law enforcement practice will perceive such a difference in taxation as an unjustified tax benefit in the artificial division of the business, with the recalculation of tax liabilities based on the income tax rate. In this case, any due diligence measures will no longer be relevant for subsequent tax disputes.

In addition, taxpayers did not have a transition period to bring their obligations in line with the requirements of tax legislation, but first of all, the requirements of the tax authorities, who turned their attention to business splitting schemes, which until recently did not attract such increased interest of law enforcement. Within a month after the entry into force of article 54.1 of the tax code of the Russian Federation, the Federal tax service issued several letters containing criteria for business splitting. Taxpayers in a situation of legal uncertainty, where abstract rules of article of the tax code was specified on a large number of acts, assumed the function of the tax law, and were forced to meet new realities in a very short period of time. At the same time, tax audits that were applied several years ago have already started using new criteria that are unknown to taxpayers at the time of planning their tax obligations.

In a letter dated August 11, 2017, no. CA-4-7/15895@ the Federal tax service of Russia outlined its vision of common signs that indicate the consistency of actions of participants in business splitting schemes in order to avoid tax obligations. However, you should pay attention to the fact that these signs can only be combined and mutually linked to indicate a formal division (splitting) of the business in order to obtain an unjustified tax benefit.

Meanwhile, in judicial practice, additional factors have been formed that may indicate a high tax risk when a business is formally divided, for example: kinship relations between business participants ; the personnel of newly created organizations are formed at the expense of employees of the main organization ; accounting and reporting using the same computers, programs, communication channels and (or) by the same persons; leased store space is not structurally separate from each other, acts as a single object of trade, etc.

In a letter dated 16 August 2017 № SA-4-7/16152@of the FTS of Russia has indicated, a necessary element of abuse must be volitional component of the act supported by evidence showing an intentional part of the taxpayer provided, including the actions of its officials and participants (founders) in the deliberate creation of conditions aimed solely at obtaining a tax benefit. At the same time, if the taxpayer's actions aimed at non-payment of tax are proven to be intentional, the tax liabilities arising as a result of such actions are fully adjusted.

The key concept that is subject to criticism is the blurred criteria for obtaining tax benefits for taxpayers and the definition of the edge when it passes into the category of unjustified. The determining factor in recognizing a tax benefit as unjustified is the organization's failure to exercise due diligence and caution in selecting counterparties (here we

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see two evaluation categories that do not contribute to certainty for the taxpayer). At the same time, according to A.V. Krasyukov, "for relations in which the taxpayer abuses his right, it is characteristic that the business goal becomes the goal of the second level, and saving on taxes is considered as the main goal" [12, p.27].

Thus, we see the fact that the fiscal function of taxation comes to the fore as another negative factor for the taxpayer's legal status. Of the 132 cases in 2019, only 26.6% were won by taxpayers. The combination and interrelation of several factors sometimes allows the taxpayer to win a dispute, but the line between splitting and structuring is very thin, so some disputes have already passed six "circles" (repeatedly reaching the cassation instance), and the same judge in the same case can make different decisions at the initial hearing and at the second, after the district court's decision to send the case to the court of first instance [13].

4. Conclusions

Given the growing number of court cases, the subject of consideration of which are circumstances that indicate that taxpayers received unjustified tax benefits as a result of the use of business fragmentation schemes, this problem is one of the most urgent in modern tax practice.

In our opinion, splitting schemes should be considered not as tax evasion, but as an abuse of law [14, p. 130]. In addition, in order to substantiate the conclusion that a taxpayer has applied a business splitting scheme, the tax authority must have evidence that will clearly indicate that the taxpayer has committed deliberate concerted actions together with persons under its control, aimed not so much at dividing the business as at obtaining an unjustified tax benefit as a result of using such a scheme.

According to the legal position of the Constitutional Court of the Russian Federation, set out in the Resolution of June 3, 2014 No. 17-P, the Ruling of July 4, 2017

No. 1440-O, tax legislation allows the taxpayer to choose a particular method of accounting policy (application of tax benefits or refusal of them, application of special tax regimes, etc.), which, however, should not be used to unlawfully reduce tax revenues to the budget as a result of abuse by taxpayers of their powers. With regard to business fragmentation, this position is expressed in a letter from the Federal tax service of Russia dated December 29, 2018. No. ED-4-2/25984: it is necessary to exclude the presentation of unsubstantiated claims to the division of business that is not aimed at abuse, since the choice and change of the business structure is the exclusive right of the economic entity. Thus, it is necessary to distinguish between business fragmentation, which is a fair exercise of the right to freedom of economic activity, and artificial (formal) business fragmentation as a form of abuse of rights.

A way out of this situation can be, according to some authors, the improvement of certain institutions of tax law (including the provisions of the new Article 54.1 of the Tax Code) and legislative level (the tax code) a clear and exhaustive list of criteria by which the activity of the taxpayer may be deemed questionable and unfair, indicating the receipt of an unjustified tax benefit [15, p. 31].

REFERENCES

1. Zaripov V.M. *Is business fragmentation a scheme or not?* Zakon.ru. Available at: https://zakon.ru/blog/2017/08/29/droblenie_biznesa_-_shema_ili_net (accessed on 22.12.2019). (In Russ.).

2. Artjukh A.A. *Premature joy: about the sensational Decision No 1440-O and the special opinion of judge Aranovskiy*. Zakon.ru. Available at: https://zakon.ru/blog/2017/08/04/prezhdevremennaya_radost__o_nashumevshem_opredelenii_1440-o_i_osobomu_mnenii_sudi_aranovskogo (accessed on 04.02.2020). (In Russ.).

3. Arakelov S.A. Anti-tax avoidance norms in international practice. New legislative tools to combat tax evasion in Russia. *Zakon = The Law*, 2018, no. 5, pp. 109–115. (In Russ.).

4. Zaripov V.M. *Tax benefit: above the baseboard*. Zakon.ru. Available at: https://zakon.ru/blog/2017/6/20/nalogovaya_vygoda_vyshe_plintusa (accessed on 28.02.2020). (In Russ.).

5. Vinnitskiy D. V. Conscientiousness, reasonableness of benefits, limits of rights implementation, or How the Russian tax law appeared at the forefront of the fight against the evil nesting in taxpayers. *Zakon = The Law*, 2018, no. 11, pp. 44–57. (In Russ.).

6. Demin A.V. *Uncertainty in tax law and ways to overcome it*. Doct. Diss. Yekaterinburg, 2014. 452 p. (In Russ.).

7. Leoni B. *Freedom and Law*. Moscow: IRISEN Publ., 2008. 308 p. (In Russ.).

8. *The Ministry of Finance did not support tax reconstruction when punishing evading firms.* RBC. Available at: https://www.rbc.ru/economics/10/01/2020/5e1701989a79471afad28a4a (accessed on 28.02.2020). (In Russ.).

9. Shishkin R.N. *Tax benefit in business splitting: the position of tax authorities and courts.* Moscow, Rossiyskaya Gazeta Editorial Board Publ., 2019. Issue 3. 176 p. (In Russ.).

10. Peresedov A.M. Signs of illegal crushing of business and its essential differences from legal optimization of expenses. *Bezopasnost' biznesa = Business Security*, 2019, no. 1, pp. 47–51. (In Russ.).

11. Volkov A.V., Blinkov O.E. Business splitting: legal problems. *Vestnik Permskogo universiteta. Yuridicheskie nauki = Bulletin of the Perm University. Legal science,* 2019, no. 2, pp. 261–280. (In Russ.).

12. Krasjukov A.V. Tax deviation. *Finansovoe pravo = Financial Law*, 2020, no. 1, pp. 25–29. (In Russ.).

13. *Review of positive decisions of courts on splitting for taxpayers for 9 months of 2019.* Klerk.ru. Available at: https://www.klerk.ru/blogs/compliance/491335/ (accessed on 28.02.2020). (In Russ.).

14. Ponomareva K.A. *The Constitutional Court of the Russian Federation on combating tax abuse: an example of the Decision of 4 July 2017 No 1440-O*, in: Pepelyaev S.G. (ed.). *Nalogovoe pravo v reshenijah Konstitucionnogo Suda Rossijskoj Federacii 2017 goda : po materialam XV Mezhdunar. nauch.-prakt. konf. 13 – 14 aprelja 2018 g., Moskva = Tax law in the decisions of the constitutional Court of the Russian Federation in 2017: based on the materials of the XV international scientific and practical conference, 13-14 April 2018, Moscow.* Moscow, Statut Publ., 2019, pp. 122–130. (In Russ.).

15. Vasileva E.G., Petukhov E.V. Criminal-legal aspects of illegal VAT compensation as a result of obtaining an unjustified tax benefit. *Nalogi = Taxes*, 2019, no. 3, pp. 27–31. (In Russ.).

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