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MEDIATION AS AN ALTERNATIVE FORM OF PRE-TRIAL SETTLEMENT OF A TAX DISPUTE: DOCTRINAL APPROACHES AND LAW ENFORCEMENT PRACTICE**

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The subject of research is the study of mediation procedure and embedding of mediation techniques in such a specific area of relations, the participants of which are the tax authority and the taxpayer. The settlement of tax disputes is quite understandable, since this mechanism allows to keep an economic entity on the market, on the one hand, and to replenish the state budget on the other.

The purpose of the article is to confirm or disprove hypothesis that the current mechanism of pre-trial settlement of disputes established in the Russian Tax Code does not correspond to the techniques of the mediation process.

The methodological basis of the research was formed by general scientific methods of cognition, which include the principles of objectivity and system analysis of the information collected during preparation of the publication. At the same time private scientific methods were also used in the work, including descriptive and comparative legal methods, which made it possible to use the practices of foreign states in terms of the use of mediation procedures. The author analyzes the official data published by the tax authority, regarding the number of disputes considered over the period of the past three years.

The main scientific results, scope of application. The study made it possible to gain new knowledge in the field of legal regulation of mediation. The presented foreign experience demonstrates that at present Russia is only at the stage of formation of mediation. Most people do not yet understand what exactly the advantages of mediation. The existing procedure for the judicial settlement of a dispute attracts its participants due to the fact that the current state fees are very low compared to their foreign counterparts. All kinds of legislative transformations lead to an ambiguous interpretation of legal norms, which often defy literal interpretation, followed by conflicts in law enforcement. Since the practice of using mediation sessions is not widespread at present, a large number of debatable questions arise about the procedure for conducting mediation, the possibility of fiscal body participation, determining the categories of disputes in which negotiation techniques can be applied.

Conclusions. Mediation is a systemic process that allows constructive negotiations between the parties involved in the dispute in order to resolve the problem and possibly reach an agreement on the settlement of the dispute. At the same time, it is emphasized that the lack of law enforcement practice complicates the process of researching the institution of tax mediation. The role of a mediator in legal relations (with the tax authority as a participant) is a person who must create a constructive atmosphere for discussing the conflict; adhere to the principles of mediation; assist in finding solutions without expressing his opinion on the agenda. This role of mediator is not adequately reflected in the legislation in relation to tax disputes.

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1. Introduction.

Legislation in the field of taxation is one of the most dynamically developing areas of legal regulation of our state. A striking example of this fact was the latest regulatory transformations of the tax law and the digitalization of tax legal relations.

In part, the conflicts that arise during tax audits, including at the stage of their appeal to the courts, contribute to the improvement of law enforcement tax practice. Of course, due to the fact that the nature of tax legal relations themselves is a fluid matter, where public interests prevail over private interests, taxpayers are focused on minimizing the taxable base and, as a result, payments to the corresponding budgets of the budgetary system of the Russian Federation, which, in turn, can be expressed both through the use of legal ways to optimize taxation and non-legal forms of such interaction.

So, according to the data of the Federal Tax Service of Russia, the number of complaints that were considered by the tax authorities in 2019 decreased by 7.9 % compared to 2018. It is noted that the number of complaints filed against decisions made following the results of tax audits was also reduced by 28.2 % [1].

Progress towards reducing the burden on tax disputes was also observed in 2020, which was demonstrated by the following indicators: the number of complaints from taxpayers decreased by 17.4 %, and those considered – by 14.8 %. In general, the decisions of the courts of first instance, which considered applications for tax disputes that have already passed pre-trial settlement, also decreased by 32.1 %. [2][1].

So, in modern economic realities, taking into account step-by-step digitalization of each sphere of social development, active interaction of participants in tax legal relations, introduction of new forms of legal regulation, new, so-called alternative ways of settling potential and real disputes both between economic entities and in a situation of appeal of the latest decisions, actions (inaction) of the state controlling bodies are gaining great importance. It is this aspect that began to acquire relevance in the public agenda of recent years.

2. Formulation of the problem.

Introduction of improved forms of settling tax disputes is understandable, since such a mechanism allows to keep an economic entity on the market, on the one hand, and simultaneously replenish the state treasury on the other hand. Situations leading to the emergence of a dispute are also quite understandable, since any legislative transformations that abound in the area under consideration lead to an ambiguous interpretation of legal norms, which often defy literal interpretation, followed by conflicts in law enforcement. And, as noted above, the desire of the taxpayer to reduce his tax burden creates a conflict of interest between public and private entities.

Realizing this reality, the tax authorities have developed a mechanism for pre-trial settlement of tax disputes as a form of alternative settlement of conflict situations. However, practice has shown that there was no immediate outflow of complaints to the judicial authorities. Moreover, this is not observed at the present time. In this regard, it seems that the institution of alternative settlement should be improved, go beyond the traditional appeal of decisions (actions) to higher tax authorities. Here it seems possible to recommend the use of methods that have been worked out in other areas of social relations, which will minimize procedural and time costs and lead to the settlement of a conflict situation. We are talking about such a form as mediation and its use in resolving public law disputes, which will help to reduce the degree of conflict between the parties, since the dispute will be resolved not by expressing a tough position of each of the parties, but in the course of the negotiation process, when the participants can truly hear each other, and the decision will not be made by sole official, taking into account the evidence presented by each of the parties, which

[1] Results of pre-trial settlement of tax disputes for 2020 have been summed up. Available at: https://www.nalog.ru/rn77/news/activities_fts/10574446/

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even at the pre-trial stage resembles a trial, but is made by the parties in cooperation.

In this regard, it is proposed to support M.V. Arakelova, who presented the definition of the concept of "alternative forms of pre-trial settlement of disputes arising from tax legal relations", under which she considers a system of legal methods (means) based on the proactive use of taxable persons to prevent the occurrence of a tax dispute and (or) settle such a dispute without contacting court [3].

The presented definition may well be attributed not only to the prescribed format of pre-trial settlement of tax disputes, namely, the procedure for appealing acts of tax authorities provided for in Section VII of the Tax Code of the Russian Federation, but also to other forms, including mediation of tax disputes, which became possible after the adoption of the Federal Law from July 26, 2019 No. 197-FZ[2], by which in part 2 of Art. 1 of the Federal Law of July 27, 2010, No. 193-FZ (hereinafter - the Law on Mediation)[3] amendments were made regarding the possibility of applying the mediation procedure to disputes arising from administrative and other public legal relations.

Returning to the concept of alternative forms of pre-trial settlement of tax disputes M.V. Arakelova focuses on the fact that the definition she presented is based on the category of "dispute", since the declared institute studies the nature of the emergence and resolution of an already existing conflict or circumstances that may contribute to its occurrence. Here she substantiates that in the classical sense, a tax dispute is already the presence of a conflict situation.

In the development of the author's thoughts, it seems possible to emphasize that the Law on Mediation itself, as well as procedural norms, in particular, judicial conciliation procedures, enshrined in Ch. 14.1 of the Code of Civil Procedure of the Russian Federation (Article 153.6) and Ch. 15 of the Arbitration Procedure Code of the Russian Federation (Article 138.5), allow the use of mediation as one of the types of conciliation procedures. Thus, the concept of a tax dispute here can be considered not only in its traditional understanding, as suggested by the author of the abstract, but also in a broader sense, i.e. when the preconditions for its occurrence still arise, namely, according to the results of the pre-verification or verification activities, and then already at the time of the decision making, commission of actions (inaction) and involvement of the taxpayer in the appeal procedure, including the judicial stage. This conclusion suggests itself in view of the fact that the Law allows resorting to mediation at any stage of the conflict: at its initial stage, in the pre-trial appeal process and during court hearings.

Also, on July 28, 2020, Government Decree of the Russian Federation of 07.24.2020 No. 1108[4] (hereinafter – Decree No. 1108) entered into force, which, as an experiment, introduced a procedure for pre-trial appeal of decisions of the control (supervisory) body, actions (inaction) of its officials persons. This document was amended by the Government Decree of 05.12.2020 No. 2029[5] concerning the inclusion of the Federal Tax Service in the list of participants to which this mechanism applies. Decree No. 1108 approved the Regulation on the procedure for conducting pre-trial appeal.

In particular, clause 2 presents the concept of pre-trial appeal of decisions of a control (supervisory) body, actions (inaction) of its officials, which is proposed to be considered as a

[2] Federal Law of July 26, 2019 No. 197-FZ "On Amendments to Certain Legislative Acts of the Russian Federation". Sobranie zakonodatelstva. 2019. No. 30. Art. 4099.

[3] Federal Law of 27.07.2010 No. 193-FZ "On an alternative procedure for resolving disputes with the participation of a mediator (mediation procedure)". Sobranie zakonodatelstva. 2010. No. 31. Art. 4162.

[4] Government Decree of the Russian Federation of July 24, 2020 No. 1108 "On conducting an experiment on the territory of the Russian Federation on pre-trial appeal against decisions of the control (supervisory) body, actions (inaction) of its officials. Sobranie zakonodatelstva. 2020. No. 31 (part II). Art. 5186.

[5] Government Decree of 05.12.2020 No. 2029 "On Amendments to the Government Decree of the Russian Federation of July 24, 2020 N 1108". Sobranie zakonodatelstva. 2020. No. 51. Art. 8436.

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procedure for resolving a dispute with a controlled person, carried out by a body authorized to consider a complaint of a controlled person.

At the same time, the Law on Mediation reveals the purpose of its creation, from which it follows that it is based on the purpose of organizing the legal conditions for the application of an alternative dispute resolution procedure with the participation of an independent person – mediator as an agent, promoting the development of business partnerships and the formation of ethics business turnover, harmonization of social relations (part 1 of article 1).

Finally, the science of tax law presents the author's definition of "the procedure for pre-trial settlement of tax disputes as an independent stage of the tax process, by which it is proposed to understand successively interconnected procedures aimed at preventing the occurrence and (or) subsequent settlement of disagreements between tax authorities and taxpayers related to completeness and correctness of the calculation and payment of taxes (fees), the scope of the rights and obligations of taxpayers and tax authorities without going to court "[3].

At the same time, M.V. Arakelova, conducting research in the area of knowledge under consideration and studying the issues of historical preconditions for the formation and subsequent development of the mediation procedure as a global trend in the legal environment, concludes that the use of the institution of mediation only in the field of civil law relations significantly limits the scope of alternative tax procedures for resolving disputes. Supporting in general the idea of using mediation in resolving tax conflicts within the framework of "... a well-built and efficiently functioning system of interaction between tax authorities and taxpayers", it is concluded that "there is no imbalance of interests of private and public participants in disputes" [3].

Thus, an analysis of the legal framework and doctrine allows us to conclude that the concepts of pre-trial and alternative forms of dispute settlement are considered as part and general, where the category of alternative ways of resolving conflicts is a general (generic) concept and is used in a broader sense, involving the possibility of appeal not only in a higher tax authority, but also providing for the possibility of contacting an independent intermediary, and the category of pre-trial ways means only the possibility of filing a complaint with a higher supervisory authority.

Returning to the issue of resolving conflicts arising between the fiscal authority and the payer under its control, one can refer to the experience of the Federal Taxation Service Interdistrict Tax Inspectorate (MIFNS) of Russia No. 21 and OOO "Rif", between which an agreement was reached on clarifying the tax obligations of the taxpayer and paying the corresponding amounts of taxes at a convenient time for the payer. Such an agreement between the parties was preceded by the mediation procedure, which was launched in a pilot mode in St. Petersburg, where the construction of a new system of relations between tax authorities and representatives of the business community is currently being tested, through the settlement of tax conflicts during mediation sessions.

Representatives of the tax authority, which took part in this format of considering the dispute, positively responded to its results, pointing out that "... One of the new mechanisms of control and analytical work may be the pre-trial mediation procedure. The essence of the mediation mechanism is to involve a third party (mediator) – an independent expert who helps the parties to develop a certain agreement on the dispute (in this case, on the claims of the tax service regarding the economic activities of the organization), while the parties fully control the decision-making process on the settlement of the dispute and conditions for its settlement "[4][6].

So, the application of the mediation procedure made it possible to solve two fundamental problems that arise in any tax dispute:

[6] Mediation is a new word in tax control. Available at: https://www.nalog.ru/rn78/news/activities_fts/10194093/ (accessed: 19.11.2020).

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- to keep an economic entity on the market;
- to make up for budget losses.

At the same time, such a process minimized various risks, including losses of time, financial, emotional, psychological and labor properties.

3. Mediation as a way of effective communication.

The first mentions of the use of the mediation procedure are found in the middle of the 70s of the XX century in the United States when the term “alternative dispute resolution” was coined. At the time of the formation of this category, mediation was an informal procedure, which the parties resorted to only on their own initiative, but after that the situation began to change dramatically, the impetus to which was given by representatives of the judicial and legal system, in particular, Frank Zander. It was he who proposed the concept of "courts with many doors" ("Multidoor Court House").

For a better understanding of what mediation is, it is proposed to refer to the publication of H. Besemer, in which the author emphasizes that mediation literally means agency work. Mediators help disputants find mutually acceptable solutions to their problems [5].

In practice, a mediator is a person whose powers do not include making a decision, but only creating the prerequisites for the active participation of the parties to the process in the development of mutually beneficial final agreements. And since the parties cannot do this without the participation of a mediator, including because they do not hear each other's arguments, but proceed from the position they took at the beginning of the conflict, they need a mediator who will build a constructive format of communication between the participants allowing them to come to a resolution of the dispute.

It is very important to understand that it is technically possible to conduct mediation if the following requirements are met:

- presence of the mediator itself;
- real desire of the parties to take part in the procedure;
- informal dialogue between the subjects of the process.

In the Russian legal doctrine, one can find the concept of negotiations, which are considered as “a discussion carried out directly, that is, without the participation of a third party, agent or mediator, aimed at making a joint decision capable of resolving existing differences” [6] or “a form of implementing a specific task through establishing a relationship of trust, formed as a result of mutual understanding of the situation and mutual desire for its positive outcome ”[7].

Science also reveals the concept of mediation, which is proposed to be considered as "a path to a meaningful mutually acceptable solution based on consensus between the parties involved in the dispute" [8].

In continuation of these thoughts, it can be emphasized that in the mediation process, the parties voluntarily become participants and jointly offer solutions that have variability.

A prerequisite for effective communication is the guiding principles that the mediator adheres to and which compliance with by the process participants is monitored by the agent. The principles are as follows:

1. Voluntariness for the parties to the process and the mediator, meaning that everyone participates in the dispute resolution procedure without coercion and independently.

This principle allows everyone to exit the procedure at any stage of its implementation without explaining the circumstances.

2. Confidentiality guarantees the parties confidence that neither the mediator nor the parties themselves have the right to disclose information received during the procedure to third parties.

3. Cooperation and equality of the parties. In the process of mediation, each of the participants, together with the mediator, is in constant interaction and is endowed with an equal scope of rights.

4. The transparency of the procedure implies the possibility of familiarization with the principles of its conduct, the stages and rights of the participants, as well as the consequences of the decision taken by them before the start of the

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procedure itself.

Analyzing the principles of mediation, it should be noted that the Ministry of Justice of the Russian Federation has prepared for discussion a draft Federal Law "On the settlement of disputes with the participation of an agent (mediator) in the Russian Federation" [9] [7] (hereinafter referred to as the Draft Law), where the principle of confidentiality is as follows - "Professional secret of a mediator".

At the same time, one of the key principles that create conditions for an open dialogue of the parties in the process of finding a solution, such as voluntariness, was not included in Art. 6 of the Draft Law.

Indeed, the Draft Law provides for cases of mandatory mediation, but even with such a statement of the issue, neither the mediator nor the participants can oblige the parties to resolve the conflict.

Thus, subject to the entry into mediation, as an obligatory stage in the settlement of the conflict, each of the parties will have the right to exit from it at any stage. Consequently, the principle of voluntariness will in fact be preserved.

4. Foreign practices.

In contrast to the law enforcement practice in the field of mediation, and even more so tax practice, the use of mediation procedures abroad made it possible to form an effective practice.

For example, in the United States, the creation of a mechanism for resolving tax disputes was reduced to improving the procedure for their consideration at the pre-trial stage, which made it possible to ensure voluntary cooperation of the parties, taking into account the balance of interests of the fiscal authority and the taxpayer.

Pursuant to the Internal Revenue Service Reform Act of 1998, the US Internal Revenue Service developed a set of measures to introduce alternative methods of resolving tax disputes at the stage of their consideration through administrative proceedings. At the heart of the transition from the consideration of disputes exclusively by supervisory authorities in favor of mediation was the desire to quickly resolve the urgent conflict between the taxpayer and the tax authority with the participation of an authorized person who ensures its fair and impartial consideration [10].

In such a process, the intermediary agent is entrusted with the task of monitoring compliance with the law in the actions of the tax authority. At the same time, the mediation agreement signed by the parties cannot be revised in court, which contributes to an increase in the level of confidence of the participants. We cannot boast of such practice at present, however, the Draft Law provides that the agreement reached as a result of mediation in the event of its notarization will have the force of an executive document (part 5 of article 20).

And in the UK, for a long time, the institution of mediation was used exclusively for resolving commercial disputes, and since 1999, after the "Wolfe Reform" aimed at simplifying civil litigation, it has become more widely used. It was from this moment that the parties began to consider alternative methods of resolving disputes both before going to court and throughout the entire dispute. Moreover, if the court establishes that one of the parties did not try to resolve the dispute in an alternative way, then the court has the power to independently order that such party pay some or all of the legal costs of its opponent, regardless of whether they won in the main claim. Thus, the judicial authorities encourage the participants in the process to use more lenient procedures for resolving conflicts, which made the mediation procedure attractive.

5. Conclusions and offers.

1. Mediation procedure is a systemic process that allows to ensure the conduct of constructive negotiations between the parties involved in the dispute in order to resolve the problem and possibly reach an agreement on the settlement of the dispute. The procedure is carried out by a

[7] They will come to an agreement. Available at: https://rg.ru/2020/10/12/miniust-predlozhil-uzakonit-procedury-primireniia-v-shkolah.html

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neutral impartial person – a mediator [8].

An important point in this chain of relations is the orientation of the participants (primarily the parties to the conflict) towards the peaceful settlement of the dispute by joint efforts and the search for a mutually acceptable way out of the current situation.

2. The lack of sufficient law enforcement practice, including data on the concluded mediation agreements, complicates the research process of this institution. However, the possibility of participation in this procedure of public authorities and local governments and, in particular, tax structures, will allow keeping records of concluded agreements and form a certain practice of categories of disputes, of course, taking into account the observance of the confidentiality principle (professional secrecy of the auditor).

3. Regarding the place of tax mediation in the system of pre-trial dispute resolution, it should be noted that, given the recognition of alternative as a broader concept than pre-trial appeal, it is premature to talk about the inclusion of mediation in the institution of pre-trial appeal of disputes. Moreover, it seems that for a start it is necessary to "test" this procedure and only later include it as an institution of tax law.

4. Since the state understands the importance of creating a climate of trust in relations with economic entities, the transition to this form of interaction will only strengthen the position of the state apparatus among taxpayers.

5. And, finally, it is important to understand the role of the mediator in these legal relations, who should:

- create a comfortable atmosphere for its participants;
- adhere to the principles of neutrality, impartiality and open-mindedness;
- ensure the equality of the parties during the mediation;
- establish communication in the interaction of the parties;
- assist in finding solutions without expressing own opinion on the agenda.

It goes without saying that the priority is to popularize the mediation procedure in public law disputes, which will increase trust in the authorities and relieve the unnecessary burden on the judicial system. Having solved this problem, it will be possible to proceed to the formulation of the relevant rules, securing them in the Tax Code of the Russian Federation, establishing the right to apply to mediation and describe the procedural features of its conduct in tax disputes.

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