

DETERMINATION OF THE ACTUAL TAX LIABILITY FOR PERSONAL INCOME TAX: LAW ENFORCEMENT ANALYSIS

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The subject. Currently, the courts are actively using a new term - "valid tax liability", or "the actual amount of tax liabilities". This term is the result of the activities of judicial authorities, however, judicial practice on determining the actual tax liability for personal income tax is only being formed and is unstable. Therefore, the subject of the study of this article is a comprehensive analysis of law enforcement practice in the field of determining the actual tax liability of individuals for personal income tax.

Purpose of the study is to dare to solve the enforcement problems that arise when determining the actual tax liability of individuals for personal income tax.

The methodology. The authors use the formally legal interpretation of Russian legislation, comparative analysis of Russian and European literature as regards the determination of a valid tax liability.

The main results, scope of application. The authors analyzed the concept of "valid tax liability", and also studied the problems of determining the actual tax liability in the context of the law enforcement practice of the Supreme Court of the Russian Federation. Based on law enforcement practice, the main problems in determining the actual tax liability are highlighted, to which the authors attribute the incorrect qualification of the object of taxation, the incorrect qualification of the nature of the taxpayer's activity and its status, as well as the incorrect determination of the taxpayer's tax base. The article also touches on the main problems in the reimbursement of the amount of overpaid personal income tax.

Conclusions. When determining the taxpayer's actual tax obligation to pay personal income tax, the tax authorities are guided by a "pro-budget" goal, seeking to increase the tax base due to incorrect qualification of the taxable object, the status of the taxpayer, or questioning the nature of its activities, which leads to the formation of arrears and forms the composition of an administrative offense.

In an effort to restore their violated rights, an honest taxpayer goes to court for protection, where, unfortunately, in the vast majority of cases, they face the formal approach of the courts, which do not reveal either the economic essence of the dispute or properly consider the circumstances of a particular case. Taking into account the above circumstances, the authors draw conclusions about the existence of legal gaps in the system of Russian law in the field of taxation, which they propose to fill by fixing the concept of "valid tax obligation" in the relevant Resolution of the Plenum of the Supreme Court of the Russian Federation. As an example of such replenishment, the authors propose to supplement paragraph 7 of the Resolution of the Plenum of the Supreme Commercial Court of the Russian Federation of October 12, 2006 No. 53 "On the assessment by arbitration courts of the validity of the taxpayer's receipt of tax benefits", indicating the need to establish a valid tax obligation of the taxpayer, including personal income tax.

1. Introduction

One of the internal functions of the state mechanism is the implementation and realization of social and community goals. These goals are aimed at maintaining and improving the quality of life of the population. To achieve this, the state is forced to ensure the receipt and accumulation of cash flows into the federal budget.

Personal income tax (hereinafter - PIT) is the most important component of the Russian budget. According to official statistics of the Ministry of Finance of Russia for 2020, the amount of state income received by the budget from the payment of personal income tax was 4 253.1 billion rubles¹, which is about 11% of the total revenue of 38 205.7 billion rubles. These statistics show that personal income tax is an integral part of the Russian budget, occupying almost one tenth of it.

Despite the fact that the main trends in the development of legal regulation of income taxation in different states and research in this area concern changes in tax rates and expansion of the tax base [1, pp. 26-31], modern studies do not always pay attention to law enforcement practice of dispute resolution in the field of income taxation, from which it is possible to learn approaches to resolving real conflicts, and, consequently, approaches to establishing the real amount of tax liabilities.

Collection of personal income tax, as well as other taxes, is entrusted to the Federal Tax Service of Russia (hereinafter - FTS). The problem of this article lies in the fact that, in carrying out its functions, the Federal Tax Service does not always perform a lawful calculation of tax payable to the budget. Often, the reason for such calculation is a misinterpretation of the tax legislation and distortion of the actual tax liability, as a result of

which conscientious taxpayers are forced to appeal to the court to cancel the decision of the tax authority.

Since PIT payers are individuals, the latter are entitled to apply for justice only to the system of courts of general jurisdiction, ranging from the district court to the Judicial Board for Administrative Cases of the Supreme Court of the Russian Federation (hereinafter - the SCAD of the RF Supreme Court). Not infrequently, the highest court instance takes the side of the taxpayer, cancelling all previous judicial acts and sending the tax dispute for new consideration on the basis of incorrect interpretation of the tax legislation by courts and fiscal authorities.

Relevance of the problem of determining the actual tax liability of individuals in the calculation of personal income tax is due to the unstable judicial practice in assessing the object of taxation, the nature of the activities of the tax base. In addition, there are often questions in the courts related to the reimbursement of the amount of excessively paid personal income tax.

Nowadays the role of courts in law-making is generally recognized, G.A. Gadzhiev noted that "it's not so much the text of law that matters, as the process of judicial "legal generation"² itself, in this case, the most active participation and notable contribution was made and continues to be made by the Supreme Court of the Russian Federation, the practice of which is the main subject for analysis, in the framework of this study.

The problem of determining the actual tax liability of individuals in payment of personal income tax has been addressed by such researchers as O.V. Boltinova, E.Yu. Gracheva, A.V. Demin, S.V. Zapolsky, V.N. Nazarov, S.G. Pepelyaev, A.A. Ryabov, R.G. Somoev and others.

2. "Valid tax liability". General provisions

¹ See: Annual information on the execution of the consolidated budget of the Russian Federation. [Electronic resource]. URL: https://minfin.gov.ru/ru/statistics/conbud/execute/?id_65=93449-yezhegodnaya_informatsiya_ob_ispolnenii_konsolidirovannogo_byudzheta_rossiiskoi_federatsiidannye_s_1_yan_varya_2006_g. (accessed 14.09.2021).

² See: Tax system over the past 10 years: expert opinions. [Electronic resource]. URL: <https://www.nalogoved.ru/art/736.html> (accessed 14.09.2021).

Personal income tax is the most popular and keenly discussed topic in all countries of the world, as "it affects the financial interest of each income recipient and directly affects his standard of living". [1, p. 141]. In this regard, it is not surprising that conducting tax audits, fiscal authorities are guided by "pro-budget" purposes and are interested in overstating the taxable base in determining the actual tax liability of the taxpayer for further accrual of arrears, fines and penalties.

In practice taxpayers strive to decrease the tax liabilities on the grounds stipulated by the Tax Code, for instance, by accounting the expenses and deducting the actual (real) incurred expenses. This recharacterization of tax liability "is due to the inconsistency of real relations of counterparties with the declared agreements of the parties to the transaction, formalized by the contract". [2, p. 66].

Tax liability in the narrow sense is understood the need for a taxpayer to pay a certain amount in a certain order within the prescribed by law terms. It is worth noting that a number of authors believe that tax duty can and should be subdivided into understanding in a broad and narrow sense [3, p. 71; 4, p. 51; 5, p. 177]. At the same time there is also another point of view, according to which one must not use the concepts of "tax duty" or "duty to pay taxes" (see for example [6, pp. 22-32; 7, p. 26]). The authors believe that since financial-legal obligations cannot be equal to civil-legal obligations, they cannot be used instead of them [8, p. 21].

In contrast to all of the above views there is a position of a number of authors who believe that the institute of tax obligation does not exist at all. V. V. Vitryansky in confirmation of this point of view indicates an unambiguous public-law nature of the obligation to pay taxes, comparing it with the concept of civil obligation in civil legal relations [9, p. 120-121], M. M. Braginsky points out the "negative consequences" of the use of civil law concepts and norms in relation to power and subordination [10, p. 18; 11, p. 82]. E. A. Sukhanov also recognizes that the "transfer" of the legal category of "obligation" from private to public entails negative consequences for the science of Russian law. [12, p. 8-9]

Currently, the courts are actively applying a

different term - "valid tax liability". This term has no official normative consolidation neither in the Tax Code of the Russian Federation (hereinafter - the Tax Code of the RF), nor in other normative legal acts, because it is the result of judicial bodies, not the legislature.

There are few works devoted to the issues of "effective tax liability" in scientific environment (see for example [13; 14; 15]) and in this connection we consider necessary to analyze the concept of "effective tax liability" and also study the problems of determination of effective tax liability in the context of law enforcement practice of the Supreme Court of the RF.

The origin of the term "valid tax liability" can be found in Article 57 of the Constitution of the Russian Federation, which indicates the need for everyone to pay legally established taxes and fees. From the norm of this article we can draw the opposite conclusion about the right of every taxpayer not to be forced to pay the established taxes and fees, which are not established at the legislative level or the amount of which is more than required by the current legislation.

The problems associated with determining the amount of tax payments more than 20 years ago was mentioned by N. I. Khimicheva who noted the lack of certainty in the provisions on tax benefits creating problems of inequality in the rights of taxpayers [16, p. 38], unfortunately, to date the problems in determining the actual amount of tax obligations have not disappeared.

Since the obligation to make tax payments, the amount of which is established by law, is entrusted to taxpayers, the State has entrusted to the tax authorities the duty to verify the proper execution of such an obligation by the taxpayer, undertaking for this proper persistence. The Constitutional Court of the Russian Federation (hereinafter, the "CC RF") drew attention to this³ by pointing out that the tax authority is obliged to establish the actual amount of the tax liability and to take all "exhaustive" measures to that end. This approach was also expressed in its

³ Decision of the Constitutional Court of the Russian Federation from 27.02.2018 № 526-O. Document was not published. "Consultant-Plus" (accessed 18.09.2021).

rulings of 2000⁴ and 2009⁵.

Speaking about the mentioning of this principle in court proceedings, it is necessary to note the Resolution of the Plenum of the Supreme Court of the Russian Federation of 23.06.2015 № 25⁶ (hereinafter - the Resolution of the Supreme Court №25), in paragraphs 77 and 85 of which the Supreme Court of the Russian Federation (hereinafter - SC RF) indicates the obligation of courts to proceed from the true economic content of transactions or a set of transactions when determining the scope of rights and obligations of a taxpayer. Subsequently, this approach of the Supreme Court has been successfully integrated into the practice of the courts, including the highest courts, as evidenced by the relatively recent "Tatneft"⁷ and "Yumaks"⁸ cases in which the courts referred to the true economic substance of certain disputed transactions. This approach directly stems from the existing in the legal system doctrine of "substance over form", according to which it is necessary to focus on the content of the transaction, not on its form [17, pp. 594-596].

In addition, it is necessary to mention the Review of Judicial Practice of 2016⁹, in which was

⁴ Decision of the Constitutional Court of the Russian Federation of 28.03.2000 № 5-P. Document was not published. "Consultant-Plus" (accessed September 16, 2021).

⁵ Decision of the Constitutional Court of the Russian Federation of March 17, 2009 No. 5-P; Decision of the Constitutional Court of the Russian Federation of June 22, 2009 No. 10-P. Document was not published. "Consultant-Plus" (accessed 15.09.2021).

⁶ Resolution of the Plenum of the Supreme Court of the Russian Federation of 23.06.2015 № 25 "On the application by the courts of certain provisions of Section I of Part I of the Civil Code of the Russian Federation". "Consultant-Plus" (accessed 18.09.2021).

⁷ Determination of the SCEC of the Supreme Court of the Russian Federation № 305-ES19-7439 from 25.07.2019. Document was not published. "Consultant-Plus" (accessed 17.09.2021).

⁸ Determination of the SCEC of the Supreme Court of the Russian Federation № 305-KG18-17303 of 19.07.2019. Document has not been published. "Consultant-Plus" (accessed 15.09.2021).

⁹ Review of judicial practice on issues related to the participation of authorized bodies in bankruptcy cases and bankruptcy procedures applied in these cases (approved by the Presidium of the Supreme Court of the

formulated conceptually important clarification of the concept of the object of taxation, defined as a set of taxable transactions (facts) formed by the end of the tax period. From this concept, it follows that the tax liability arises not at the end of the tax period during which this or that tax should have been calculated and paid, but in connection with the presence of the object of taxation itself and the taxable base, which is consistent with the provisions of paragraph 1 of Article 38 of the Tax Code.

Thus, in determining the actual tax liability, the tax authorities should pay attention to the legality of the very economic activity of the taxpayer, which depends on the legal rules established by the state. In this connection, we can conclude that under the valid tax liability can be understood the amount of tax to be calculated based on the results of the tax period, which corresponds to the norms of law governing tax legal relations on the given tax.

As noted by V. Romenko, establishment of valid tax liability is possible in case of simultaneous observance of two requirements:

1. Elements of tax liability are established (formal certainty, completeness of elements of tax liability and consideration of objective characteristics of economic and legal content of tax);

2. The proper legal nature of the activities of tax authorities is observed, which is ensured by forms of tax control and is implemented by exhaustive measures taken by the tax authority, which are aimed at determining the actual amount of the tax obligation. [18]

3. Problems of determining the actual tax liability of individuals for personal income tax

3.1 Incorrect qualification of the object of taxation

Speaking about the problems associated with determining the valid tax liability of individuals, we cannot but touch upon the key issue for our study - qualification of income as an object of taxation.

In accordance with Article 38 of the RF Tax Code, each tax has its own separate object of taxation, defined in accordance with the provisions of Part

Russian Federation on 20.12.2016). Document was not published. "Consultant-Plus" (accessed 18.09.2021).

Two of the RF Tax Code. It is noteworthy that more than 100 years ago, a famous Russian economic scientist I.Kh. Ozerov studying the concept of "object of taxation" defined it as facts or things due to which tax is paid, thereby concluding that each tax has its own object of taxation [19, p. 222-223] that fully complies with the modern norm of Article 38 of the RF Tax Code.

In accordance with Article 209 of the Tax Code, the object of taxation of personal income tax is the income received by an individual from the source in the Russian Federation or abroad.

It should be noted that Article 217 of the Tax Code establishes a list of income that is not subject to personal income tax, and it is in connection with the qualification of income, which is subject or not subject to personal income tax, that the main disputes arise, which have to be resolved in court.

A classic example is the situation in which the taxpayer sells property belonging to him on the right of ownership, but the right itself was re-registered less than 3 years before the sale, because the property for which the certificate was issued has undergone various kinds of changes. There is a situation in which the question of the presence or absence of the taxpayer's right to a tax deduction established by paragraph 17.1 of Article 217.1 of the Tax Code and, accordingly, the information to be indicated in the tax return for the relevant tax period.

Thus, in one of the administrative cases¹⁰, the taxpayer owned a share in the form of an apartment, based on a gift agreement concluded back in 1989. Subsequently, the apartment, underwent a major renovation and then was replaced with a newly constructed residential addition, whereupon, in 2016, the ownership of the 1989 share was replaced with the ownership of the apartment resulting from the above changes, but fully compliant with the characteristics of the 1989 agreement. The taxpayer, selling the apartment in 2017, believed that since he had the ownership right back in 1989, he was entitled to the tax

deduction established by the tax law, therefore, the tax deduction was declared in the tax return, and the amount payable was 0 rubles.

The tax inspectorate, conducting a desk tax audit of the declared tax return with the opinion of the taxpayer did not agree, and believed that the ownership of the taxpayer arose in 2016, therefore, the right to a tax deduction established by paragraph 17.1 of Article 217 of the Tax Code, the taxpayer did not have.

Believing that the decision of the tax authority was illegal, the taxpayer went through all the courts up to the Supreme Court of the Russian Federation, which put an end to the matter.

Thus, the Supreme Court SCA indicated that since ownership of the interest arose prior to the entry into force of the Law on Registration of Rights (before January 31, 1998), it is recognized as valid, even in the absence of registration in the Unified State Register of Real Estate (hereinafter - USRN), since registration of such rights in the USRN occurs on the will of the holders of rights.

Since the taxpayer's existing title to real estate has not been terminated as a result of reconstruction, the amount of money received by the taxpayer as a result of the sale of such property cannot be attributed to income subject to taxation in connection with the presence of the real estate in the taxpayer's ownership for more than five years.

As a result, the decisions of the lower courts were overturned, the inspection's decision was found illegal, and the taxpayer's claims were satisfied.

The example of this case vividly demonstrates that in the current tax legislation there is a problem of qualification of the object of taxation, and when such situations arise, the fiscal authority takes a pro-budget position, seeking to seize money from the taxpayer in favor of the state. Unfortunately, this case is not unique, and in the majority of such situations it is possible to achieve justice and restore one's violated rights only by reaching the highest court instances.

The following example of a problem in the qualification of the object of taxation can be observed in administrative case No. 2a-1027/2018¹¹.

¹⁰ Decision of the Judicial Board for Administrative Cases of the Supreme Court of the Russian Federation of 03.02.2021 № 83-KAD20-5-K1 on case № 2A-2183/2019. Document has not been published. "Consultant-Plus" (accessed 15.09.2021).

¹¹ Decision of the Judicial Board for Administrative Cases of the Supreme Court of the Russian Federation of 18.02.2020 № 18-KA19-68 in case № 2A-

The problematic issue, which was incorrectly resolved by the tax authority and the courts of lower instances up to the SCAD of the Supreme Court of the RF, was the qualification of fiscal obligations after the application of the consequences of the invalidity of the transaction. As a result of a gift, the taxpayer received a 1/2 share in the right of common shared ownership of the house. After filing an amended tax return a cameral tax audit was carried out in respect of the taxpayer, which found underpayment, as a result of which additional tax was charged, as well as fines and penalties were imposed. In the same year the deed of gift, under which the taxpayer's share was transferred, was declared invalid and the consequences of the transaction invalidity were applied, which, in the taxpayer's opinion, was the basis for cancellation of the tax authority's decision.

The Inspectorate again took a pro-budget position, believing that the taxpayer retained the obligation to pay fiscal payments, and again only at the level of the SCAD of the Supreme Court of the Russian Federation managed to restore justice. The Judicial Board pointed out that the recognition of a transaction for the sale of property as invalid or its termination means that the sale of property did not take place, and the proceeds from the transaction, as a general rule, are returned to the other party. In such a situation, the economic gain from the sale of property by a citizen should be recognized as lost, which, in accordance with Articles 41, 209 of the Tax Code of the Russian Federation indicates the absence of the income received as an object of taxation.

As a result, the decision of the court of first instance was upheld, coming to the same conclusions as those of the SCAD of the RF.

3.2 Incorrect qualification of the nature of a taxpayer's activity and its status

The legal status of a taxpayer is an important category of tax law. And since in tax relations private and public interests most often collide, they cannot but affect the implementation by a taxpayer of his legal status [20, p. 241]. The most accurate

definition of the legal status of a taxpayer can be considered the position of S. S. Tropkaya who defines legal status as "a system of legal obligations and rights guaranteed by the institutions of legal responsibility and the right to complain against illegal actions (inaction) and acts of authorized bodies and their officials". [21, p. 9]

Determining the actual tax liability of a taxpayer, an important role is given to the qualification of activities, from the income of which fiscal payments are subject to payment. Since the legal status of a PIT taxpayer is formed either on the basis of the status of an employee under an employment contract, or on the basis of the status of a contractor in civil law relations [22, pp. 159-160], then in determining the actual tax liability the qualification of the taxpayer and its status, depending on which the tax base may be subject to change up or down, plays an important role.

Since personal income tax is paid not only by individuals, but also by individual entrepreneurs, in practice there have been a number of cases when the tax authorities have reclassified the taxpayer status from a physical person to an individual entrepreneur, which led to an increase of the initially declared taxable base and additional payment of not only personal income tax, but also VAT.

The key issue in determining the status of the taxpayer is the nature of his activities, since paragraph 17.1 of Article 217 of the Tax Code, the sale of property owned by an individual for more than five years is not subject to personal income tax, in addition, under Article 220 of the Tax Code, the taxpayer is entitled to property deductions, the amount of which depends on the type of property. But these conditions do not apply to the individual entrepreneur, who is obligated to pay the full amount of taxes and fees established by law that are specific to his activities. That is what fiscal authorities use and during tax audits they reclassify the actions of an individual as entrepreneurial activities, thereby creating conditions for overstating the taxable base and ultimately increasing the tax payments to the treasury.

Here is an example from recent court practice¹² -

1027/2018. Document has not been published. "Consultant-Plus" (accessed 17.09.2021).

¹² Decision of the Judicial Board for Administrative Cases of the Supreme Court of the Russian Federation of 28.07.2021 № 39-KAD21-5-K1 in case № Law Enforcement Review 2022, vol. 6, no. 2, pp. 93–105

a taxpayer bought and subsequently sold several apartments in 2018. The tax return for 2018 included information on the application of the tax deduction established by Article 220 of the Tax Code of the Russian Federation. The tax inspectorate conducted a desk audit and found that the taxpayer in the period 2013 to 2018 acquired and sold 7 apartments, of which 2 in the audited tax period, in connection with which the tax authority concluded that the entrepreneurial nature of the taxpayer, as transactions were concluded consistently and were of homogeneous nature, as a result, the taxpayer was punished for understating the tax base in the form of a fine, arrears and penalties.

Challenging the tax authority's decision, the taxpayer argued that the two apartments he bought in the audited period were intended for his personal use, namely for the purpose of combining the two apartments into one, since the apartments he bought were adjacent, in the same stairwell, but realizing that it would be extremely problematic to issue such a combination, he sold both apartments, with a difference of 50,000 rubles from the original price, which was the amount of utility bills. But the courts of the first, appellate and cassation instances sided with the inspectorate and upheld the decision of the FTSA.

To restore the violated rights again had to SCA of the Supreme Court, which pointed out that the realization of a citizen's legal right to dispose of his property owned by him on the right of ownership cannot itself be considered as a business activity, because it violates the right of the taxpayer to sell the property, established by Article 209 of the Civil Code. In this case, the courts should have examined the circumstances of the exploitation of the real estate sold, rather than taking a formal approach to the consideration of the case. The court came to similar conclusions in another case similar to the one considered above, where in addition to the already mentioned conclusion the Supreme Court SCA expressly states that an ordinary apartment seller cannot be found an entrepreneur, since his actions are not risky and aimed at making a profit, as required by the business activity from the

perspective of Article 2 of the Civil Code.¹³

However, it should be noted that the Supreme Court does not always stand on the side of the taxpayer, and if the activity of an individual is clearly entrepreneurial, the reclassification of the status of the taxpayer by the tax authority will be recognized as legitimate.

For more than 20 years in Russia there has been a spontaneous development of market relations, which leads to improvement of forms of entrepreneurial activity, but these factors have also contributed to the growth of offenses in the tax sphere. Since only the legal receipt of income from entrepreneurial activity will be the basis for the payment of tax by an individual entrepreneur, entrepreneurs constantly apply new schemes to conceal the income received or to reduce the taxable base [23, p. 140].

The most common example of reducing the taxable base is traced on the example of administrative case No. 2a-2338/2019¹⁴, in which the taxpayer sold 17 vehicles for one year, while in the tax return indicated that the amount of personal income tax payable is equal to 0 rubles.

Under such circumstances, the SCA of the RF quite rightly recognized the reclassification of income of an individual under 17 sales contracts as income from the sale of vehicles that were used in entrepreneurial activities, since these vehicles were not intended by their technical characteristics exclusively for personal, family, household and other purposes not related to entrepreneurial activities.

3.3 Incorrect definition of the tax payer's tax base.

According to paragraph 1 of Article 17 of the Tax Code, the tax base is one of the mandatory elements of taxation. A tax will be considered properly

¹³ Decision of the Judicial Board for Administrative Cases of the Supreme Court of the Russian Federation of 14.04.2021 № 39-KAD21-1-K1 in case № 2A-157/27-2020. Document was not published. "Consultant-Plus" (accessed 17.09.2021).

¹⁴ Decision of the Judicial Board for Administrative Cases of the Supreme Court of the Russian Federation of 16.09.2020 № 39-QAD20-2-K1 for case № 2a-2338/2019. Document was not published. "Consultant-Plus" (accessed 17.09.2021).

2A-2487/23-2020. Document has not been published. "Consultant-Plus" (accessed 18.09.2021).

established only if both taxpayers and all elements of taxation are defined.

By the tax base the legislator understands the cost, physical or other characteristics corresponding to the type of tax. This provision is specified in the clause 1 of the article 53 of the Tax Code of the RF.

For personal income tax, the tax base is the totality of all income of the taxpayer, which was received in cash or in kind, as well as in the form of material income.

Thus, in order to legally impose the fiscal obligation for personal income tax, it is necessary to correctly and correctly determine the tax base.

One of the main problems that arise in determining the tax base is the issues related to forgiveness of debt in a committed credit relationship. To answer this question, it is necessary to refer to the main provisions formulated in the civil legislation and their interpretation in the practice of the tax authorities and, of course, the judicial practice of the highest instances.

From the point of view of the Civil Code of the Russian Federation, legal relations concerning debt forgiveness are regulated by the norms of Article 415, from which it follows that the key criterion of debt forgiveness is its gratuitous nature and absence of counter representation by the giver, in order to exclude property gain for the creditor.

From the point of view of the legislators, the forgiveness of debt certainly creates both an economic benefit and taxable income, which follows from the rules of Article 165.1, paragraph 2 of Article 415, as well as paragraph 2 of Article 438 of the Civil Code. The Supreme Court of the RF agrees with this legal position, which, however, noted that "forgiveness of debt is a bilateral transaction with an implied, as a general rule, consent of the debtor to its fulfillment," however, the court indicates that the forgiveness of debt cannot be considered valid if the debtor sends the creditor objections in any form against the forgiveness of the debt.¹⁵

¹⁵ Decision of the Judicial Board for Administrative Cases of the Supreme Court of the Russian Federation of 16.12.2020 № 49-KAD20-2-K6.

The tax authorities are of the opinion that forgiveness by a credit institution of a debt arising from a contractual relationship (the most common example is a loan agreement) or as a result of a court decision automatically leads to a property benefit for the taxpayer and the formation of income from which personal income tax must be paid.

The Supreme Court takes the opposite position from the tax authorities on this issue, indicating that the forgiveness of fines, penalties and other sanctions does not automatically generate income for an individual. For income to arise from forgiveness of debt, the debtor must recognize such sanctions himself or they must be awarded by a court decision.¹⁶

3.4 Problems of refunding the amount of overpaid personal income tax

Challenging the decision of tax authorities because of incorrectly defined actual tax liability, a taxpayer pursues a personal interest - to reduce the taxable base to the one that, in his opinion, really corresponds to the current legislation. When contesting the decision of a tax authority, the person is not yet obliged to pay the fiscal payments, penalties and fines indicated in the decision, but sometimes, taxpayers take action to pay the payments immediately after the decision is rendered, and only then try to challenge this decision and subsequently return the overpaid amounts. It is about the problems that the taxpayer may have with such a sequence of actions and we will talk about further.

So, administrative case No. 2-2909/18¹⁷, the taxpayer filed a tax return, in which he reflected the property received as a gift, the value of the property

Document has not been published. "Consultant-Plus" (accessed 16.09.2021).

¹⁶ Decision of the Judicial Collegium for Administrative Cases of the Supreme Court of the Russian Federation of 18.01.2019 № 86-KG18-10. Document has not been published. "Consultant-Plus" (accessed 18.09.2021).

¹⁷ Decision of the Judicial Board for Administrative Cases of the Supreme Court of the Russian Federation of 18.03.2020 № 5-KA19-83 in case № 2-2909/18. Document has not been published. "Consultant-Plus" (accessed 18.09.2021).

was stated on the basis of the data in the certificate issued by the Bureau of Technical Inventory. Two years later, the tax authority conducted an on-site tax audit, in the course of which a valuation expertise was carried out, which determined a different value than the one indicated by the taxpayer. As a result - intentional understatement of the tax base, fines, penalties, payment of arrears.

In this situation, the taxpayer paid the additional tax together with the fine and penalty, and then appealed to the tax authority with an application for the return of the excessively paid amount of the tax payment. Having received a refusal, the taxpayer went to court with a statement of claim. The courts of the first, appellate and cassation instance refused to satisfy the claim because the taxpayer did not appeal in court the decision of the tax authority on the recovery of personal income tax penalty and interest in 2015.

The most competent in this matter was the SCA of the Supreme Court of the Russian Federation, which stated the following position - if the taxpayer initiates the procedure of appealing the decision of the tax authority, the court must decide on the legality of the adopted non-normative act. Similarly, the court should act in the case of initiation by the taxpayer of the procedure for reclaiming excessively collected tax, and the court has the opportunity to oblige the tax authority to return the tax, which has already been collected in excess on the basis of an illegal act, without its recognition as invalid.

Thus a taxpayer has the right to apply to court with a claim for the refund of overcharged taxes, penalties and fines, even if the non-normative act of the tax authority itself has not been challenged.

Further, the court indicates that since the taxpayer had no information on the cadastral value of real estate, he rightfully indicated the cost on the basis of the certificate of the Bureau of Technical Inventory and the tax authority was also required to determine the personal income tax on the basis of the inventory value, which was not done.

The next common situation is the imputation of fiscal payment to a person who should not pay it. As a general rule, established by paragraph 3 of

Article 78 of the Tax Code, the tax authority must inform the taxpayer of each fact of excessive tax payment and the amount of excessive tax paid, which became known to the tax authority, within 10 days from the date of discovery of such a fact. As rightly pointed out by V. A. Solovyov, Articles 78 and 79 of the Tax Code of the RF are the basis that formed the fundamental for the tax legislation institute of return and offset of amounts of overpaid tax payments [24, p. 89-90]. But tax authorities do not always rush to fulfill the requirements of these articles, hoping that the taxpayer will not notice and will not try to recover overpaid payments.

This is what happened to Chagovets R.A., who got access to her personal account of the taxpayer in 2019. According to the information in her personal account, R.A. Chagovets paid personal income tax in 3 payments in 2012, 2013 and 2015 for a total amount of 43,523 rubles, which in her opinion is a clear error of the tax authority, because the taxpayer had no income subject to taxation.

Appeal to the tax authority with a claim for refund of overpaid tax payments has not led to the desired result, because the Department of FTAI considered that since the payments were made in 2012, 2013 and 2015, he could not be unaware of the resulting overpayment, he had the opportunity to apply to the tax authority within the three-year period prescribed by law, but he did not do so, which is the basis for refusing to satisfy the application. The mentioned conclusions were supported by the courts of the first, appeal and cassation instance.

The last hope was the Supreme Court, which referred the case for a new review, because significant violations were found in the court proceedings. The Supreme Court SCA indicated that the lower courts approached the proceedings from a formal point of view, referring only to the violation of paragraph 3 of Article 78 of the Tax Code, in the absence of the establishment of significant for the proper resolution of the dispute circumstances of overpayment of tax, not asked for documents of compliance with the administrative claimant notice of the taxpayer to pay tax, and documents on payment of tax, references to which are in the register of payment documents, that is, did not establish the presence or absence of overpayment of

tax in the register of payment documents.¹⁸

The mentioned examples vividly illustrate the mistakes inherent in the majority of court proceedings on tax disputes, such as formalism, unwillingness to establish the economic essence of the disputable tax legal relations and disputes on them in the absence of proper examination of the factual circumstances of the case.

4. Conclusion.

Determining the actual tax liability of a taxpayer on payment of personal income tax, tax authorities are guided by the "pro-budget" goal, seeking to increase the taxable base due to incorrect qualification of the object of taxation, the taxpayer status or questioning the nature of its activities, which leads to the formation of arrears and constitutes an administrative offence. In contrast to the tax position we would like to recall that the taxpayer has an established by the current legislation possibility of reducing the tax liability, for this it is necessary that the basis of reduction may be based only on those facts that would testify to the real incurring of expenses [25, p. 39].

Seeking to restore his violated rights, an honest taxpayer goes to court for protection, where, unfortunately, in the vast majority of cases encounters with the formal approach of courts, which do not identify either the economic essence of the dispute, or properly consider the circumstances of a particular case.

Under such circumstances, it becomes obvious that the system of Russian law needs to fill gaps in the field of taxation, namely in the very approach to determining the amount of tax liabilities, in connection with which the authors propose to fix the concept of "valid tax liability" in the profile Resolution of the Plenum of the Supreme Court of the RF, while indicating to courts the need to identify in each specific case the real economic essence of the dispute, as it is consistent with the position of the RF Supreme

Court¹⁹. As an example of the implementation of such a decision may be supplemented by paragraph 7 of the Resolution of the RF Supreme Arbitration Court (RF SAC) of 12.10.2006 № 53 "On arbitration courts evaluation of the validity of taxpayers' receipt of the tax benefit"²⁰, indicating the need to establish (determine) the actual tax liability of a taxpayer (the real amount of his tax liability), including on personal income tax.

¹⁸ Decision of the Judicial Board for Administrative Cases of the Supreme Court of the Russian Federation of 28.04.2021 № 57-QAD21-4-K1. The document was not published. "Consultant-Plus" (accessed 17.09.2021).

¹⁹ In the Ruling of the Judicial Board for Economic Disputes of the Supreme Court of the Russian Federation of 28.10.2019 № 305-ES19-9789 in case № A41-48348/2017 stated: "...the mere fact of receiving an unjustified tax benefit cannot serve as a basis for changing the procedure for determining the arrears and for charging tax in a relatively larger amount. According to paragraphs 1 and 2 of Article 122 of the Tax Code, the form of guilt matters in determining the amount of the fine."

²⁰ Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation of 12.10.2006 № 53 "On arbitration courts assessing the validity of a taxpayer receiving a tax benefit". "Bulletin of the Supreme Arbitration Court of the Russian Federation", № 12, December, 2006.

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