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SPECIFIC FEATURES OF TAXATION OF INDIVIDUALS IN RELATIONSHIPS WITH FOREIGN ELEMENTS

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Subject. The issues of taxation of residents and non-residents under Russian tax law are considered in the article. The problems of realization of non-discrimination principle under Russian tax law are brought into light. The important role of judicial practice in development of mechanisms of taxation of non-residents is brought into light.

Aim. The aim of this paper is the design of the legal framework of taxation of residents and non-residents under Russian tax law in the scope of implementation of OECD mechanisms in the legal regulation of income taxation.

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 comparative law.

Results, scope. The personal income tax under Russian tax law is a direct federal income tax. It occupies a special place in the tax system, affects the interests of almost all citizens, is fairly simple in administration, and the share of its receipt in the budget is high.

The leading element of the legal construction of the tax considered in the article is the subject of taxation, and namely the peculiarities of the taxation regime, depending on whether the taxpayer has the status of a resident or non-resident. The main differences of the taxation of tax residents and non-residents in the Russian Federation are the following ones:

the object of taxation for tax residents of the Russian Federation is income received from sources in the Russian Federation and (or) from sources outside the Russian Federation; for non-residents it is the income they received only from sources in the Russian Federation;

the tax rate for tax residents of the Russian Federation is 13 percent; the tax rate for non-residents is 30 percent.

When determining the tax base, all incomes of the taxpayer, received by him in cash or in kind, or the right to dispose of which he has arisen, as well as income in the form of material benefits, are taken into account. Exceptions to this rule are provided for in Article 217 of the Tax Code, which contains a list of income exempt from taxation.

Conclusions. The author comes to the conclusion that the legal regulation of the taxation of residents and non-residents is changing rapidly. Meanwhile, in the Russian legislation, the specifics of creating and terminating the status of a tax resident are not specified in detail. At the same time, several taxation regimes have been established for foreigners. This fact allows them to pay taxes at a general rate.

Key words: tax law, personal income tax, resident, non-resident, income

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General trends of income taxation in the Russian Federation

The personal income tax in Russian tax law is a direct federal income tax. It occupies a special place in the tax system, which, according to V.V. Gritsenko, is conditioned by objective factors: it affects the interests of almost all citizens, the range of taxation objects is diverse, it is quite simple in administration, the share of its receipt into the budget is high [1. C. 64].

A.P. Terekhina points out that "income taxation has great opportunities to influence the level of real incomes of the population, it allows using the system of privileges, the choice of an object and tax rates to stimulate stable budget revenues by raising the tax rates as the earnings of citizens increase" [2. 36]. This thesis, for all its fairness, is not applicable to Russian conditions in its entirety: the income from personal income tax is a relatively small part of the revenues of the Russian budget in comparison with the budgets of European states. Tax revenues of the budget from personal income tax are substantially lower than those from those for corporate income tax. In addition, “deoffshorization” measures will increase tax revenues from legal entities, while income from personal income tax is stable and will not change significantly. The main directions of the tax policy of the Russian Federation for 2016 and the planning period of 2017 and 2018 contain the thesis that the taxation of individuals' incomes requires constant adjustment in order to exclude unreasonable tax benefits, and monitor the completeness and timeliness of tax payment.

Legal Status of Residents and Non-Residents in Russian Tax Law

The leading element of the legal composition of the tax considered in the article is the subject of taxation, and namely the peculiarities of the taxation regime, depending on whether the taxpayer has the status of a resident or non-resident. We can also characterize tax relations involving a foreign element. The importance of using such an approach is justified by A.A. Shakhmametyev: according to him, "it is not only theoretically possible and practically feasible, but it is necessary to oppose or isolate the national law regulating relations with a foreign element for the comprehensive coverage of the phenomenon when considering the tax and legal regulation of a particular state" [3. [128]. At the same time, the norms regulating such relations operate only within the Russian Federation and are fixed in the Tax Code of the Russian Federation.

In the science of tax law, there is a tradition of classifying foreign elements for a foreign element on the side of the subject, on the side of the object and a foreign element characterizing the onset of a legal fact [4, 5]. For example, A.S. Grigoriev combines tax relations with a foreign element into two groups. He refers to the first one the cases when the state collects tax from a taxpayer who is a subject of foreign law, to the second one he refers the cases when the state demands to calculate the tax from the object of taxation that arose from a subject of national law abroad. In the first variant, the subject of taxation acts as a foreign element, and in the second - the object of taxation does [6. 150].

For the purposes of this study, we believe it expedient to proceed from the subject composition of participants of tax relations, since it is the status of a person that determines the status of a relationship as of a cross-border one in cases of taxation of individuals. Income tax, in the opinion of T.V. Kazakova, traditionally refers to taxes of a resident type, which means that the amount of tax liability, the procedure for determining the tax base and, in some cases, rates will depend on whether the person is recognized as a resident or not [7. C. 13]. The Tax Code does not link the tax residency in the Russian Federation with the criterion of citizenship. In other words, this means that subjects of foreign law of all categories (non-residents and non-nationals) have the same rights and bear the

same responsibilities as subjects of national law of all categories [4. C. 455]. Tax residents bear a full tax duty to the state of their resident, non-residents bear limited responsibility.

Law enforcement practice on taxation of residents and non-residents

The Constitutional Court of the Russian Federation in its judgment of June 25, 2015 № 16-P noted the important thesis that the tax status of an individual based on the criterion of his stay in the Russian Federation for at least 183 calendar days within 12 consecutive months is precisely defined at the beginning of the tax period, but at the end of each tax period clarification based on the results of this tax period is required. The existence of the status of a tax resident of the Russian Federation, established at the beginning of the tax period on each date of payment of income is preliminary and is subject to clarification at the end of the tax period, depending on the length of stay of an individual in the territory of the Russian Federation in this tax period, which is the basis for the recalculation of the tax on income of individuals levied on the basis of the preliminary tax status of the person it had at the beginning of the current tax period.

The citizen of the Republic of Belarus S.P. Larskiy concluded a labor contract with Energoproekttekhnologiya LLC on his arrival on July 13, 2010 in the Russian Federation. The LLC as a tax agent kept his income tax on individuals at a rate of 30 percent due to the lack of his tax resident status from July 2010.

In the applicant's opinion, in determining this period the period of the actual location of the taxpayer on the territory of the Russian Federation for 183 calendar days should be taken into account; a different understanding of these legal provisions does not allow the taxpayer to pay back the personal income tax paid at an increased rate (30 percent) for the previous tax period, which is less than the calendar year.

According to the tax authorities, following the results of 2010, the citizen of the Republic of Belarus was not a Russian tax resident, since that year he spent only 172 days in the Russian Federation.

The courts of general jurisdiction denied the applicant the satisfaction of the requirements for the recalculation of the tax at the rate of 13% and the return of the overpaid amount of tax, citing the fact that for the recognition of a person as a tax resident of the Russian Federation in 2010, his or her actual stay in Russia should not be less than 183 days. The term of the applicant's stay in Russia in 2010 was 172 days, and therefore he could not be recognized as a tax resident of the Russian Federation in that period and personal income tax could not be recalculated and returned.

The Constitutional Court of the Russian Federation recognized the impugned provisions as not contradicting the Constitution of the Russian Federation, since the provisions contained therein do not imply a waiver of the remuneration for citizens of the Republic of Belarus for the work for hire received during their stay on the territory of the Russian Federation in the application of the rules established for tax residents of the Russian Federation.

At the same time, the Constitutional Court of the Russian Federation stressed that when choosing the norm of an international treaty, it is necessary to take into account not only the provisions of the Protocol of January 24, 2006 to the Agreement, but also the provisions of the EAEU Treaty, within which an agreement was reached on unconditional distribution to individuals who are tax residents of the EAEU member states, national tax regimes regarding the application of

the tax rate of income received in connection with employment in other member states of this Union. Thus, migrants from the EEA member states working in the Russian Federation are covered by the national tax regime.

The main differences in the taxation of tax residents of the Russian Federation and individuals who are not tax residents of the Russian Federation are the following ones:

the object of taxation for tax residents of the Russian Federation is income received by them from sources in the Russian Federation and (or) from sources outside the Russian Federation; the object of taxation for persons who are not tax residents of the Russian Federation, the income they received only from sources in the Russian Federation;

for tax residents of the Russian Federation is 13 percent; the tax rate for persons who are not tax residents of the Russian Federation is 30 percent.

All the income received by them, either in cash or in kind or right of disposal of which he emerged, as well as income in the form of material benefit is included in the tax base. Exceptions to this rule are provided in article 217 of the Tax Code, which contains a list of income that is exempt from taxation.

D.V. Tyutin summarizes the foregoing: residents pay personal income tax on income from sources in the Russian Federation and from sources outside the Russian Federation at the rate of 13% (paragraph 1 of Article 224 of the Tax Code); and non-residents pay taxes only from sources in Russia, but for the most at 30% (paragraph 3 of Article 224 of the Tax Code) and excluding deductions (paragraphs 3 and 4 of Article 210, Article 224, paragraph 3 of the Tax Code). At the same time the nationality of a natural person does not have legal value [8].

The described legal regime creates a risk of double taxation / double non-taxation. Multiple taxation according is connected directly to the genesis of national fiscal systems in the early stages of development of which taxation of the same object (with the same payers) was a common practice [9].

The Tax Code does not give to a universal definition of "income" concept for tax purposes, which could be suitable for both individuals and legal entities, which often causes disputes on legal practice [10, 11]. According to Article 41 of the Tax Code income is recognized as economic benefit in cash or in kind are taken into account in the case of the possibility of its evaluation and to the extent that this benefit can be assessed and determined in accordance with the chapter "The tax on personal income" and "Corporate income Tax" of the Tax Code. It also pointed by the Presidium of the Supreme Court in its judgment of 22 July 2015 on the case number 8 PV15 .

Law enforcement problems of the implementation of the principle of non-discrimination in tax law

Legal regulation of the taxation of residents and non-residents is changing rapidly. S.G. Pepelyaev points out that particularities of creation and termination of tax resident status are not defined in Russian legislation in detail [12. p. 33].

Moreover, the need to determine the status of a tax resident of the Russian Federation in the context of the application of the provisions of DTTs gave rise to contradictory acts. Thus, according to the explanations given in the letter to the Russian Federal Tax Service on October 29, 2015

number of OA-3-17 / 4072, letter to the Federal Tax Service of Russia from November 13, 2015 number of OA-3-17 / 4271 @ the center of vital interests was determined by the place of the family residence, core business or work. In this case, the fact of spending for at least 183 days during the tax period (calendar year) in the Russian Federation does not lead to the automatic loss of the status of a tax resident of the Russian Federation.

Distribution of taxing rights of the Contracting States in respect of income of an individual is made with consideration of DTTs, taken through the provisions of the OECD Model Convention on taxes on income and on capital (hereinafter - MC OECD), as well as similar to those in the Model Agreement on the conclusion of international agreements on avoidance double taxation and prevention of tax evasion on income and property taxes.

According to paragraph 2 of Article 14 of the agreement, remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first mentioned State if the following conditions are met:

- the recipient is present in the other State for a period or periods not exceeding 183 days in total in any 12-month period, starting or ending in the fiscal year;

- the remuneration is paid by, or on behalf of, an employer who is not a resident of the other Contracting State;

- the remuneration is not borne by a permanent establishment which the employer has in the other Contracting State.

In April 2016 Russian Ministry of Finance presented the position radically different from those letters Russian Federal Tax Service, which showed that in the presence of the center of the vital interests of the Russian Federation, the individual may be Russian tax resident in a calendar year. Russian Ministry of Finance pointed out that the letter of the Federal Tax Service of Russia on January 16, 2015 number of OA-3-17 / 87 @, and the other letters in which the Federal Tax Service outlined a similar position, shall not be applied in connection with the discrepancy of the Russian tax legislation and the provisions of DTTs, as well as the inconsistency with the position of the Russian Finance Ministry.

Moreover, the Ministry of Finance pointed out that it was the Ministry of Finance is the competent authority for the use of intergovernmental agreements (treaties, conventions) for the avoidance of double taxation and the Federal Tax Service functions are quite different: it informs taxpayers about taxes and fees, about the legislation on taxes and fees, the procedure of calculation and payment of taxes and fees, about obligations of taxpayers, tax authorities and their officials, as well as providing tax reporting forms and explains the procedure for their completion. The letters Russian Federal Tax Service did not comply with the legislation of the Russian Federation on taxes and duties and the provisions of international agreements on avoidance of double taxation, as well as had not been agreed with the position of the Ministry of Finance of the Russian Federation.

The concept of the FTS was borrowed from foreign tax legislation. It appears that the Federal Tax Service was based on the provisions of paragraph 1 of Article 7 of the Tax. However, we have already noted that the determination of residence in the center of vital interests is provided by DTTs only when the individual is a resident of both Contracting States in accordance with their national legislation. However, the only criterion for determining tax residency under Article 207 of the Tax Code is actual determination of physical persons in the Russian Federation for at least 183 calendar

days within 12 consecutive months. Therefore, we believe that Tax Code of the Russian Federation should be the basis for determining whether a person is a tax resident of the Russian Federation.

The peculiarities of taxation under national tax law, due to the presence or absence of resident status, create a basis for determining the tax liabilities of different categories of taxpayers. In connection with this second aspect which is important for taxation of individuals is the non-discrimination regime.

Part 2 of Article 3 of the Tax Code corresponds to the principle of non-discrimination with world practice. Specific requirements for non-residents on procedure for filing tax returns and payment of taxes are due only to the terms of their stay in the territory of the Russian Federation and the lack of permanent links with the area. According to the Tax Code, the legal status of non-residents does not depend on the form of ownership, the nationality of natural persons or place of origin of the capital. However we agree with I.A. Havanova that the definition of the cause of discrimination in the field of income taxes causes difficulties, since international tax disputes affect the laws of several countries, and the test of comparable internal situation is not perfect [13. C. 37]. The main problems associated with finding comparable situations, because there are different approaches to residents and non-residents.

In this regard, some Russian scholars state that foreign citizens are often in a more privileged position in the Russian Federation than the Russian ones, for example, if we talk about a special migration regime for foreign qualified specialists. On the other hand, there are no preferences for Russian specialists [7,14, 15].

There is a well-known Decision of the Constitutional Court of July 14, 2011 № 949-O-O, in which the setting of increased tax rate of 30% for non-residents was not considered discriminatory in the sense of paragraph 2 of Article 3 of the Tax Code and it was indicated that establishing different rates of personal income tax is based on the objective criteria for defining the relationship of an individual with the tax jurisdiction of the Russian Federation .

The Tax Code provides taxation of foreign natural persons at the rate of 13% in the following cases:

after recognizing them as tax residents of the Russian Federation;

implementation of employment specified in Article 227.1 of the Tax Code in respect of which the tax rate is set at 13% (paragraph 3 of paragraph 3 of Article 224 of the Tax Code);

carrying out work as a highly qualified specialist in accordance with the Federal Law of July 25, 2002 № 115-FZ "On the Legal Status of Foreign Citizens in the Russian Federation", in relation to which the tax rate is set at 13% (paragraph 4 of paragraph 3 of Article 224 of the Tax Code Russian Federation);

on the implementation of work participants of the State program to assist the voluntary resettlement to the Russian Federation of compatriots living abroad, as well as their family members, co-migrated for permanent residence in the Russian Federation in respect of which the tax rate is set at 13% (paragraph 5 paragraph 3 of article 224 of the Tax Code);

to perform job duties members of the crews of vessels sailing under the state flag of the Russian Federation in respect of which the tax rate is set at 13% (paragraph 6, paragraph 3 of Article 224 of the Tax Code);

from the realization of labor activity by foreign citizens or stateless persons granted refugee status or temporary asylum in the Russian Federation in accordance with the Federal Law "On Refugees", in relation to which the tax rate is set at 13% (paragraph 7, paragraph 3 of Article 224 of the Tax Code).

In addition, in order to avoid discrepancies in the practice of taxation by Member States of the EAEC, Article 73 of the Treaty on the EAEC stipulates that the tax is paid by the state's local rate.

Conclusion

Thus, foreign individuals have multiple tax regimes, which allow them to pay taxes at the general rate. However, tax regimes for the Russian citizens who are not tax residents of the Russian Federation, do not vary and benefits for them are not provided.

We believe that the position expressed by Constitutional Court of the Russian Federation is not consistent with its previous opinion expressed in its Resolution of 13 March 2008 № 5-P: "equality in regard of taxation is understood primarily as uniformity, neutrality and fairness of taxation. This means that the same economic outcomes for taxpayers should involve the same tax burden, and that the principle of equality of tax burden is violated in cases where a certain category of taxpayers falls into different than other taxpayers' conditions, although there are no significant differences between them justifying unequal legal regulation. Taxpayers should bear an equal burden of taxation " 9 .

In this sense the situation in the application of Article 224 of the Tax Code is similar to circumstances which have not been accepted by the European Court of Justice as a justification of discrimination: Member States are not permitted to apply measures other than those applied to nationals or national companies of this State to foreign persons exercising their rights, unless these measures do not meet the principle of proportionality. Moreover, the level of payment of foreign highly qualified specialists work may be substantially higher than the level of payment of Russian employees in similar positions. L.Sh. Yulgusheva rightly points out that "Russian citizens are often highly qualified and meet the specified requirements with regard to the level of remuneration. The only thing that prevents them from obtaining a privileged position in the taxation of income in Russia in the year during which they have been non-residents is citizenship "[14. C. 73].

In any case, the change of rules of tax resident status does not solve the issue of discrimination against citizens who are not subject to preferential tax regimes.

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