УДК 347.9
DOI 10.24147/2542-1514.2017.1(3).71-81

PRINCIPLES OF SUBSIDIARITY AND PROPORCIONALITY IN TAX LAW ENFORCEMENT

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Subject. The principles of subsidiarity and proportionality, which serve as the basic principles for determining the competence of integration associations, are considered in the article.

Aim. The aim of this paper is to analyse the place and the importance of Member States' obligations deriving from the EU legal order in order to address the relationships between EU law and national tax law, as well as to analyse the practice of using of principles of subsidiarity and proportionality by the highest courts of the Russian Federation as a federal state.

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 exercise of power by the European Union in the areas of shared competence must respect the principle of subsidiarity. The founding Treaties make clear that subsidiarity is a legal enforceable legal principle. However. the case law of the European Court of Justice reveals that the enforcement of subsidiarity as a judicial principle has been ineffective.

The article examines cross-border loss relief for group companies in the context of European Union law and considers how this has affected Member States such as the UK. The case law of the Court of Justice is then analysed in an attempt to assess whether some of the principles set out in these legislative initiatives found their way to Member State laws through the Court's jurisprudence. Following this, the judicial and legislative response to the Marks & Spencer judgment in the UK are critically assessed.

The practical suggestions are looking at developing EU compatible tax principles to be applied to cross-border taxation within the EU.

Having considered the principles of subsidiarity and proportionality in the context of interaction between integration and national tax law, the author suggests directions for improving the practice of integration tax law. The supranational judicial authority should dwell on the position that only those differences that are directly based on the origin of the income or nationality of the taxpayer can be justified on the basis of restrictions on fundamental freedoms.

Conclusions. The author comes to the conclusion that a co-ordinated approach to cross-border tax is essential. The effectiveness of integration tax law will largely depend on how the ratio of the norms of integration and national law in the tax jurisdiction of the Union and member states will be formed. However, historically direct tax has been viewed by Member States as central to national sovereignty.

Key words: tax law, subsidiarity principle, proportionality principle, legal practice, taxpayer, income, European Union

Информация о статье:
Дата поступления – 05 июля 2017 г.
Дата принятия в печать – 10 июля 2017 г.
Дата онлайн-размещения – 30 сентября 2017 г.

Article info:
Received – 2017 July 05
Accepted – 2017 July 10
Available online - 2017 September 30

It is necessary to consider two interrelated principles - the principle of subsidiarity and the principle of proportionality as fundamental foundations of the definition of the competence of integration associations. Thus, in the EU these principles are combined in the title of the Protocol on the application of the principle of subsidiarity and proportionality, the updated version of which is the Second Annex to the Lisbon Treaty. In close connection with them, it is necessary to consider the principle of empowerment. In the EAEU law, these principles are reflected in Article 5 of the EAEU Treaty. In Russian tax legislation the principles of proportionality, certainty, universality and equality of taxation are enshrined in Article 3 of the Tax Code. The proportionality of taxation, according to A.V. Demin, consists of three components, which are proportionality, validity and admissibility of tax exemptions [1].

Many difficulties arise in process of legal regulation of tax relations, for example, the problem of the correlation of powers of union institutions and member states in the tax sphere (in integration associations) and the powers of the federation and its subjects in federal states, for example, the Russian Federation. The principle of subsidiarity is "the closest to the concept of a state-legal institution of joint jurisdiction, acting as a system-forming element of the cooperative model of federalism" [2. P. 88].

The federalism in the EU was expressed by J. Weiler: according to him, the EU is neither a confederation nor a federation in the traditional sense of these words, but at the same time it has its own "brand of constitutional federalism" [3. P. 70]. One of the most important goals of this association are economic integration and creation of an internal market. At the same time, "the tax landscape of the EU is still very fragmented" [4. P. 79]. As noted in the acts of the European Commission and the comments of European researchers, a lack of coordination can lead to the erosion of the tax base by exploiting gaps in legislation and preventing Member States from balancing and improving their tax systems[1].

The principle of subsidiarity in the tax law is important both for the tax law of integration associations and for federal states, which will be considered on the example of the Russian Federation.

Principle of subsidiarity

The principle of subsidiarity, is the basis of distinguishing the competence between supranational and state levels of power in the EU in all areas, including tax, thus ensuring the existence of a key element of fiscal federalism in the EU [5. P. 15]. The essence of this principle is that management measures should be taken by the level of authority that can ensure the most effective achievement of the goals of such measures.

The principle of subsidiarity was originally fixed in Article 3 (b) of the Treaty of Maastricht, according to which in the areas which do not fall under its exclusive jurisdiction, Community operates in accordance with the principle of subsidiarity if and as targets proposed action cannot be sufficiently achieved States Members and therefore, due to the scale and results of the intended action, can be more successfully achieved by the Community[2] . However, the wording of this article caused disagreement and did not allow distinguishing the competence of the Union and the member states.

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level (Article 5 (3) TEU). Thus, full harmonization of the tax legislation of the Member States does not apply to the objectives of the EU constituent treaties.

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[1] Communication from the Commission, Co-ordinating Member States' direct tax systems in the Internal Market, 19 Dec. 2006, COM (2006) 823 final, p. 4.

[2] Treaty on the European Union, signed in Maastricht on 7 July 1992. OJ C 191, 29 July 1992.

Protocol on the application of the subsidiarity and proportionality principles laid down three criteria for determining the appropriateness of the intervention of the European institutions:

- whether there are situations that, by virtue of the law, cannot be resolved at the level of the Member States;
- whether the national action or inaction will contradict the requirements of the TEU;
- whether the resolution of the situation at the EU level has obvious advantages.

EU institutions carry out their activities on tax issues only if the member state cannot effectively solve the problems that have arisen. In fact, the problems arise from the lack of an appropriate level of coordination between the tax systems of the EU member states [6. P. 314]. Article 5 of the Treaty on European Union says that the principle of provision of competence controls the borders of the Union competence, and the principles of subsidiarity and proportionality govern the exercise of this competence. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States. This principle, according to A.O. Chetverikov, points out "on the origin of the competence of the Union: it has a derivative character, since it was received from the Member States which, through the treaties concluded by them, transferred part of their sovereign and other prerogatives to the EU)" [7].

Based on the above, we can formulate the conditions under which the EU is authorized to resolve the tax situation:

- the EU is empowered to act in this situation (the principle of empowerment);
- in the context of the division of competence the EU level best meets the objectives of the EU constituent treaties (the principle of subsidiarity);
- the content and the form of the action do not exceed the limits necessary to achieve the goals established by the memorandums of association (the principle of proportionality).

The control over observance of the abovementioned principles is realized both in the form of subsequent control by the Court of the EU and in the form of preliminary control by the national parliaments of the Member States carried out in the course of legislative procedures. Whatever it was, taxation is the core of state sovereignty, and the interaction of national tax systems remains a source of disagreement. The Union and Member States take measures to prevent abuses and simplify tax systems. At the same time, tax secrecy and deficiencies in the interaction of member states still allow companies to exploit gaps in tax legislation and differences in national tax systems. In addition, large multinational companies due to their presence in a large number of jurisdictions and complex corporate structures have opportunities for aggressive tax planning which are not available for small businesses or individuals do not have.

The European Court of Justice court is empowered to rule on claims in connection with the violation of the principle of subsidiarity by the EU legislative acts [8], which, according to the conditions laid down in Article 263 TFEU are applied by Member States or transmitted by them in accordance with their legal order on behalf of their national Parliament or a chamber of the latter (Article 8 of the Protocol).

Similarly, the Constitutional Court of the Russian Federation repeatedly stated in its decisions that it follows from the interrelated provisions of articles 1 (part 1), 55 (part 3) and 57 of the Constitution of the Russian Federation, that, by implementing tax regulation and establishing the general principles of taxation and charges, including an exhaustive list of regional taxes, the federal legislator is bound by the requirements of ensuring constitutional principles of fairness and proportionality in the sphere of tax relations and at the same time has a sufficient degree of discretion in establishing specific taxes: it independently determines the parameters of the main elements of the tax, including definition of taxpayers and objects of taxation, types of tax rates, the duration of the tax period etc. According to Article 1 and clause 3 of Article 12 of the Tax Code of the Russian Federation, when establishing regional taxes by the legislative bodies of the authorities of the constituent entities of the Russian Federation, tax rates,

the procedure and terms for payment of taxes are determined in the manner and within the limits provided by this Code; other elements of taxation on regional taxes and taxpayers are determined by the Tax Code. Consequently, the federal law should establish the circle of taxpayers, as well as such essential elements of each regional tax as the object of taxation, the tax base and the marginal tax rate [3] . Thus, since in accordance with Article 75 (part 3) of the Constitution of the Russian Federation, the authority to develop and establish general principles of taxation and charges is assigned to the federal legislator, the establishment of significant elements of taxation for making the tax legally established should be made by federal law. At the same time, regardless of the level of tax in the tax system the tax rate is determined in the federal law on this tax (in the relevant chapter of the Tax Code of the Russian Federation[3].

The core component in the state-power relations between the Federation and its subjects is the institution of joint jurisdiction. The sphere of taxation requires cooperation and mutual responsibility of the federation and its subjects. Evaluating the possibility of applying the principle of subsidiarity in the domestic relations of the Russian Federation system, we note that the Russian Constitution is the establishment of common principles of taxation and levies in the Russian Federation under the joint jurisdiction of the Russian Federation and its subjects and local government has the authority to establish local taxes and fees.

The principle of the unity of the tax system of the Russian Federation is closely connected with the provisions of the Tax Code of the Russian Federation, which fix the principle of federalism in tax law. According to A.N. Kozyrin, he reveals through the legislative consolidation of the trend of centralization of the Russian tax system:

- an exhaustive list of all taxes is fixed in the Tax Code of the Russian Federation (articles 13, 14, 15 The Tax Code of the Russian Federation);
- federal, regional or local taxes and fees not provided for by the Tax Code of the Russian Federation (paragraph 6 of Article 12 of the Tax Code of the Russian Federation) cannot be established;
- the abolition of federal, regional and local taxes is carried out only by the Tax Code of the Russian Federation (clause 5 of Article 12 of the Tax Code of the Russian Federation);
- clear definition of the boundaries of regional and local rulemaking in the tax sphere (clauses 3 and 4 of Article 12 of the Tax Code of the Russian Federation);
- the unified system of federal tax authorities [9].

Let us note the importance of interpreting the principle of subsidiarity by the Constitutional Court of the Russian Federation: "The determination of the constitutional meaning of the right of the constituent entities of the Russian Federation guaranteed by the Constitution of the Russian Federation to establish taxes is possible only taking into account the basic human and rights enshrined in articles 34 and 35 of the Constitution of the Russian Federation, as well as the constitutional principle of the unity of the economic space. Proceeding from the need to achieve a balance between these constitutional values, the tax policy tends to unify tax exemptions. The general principle of taxation, such as the exhaustive list of regional taxes that can be established by the state authorities of the constituent entities of the Russian Federation, and the resulting restrictions on the introduction of additional taxes and mandatory contributions, as well as on raising tax rates and tax payments". The court also pointed out that taxes introduced by the legislative bodies of the subjects of the Federation in accordance with the general principles of taxation and charges determined by federal laws are recognized as legally established. Establishment of a regional tax means specification of the general legal provisions, including detailed definition of subjects and objects of taxation, order and terms of payment of taxes, the rules for granting benefits, the manner of calculation of specific rates (Article 8 (Part

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[3] Определение Конституционного Суда Российской Федерации от 23 июня 2005 года № 272-О «Об отказе в принятии к рассмотрению жалобы гражданина Баукина Владимира Васильевича на нарушение его конституционных прав положениями пунктов 1 и 2 статьи 361 Налогового кодекса Российской Федерации» // СПС «КонсультантПлюс».

1), 71 (point "a"), 72 (item "and" part 1), 74 (parts 1, 2), 114 (paragraph "b" of part 1) of the Constitution)[4]. The essence of this principle, according to SG. Pepelyaeva does not consist in concentrating the financial authority of the federal center, but in creating unified mandatory standards for financial activities that ensure a balance of rights and interests of all participants in financial relations [10. P. 78].

A.V. Demin draws attention to the fact that the competence of the subjects of Russian Federation and municipal entities in the tax area is made up of three components: 1) the introduction of the regional (local) taxes and fees; 2) the establishment of the regional (local) taxes and fees; 3) on the implementation of the delegated powers in the field of taxation [11. P . 152] .

The principle of proportionality

According to the principle of proportionality Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality (Article 5 (4) TEU).

An important issue of proportionality in the tax field is to establish indicators of the proportion of powers in determining the scope and definition criteria of proportion. According to Article 5 of the Protocol on the application of the subsidiarity and proportionality principles of reasoning leads to the conclusion that the objective of the Union can be better achieved at the level of the latter, should be based on qualitative and, wherever possible, quantitative indicators. A special role in the application of the principle of proportionality to the provisions of tax law belongs to the EU Court of Justice.

The principle of proportionality consists of three subprinciples: suitability, necessity and proportionality in the narrow sense. All these subprinciples express the idea of optimization: in order to apply the principle of proportionality to the constitutional rights, it is necessary to use them as optimization requirements. Therefore, the term "principle" is often used instead of the term "right" [12. P. 6] .

If the national tax law restricts the fundamental freedom, it is necessary to conduct a proportionality analysis, for which two questions are to be answered:

whether application of the norm contributes the achievement of the objective measures (suitability test);

whether the norm exceeds the necessity of the measures for achievement of this goal (the necessity test) [13. P. 34] .

In science tax law there is a trend that is referred as a "struggle between two incompatible positions: allowing Member States to determine their own tax jurisdiction and to defend tax sovereignty and, at the same time forbidding them to levy taxes on cross-border transactions in less favorable than in comparable national situations" [15. P. 343]. Thus, the key issue is the balance between fundamental freedoms and the protection of tax sovereignty. Analysis of the literature has shown that it is often impossible to explain why international double taxation in those or other matters will not lead to limitation of fundamental freedoms or why such restrictions are justified by the European Court of Justice in some cases and rejected in others and on what grounds the Court conducted the necessity test in cases like Marks & Spencer[5].

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[4] Постановление Конституционного Суда Российской Федерации от 21 марта 1997 года № 5-П «По делу о проверке конституционности положений абзаца второго пункта 2 статьи 18 и статьи 20 Закона Российской Федерации от 27 декабря 1991 года «Об основах налоговой системы в Российской Федерации» // Вестник Конституционного Суда Российской Федерации. 1997. № 4.

[5] Case C-446/03 Marks & Spencer Pic v David Halsey (HM Inspector of Taxes), ECJ, 13 December 2005.

An example from the Dutch practice can clarify the requirement of proportionality in the narrow sense of the word. As a result of checking of proportionality in the narrow sense, the Member State may be required to adopt a measure which imposes fewer restrictions on economic activities within the Union, even if it leads to the lower level of protection of its legitimate interests. The case concerned a taxation of taxi drivers's tips. The taxpayer received a notice of income tax, in contrast to most of his colleagues, although the fact that the average taxi driver annually receives a substantial part of the income in the form of a tip is considered as common knowledge. As a result, there was disparity in the tax treatment of a particular taxpayer and his fellow taxi drivers and the question arose as to whether it violates the principle of equality. The Supreme Court of the Netherlands has concluded that the operation of the tax notification dissemination system creates a conflict between the need to ensure effective tax administration procedures, on the one hand, and the need to ensure compliance with tax obligations in accordance with the law, on the other. The Supreme Court weighed the interests and ruled as follows. It was necessary to the actual investigation to find out whether they could not solve the tax authorities to refrain from giving notice to all the taxi drivers due to administrative problems. The scale of the violation of the principle of efficiency should be determined by the lower court. The greater the impact, the more likely it is "outweighs" the principle of equality. If the tax authorities could implement taxation without major performance problems, this minor violation of the principle of effectiveness could not "outweigh" greater breach of the principle of equality.

Similarly, analyzing the principle of proportionality and the Russian judiciary. Thus, the Constitutional Court ruling of July 17, 2014 № 1578-O refused JSC "Gurovo-Beton" to accept for consideration of the complaint on a violation of the constitutional rights and freedoms of paragraphs 2, 3 and 4 of Article 269 of the Tax Code, since the contested legislative provisions, with additional requirements for the taxpayer for the purpose of accounting for the payment of corporate profit tax interest given to him a foreign member of the loans are aimed at countering the abuse of tax relations and mo Gut regarded as violating the constitutional rights and freedoms of the applicant in that their aspect, including as contrary to the principle of proportionality[6].

Thus, the national measures to prevent the exercise of fundamental freedoms or make them less attractive can only be justified if they pursue a legitimate aim in the public interest, suitable for the purpose and do not exceed the necessary measures to achieve it.

Let's return to the EU. If the Court of Justice considers the EU legislation in terms of the principle of proportionality, it is necessary to ensure a balance between the individual and the interests of the Union [9] . If the ECJ considers from that point of view the national legislation, it must strike a balance between the interests of the nation-state and the Union. There are not many examples of the fact that the Court of Justice has applied the principle of proportionality in the narrow sense in cases of violation of fundamental freedoms, mainly in the case of free movement of goods. For example, in Stoke-on-the Trent the Court described the principle as follows: assessment of the proportionality of national rules in pursuit of a legitimate aim in accordance with Community law consists in weighing the national interest in attaining that goal against the Community interest in ensuring the fundamental freedoms of action[7].

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[6] Определение Конституционного Суда Российской Федерации от 24 марта 2015 года № 695-О «Об отказе в принятии к рассмотрению жалобы открытого акционерного общества «Гурово-Бетон» на нарушение конституционных прав и свобод пунктами 2, 3 и 4 статьи 269 Налогового кодекса Российской Федерации» // СПС «КонсультантПлюс».

[7] Case C-169/91 Council of the City of Stoke-on-Trent and norwich City Council v B & Q plc, judgement of 16 December 1992.

Although the European Court of Justice has never applied the principle of proportionality in the narrow sense of the word in matters relating exclusively to direct taxation, there are at least two tax cases in which this principle is addressed: Marks & Spencer and N[8].

Case N concerned the Dutch taxation of latent growth of shareholder value. These shares are owned by the taxpayer - the largest shareholder of the Dutch company, who decided to leave the tax jurisdiction of the Netherlands. Reducing the value of the company, which occurred after a change of residence, was not taken into consideration in order to reduce tax arrears. The Court of Justice held that the tax for leaving the country of a resident (of exit tax) corresponds to the principle of fiscal territoriality. However, the Court continued its review of whether the action goes beyond the norm for the purposes of which it pursues. The Court concluded that in order to be recognized as the appropriate principle of proportionality, such a system of income tax refunds should take into account the possible reduction of the cost after the change of residence of the taxpayer, if this has not been taken into account by the host Member State of the taxpayer. This decision echoes the decision in the case of Marks & Spencer, as losses incurred outside the tax jurisdiction of the State, should be taken into account under certain conditions. Obviously, it violates the objective of the Dutch tax system, namely, the principle of territoriality.

In our opinion, the case Marks & Spencer and N are the result of the need to respect the balance between tax sovereignty and the interests of the internal market. The importance of this balance expressed Advocate General J. Kokott Oy AA[9], the subject of which was the inability of deducting the contribution of the group to the parent non-resident. The Advocate General says the following: "The restriction of freedom of establishment is possible only if it pursues a legitimate aim compatible with the Treaty and is justified by imperative reasons in the name of public interest. In this case, it is necessary that this goal was achieved without exceeding the boundaries of the actions required to achieve it. Thus, the measure must respect the principle of proportionality in the narrow sense of the word".

The Advocate General noted that the possibility of deducting intercompany transfers to the Finnish company aims to provide the distribution of powers of taxation between the Member States in order to eliminate the possibility of non-taxation movement of proceeds and tax abuse. This confirms the fact that the profits earned by group companies in Finland are subject to taxation, and it is consistent with the principle of territoriality. It remains to decide whether they do not exceed the tax rules requirements of necessity and proportionality in the narrow sense of the word in order to achieve this goal. The Advocate General noted: "In summary, it should be held that restricting the deductibility of intra-group transfers to transfers to Finnish companies is apt to safeguard the allocation of powers to impose taxes between Member States, to exclude the possibility that income which is transferred is not taxed, and to combat tax avoidance. It ensures that profits earned by group companies in Finland are subject to taxation there according to the principle of territoriality. There remains to be considered whether the provision does not go beyond what is necessary and proportionate (within the narrower meaning of that term) to achieve these purposes. If the only issues were to ensure that transferred income was taxed and to prevent tax avoidance, the general restriction on deductibility of intra-group transfers to transfers to Finnish companies would go too far. Specifically, these two purposes could also be achieved by a rule which was less restrictive of freedom of establishment. As already explained, one might make the deductibility for tax purposes of an intra-group transfer conditional on proof that the income was in fact taxed in the hands of the recipient company. However, safeguarding the allocation of powers to impose taxes, which is directly connected to the other two grounds of justification, could not be achieved by a corresponding, less restrictive national provision. A rule which required the State in which the transferor company was resident to allow a deduction provided that the transferee was taxed would not preclude a transfer of the power to impose

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[8] Case C-470/04 N v Inspecteur van de Belastingdienst Oost/kantoor Almelo, judgement of 7 September 2006.

[9] Case C-231/05 Oy AA, judgement of 21 July 2007.

taxes. Weighing up the various interests, it also appears that a provision such as is laid down by the Finnish Law on Intra-group Financial Transfers is proportionate within the narrower meaning of that term[10].

Thus, the rate of the Finnish law in relation to the group of transfers is proportional in the narrow sense of the word. In the case of Marks & Spencer the Court found it disproportionate to the non-recognition of the EU cross-border offsetting of losses in the exceptional situation that has arisen in the case, namely, when a wholly owned subsidiary has exhausted all possibilities to take into account the losses and the losses could not be taken into account for the future. In this case the freedom of establishment was higher legal force in comparison with authority to set taxes and credit losses was settled. However, considering the case in this regard, Oy AA , it is impossible to believe that it, too, is an exceptional situation, which has been recognized by the situation in the Marks & Spencer . Thus, there is no reason to believe that the principle of proportionality requires a different approach to the power to tax, depending on the particular situation of exclusivity.

We believe that the EU Court is prepared to apply the principle of proportionality in the narrow sense of the word also in cases of direct taxation.

Can the same practice in the framework of the Eurasian Economic Union or national systems of its member states?

It is possible to suggest ways of improving the practice of the integration of the tax law.

First, a supranational judicial body has to stop in the position that only those differences that are directly based on the source of origin, or national income of the taxpayer accessories, can be justified on the basis of restrictions of fundamental freedoms.

Second, the court must abandon the formal requirement that only the reasons that override or force can justify restrictions on fundamental freedoms. The only thing that matters is the goal of such a rule, and it must be valid in relation to the fundamental freedoms.

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Библиографическое описание статьи	***Bibliographic description***
Пономарева К.А. Принципы субсидиарности и пропорциональности в налоговом правоприменении / К.А. Пономарева // Правоприменение. – 2017. Т. 1, № 3. – С. 71-81. – DOI: 10.24147/2542-1514.2017.1(3).71-81.	Ponomareva K.A. Principles of subsidiarity and proporcionality in tax law enforcement. *Pravoprimenenie = Law Enforcement Review*, 2017, vol. 1, no. 3, pp. 71-81. – DOI: 10.24147/2542-1514.2017.1(3).71-81. (In Russ.).