

GUARANTEES FOR THE PROTECTION OF THE TAXPAYER'S LEGITIMATE INTEREST: A PARADIGM SHIFT

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The subject. The article is devoted to the analysis the dominant scientific conception, related legal problems and a new model of ensuring the implementation of the legitimate interest of the taxpayer.

The purpose of the article is to consider the legal and organizational aspects in the field of ensuring the legitimate interests of taxpayers. The hypothesis of the study is that the level of guarantees for the implementation of the taxpayer's legitimate interests, as permitted, by its legal nature should not be inferior to subjective rights. The traditional view of the guarantees of legitimate interests in practical terms is unproductive, which forces a paradigm shift.

The methodological basis of the study consists of various general (analysis, synthesis, comparative method, description) and special methods of cognition of the phenomena of legal reality. Among them, particularly significant are the legal-dogmatic and comparative legal methods.

The main results and scope of their application. In domestic legal science there is a conceptual point of view that legitimate interests, regardless of industry affiliation, are guaranteed only in general or to a certain extent. At the same time, the jurisprudence of interests in the tax sphere is much more complex in nature than it is presented in the general theory of law. Through the prism of the features of public relations, traditional approaches to determining the mechanism of guaranteeing legitimate interest are subjected to critical analysis. Based on the needs of practice, a fundamentally new view on security instruments, the place and role of tax officials in the implementation of the legitimate interest is proposed. The point of view of the inferiority of the "warranty degree" guarantee degree of legitimate interests is substantiated, since such selectivity disorients both the taxpayer and the law enforcement agent (courts, tax authorities).

Conclusions. It is concluded that the protective parity of subjective rights and legitimate interests of the taxpayer. In the new paradigm, the duty and responsibility of tax officials will act as guarantees for the implementation of the legitimate interests of taxpayers.

1. Introduction

The theory of legal guarantees pays considerable attention to ensuring subjective rights and freedoms: dozens of monographs and dissertations of famous scientists have been prepared both at general theoretical and sectoral levels [1-3]. At the same time, the problem of guaranteeing legitimate interests (without reference to subjective rights) undeservedly remains poorly researched.

A number of scientists in General question the very possibility of guaranteeing legitimate interests and claim their insecurity. Another group of authoritative scientists-theorists about the guarantees of legitimate interests speaks very carefully, introducing a certain conditionality: "a certain degree of guarantee" [4, p. 87-88; 5, p. 58], guarantee "in general" [4, p. 98, 104], etc., which in its strength is significantly inferior to the guarantee of subjective rights. This point of view prevails, most researchers of legitimate interests both in theoretical and in branch scientific section rely on it.

At the same time, such scientific approaches are alarming. They not only do not create a scientific basis for the realization of legitimate interests, but also act as a kind of outpost to justify the inaction of the obliged officials of tax authorities, representative bodies and the exclusion of their responsibility in practice.

Accordingly, there is a need to critically analyze the traditional concept of guarantees of legitimate interests in tax relations.

2. The traditional understanding of the safeguarding of the legitimate interests

In the jurisprudence of interests, there is a scientific view that legitimate interests are a "truncated legal possibility", "truncated right" [6, p. 37]. This category reflects the legal non-prohibition of actions and has the character of a legal aspiration. Comparing the concept of legitimate interests with another legal permission - subjective rights, academic theorists come to the conclusion that legal interests, unlike subjective rights, are not

opposed by a legal obligation. As a consequence, "this possibility is guaranteed only to a certain extent" in contrast to the subjective right guaranteed and secured by the state in full [4, p. 83].

Such conclusions are based on the comparison of the structure of subjective law and legitimate interest and the resulting powers (opportunities).

In contrast to the four-component structure of the subjective right (the right to own actions, the right to demand or claim, the right to protect, the right to enjoy the good) A.V. Malko, V. V. Subochev in the legitimate interest allocate only two-element structure:

- 1) enjoy a certain social good;
- 2) apply in some cases to judicial protection [7, p. 97; 4, p. 121].

F. O. Bogatyrev emphasized that "when it comes to an interest protected by law, the subject of interest is not provided with a measure of possible behavior (which makes it possible to demand proper behavior from obligated persons), but only an opportunity to protect the interest within the framework of a protective legal relationship" [8, p. 32-33].

There are also more categorical views on the structure of legitimate interest. Thus, V. V. Gruzdev believes that "the inclusion of any powers in the content of a legitimate interest is logically incorrect, since they are by definition elements of subjective law [9, p. 59].

However, this view has not found its support. According to most scientists, the bearer of a legitimate interest is deprived of the legal opportunity to demand appropriate behavior from other participants in the legal relationship, he can only ask.

Since the taxpayer does not have the authority to demand proper behavior from the opposing party, the very realization of a legitimate interest, according to scientists, "depends on the discretion of officials" [6, p. 40]. Italian administrativist Aldo Travi points out that when a private person is faced with "discretionary power of administration", the object of attention is not his subjective rights, and legitimate interests [10, p. 62].

This concept has become a paradigm. Modern scientists perceive it as a dogma. It can be found in textbooks, dissertations, on the pages of respected academic publications. This position is most consistently reflected in the numerous works of professors A.V. Malko and V. V. Subochev, who devoted tens of years of their lives to the theory of legitimate interests without exaggeration.

It must be admitted that the origins of this interpretation of legitimate interest come from pre-revolutionary times. Still N. M. Korkunov noted that "to allow one does not mean to oblige another", "absence of a ban does not create still the right for not forbidden action" [11, p. 160]. G. F. Shershenevich wrote that "the cash of interest does not yet create a right" [12, p. 607].

Soviet scientists generally held a similar point of view [13, p. 26].

3. Grounds for revision of the classical concept

Paying tribute to scientists it should be noted that the theory of interests in our country was born and developed at a time when tax law was given the role of only the Institute of financial law, and in relation to the financial law itself, there was a discussion about industry identification. The very first normative reference to the concept of "legitimate interests of the taxpayer" appeared only in 1998 with the adoption of the first part of the Tax Code of the Russian Federation. In other industries, the term "legitimate interests" was used in regulations in the early twentieth century.

Modern tax legislation as well as tax law is developing rapidly and even lightning fast. This can be seen not only in the number of permanent amendments to the legislation on taxes and fees, but also in General in rethinking the place of tax law in the legal life of society. In leading Universities, along with the Department of financial law, there are departments of tax law. Tax law has been studied as an independent discipline for several years. In the nomenclature of scientific specialties in law, tax law is on a par with financial law (code 12.00.04), although until recently it was not mentioned in isolation from financial law. This

suggests that the Higher Attestation Commission sees the relevance of the new scientific direction. In other words, today's tax law is a completely new legal education and a new system of knowledge. S. D. Shatalov noting the uniqueness of the domestic tax system in the historical perspective noted that the path taken by Russia, other States took many decades and even hundreds of years [14, p. 15].

The above theoretical judgments about legitimate interests are valid for private-legal relations based on the principles of legal equality of the parties, but they do not take into account (and probably at that time could not take into account) the peculiarities of tax relations and therefore need to be clarified in relation to them.

Abstract guarantee "in General" in reality does not contribute much to the implementation of legitimate interests: it is not perceived by the participants of the relationship and does not create incentives for the obligated persons.

The lexical phrase "to a certain extent guaranteed" raises numerous questions: "to what extent is protection guaranteed to legitimate interests?", "who determines this degree?" or "what determines this degree?", "what criterion underlies the guarantee?" etc.

"A certain degree" initially gives guarantees an understated quality, declarative nature, some inferiority, in fact, levels them, turning them into "under-guarantees", "half-measures". There is uncertainty in their understanding not only for the taxpayer, but also for the law enforcement officer. As a result, we do not get an answer to the main question: what can the taxpayer count on and what determines the implementation of a legitimate interest.

Following the traditional concept allows the law enforcement officer to draw erroneous conclusions that it is not necessary to fulfill the legitimate claims of the taxpayer. After all, if there is a certain degree of guarantee on one side, then on the other side there is a degree of non-guarantee, which can always be referred to.

The discretion of officials in the traditional paradigm becomes decisive in the realization of a legitimate interest. Discretion, in turn, is closely related to another term - expediency and is often substituted for it in practical activities.

V. V. Subochev, A.V. Malko, V. N. Bibilo indicate that the realization of a legitimate interest is conditioned by its expediency [4, p. 94; 15, p. 128].

A. B. Zelentsov argues that the legitimate interests of citizens in the sphere of public administration are faced with the discretionary powers of public authorities, which carry out the choice of appropriate behavior "based on the principle of expediency" [16, p. 80].

These statements seem to us to be insufficiently substantiated and in need of further explanation. The problem consists in the subject determining expediency and its criteria. From the pragmatic point of view of the taxpayer the declared interest is always expedient, but this point of view cannot coincide with the position of the law enforcement officer.

The highest measure of public expediency is the law. The constitutional Court of the Russian Federation has repeatedly pointed to the "connection of tax authorities with the law in their activities." Therefore, no other criterion than the law, or rather-the non-prohibition of the law, cannot act as a measure of expediency. Otherwise, by opposing expediency to law, there is a danger of justifying any obstacles to the satisfaction of legitimate claims by their impracticability at one time or another. When the law becomes inexpedient, the situation will remind the Charter "about non-oppression of mayors by laws" in "History of one city" of M. Saltykov-Shchedrin which read: "If you feel that the law supposes to you an obstacle, then, having removed it from a table, put under yourself. And then all this, having become invisible, much you in action will facilitate" [17, p. 401].

Expediency as a criterion for the realization of legitimate interests is very doubtful. In particular, the judicial authorities are unanimous in the opinion that due to the principle of freedom of economic activity, the tax authorities are prohibited from assessing the validity of the taxpayer's expenses that reduce the income received for tax purposes, from the point of view of their expediency, rationality, efficiency or the result obtained.

The meaning of the legal positions of the constitutional Court of the Russian Federation, judicial review is not intended to test the economic feasibility of decisions made by business entities that are in business have autonomy and wide discretion, because of the risk nature of this activity there are objective limits in possibilities of the courts to identify the presence of business failures.

Therefore, the traditional vision of legitimate interests with a power guarantee, the criterion for the implementation of which is the discretion of officials and the expediency determined by them, significantly complicates the explanation of the mechanism for protecting the legitimate interest and gives scope for abuse to officials.

At the same time, the logic of the term "guarantee" involves the implementation of the desired result, to make real (actual) performance. In General, we should agree with those scientists who understand the conditions, specific factors and circumstances that make possible the realization of legitimate interests, one way or another contribute to it [4, p. 411-412].

As rightly argues E. Ya. Motovilovker, "if a person has a legitimate interest, then he has the right to its satisfaction, since the law, recognizing the subjective interest, thereby provides the interested subject with a real opportunity to satisfy it; he cannot fail to provide it" [18, p. 59].

In this regard, the guarantee must become an inherent property of a legitimate interest, and the guarantees themselves must be concrete measures that can have a positive impact on the final result. They should pose a threat to the violator, generate the fear of adverse consequences in the event of violations of the legitimate interests of the taxpayer. The needs of tax practice appeal to this. "Legal protection of interests is given against actions of the person by influence on his will by threat"...>. Legal means of ensuring interests presuppose the existence of a will capable of assimilating the threat and refraining from violation" - G. F. Shershenevich rightly noted [12, p. 639].

4. Searching for a new paradigm

In scientific turnover the notion of "paradigm" (from Greek. paradeigma-example, model, sample) was introduced by the American scientist Thomas Kuhn in 1962 in the monograph "the Structure of scientific revolutions". This phenomenon Kuhn considered as "universally recognized scientific achievements [universally recognized scientific achievements], which for a certain time give the community of practitioners a model of problem-solving and their solutions" [19, p. viii]. According to Kuhn science does not develop cumulatively, but in leaps and bounds, non-linear, by means of scientific revolutions, i.e. paradigmatic.

If we turn to the modern legal regulation in the field of protection of legitimate interests, we will see that in reality the legislator does not limit or condition the taxpayer's right to protect their legitimate interests. The taxpayer may apply for judicial protection of legitimate interests in all (and not in some, individual) cases without restrictions. At least this conclusion follows from the law (p. 3 part 1 of Article 193, p. 3 part 1 of Article 199 of the agricultural code). The right to appeal to the court for the protection of legitimate interests is conditioned only by the opinion of the applicant.

In paragraph 1 of Article 22 of the Tax Code, the taxpayer's legitimate interests are on a par with subjective rights and the same administrative and judicial protection is guaranteed in their respect. That is, the legislator proceeds from the protective parity of legitimate interests and subjective rights.

However, it is clear that the Declaration of the existence and protection of legitimate interests (para. 1 item 1 of Art. 22 of the Tax Code of the Russian Federation) in itself is not enough for their proper actual implementation. In tax practice, the implementation of the interest depends not so much on the opinion of the applicant as on the opinion of the law enforcement officer. Therefore, it is necessary to build an effective system of security legal means and procedures that allow to exercise the legitimate interests of the taxpayer, to effectively overcome the obstacles of the opposing party.

Semantically, the term "provision" means an action (activity) aimed at "making something

quite possible, effective, actually feasible" [20, p. 388], "to guarantee, to make something true, certain", "to eliminate the care, care, fear, giving something true; to provide everything necessary, to protect from losses, lack, need, from the danger threatening someone, and so on".

Ensuring the exercise of legitimate interests has a teleological (from Greek - the result, the goal) nature, which is revealed through their purpose.

The purpose of a security mechanism within the paradigm of realization of legitimate interests is to reduce the risk of deviation from proper conduct required of officials, create conditions for the smooth realization of the legitimate aspirations of the taxpayer and (or) overcome obstacles and other legal barriers, as well as to minimize negative consequences in case of legal impossibility of overcoming them, and thereby to give the taxpayer confidence in the reality of the realization of its legitimate aspirations.

In our opinion, the legal essence of security methods is most fully revealed through the prism of their functions. In the General philosophical plan the concept "function" is understood as "external manifestation of properties of any object in the given system of relations" [21, p. 504-505].

The functional approach allows us to highlight, in our opinion, the main function underlying the implementation of legitimate interests-the obligation of officials to properly assist the taxpayer on pain of adverse consequences for them. It is the establishment of a security obligation for the tax authorities that makes the legitimate interests of the taxpayer defensible. And last but not least, the threat of application of measures of responsibility for officials should encourage them to proper behavior.

Stimulating influence on responsible officials is a disciplining measure. For the tax authority, the taxpayer's request should not remain indifferent. Assigning real responsibility to officials is aimed at changing their professional attitude to the legitimate interests of taxpayers. Today, in the absence of this tool, the tax authorities have no significant incentives to ensure the legitimate interests of taxpayers. Over the years, the fiscal ideology that has been shaping the economy puts completely different tasks in the first place - filling

the budget, and not ensuring the legitimate interests of taxpayers. The second may even be perceived as a barrier to solving the primary problem.

Legitimate interests, being a phenomenon obscure for the law enforcement officer, is considered by the latter as something insignificant, that is, something that can be ignored with impunity. Therefore, the tax authority should be associated with possible adverse consequences in case of violation of the legitimate interests of the taxpayer.

The well - known civilist V. A. Belov compares subjective law and legal obligation with two sides of the same coin, and the first, according to the scientist, is designed (defined) so that it cannot be thought of without the second. Minting a medal at least on one side, we inevitably create a reverse side, even if it remained free from coinage [22, p. 50]. This reasoning is fully valid for legitimate interests.

It is not possible to describe in detail the nature of this duty within the scope of this Article, since the author has devoted separate works to it. It should be noted only that the duty of the tax authority opposing the legitimate interest is complicated and structured. Its peculiarity is a relatively definite, implicit character, which in many ways makes it not typical for perception. It has an open content and is determined by the legitimate interest of the taxpayer, that is, it is filled with a specific meaning in connection with the actual claim of the taxpayer, depending on the circumstances of the particular case.

Quite often the tax authorities do not consider themselves obliged to assist the taxpayer in satisfying his legitimate interest, because they associate their duty only with the rule written (in the law). There is no prescribed duty in the law, therefore there is no responsibility, so it is not necessary to contribute.

At the same time, the list of duties of the tax authority directly indicated in the law is not exhaustive; they may arise from its provisions. This conclusion was reached in particular by the FAS of the North-Western district in a number of cases in which the duty of tax authorities (their officials) to charge interest for untimely reimbursement of

value added tax amounts, their reflection in the conclusion on tax refund sent to the Federal Treasury bodies was not directly indicated in the Tax Code of the Russian Federation and other Federal laws .

Unwritten or derived (deductible) obligations correspond to the same unwritten claims of the taxpayer-legitimate interests. These duties are tied to all functions of tax authorities, their purpose and follow from the system provisions of the Tax Code of the Russian Federation, as repeatedly stated by the Supreme Arbitration Court of the Russian Federation.

In another case, it was noted that despite the absence of provisions in the law obliging the tax authorities to provide information on the execution or violation by individuals of the legislation on taxes and fees, such an obligation actually exists . The court explained that this kind of information is necessary for the taxpayer to exercise its legitimate interest in checking its counterparties for good faith and confirming due diligence in selecting a counterparty in the event of a dispute. Otherwise, the tax benefit of the taxpayer could be considered unfounded, with reference to paragraph 10 of the Resolution of Plenum of the RF from 12.10.2006 № 53 "On evaluation by arbitration courts of validity of receiving by the taxpayer of tax benefit".

5. Conclusions

Based on the parity of importance of legal interests and subjective rights of the taxpayer, the level of legal protection of the first should not be inferior to the second. Legitimate interests are guaranteed not selectively to a certain "certain extent", but fully and completely.

Elements of the security mechanism for the implementation of the legitimate interests of the taxpayer in the new paradigm should be the corresponding duty of tax officials and their responsibility for improper performance.

Tax authorities, being part of the rule of law, must comply not only with the provisions of the law (PP. 1 item 1 of Art. 32 of the Tax Code), but also those provisions which follow from it that demands from the law enforcement officer of high level of professional culture. The lack of the latter can be a serious obstacle.

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