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INCREASING THE LEVEL OF TAX SECURITY

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Abstract

The subject of the research of the given paper is the process of increasing the level of tax security. The goal is to explore the scientifically grounded and practice-oriented approaches to the enhancement of the process of fighting tax offences and increasing the level of tax security.

The research methodology includes comparative, formal legal, analytical and systemic approaches.

Key words

tax safety; abuse of law; unjustified tax benefit; tax revenue.

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1. Introduction

The goal of the given article is to reveal scientifically grounded and practice-oriented approaches to the enhancement of the process of fighting tax violations and increasing the level of tax security.

The methodology of the research includes comparative, formal legal, analytical and systemic approaches.

Among other works the following articles on the subject of the research were published before: “The Institute of Tax Responsibility (Legal and Financial Evaluation of the Development in the Russian Law-Enforcement Practice” // Chernikova E.V., Prokoshin M.S., Gorosh Y.V.: Izdatelsky Dom VGU, 2014 No 4; “Legal Order of Receiving Tax Preferences in the Russian Federation and the Republic of Poland: Comparative Legal Aspect // Chernikova E. V., Prokoshin M. S., Ciupek B., Famulska T.: “Modern Law”, 2016 No 6.

The authors analyse the existing ways of fighting tax violations, highlight the latest trends in the area of tax benefits for the taxpayers, as well as the limits of exercising authorities in terms of tax assessment and the issues around the interaction of law enforcement authorities and the Federal Tax Service. The conclusions can be used in further research of the processes that ensure a higher level of tax security.

2. Tax Security as an Essential Element of Financial and National Safety

The level of development of financial security determines the level of national security of a particular state in many respects. The key documents regulating the issues around the development and provision of financial security in the Russian Federation is the Presidential Decree of 31.12.2015 No 683 “Concerning the Strategy of National Security of the Russian Federation”, and the Presidential Decree of 13.05.2017 No 208 “Concerning the Strategy of Economic Security of the Russian Federation for the Period till 2030”.

At the same time tax security is one of the most important sub-systems of financial security. One can give the following definition to tax security: it is carrying out the efficient tax control with the aim of achieving maximum tax revenues for the Russian Federation and protection of fiscal interests of the state.

The tax system is closely connected with the budget system, and the budget system of the Russian Federation cannot work without necessary tax receipts, financial resources. The level of stability of the budget system of Russia, of state finances depends

directly on how efficient the tax policy of the state is, how balanced the budgets are, whether the budget revenues of all levels in the budget system are growing.

Functioning of the tax system of the Russian Federation as a subsystem of the financial system that ensures its security is connected with the high level of activity of economic subjects, both residents and non-residents of Russia. The realization of efficient mechanisms fighting a large number of violations, crimes and abuses in the financial sphere in Russia is in progress.

According to the generally accepted views all the ways of decreasing tax payments can be divided into three categories:

- illegal reduction of tax liabilities;
- tax evasion;
- tax avoidance (optimization).

The first category includes the ways the economic effect of which in the form of reduced tax liabilities is achieved via direct violations of the tax and levy legislation, including the abuse of right.

The second category is of highest social danger. Tax evasion is liable to criminal proceedings. The ways referred to the third category are united by one attribute: the minimization of tax payments is carried out without violating tax legislation.

Analysing the documents regulating the issues around fighting the abuse of right, first, it is necessary to mention the Ruling of the Plenum of the Higher Arbitration Court of 12 October 2006 No 53 “Concerning the Evaluation by Arbitration Courts of the Legitimacy of the Receipt of a Tax Benefit by a Taxpayer”. In the given act the court gave a definition to the category of “tax benefit”, which according to the given Ruling is understood as a reduction in the amount of a tax liability resulting, in particular, from a reduction of the tax base, the receipt of a tax deduction or tax concession or the application of a lower tax rate, and the receipt of a right to a refund (offset) or reimbursement of tax” (Ruling of October, 12, 2006 No 53). The Ruling of the Plenum of the Higher Arbitrazh Court of 12 October 2006 No 53 enshrines the criteria, developed in the course of judicial practice: due diligence of the taxpayer and a specific business goal are most significant for the administration of justice by the arbitration courts.

To continue fighting the abuse of right in tax relations Federal Law of 18 July 2017 No 163-FZ “Concerning the Introduction of Amendments to Part One of the Tax

Code of the Russian Federation” was adopted. The given act added Article 54.1 to the Tax Code, “Limits on the Exercise of Rights Relating to the Calculation of the Tax Base and (or) the Amount of a Tax, a Levy or Insurance Contributions”.

The criteria of evaluation of tax benefit introduced by the legislator (Art. 54.1 of the Tax Code of Russia) in many respects repeat separate provision of the Ruling of 12.10.2006 No 53 “Concerning the Evaluation by Arbitration Courts of the Legitimacy of the Receipt of a Tax Benefit by a Taxpayer”.

Article 54.1 of the Tax Code was adopted as a development of the Ruling of the Plenum of the Higher Arbitration Court No 53. There are no significant discrepancies between these two approaches; however, there are some subtle differences.

For example, Art. 54.1 of the Tax Code stipulates that “signing of primary accounting records by an unidentified or unauthorized person, violation of the law on taxes and duties by a taxpayer’s counterparty may not be regarded as the sole reason for recognizing reduction of the tax base and (or) the payable tax by a taxpayer as an illegal act”.

The conditions under which the taxpayer is entitled to reduce the tax base are determined. Among them there are the following: the primary goal of the transaction was not tax evasion and (or) a tax refund; the transaction was actually performed by a counterparty or another entity according to a contract. Provided both of these conditions are met the reduction is considered justified.

One should also pay attention to the peculiarities of the enforcement of the new article 54.1. According to Article 2 of the Federal Law of 18 July 2017 No 163-FZ, the provision of point 5 Article 82 Part One of the Tax Code of Russia apply to in-house tax audits of tax declarations submitted to a tax authority after the effective date of the law and to on-site tax audits and tax audits of transactions between related persons that are ordered by the tax authorities after the effective date of the given law (Federal Act No. 163-FZ of July 18, 2017). Therefore, the provisions of Article 54.1 of the Code are applicable to the results of tax inspections that were started after Federal Law of 18.07.2017 No 163-FZ had come into effect (since 19 August 2017).

However, no unanimous position has yet been developed in judicious practice regarding the possibility of retroactive power of this article. Some courts do not find the retroactive power of the given article possible when considering the results of the tax inspections that were started after Federal Law of 18.07.2017 No 163-FZ (since 19 August 2017) had come into effect, which is confirmed by the court rulings:

- of the 9th Arbitration Court of Appeal of 17.10.2017 № 09AP-48550/2017, case No A40-76346/17;
- of the 14th Arbitration Court of Appeal of 18.10.2017, case No A66-4713/2017.

Other courts are convinced that basing on part 2 Art.54 of the Constitution of Russia and point 3 Art.5 of the Russian Tax Code, there are legal grounds for applying the retroactive power of the norms of Art. 54.1 of the Russian Tax Code to the provisions that improve the position of the taxpayer. The following rulings can exemplify this:

- of the 7th Arbitration Court of Appeal of 20.09.2017 No 07АП-7376/2017, case No A45-4180/2017;
- of the 16th Arbitration Court of Appeal of 17.10.2017 No 16АП-815/2017, case No A63-232/2017.

As for the position of the Federal Tax Service of the Russian Federation expressed in the Letter of 5 October 2017 No CA-4-7/20116, it is unambiguous and stems from the literal interpretation of Art. 2 of the Federal Law of 18 July 2017 No 163-FZ: when in the course of judicial proceedings the taxpayers invoke the provisions of Article 54.1 of the Tax Code on their own, the tax authorities shall inform the court (in the oral and written forms) of the position, in accordance with which the provisions of Article 54.1 of the Code do not apply to the results of the inspections started before the Federal Law of 18.07.2017 No 163-FZ came into force.

As for the effect of the Ruling of the Higher Court of Arbitration No 53, one should note that the given document is applied by courts to the disputes based on the results of tax inspections that had been carried out before Federal Law of 18.07.2017 No 163-FZ came into effect. At the same time there is no ban on a combined application of the Ruling of 12.10.2006 No 53 “Concerning the Evaluation by Arbitration Courts of the Legitimacy of the Receipt of a Tax Benefit by a Taxpayer” and Art. 54.1 of the Tax Code regarding the period starting from 19 August 2017.

In their letter of 31 October 2017 No ED-4-9/22123@ “Recommendations from the Russian Federal Tax Service on applying Article 54.1 of the Russian Tax Code” the FTS noted that the concepts enshrined in Ruling No 53 should not be used after Federal Law of 18.07.2017 No 163-FZ came into force.

One should also pay attention to the fact that the concept of the taxpayer’s due diligence has been reviewed: Article 54.1 of the Russian Tax Code stipulates that

“violation of the law on taxes and duties by a taxpayer’s counterparty may not be regarded as the sole reason for recognizing reduction of the tax base and (or) the payable tax by a taxpayer as an illegal act”.

However, in the Letter of the Federal Tax Service of 28.12.2017 ED-4-2/26807 it is noted that the concepts reflected in the Ruling of the Plenum No 53, including the concept of “due diligence”, that had developed before Law No 163-FZ came into force, should not be used in the course of tax inspections carried out after the given law had come into force. This means that the application of the category of “due diligence” will gradually become a thing of the past and will be applied in the inspections that cover the periods before 19 August 2017. At the same time it does not mean that there is no need for it, and in the same letter the Federal Tax Service of Russia appeals to the taxpayer with the request to assess tax risks carefully when concluding contracts.

3. Tax Violations

The second category of tax reduction, which is the most socially dangerous one, is tax violations. The preliminary inquiry into tax crimes is carried out by the investigators of the Investigative Committee of the Russian Federation (item 1a part 2 Article 151 of the Russian Federation Code of Criminal Procedure).

One should note that the norm of the Code of Criminal Procedure stipulating the possibility to start a criminal investigation into a tax offence based only on the material provided by tax bodies (e.g. launching criminal proceedings is possible on receiving the report of a crime) has been abolished; changes have been made with the adoption of Federal Law of 22.10.14 No 308 “On making changes to the Code of Criminal Procedure of the Russian Federation”. The abolition of the given norm allowed to raise the level of tax security. Thus, in the Letter of the Investigative Committee of the Russian Federation of 13 September 2017 No 225-38823-17 “Concerning criminal proceedings on tax offences” it is noted that basing on the material on tax crimes in 2016 the Investigative Committee started 3,111 criminal cases, including 1,676 that were based on the material provided by the Federal Tax Service. In the first half of 2017, 1,806 criminal cases were started, including 8,421 that were based on the material from the Federal Tax Service. Therefore about a half of the cases related to tax crimes are started based on the results of field tax inspections, which definitely proves the efficiency of work of the Investigative committee.

On the whole one can note higher efficiency of inquiries into tax crimes, which was facilitated by the interaction of the Federal Tax Service, the Ministry of Internal Af-

fairs of Russia, the Investigative Committee of the Russian Federation and the Public Prosecution Office. As a confirmation of effective joint work of the Federal Tax Service and the Investigative Committee of the Russian Federation one can speak of the development of joint approaches to the detection of violations in the sphere of taxation enshrined in the Letter of the Federal Tax Service of Russia of 13.07.2017 No ED-4-2/13650@ “Guidelines on substantiating evidences of willful intent in actions of taxpayer’s officials aimed at tax (duty) evasion during tax and procedural inspections” (together with the methodic recommendation “On the research and proof of willful non-payment or incomplete payment of a tax (duty)”, affirmed by the Investigative Committee of Russia, the Federal Tax Service of Russia).

One should specially note the cooperation of the Federal Tax Service of Russia and the Ministry of Internal Affairs of the Russian Federation. Under p.1 Art. 36 of the Russian Tax Code law enforcement agencies take part in field tax inspections on request from the tax bodies. The order of interaction of tax and law enforcement bodies in terms of prevention, detection and restraint of tax offences was affirmed by the Order of the Ministry of Internal Affairs of Russia No 495, Federal Tax Service of Russia No MM-7-2-347 of 30.06.2009. The goal of joint field tax inspections is the detection and restraint of violations of tax legislation. Law enforcement officials are involved in carrying out particular activities of tax control (seizure of documents, premises inspection, etc.) to ensure tax officials security and in other cases, too. Besides, as it is pointed out in the Letter of the Federal Tax Service of the Russian Federation of 24.08.2012 No AC-4-2/14007@ “On the involvement of law enforcement bodies in field tax inspections”, it is mandatory to involve law enforcement officials in case of detection of tax evasion schemes, particularly in case there are circumstances confirming unjustified reimbursement or the receipt of illegal VAT offset, or in case of fly-by-night companies detection.

Enhancing the fight with tax crimes is one of the key directions in the administration of justice in the sphere of taxation. On the whole it is necessary to note that the implementation of effective mechanisms aimed at the improvement of tax security in Russia is still in progress. It is necessary to continue increasing the level and quality of interaction of control and law enforcement bodies aimed at higher efficiency of fighting offences and crimes in the sphere of taxation.

Conclusion

Scientifically justified and practically oriented approaches to enhancing the process of fighting tax violations and raising the level of tax security have been re-

vealed. The latest changes made to the legislation, up-to-date departmental act of the Federal Tax Service and relevant case material have been analysed in the course of the research.

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