

Written Explanations of the Russian Tax Law

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DOI: 10.36250/00749.14

JEL Classification: K34

Abstract

The article is devoted to the theoretical description of the interpretation of the norms of the tax law and the definition of the legal status of written explanations of the tax legislation, their place in the mechanism of legal tax regulation. The purpose of the article is to confirm or refute the following hypothesis: written explanations of the tax legislation – an act of official interpretation of the norms of the tax law and mandatory for subjects of tax law enforcement. Methods: the methodological basis of the study was a set of methods of scientific knowledge. General scientific (dialectics, analysis and synthesis, abstraction and concretisation) and private scientific methods of research (formal-legal, comparative-legal, technical-legal) were used. To obtain new knowledge, the author also used the systemic and instrumental approach, empirical methods of description, comparison; methods of analogy, abstraction and the structural-functional method.

Keywords

written explanations; interpretation of tax law; tax law enforcement; law procedure

1 Introduction

First of all, tax and legal science is the theoretical understanding of the interpretation of tax and legal norms. Interpretation is an important component of tax law enforcement,

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since there is no and there can be no enforcement without interpretation (Monaenko, 2013: 193). Due to interpretation, the law enforcement entity (first of all, the tax authority) establishes the true meaning and content of the tax and legal norm.

The need for interpretation of legal norms arises before law enforcement. The reasons for this are the general nature of the legal rule, the use of terms not established by law, errors and ambiguities in the text of the law (Vengerov, 1999: 450–452). These shortcomings are also inherent in tax legislation. Part one of the Tax Code of the Russian Federation contains gaps in the regulation of tax relations. The technology of the presentation of the norms of the tax law in the Tax Code of the Russian Federation is incomplete. Part two of the Tax Code of the Russian Federation is a step backwards. This is the result of the fact that lawyers were practically not involved in its development. This is evidenced by the style, language, terms and legal illiteracy of the statement of norms (Mihajlova and Pepeljaev, 2004: 6). More than 10 years have passed since the approval of this idea, but the legal technique of the tax law is still far from perfect. The tax legislation objectively requires interpretation. The reason is the use in the tax law of institutions, concepts and terms of civil law. Such terms should be understood in the meaning and sense defined by the norms of civil law, unless otherwise stipulated by the Tax Code of the Russian Federation (Art. 11 of the Tax Code of the Russian Federation).

Russian tax law contains several rules governing the interpretation of its provisions. For example, this is par. 7 of Art. 3 of the Tax Code of the Russian Federation, according to which all irremovable doubts, contradictions and ambiguities in the acts of legislation on taxes and fees are interpreted in favour of the taxpayer. Art. 34.2 of the RF Tax Code defines the powers of the Ministry of Finance of Russia and of the financial bodies of the subjects of the Federation and municipal entities on a written explanation of the tax legislation.

Some problems of interpreting tax and legal norms were covered in the periodical press, but they did not receive a theoretical generalisation.²

It seems that the need for a theoretical and methodological study of the interpretation of the norms of tax law has matured.

In the present work we will focus on the issues of determining subjects of interpretation of the norms of tax law, types of acts of interpretation of tax norms and their legal force.

2 Interpretation in the Mechanism of Tax Law Regulation

In legal theory, interpretation is defined as a component of law enforcement, a kind of law regulation (Malahov, 2012: 276). The process of application of the norms of law consists of successive stages, which reflect the sequence of mental operations of

² See Zaripov, 2015: 51–55; Pilipenko, 2012: 25–29; Mironova, 2009: 155–156; Nikitina, 2008; Cerenov, 2007.

the law enforcer. The process of applying the rules of law is a logical sequence. First, it involves understanding the concrete factual circumstances of the case, the substance of the matter. At this stage, the proof of the legally significant circumstances of the case. The second stage is legal due diligence. At this stage, the actual and legal circumstances acquire a legal assessment. To do this, the law enforcer seeks a legal rule that should regulate the situation in question. The third stage is the preparation and decision-making to set, change and make concrete abolishing of the rights and obligations of the participants of legal conflicts (Rassolov, 2014: 278).

At the second stage of law enforcement, the law enforcer interprets the law. Interpretation is carried out not only at the stage of application of the norms of the tax law, but also at the stage of tax rulemaking. Normative interpretation of tax norms is connected with tax norm-setting, the existence of which will be proved below. The theoretical and methodological basis for understanding the interpretation of the norms of tax law is the construction of a mechanism for tax and legal regulation. The mechanism of legal regulation is a system of legal means by which an effective legal influence on public relations is provided. The concept of the mechanism of legal regulation allows us to bring together phenomena of legal reality – norms, legal relations, legal acts, etc. These legal phenomena are built in a system-dynamic form and they show their specific functions. Their relationship and interaction with each other becomes obvious (Alekseev, 2009: 267). The mechanism of legal regulation includes the following elements: “norms of the law – legal relations – acts of the implementation of rights and obligations”. Between them can be acts of the application of law. They bring the mechanism of legal regulation into motion in cases where this is impossible without the authoritative organising activity of authorised entities.

The mechanism of tax and legal regulation allows to transform normative tax and legal regulation into individual tax and legal regulation, norms of tax law into individual prescriptions contained in individual tax and legal acts. The regulatory legal regulation of tax relations includes tax norm-setting, which results in normative-legal acts. The normative interpretation of tax norms is connected with tax norm-setting. Its result is the acts of normative interpretation of tax legislation. Individual legal regulation of tax relations is carried out during the course of tax enforcement. Individual tax and legal acts are means of individual regulation of tax relations. In such acts, an enforcement decision is made by the tax authority. In the course of tax enforcement, a casual interpretation of tax rules is carried out. Acts of casual interpretation of tax and legal norms can be objectified in a separate document (an interpretative act), or be part of an individual legal act (law enforcement decision). Casual interpretation as part of the law enforcement decision is contained in the reasoning of the act. It reflects the reasoning of the law enforcer, the analysis of tax law norms. In the process of such an interpretative interpretation, a legal interpretation of the legal norms can be implemented (Zaloilo, 2010: 110).

Interpretation of legal norms is the establishment of the content of normative legal acts aimed at disclosing the norm-setting agent expressed in them (Pigolkin, 1998: 66).

Interpretation is, on the one hand, an internal cognitive process of clarifying the meaning of legal norms. On the other hand, interpretation is the result of the process of cognition, i.e. its external expression. It consists in clarifying the content and meaning of the norms of law (Pigolkin, 1962; Cherdancev, 1979).

3 Written Explanations of the Tax Legislation: Problems of Law Enforcement

The principle of interpretation of all the unavoidable contradictions, doubts and ambiguities of tax legislation in favour of the taxpayer, fixed by par. 7 of Art. 3 of the RF Tax Code, is formulated incorrectly. The interpretation of the law is aimed at eliminating contradictions and ambiguities. Therefore, if it is impossible to eliminate them by interpretation, then the interpretation is powerless. Such a norm is defective and must be removed or amended by the lawmaking body. This principle should be more correctly called the principle of application in the taxpayer's favour of a norm of tax legislation containing unavoidable contradictions, doubts and ambiguities.

It is necessary to clearly distinguish the powers of the Ministry of Finance of Russia (financial bodies) and the Federal Tax Service of Russia to clarify tax legislation. It is also necessary to include in the RF Tax Code the powers of the Federal Tax Service of Russia to clarify the tax legislation. Then par. 6.3 of the Regulation on the Federal Tax Service of Russia will receive a legislative basis. The law should define and distinguish the competence of the Ministry of Finance of Russia and the Federal Tax Service of Russia in interpreting tax legislation.

It is important to unify the names of acts of a written explanation of the tax legislation. Most often, the Ministry of Finance of Russia and the Federal Tax Service of Russia call them letters. Resolution of the Government of the Russian Federation No. 1009 of August 13, 1997 (which approved the Rules for the Preparation of Normative Legal Acts of Federal Executive Authorities and Their State Registration) determines the types of regulatory acts of federal executive bodies: decrees, orders, rules, instructions and regulations. But the legislator does not disclose the specifics of the indicated types of acts. In which cases when regulating managerial relations, are the instructions adopted when – rules or regulations? (Starilov, 2011: 130) The form and types of acts of interpretation of law are not defined normatively. It is necessary to issue a law on normative legal acts and acts of interpretation. To date, there are three draft laws on regulatory legal acts of the Russian Federation.

In 1996, deputies of the State Duma drafted the RF Law “On Regulatory Legal Acts of the Russian Federation” (No. 96700088-2), submitted to the State Duma, but was never adopted. The Institute of Legislation and Comparative Law at the Government of the Russian Federation (ILCL) in 2012 developed a draft law “On Regulatory Legal Acts in the Russian Federation” (Proekt federal'nogo zakona, 2013). This is the second draft law on normative acts. It contains a chapter on the official interpretation of

normative acts. The official interpretation of normative legal acts is generally binding; its legal force corresponds to the interpreted act. The third draft of the Federal Law “On Regulatory Legal Acts in the Russian Federation” was prepared by the Ministry of Justice of Russia in 2014, but was not submitted to the State Duma of the Federal Assembly of the Russian Federation.

Unfortunately, in Russia, not a single draft law has ever been adopted. Although, for example, the Republic of Belarus has the Law of the Republic of Belarus of 10.01.2000 “On Regulatory Legal Acts of the Republic of Belarus”. All bills contain a section on the interpretation of regulatory legal acts. But this does not exclude a special legal regulation of the interpretation of the norms of tax law.

The official interpretation of the tax legislation can be considered from the general philosophical categories of form and content. Clarification of the meaning of the tax norm is a content, and explanation is a form of interpretation. Therefore, it is correct to refer to the act of a written interpretation of tax legislation as an “explanation”, and not a letter. The internal form of explanation is its structure, and the external form can only be written. The act of normative interpretation should contain an introductory, descriptive-motivational and resolute part. The act of normative interpretation becomes an integral part of the interpreted tax and legal norm and is applied in unity with it.

Therefore, the principle of mandatory acts of an official written explanation of the tax legislation should be consolidated. An officially interpreted tax and legal norm can operate and be applied only in unity with an act of official interpretation. Acts of a written explanation of the tax legislation should be officially published on the website of the Ministry of Finance of Russia and the Federal Tax Service of Russia. Non-published acts should not be binding.

I believe that the Tax Code of the Russian Federation should provide for the reverse action of acts of a written explanation of the tax legislation. According to par. 5 of Art. 58 of the draft law “On Normative Legal Acts” of the Ministry of Justice of Russia, the interpretation acts are retroactive and effective from the moment of coming into force of the act to be interpreted. A similar norm is also contained in the above-mentioned draft law ILCL (par. 5 of Art. 77). This rule should be consolidated in the Tax Code, because judicial practice is not uniform. For example, the explanation of the Ministry of Finance of Russia exempts taxpayers from liability only if it is received before the commission of a tax offense (Federal Arbitration Court of the Moscow District, Decree No. KA-A40/8197-08 of 04.09.2008, Federal Arbitration Court of the West Siberian District of 04.04.2007 No. F04-1836/2007 (32977-A27-42), as of 07.06.2007 N Ф04-3146/2007 (35046-A70-29), but there is also an opposite practice: Decree of the Federal Arbitration Court of the North Caucasus District of 15.05.2009 in the case No. A53-12417/2008 -C5-14.

According to Art. 217.1 Code of administrative procedure RF, cases on challenging acts containing explanations of legislation and possessing regulatory features are under the jurisdiction of the Supreme Court of the Russian Federation. Such cases are

examined according to the rules of challenging normative legal acts, but with some procedural features.

The contestation of a written explanation of the tax legislation is possible if three conditions are met:

1. the act violates the rights and legitimate interests of the taxpayer;
2. the act has normative properties;
3. the content act does not correspond to the actual meaning of the clarified normative provisions.

The burden of proving the compliance of the content of the act with the meaning of the norms of law is assigned to the Ministry of Finance of Russia and the Federal Tax Service of Russia.

The act of normative interpretation has the right to be challenged by the persons against whom this act is applied.

From January 1, 2015, tax control in the form of tax monitoring is applied in Russia. Analysis of Art. 105.30 of the Tax Code of the Russian Federation and the Requirements for drawing up a motivated opinion of the tax authority leads to the following conclusion. A motivated opinion is an act of interpretation of tax rules and facts of economic activity of a taxpayer organisation and is not an enforceable act. It does not imply the possibility of enforcement. If the taxpayer does not agree with the reasoned opinion, then a mutually agreeing procedure is initiated in the Federal Tax Service of Russia.

A literal reading of Art. 105.31 of the Tax Code of the Russian Federation leads to the conclusion that there is no possibility of judicial challenge to a motivated opinion. Since a taxpayer cannot fulfil a motivated opinion, it is not a non-normative legal act. Consequently, a motivated opinion cannot be challenged in court. A motivated opinion is also not an act of normative interpretation, so the Supreme Court of the Russian Federation is not authorised to consider its compliance with the law. It turns out that the notification of the Federal Tax Service of Russia on the basis of a mutually agreeing procedure is final and is not subject to judicial challenge. It is unlikely that this state of affairs is consistent with the constitutional right to judicial protection.

4 Conclusion

It is necessary to develop and include in the RF Tax Code a normative construction of interpretation of tax norms.

It seems that due to the lack of normative powers of the Federal Tax Service of Russia, only the Ministry of Finance of Russia, the financial bodies of the constituent entities of the Russian Federation and municipal entities have the right to issue written explanations addressed to an indefinite circle of taxpayers (normative interpretation). The Federal Tax Service of Russia should be empowered to clarify the application of tax

legislation at the request of a particular taxpayer (casual interpretation). At the same time, the interpretation position expressed in the written explanation of the Ministry of Finance should have greater legal force than the interpretative provision contained in the letters of the Federal Tax Service of Russia.

The delineation of written explanations of tax legislation and informing taxpayers should be carried out according to the degree of intellectual and logical processing of normative material. Informing should be limited to literal reproduction of the text of the norms of tax legislation without formulating conclusions and advice of the tax authority. If the text of the letter of the Federal Tax Service of Russia contains a logical reasoning and formulates a legal advice, then this should be understood not as informing, but as a written explanation of the tax legislation (interpretation of the tax law).

Written explanations of the tax legislation are acts of official interpretation of tax laws and therefore must be mandatory for taxpayers, provided there is an effective legal mechanism for challenging the interpretations contained in them.

Since the interpretation position is valid and applied in conjunction with the interpreted norm of the tax law, it must have retroactive effect. The reverse effect of a written explanation of the tax legislation is not allowed only in the event of a deterioration in the legal status of the taxpayer.

The procedure for issuing and publishing written explanations of the tax legislation should be regulated normatively in the Tax Code of the Russian Federation or in the administrative regulations. The most acceptable name for acts of interpretation of tax rules is “explanation”, and not “letter”. All regulatory explanations of the tax legislation should be published on the official website of the Ministry of Finance and the Federal Tax Service of Russia.

An obligatory element of the structure of explanation of the tax legislation should be a descriptive-reasoning part containing logical reasoning of the interpreting subject, the presence of which will allow the court in case of challenge to check the correctness of the interpretation of tax norms.

References

- Alekseev, S. S. *Obsbhaja teorija prava: ucheb* [General Theory of Law: A Textbook]. Moscow: Prospekt, 2-e izd., pererab. i dop., 2009.
- Cerenov, B. V. Nalogovye indul'gencii Minfina Rossii [Tax Indulgences of the Ministry of Finance of Russia]. *Vash nalogovyy advokat* [Your Tax Attorney], (11) 2007.
- Cherdancev, A. F. *Voprosy tolkovaniya sovetskogo prava* [Questions of Interpretation of the Soviet Law]. Sverdlovsk: SvJul, 1972.
- Cherdancev, A. F. *Tolkovanie sovetskogo prava (teorija i praktika)* [Interpretation of the Soviet Law (Theory and Practice)]. Moscow: Juridičeskaja Literatura, 1979.

- Malahov, V. P. eds., *Aktual'nye problemy teorii gos. i prava: ucheb. pos. dlja studentov vuzov* [Actual Problems of the State and Law: A Textbook for Students]. Moscow: JuNITI-DANA, 2012.
- Mihajlova, O. R. and Pepeljaev S. G. eds. *Tolkovanie norm nalogovogo zakonodatel'stva: ucheb. posobie* [Interpretation of Norms of the Tax Legislation: Manual]. Moscow: Statut, 2004.
- Mironova, S. M. *Obzhalovanie aktov finansovyh organov, Nalogovoe pravo v reshenijah Konstitucionnogo Suda RF 2007 goda: po materialam V Mezhdunar. nauch.-prakt. konf. 11–12 aprelja 2008 g.* Moscow: Wolters Kluwer, 2009.
- Monaenko, A. Tax explanations and consultations as a special form of tax enforcement under current Ukrainian legislation. In: Kostyukov A. N. ed., *Problems of Tax Enforcement in Central and Eastern Europe: Materials of an International Scientific Conference*. Omsk, September 23–24, 2013. Omsk: Publisher of the Omsk State University, 2013, pp. 192–195.
- Nikitina, S. V. Status razjasnenij Minfina Rossii po voprosam primenenija nalogovogo zakonodatel'stva [Interpretation of Norms of the Tax Legislation: Manual]. *Nalogovye spory: teorija i praktika* [Tax Disputes: Theory and Practice], (1) 2008.
- Pigolkin, A. S. *Tolkovanie normativnyh aktov v SSSR* [Interpretation of Normative Acts in the USSR]. Moscow: Gosyurizdat, 1962.
- Pigolkin, A. S. Tolkovanie norm prava i pravotvorchestvo: problemy sootnoshenija [Interpretation of the Law and the Problem of Correlation]. In: Pigolkin A. S. ed., *Zakon: sozdanie i tolkovanie* [Law: Creation and Interpretation]. Moscow: Spark, 1998.
- Pilipenko, A. A. Teoretiko-prikladnye aspekty ponimaniya pravovoj prirody pis'mennyh razjasnenij nalogovogo zakonodatel'stva [Theoretical and Legal Aspects of Understanding the Legal Nature of Written Explanations of Tax Legislation]. *Nalogi* [Taxes], (5) 2012, pp. 25–29.
- Qiu, D. Interpretation of tax laws in China: Moving towards the rule of law? *Hong Kong Law Journal*, (44) 2014, pp. 589–619.
- Rassolov, M. M. ed. *Aktual'nye problemy teorii gosudarstva i prava [Jelektronnyj resurs]: uchebnoe posobie* [Legal Problems of the State and Law: A Textbook]. Moscow: JuNITI-DANA, 2014. Available at: www.iprbookshop.ru/18188 [Accessed 13 Sept. 2019].
- Starilov, Ju. N. ed. Administrativnaja reforma v Rossijskoj Federacii na sovremennom jetape: osnovnye dostizhenija, problemy i perspektivy [Administrative Reform in the Russian Federation at the Present Stage: Main Achievements, Problems and Prospects]. *Pravovaja nauka i reforma juridicheskogo obrazovanija* [Legal Science and Legal Education Reform], (1) 2011.
- Vengerov, A. B. *Teorija gos. i prava: ucheb. dlja jurid. vuzov* [Theory of Government and Rights: Textbook]. Moscow: Omega-L, 1999.
- Zaloilo, M. V. Konkretizacija i tolkovanie jurid. norm: problemy sootnoshenija i vzaimodejstvija [Specification and Interpretation of Legal Norms: Problems of Correlation and Interaction]. *Zhurnal rossijskogo prava* [Journal of Russian Law], (5) 2010.
- Zaripov, V. M. Obzhalovanie raz#jasnenij finansovyh i nalogovyh organov: voprosy podvedomstvennosti i podsudnosti [Appealing Explanations of Financial Tax Authorities: Issues of Jurisdiction and Jurisdiction]. *Nalogoved* [The Taxman], (1) 2015, pp. 51–55.

- Draft law “On Regulatory Legal Acts of the Russian Federation” (No. 96700088-2). Available at: <http://asozd.duma.gov.ru/main.nsf/> [Accessed 13 Sept. 2019].
- Draft law “O normativnyh pravovyh akтах v Rossijskoj Federacii” (iniciativnyj zakonoproekt) [On regulatory legal acts in the Russian Federation (initiative bill)], Moscow: Institut zakonodatel’sтва i sravnitel’nogo pravovedenija pri Pravitel’stve Rossijskoj Federacii [Institute of Legislation and Comparative Law at the Government of the Russian Federation], 2013.
- Draft law “On Regulatory Legal Acts in the Russian Federation” (prepared by the Ministry of Justice of Russia), 2014. Available at: www.consultant.ru [Accessed 13 Sept. 2019].
- Decree of the Constitutional Court of the Russian Federation No. 6-P of March 31, 2015. Available at: www.consultant.ru [Accessed 13 Sept. 2019].
- Definition of the Constitutional Court of the Russian Federation No. 632-O-O of October 02, 2007. Available at: www.consultant.ru [Accessed 13 Sept. 2019].
- Definition of the Constitutional Court of the Russian Federation No. 442-O of October 20, 2005. Available at: www.consultant.ru [Accessed 13 Sept. 2019].
- Definition of the Constitutional Court of the Russian Federation No. 319-O of November 5, 2002. Available at: www.consultant.ru [Accessed 13 Sept. 2019].
- Federal Arbitration Court of the Moscow District, Decree of September 4, 2008 No. KA-A40/8197-08. Available at: www.consultant.ru [Accessed 13 Sept. 2019].
- Federal Arbitration Court of the West Siberia District, Decree of April 4, 2007 No. F04-1836/2007(32977-A27-42). Available at: www.consultant.ru [Accessed 13 Sept. 2019].
- Federal Arbitration Court of the West Siberia District, Decree of June 7, 2007 No. F04-3146/2007(35046-A70-29). Available at: www.consultant.ru [Accessed 13 Sept. 2019].
- Federal Arbitration Court of the North Caucasian District, Decree of May 15, 2009 No. A53-12417/2008-S5-14. Available at: www.consultant.ru [Accessed 13 Sept. 2019].
- Order of the Federal Tax Service of Russia on May 7, 2015 No MMV-7-15/184@ «Ob utverzhdenii form dokumentov, ispol’zuemyh pri provedenii nalogovogo monitoringa, i trebovanij k nim» [On the approval of forms of documents used in the conduct of tax monitoring, and the requirement for them]. Available at: www.consultant.ru [Accessed 13 Sept. 2019].

