

# CASE LAW AS A NEW PHENOMENON IN TAX LAW OF RUSSIA

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## **Abstrakt v rodném jazyce**

Темой настоящего доклада является анализ возможности признания судебного прецедента в качестве нового вида источника налогового права России. Рассматривая теоретические положения, практику правоприменения, автор делает вывод о том, что фактически судебный прецедент уже является источником налогового права в России. Использование судебного прецедента для регулирования налоговых отношений затрудняется отсутствием разработанной теоретической базы применения прецедентного права.

## **Klíčová slova v rodném jazyce**

Источники права, законы, подзаконные акты, судебные прецеденты, налогообложение, иерархия источников.

## **Abstract**

The main idea of this article is an ability to use precedents (cases) for regulating of taxation in Russia. The author analyzed theory of law, the text of law – tax code of Russia, precedents (cases) and administrative practice of taxation in Russia. Author makes a conclusion, that the cases (precedents) became a source of modern tax law in Russia. Practice of taxation still face some difficulties in using cases, because of theoretical problems in Russian tax law science.

## **Key words**

Law sources, laws, by-laws, precedents, cases, taxation, hierarchy of sources.

The science of Legal Theory and Finance Law constantly pays attention to the problem of legal sources.

In this report we use the term “formal sources” in the meaning of “legal sources”, that is exterior form for legal norms, namely, legislation, by-laws, etc.

The scientists of Law say, that legal forms are not absolutely constant. “There is a moment in the process of law effect development, when its new qualities cannot be put into the frames of the old form. Then, the new legal effect changes the old form; the new form which is adequate to its meaning appears”<sup>1</sup>. It necessary to notice, that such form change takes place during the serious political, economical and social reforms.

Serious reforms are taking place in Russia during the last 16 years in all spheres of social life. The most important element of reform in financial field is modernization of the taxation which is connected with codification of Tax Law. The meaning of legal sources in Taxation should be reviewed. Russian scientists and practical lawyers who work in Taxation field try to answer the following principle questions:

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<sup>1</sup> Kerimov D.A. Methodology of law. Moscow, Avanta+, 2001, p. 183.

1. Should judicial and administrative precedents (Cases) be seen as admissible source for Tax Law norms?
2. If the precedent (Case) is the Tax Law source, then in which way the norms-precedents can correspond with the norms, in laws, by-laws and international treaties?

There are no clear answers in Russian Tax Law as well as in Tax Law Theory on these questions.

Let us see the place of judicial precedents, judicial and administrative practice and doctrine, that is “non-traditional Tax Law sources, norms on the basis of legal texts made by tax payer in the system of Tax Law sources.

Legal Theory determines the following legal sources: standard legal acts, judicial precedents, legal customs, agreements, judicial and administrative practice and legal doctrines<sup>2</sup>.

The division of the states for Romanic Germanic and Anglo-Saxon legal families is the classical in the Legal Theory. Earlier some authors marked out “socialistic-law” states. They pointed out that the legal system in a “socialistic” state based on Romanic Germanic model. From this point of view, the modern Russian law, including Tax Law must be based on “Romanic - Germanic” model<sup>3</sup>.

This point of view is rather clear shown in the structure and text of Tax Code of Russian Federation. In the Tax Code of Russia which is currently in force there is not Tax Law sources structure. But Chapter 1 of Tax Code is called “Legislation for taxes and duties and other standard legal acts on taxes and duties”.

Chapter 1 of Tax Code shows clearly that the Tax Law source of norms is law, not any, but the law which is the part of the “Taxes and Duties Legislation”. Chapter 4 of Tax Code of RF lets regulate the tax relations with by-laws acts of the Russian Federation Government and executive bodies under the condition the law priority over any by-laws. In the end, Chapter 7 of Tax Code includes International Treaties in Tax Law sources.

According only to Tax Code of RF, the tax relations cannot be regulated by doctrine, judicial or administrative practice or precedent. Tax Law sources structure which in Tax Code of RF is completely adequate to “Romanic Germanic” model of legal regulation.

The priority of some kinds of law formal sources can be changed in accordance with time, social situation in the state. The stability in social life makes possible the stability of law sources. Social reforms are followed by the law reforms and different changes in the system of sources.

Even Soviet scientists said that there are neither Romanic - Germanic nor Anglo-Saxon legal systems as they were before. There was noticed “the weakening the formal clearness of the legal regulation, the growth of significance in casuistic norms”<sup>4</sup>. So, there is convergence,

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<sup>2</sup> Bregel J.L. Theory of law. Moscow, Nota Bene, p. 97-157.

<sup>3</sup> David R. Modern Legal Systems. Moscow, 1967, p.59-65.

<sup>4</sup> Alexeev S.S. Theory of law. Moscow. 2008, Prospect, p.95.

inter-penetration and influence of different legal systems, connected with the growth of judicial activity and precedent practice in the countries of Romanic-Germanic legal system.

European researches of this problem also recognize the fact of convergence, pointing out that the rule of absolute law sovereignty subjecting to judicial practice was not peculiar to Romanic-Germanic, but socialistic legal system. In continental system European countries the judge himself could create norms-precedents (cases) if there was no ready norm. Social and legal evolution in Romanic-Germanic legal systems leads to the standard legal act texts "dispersion" into small parts by publishing by-laws. As a result, "dictatorship legal system" is formed. To overcome this phenomenon the precedent mechanism should be used<sup>5</sup>. It can be seen on the example of European Community Law.

Above mentioned phenomenon of legal convergention is connected with Tax Law in equal parts with other legal branches. So, Tax relations regulation norm only by law should be definitely corrected. Tax Law sources can not be only Tax and Duties legislation, by-laws and international treaties which reflect mainly fiscal interests of the state. Also judicial and administrative practice (cases) and legal doctrine, which reflect in this or that way the point of view of tax payers can be the Tax Law sources.

We think that in order to make the precedent (Cases) the valuable Tax Law source of Russian Federation it is necessary to introduce into the Part I of Tax Code of Russian Federation the correspondent changes by consolidation as a Tax Law source precedents, practice and doctrine and by determining the place of the new sources in the common sources hierarchy.

Since 1998 Russia accepts the jurisdiction of European Court of Human Rights on its territory and executes the ECHR judgments. Supreme national judicial organs, namely, Constitutional Court of RF, Supreme Court of RF and Supreme Arbitration Court of RF agree in some ways with the precedent character of ECHR, but the place of ECHR judgments in national legal system has not been determined yet.

In fact, the recognition of precedents firstly made by Constitutional Court of RF as legal sources has begun already. Leading specialists, actual and former judges of Constitutional Court of RF as well as scientists point out that decisions of Constitutional Court of RF plays the role of cases in Russian law system . Some authors point out on doctrine character of conclusions made by Constitutional Court of RF, but obligatory legal doctrines can also be seen as legal sources as well. As for judicial acts which are taken by Arbitration courts and General jurisdiction courts, especially Supreme Arbitration Court and Supreme Court of RF, their recognition as precedents - Tax Law sources - is necessary and possible. So, some points in Legal Theory should be reviewed and correspondent changes should be introduced into Part I of Tax Code of RF. This conclusion is proved by the fact that EC Tax Law uses such kind of formal sources as precedents (cases).

Now the use of Precedents (Cases) in tax practice in Russia is possible but not easy because not one, but some precedent systems are formed on the territory of the same state, and these precedents are often contradictory and their hierarchy is not definite.

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<sup>5</sup> Bregel J.L. Theory of law. Moscow, Nota Bene, p. 115-117.

ECHR positions are taken into account only in cases in which the RF took part, but they are not taken into account if there was not Russia there. The ECHR position is taken into account from time to time by the High Courts and is practically always ignored by the court of the base level.

Constitutional Court of the RF precedents are obligatory if they are in the form of Resolutions (decisions). If the position of Constitutional Court of the RF is in the form of pre-decision it can be ignored by other government bodies.

Supreme Arbitration Court of the RF resolutions are precedents, but only for arbitration courts system. Arbitration courts of districts precedents are, in fact, obligatory, but only in the district where they are passed. The courts of different districts interpret the same tax norm in different ways. We have 10 arbitration districts – so we have 10 different systems of cases. The decisions of Arbitration courts of base level are not precedents.

Supreme Court of the RF Resolutions are obligatory only for courts of general jurisdiction. Regional courts of general jurisdiction and courts of general jurisdiction of base level do not make precedents at all.

Some modern authors refuse to view precedents as real Tax Law sources. They say, for example, that the CC of the RF legal position is “legal substantiation of passed decision on case which is obligatory for the court itself when the consequent decisions are taken. But for other lawyers it is convincing (but not necessary) judicial precedent ...”<sup>6</sup>. In my opinion, this point of view can be dangerous, because even if in theory “convincing but not necessary precedents” are recognized, it leads to the growth of legal uncertainty, which is especially undesirable in Tax field. Precedent way of tax relations regulation is to be applied either in all clear obligatory rules or is not to be applied at all, but as it was said above, the application of precedents(cases) in legal regulation is objective and inevitable phenomenon.

There is also a point of view that the decisions of the judicial Supreme bodies cannot be Tax Law sources, because they cannot be controlled in any way “from above” and can only “expose law meaning without passing any standard legal regulations”<sup>7</sup>.

This argument is very important, but the problem can be solved if in Russian Tax Law Theory the Theory of application precedent and doctrine as the law source will be worked out and then legally consolidated. That is the precedent mechanisms can be applied only if it is clearly determined when it is admissible to use precedent, which government body decision is precedent, the hierarchy of precedents and their correspondence with the doctrine; if lawyers could and in which case digress from precedents and some other questions of Precedent Law.

There is one more argument on the question on Tax Law structure change. The practical persons are often against introduction the new kinds of legal sources. Thus, according to sociological research among judges “only 28% of respondents answer the question on application the Precedent Law in Russia positively, while 46.7% answered negatively”<sup>8</sup>.

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<sup>6</sup> Sasov K.A. Decisions of CC RF in taxation. Moscow, 2008, p.17.

<sup>7</sup> Morshakova T.A. In the Tax club. [www.fbk.ru](http://www.fbk.ru)

<sup>8</sup> Boshno S.V. In the Tax club [www.fbk.ru](http://www.fbk.ru)

The following comments can be done on this argument.

Continuity and congenial conservatism is the positive characteristic of any system including Russian legal system. Modern Russian Financial Law appeared on the theoretical and legal standard basis of socialistic law in the Soviet Union. The Russia Federation Tax Law appeared in the period of 1991-1992, but, the influence of the Soviet legal system, Soviet economy theory on the modern Tax Law development can not be undervalued. Also it should be taken into consideration the fact that practically all legislators, managers in financial and tax bodies, outstanding scientists, leading practical lawyers got professional education and started their activity in the socialistic legal system. These persons' sense of justice was formed under the influence of the Soviet State and Law system. The Soviet Legal Theory critically regarded the precedent as legal source, asserted that "dominating tendency in the development of legal sources is higher raising the proportion of standard legal acts...". Foreign authors also pointed out that the most critical attitude to the precedents as legal sources in the USSR and in the countries of so-called "socialistic sector", and, in accordance with Soviet theory "any corrective interpretation contradicts principles of socialistic legislation and priority of law".

It is in this Soviet theory where the use of precedents as legal sources is undesirable. But 17 years passed after our state changed the way of development. Legal Theory changed greatly and there is a hope for the correspondent changes in participants' sense of justice in Taxation field. And including all changes new approaches to Tax Law sources system are possible.

There are a great majority of examples in history when practical lawyers changed their opinion on the contrary during the time. For example, French Civil Law codification by Napoleon I in 1804 in France was the example of legal technique. For about 100 years French scientists considered Civil Code of 1804 the only legal source was due to be interpreted literally and logically, but not to be supplemented. Only at the end of 19 - the beginning of 20 century French Legal Theory and legal practice digressed from literally-logic interpretation of the Code and permitted the judicial legal regulations under the influence of French scientists Geny and Saleil. The same processes took place in Germany conformably to German Civil Code of 1900<sup>9</sup>.

And even if French lawyers with their close to ideal codification of legal branch and long years continental legal tradition digressed from standard regulation of tax relations to application the precedent regulation, so what prevents Russian specialists in Tax Law field from following the same way? In our opinion, there are not any obstacles to apply the precedent regulation in Russian taxation, especially when in its quality Tax Code of the RF is far from quality of Napoleonic Civil Code of France 1804. The Conservatism in legal society in this way can be overcome, especially when European lawyers passed this way approximately 100 years ago.

In conclusion it should be said:

1. Tax Law in Russia is being developed after a model of modern "Romanic-Germanic" system. The major source of Tax Law in Russia is Tax Code. The additional sources are

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<sup>9 9</sup> Bregel J.L. Theory of law. Moscow, Nota Bene, p. 115-117.

Ministry of Finance Acts. If there are any gaps in legislation, then courts can liquidate them by passing the norms-precedents (cases).

2. Precedents (cases) application for tax relations regulations is possible even if there is the hierarchy of precedents, correlation of precedents with other legal sources. Otherwise the position of participants in tax relations becomes indefinite and the tax regulation is difficult.

**Literatura:**

- The tax code of Russia 1998.
- Kerimov D.A. Methodology of law. Moscow, Avanta+, 2001, p. 183.
- Bregel J.L. Theory of law. Moscow, Nota Bene, p. 97-157.
- David R. Modern Legal Systems. Moscow, 1967, p.59-65.
- Alexeev S.S. Theory of law. Moscow. 2008, Prospect, p.95.
- Sasov K.A. Decisions of CC RF in taxation. Moscow, 2008, p.17.
- Morshakova T.A. In the Tax club. [www.fbk.ru](http://www.fbk.ru)
- Boshno S.V. In the Tax club [www.fbk.ru](http://www.fbk.ru)

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