

## **SOURCES OF FINANCIAL LAW IN CONNECTION WITH POLITICAL SYSTEM OF THE STATE**

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### **Abstract in original language**

Темой доклада является анализ системы источников финансового права России. Автор рассматривает основные источники как в статическом, так и в динамическом аспекте. Нормативно-правовые акты являются «классическими» источниками финансового права в РФ. Несмотря на это постоянно увеличивается количество и значимость «нетрадиционных» источников, которыми являются судебные и административные прецеденты. Автор приходит к выводу, что использование прецедентов для регулирования финансовых отношений происходит из-за ненадлежащего качества законодательных актов, принимаемых парламентом без надлежащего обсуждения при отсутствии реальной политической дискуссии.

### **Key words in original language**

Источники права, законы, подзаконные акты, судебные прецеденты, ненадлежащее качество законов, влияние политической системы на источники права.

### **Abstract**

The concept of this article is a review of sources of financial law in Russia. Author analyzed the main sources of financial law in “static” and “dynamic” aspects. Legal texts (laws and by-laws) are the “classical” sources of financial law in Russia. In spite of this the quantity and significance of “non-traditional” law sources such as administrative and court precedents (cases) is constantly increases. Author makes a conclusion, that the reason of increase of using precedents in financial regulation is poor quality of legal text, which are made by parliament without real political discussion

### **Key words**

Law sources; laws; by-laws; precedents; quality of legal text; influence of policy on sources of law.

Up-to-date Tax System exists in Russia for about 17 years. During this period the practice of the Russian taxation worked out rather original approach to solve some problems connected with formation and modernization of the state Tax system.

Any state realizes its sovereign rights and follows the certain tax policy. The aim of the state tax policy is to form the Tax System which could redistribute financial sources from private to public funds to provide the

balance between public and private interest and to form the conditions for maximum development in public and private sectors in economics as well.

Tax System is formed by the state by the elaboration and implementation legal tax regulations into force. Tax regulations get their outer securing in so-called formal Tax Law sources.

Legal Theory marks out the following types of formal (textual) legal sources: legal standard rules, judicial precedents, legal customs, international treaties. It is also possible to regard judicial and administrative practice and legal tenets as legal sources<sup>1</sup>.

The classical in the Legal Theory is the subdivision of the states into the states of the German-Romanic and Anglo-Saxon legal families. From this point of view contemporary Russian Law including the Tax Law must be formed according to the “German-Romanic” example when the main legal source is the legal-standard rule<sup>2</sup>.

Just because of that very reason the Tax Code of the RF recognizes the Tax Law sources as law, by-law and international treaty. The structure of the Tax Law sources enters completely into “German-Romanic” model of legislation.

The growth of significance of the justice and precedent practice for the regulation of public relation is vivid sequence of the influence of globalization on Russian legal system<sup>3</sup>. This process is especially evident in Tax Law, where the significance of the ‘non-traditional’ legal sources for the RF as precedents and tenet is very high.

At the moment in the RF the Tax Law sources can be not only Taxes and Fees Law, by-laws and international treaties which reflect state fiscal interests. Also the Tax Law sources must be called judicial precedents, judicial and administrative practice and legal tenet which reflect in certain degree the taxpayers’ point of view.

Of course, legal-standard rule, namely, the Tax Code of the RF of 1998 is the major source of Tax Law of the RF. The Tax Code of the RF gives definitions for tax and fee, formulates taxation principles, secures the status of the participants of the taxation relations and forms the system of taxes and fees. The TC of the RF defines the order for execution by the taxpayers the duty to pay tax, forms the procedure to fulfill tax control and to call to tax account for the law infringements. The by-laws which are passed out by

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<sup>1</sup> Bregel J.L. Theory of law. Moscow, Nota Bene, p. 97-157.

<sup>2</sup> David R. Modern Legal Systems. Moscow, 1967, p.59-65.

<sup>3</sup> Alexeev S.S. Theory of law. Moscow. 2008, Prospect, p.95.

the Finance Ministry can not change and supplement the rules secured in the Tax Code.

Nevertheless, there is not always enough the provisions in the Tax Code of the RF to regulate complex and constantly changing economic relations. The practice of Tax administration always leads to disclosure the mistakes and gaps in the text of the TC of the RF which the deputies of the legislative body can not or in time liquidate by passing out the correspondent bills to current law.

Just in these cases the practice has to follow the way of forming and application 'non-traditional' tax law sources such as precedents and legal tenets. Some tax rules which first were as judicial precedents or tenet are included into the text of the Tax Code of the RF later. The main part of precedents or tenet propositions connected with the regulation of taxation relations formed by the courts during some years do not receive the legislative security and exist as 'non-traditional' sources. What is the explanation for such inconsequence of the state in forming the Tax Law sources structure ?

It seems to us that this phenomenon has political reasons and closely connected with the specific features of parliamentary and law-making procedure in modern Russia.

According to prof. M.V. Karaseva, 'politics is indispensable condition to form any ... legislative rules... Law is the most efficient provider of the policy reflected in it'<sup>4</sup>. Tax Law rules are politically 'tense', because their realization entails redistribution the property between taxpayers and legal-public institutions on the benefit of the last. Besides, the above-mentioned 'tense' appears in the connection with that redistribution takes place on the rules formed by the one part of the public relation, so, the second part influence highly the law-maker to provide responsiveness the interests of the second, subordinate part.

The same features of tax rules are also noticed in the work of foreign specialists Richard K. Gordon and Victor Thuronyi "Tax law design and drafting". It is said in this work that in most of OECD member countries, the tax rules drafting changed into complete ritual in the frames of which different social groups compete in the attempts to pass through the legislative body the law draft which contains their point of view on the proper tax policy. The serious Tax draft is based on the results of work of thousands professional lobbyists, political analytics, lawyers, accountants, economists and even ordinary citizens<sup>5</sup>.

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<sup>4</sup> Karaseva M.V. Budget and tax law and policy. Moscow, 2005 p.25.

<sup>5</sup> Victor Thuronyi .Tax Law Design and Drafting IMF, 1996, C. 1.

With the correspondent approach and use of the democratic ways of fulfillment the state power the economic interests of the most active social groups or even some persons can transform into national interest. This national interest will be later expressed in passing by these or those legal rules which let redistribute the tax duty taking into account the point of view of the most active politically taxpayers. Political struggle presumes the fact of appearance of some tax rules and influences the form and structure the these very rules. In its turn, tax rules in the result of their realization lead to deprivation the part of the property from the taxpayers, so new tax rules are always the reason for worsening the political processes in the society.

The special features of the taxation policy in Russia are partly of economic features in taxation system. Depending on the part of indirect taxes , taxation systems can be classified as:

- based on income taxation, where the main receipts to the budget are from taxes on incomes and property and the part of the indirect taxes is not more than 35% of the total tax incomes. The examples of such taxation systems are countries of Anglo-Saxon law, such as the USA, Great Britain, Canada etc.;
- based on combined taxation, where tax burden directed equally by the taxation the consumption as well as property and incomes. In these systems the part of indirect taxes is from 35 to 50%. Such taxation systems are in the most European state<sup>3</sup>;
- based on indirect taxation, where indirect taxes give more than 50% of taxation income to the state. This approach to the taxation characterizes the developing countries, such as Brazil, Mexico, Argentina, India including Russia<sup>6</sup>.

The analysis of incomes of consolidated budget of the RF brings to the conclusion that the most part of tax budget income forms as the result of applying the VAT, excise and import and export custom duties including deals with carbohydrates, ferrous and non-ferrous metals. Also the great part of the budget income gives the Tax on Extraction ( following TE), receipts from which are also connected with extracting carbohydrates and raw materials for the metallurgy. That is, the main part of the tax income Russian budget gets from indirect taxes, customs duties and taxes connected with extraction and export by the giant corporations the carbohydrates, ferrous and non-ferrous metals. The percent of taxation receipts into budget from income taxation of physical persons as well as taxation of physical persons' property is extremely low.

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<sup>6</sup> Maiburov I.A. Theory and history of taxation. Moscow, 2007, p.306.

So, taxation system of the RF is formed in such a way that by taxes the burden of financing the state expenses is put mainly on corporations and at the least degree it concerns the interests of physical persons - taxpayers.

Physical persons - taxpayers are the most numerous participants of political process, because they are the voters at elections, members of political parties and movements, the participants of referendums. It is supposed that citizens - taxpayers

taking part in elections or referendums are under the influence of taxation reasons in their decisions as well. The voters leading by interests of owners are not ready to support the candidates or parties offering tax growth affecting the interests of this category of voters. In equal degree the deputy of legislative body must note vote actively for passing out tax documents additionally burdening the voters - taxpayers the interests of which this deputy presents. The specific significance for tax reasons in parliamentary activity is proved additionally by the fact that the first Parliament in history (English) was formed in accordance with "Great Charter" firstly as representative body giving the executive body (the Crown) agreement to make out and put into practice new taxes. The other legislative powers were given to the Parliament much more later<sup>7</sup>.

Russian voters - taxpayers take an active part in political process only when drafting and passing out taxation documents, which regulate income or property taxation of physical persons. The example of such demonstration of active civil position is the political company connected with the attempts to rise Tax on Transport under the initiative of the Finance Ministry of the RF.

Tax on Transport in on-property tax which is paid by the physical persons and organizations - owners of the transport as well. The tax is paid to the budgets of the subjects of the Russian Federation at the rate which depends on car engine capacity. The progressive scale of rates of this tax is defined by the Law, that is as the engine capacity grows, the rate of tax on each unit of measuring the capacity grows, too<sup>8</sup>.

In November, 2009, the deputies of Russian Parliament adopted bills into Tax Code, drafted by the Finance Ministry of the RF, which increase the base rate of the Transport Tax in two times beginning with 2010. The base tax rate of the Transport Tax is defined by the federal legislator. Region authorities have the right to determine Transport Tax rate under the condition that it will not be higher than the base rate more than five times. At present, it is, in particular, 5rbl. from each horse power for the cars with capacity under 100 hp (in accordance with the law draft it is offered to rise

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<sup>7</sup> Pepeliaev S.G. Tax law. Moscow, 2005, p.25.

<sup>8</sup> Tax code of Russia. Ch 28 \\\ SZ, 2002,# 30..

the rate to 10 rbl.), 10rbl. With the capacity from 150 to 200 hp (it is offered the rise of rate to 20rbl.), and 30 rbl. - with the capacity of the car more than 250hp (it is offered the rise to 60 rbl.). So, for 97 hp Hyundai Gets the maximum rate of the tax can be 4850 rbl. a year. For the cars with the capacity more than 250hp the tax rate theoretically could rise to 300rbl. Per horse power (now 150rbl.). So for the owner of expensive and powerful car like Audi A6 3.0 TFSI(290 hp) the tax could rise to 87 000 rbl. instead of 43,500 rbl a year. For other categories of car owners the tax could rise on average for 10-30%.

The discussion of this draft provoked heated protest of some car owners, opposition political parties and public unions. Opposition conducted street mass demarches of protest in large cities including Moscow and promised the social exposure if the above mentioned bills would be put into force. Remonstrative insistence of citizens are clear because the rise of income tax from 10 to 200% is clearly seen on the wellbeing of some taxpayers which is especially negatively perceived during economic crisis.

In connection with that so-called “party of power” has the constitutional majority of 2/3 in the Parliament of the RF, the negative opinion of all other oppositional parties was not taken into account, the taxpayers’ protests were also ignored and the law draft on increasing the Transport Tax introduced by the Finance Ministry was approved by the low chamber of the Parliament of the RF without any significant changes.

But, the opinion of the politically active part of the population was suddenly heard by the high chamber of the Parliament of the RF. Under public pressure the high chamber of the Russian Parliament (which is controlled the same political party of power as the low chamber) declined the law draft about increasing the Transport Tax as breaking the principles of justice and economic validity of the tax formulated in the Tax Code. The same opinion was expressed by the President who was going to use his right of veto on this law draft quoted on its insufficient studying and vivid anti-sociality.

During the second voting in the low chamber on the law draft it was significantly elaborated, as a result the right of increasing the tax rate was given to regional authorities which will be able to take decisions according to the playability of taxpayers and other legally meaningful circumstances.

So, we can see, that when working out and adopting the tax law is clear and affects directly the rights and legal interests of taxpayers - physical persons, then law-making process is accompanied by the heat political discussion. Such discussion of tax draft is usual and leads to understanding and correcting the most legal mistakes, which can be in the text of the law draft and passing out qualitative and efficient legal standard rule.

The passivity of public when discussing and adopting tax law draft is unusual. The example of adopting the most important tax law draft without any political discussion is reforming tax law of the RF on Common Social Tax (CST).

CST in Russian taxation is the tax which is paid by the employers. The object of taxation is money paid to employees. The rate of CST is regressive, from 26% and lower as salaries grow. The receipts from CST have the special purpose and are expended on the filling the Pension Fund of the RF, Medical Insurance and Social Insurance Funds of the RF.

In connection with that formally employers (corporations as a rule) but not employees (physical persons) pay CST, the majority of the Russians did not think that this law draft could break their rights and legal interests. It is clear to the specialists that this opinion is wrong and that the rate of the tax on salary fund determines the employees' amount and form of the salary fund itself. But the majority of the Russian citizens-taxpayers did not come to this conclusion. That is why there was not any national political discussion on its issue, nobody from the voters organized protest demarches or any companies in Mass Media against the law about changing CST by insurance pays into extra budget funds with higher rates. Such passivity led to the following sequences:

At the end of 2008 - the beginning of 2009 the representatives of the Health and Social defense Ministry worked out the draft of the radical reform in the mechanism of financial provision in the system of pension, social and medical insurance. The reform supposes the complete repeal the CST from 2010 and exchange it with insurance pays paid directly to the Pension Fund, Social Fund and Medical Insurance Funds of the RF. All tax benefits which were before are declined and the total amount of payments of the employers increases from 26% to 34% from the money paid to employees.

Actually, only the state authorities as well as representatives of organizations-employers took part in the procedure of public discussion of the law draft. The discussion was not very long but extremely active. The Finance Ministry of the RF, Economic Development Ministry of the RF and business representatives were against the initiative of declining CST and turning to different pays on higher rates. Such unanimity of representatives can be rarely seen and tells about many things. The reasons for businessmen-taxpayers to be discontented are vivid. The officials of the Finance Ministry of the RF together with the Economic Ministry of the RF as well thought that increasing tax burden for business at the heat of the crisis will unfavorably influence business and rise the heaviness of its sequences. Only the Prime Minister and the originator of this law draft - the Health Ministry- support it openly.

The Government of the RF ignored the negative meaning of the Finance and Economic Ministries of the RF, the negative reaction of public and introduced the law draft to the Russian Parliament. Under the pressure of

authority and administrative source of the Prime Minister of the RF the Parliament adopted the correspondent law by changing the CST with insurance pays and increasing the rate of pays from 26% to 34% under the weak public protest and in the shortest time.

The above mentioned example of changing the Tax Law by substitution the CST with insurance pays at higher rates is rather demonstrative. It convinces us once again that the lack of real political discussion as well as unwillingness to take reasonable opinion of the counterpart into account lead to passing out documents in Tax Law with legal mistakes and which can not act efficiently.

In both above mentioned cases tax rules were made out and adopted by the legislative body which in any case passes out legal standard rules after they have been discussed and in accordance with the results of voting. It is undoubtedly that with the lack of real discussion of parties and public unions this law draft is essential necessity. But even such procedures imitating political struggle are possible even if the necessity of adopting tax rule is recognized by the subject of the legislative initiative and is introduced to the discussion to the Parliament. As a rule, law drafts on reducing tax or benefits are introduced and lobbied by the representatives of private persons -taxpayers. Law drafts on introducing new taxes and increasing rates of active taxes are usually worked out and lobbied by the Governments of the states or Ministries in charge of public sector of state economics. In number of countries it is legally fixed the list of subjects to be in charge of working out new law drafts but in any case the list of subjects which have legislative initiative is limited.

If no one from possible initiators of law draft does not want or can not start the process of making the object tax rule then the court or any other law enforcement body has to fill the gap or collision in the Tax Law by creating judicial or administrative precedent.

So, from the above said it is possible to make resolutions which seem to be valid:

- adopting legal tax rules s legal standard documents passing out by the legislative body under the real political discussion is the guarantee to create the quality source for efficient legal rules;
- adopting legal standard documents on taxes and fees without any discussion by interested in it parts increases the possibility of legal mistake in the text of tax rule and reduces the efficiency of its application;
- the lack of interest from legislative body to the tax making activity because of object or subject reasons is abnormal. With such passivity of the Parliament the rules which are objectively necessary to regulate tax



relations begin to be created as non-traditional for continental law the judicial or administrative precedents or tenets as well.

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