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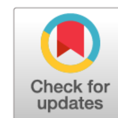

Alternative Legal Constructions for the Settlement of Tax Situations: Limits of Admissibility

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ABSTRACT

This article analyzes alternative legal constructions used to resolve tax situations and determines the limits of the admissibility of their use. It emphasizes that such legal constructions are lawmaking and enforcement. Moreover, the latter takes place in the course of both judicial and administrative law enforcement. These constructions are civil law. The authors highlight the fact that the subject of this article is not civil law institutions that determine tax law. We discuss civil law constructions in the system of tax situations, i.e., situations that arise from tax legal relations and require their resolution. In the context of the article, the lawmaking constructions are those that are established in the Tax Code of the Russian Federation. One example, in particular, is the civil law constructions of a surety and a bank guarantee, enshrined in Art. 74 and 74.1 of the Tax Code of the Russian Federation. Enforcement constructions, in particular, are civil law constructions of unjust enrichment and tort liability. As an alternative, these constructions for regulating tax situations are used in the Resolutions No. 9-P, dated March 24, 2017, and No. 39-P, dated December 8, 2017, of the Constitutional Court of the Russian Federation.

We pay particular attention to the analysis of the “tax clause” as a false alternative civil law construction initiated into the practice of the Federal Tax Service of Russia, and we determine the criteria for the limits of permissibility of using alternative legal constructions in the context of the subject of research..

Keywords: alternative legal construction; tax clause; tort liability; unjust enrichment; tax legal relationship; civil legal relationship.

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Научная статья

Альтернативные правовые конструкции урегулирования налоговых ситуаций: пределы допустимости

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Аннотация

В статье анализируются альтернативные правовые конструкции, используемые для разрешения налоговых ситуаций, и определяются пределы допустимости их использования. Подчеркивается, что такие правовые конструкции являются правотворческими и правоприменительными. Причем последние имеют место как в ходе судебного, так и административного правоприменения. Эти конструкции являются гражданско-правовыми. Обращается внимание на то, что предметом настоящей статьи не являются гражданско-правовые институты, имеющие место на уровне гражданско-правовой детерминации налогового права. Речь идет о гражданско-правовых конструкциях в системе налоговых ситуаций, т.е. ситуаций, возникающих из налоговых правоотношений и требующих своего разрешения. В контексте статьи правотворческие конструкции — это те, которые установлены в НК РФ. Примером, в частности, являются гражданско-правовые конструкции поручительства и банковской гарантии, закрепленные в ст.ст. 74 и 74.1 НК РФ. Правоприменительными конструкциями являются гражданско-правовые конструкции неосновательного обогащения и деликтной ответственности. Как альтернативные эти конструкции в целях регулирования налоговых ситуаций использованы в Постановлениях КС РФ от 24.03.2017 № 9-П и от 08.12.2017 № 39-П. Особое внимание в статье уделяется анализу «налоговой оговорки» как лжеальтернативной гражданско-правовой конструкции, инициированной в практику ФНС России. Определяются критерии пределов допустимости использования альтернативных правовых конструкций в контексте предмета исследования.

Ключевые слова: альтернативная правовая конструкция; налоговая оговорка; деликтная ответственность; неосновательное обогащение; налоговое правоотношение; гражданское правоотношение.

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The issue of alternative legal constructions in the resolution of tax situations is in the problems of the interrelationship of tax and civil law. This issue has manifested in recent years and is generated in general by the search for a fair and effective resolution of tax situations. There are also examples of the use of civil law structures for resolving tax situations when there is a real, and sometimes seeming need for various reasons to "close" the temporary insufficiency of tax-legal regulation. The problem has legislative and law enforcement segments, as it is manifested in the Tax Code of the Russian Federation (RF Tax Code), as well as in judicial acts of precedent. What is very interesting is that administrative law enforcement practice has also begun to try to use alternative legal structures for addressing tax situations. The latter are, in the vast majority of cases, matters of civil law. The number of these structures is constantly growing, although not quickly.

When discussing alternative legal structures in the regulation of tax situations, it is important to emphasize that we are not talking about regulating tax relations with the help of such structures, which, as we know, is completely unacceptable. We are talking about the regulation of tax situations, that is, those that arise from tax-legal relations, but the resolution of which in legislation or judicial practice requires the use not of tax, but civil law structures.

More specifically, from a theoretical point of view, these constructions exhibit the relationship and autonomy of tax and civil law. However, they do not take place at the level of civil-law determination and the autonomy of tax law. Alternative legal constructions show the interrelationship of tax and civil law in the system of tax-legal situations, i.e., situations arising from tax-legal relations and requiring their resolution.

Civil law constructions in the regulation of tax situations are admissible; they operate in conjunction with tax-legal relations, forming a kind of legal knot. However, practice shows that the articulation of civil and tax law in the regulation of tax situations must have limits and certain boundaries. These limits can be derived from the doctrine of law, civil legislation, and case law regulation, which provides examples that allow making some generalizations about the limits of admissibility of alternative articulations of tax and civil law. This is very important because there are no normative legal guidelines for this kind of articulation of tax and civil law. It is important to have them because if they are not formulated by legal science and if they will not be exercised in practice, then there may be facts of judicial and administrative intrusion into the sphere of the legislator's discretion, and will destroy the existing doctrine of law imperceptibly.

The alternative, i.e., civil law constructions in the regulation of tax situations should be referred to, and first of all, those established in the Tax Code of the Russian Federation. The example of lawmaking provides a legal paradigm for the resolution of tax situations by the method of alternative docking of tax and civil law.

Therefore, articles 74 and 74.1 of the Tax Code of the RF establish such alternative civil law constructions for resolving tax situations as a surety and a bank guarantee. Their essence is as follows: if a taxpayer cannot fulfill a tax obligation in connection with the granting to him of a deferral or installment according to tax legislation, it must be fulfilled in a civil law order by a surety, bank, or insurance organization, which have concluded with the tax authority the relevant contracts.

As for case law regulation, alternative legal constructions for the resolution of tax situations began to appear in 2017. It all began with the Decision of the Constitutional Court of the Russian Federation (CC RF) of 24.03.2017 № 9-P, in which unjust enrichment (article 1102 of the Civil Code) as a measure of state enforcement (civil legal construction) was elevated to the constitutional and legal institution and, accordingly, acquired the status of an inter-branch legal institute. This legal institution was used in this decree to close a gap in the tax legislation because it did not resolve the issue of erroneous provision of a tax deduction to a taxpayer by the tax authority. The court's use of the institution of unjust enrichment concerning a situation arising in the field of taxation is an alternative legal construction. This is in the sense that, by definition, the elimination of gaps in tax legislation is the sphere of the legislator's discretion. Therefore, as emphasized in the above-mentioned Decision of the Constitutional Court, the legislator has the right, at his discretion, "to make changes in the current tax regulation, aimed at regulating the grounds, procedures, and timing for the recovery of relevant funds from the taxpayer." This finally happened in 2021. In article 221-1 (item. 7) of the Tax Code, the legislator overcame the Decision of the Constitutional Court and established a rule under which, "in case the tax authority or bank <...> provided clarified information, which results in reducing the amount of tax refunded to the taxpayer in connection with the provision of the tax deduction, the tax authority within five days after receiving the said information shall decide to cancel the decision to provide a tax deduction in full or in part." In this case, the alternative expressed in the dual possibility of legal regulation — civil law, brought to the constitutional–legal level, or tax law. Ultimately, the legislator in the sphere of his discretion, conditioned by sovereign law, has established a tax law norm for regulation in this situation, thereby demonstrating the autonomy of tax law from civil law. In this scenario, there exists another form of coincidence of tax and civil law.

The Decision of the Constitutional Court of the Russian Federation of 02.07.2020 № 32-P used a fundamentally new legal structure — "harm caused to the budget system". In addition, the Decision of the Constitutional Court of the Russian Federation of 08.12.2017 № 39-P used the civil law construction of tort liability provided for by article 1064 of the Civil Code of the Russian Federation even though

the situation considered by the court was, in fact, a tax and legal one. Based on the said Decision of the Constitutional Court of the RF, tax liability should be applied to the organization which has not paid the tax, and the arrears to an individual — the head of an organization that has been brought to criminal responsibility and created the situation of inability to cover the organization, and in some cases civil law tort liability may be applied under article 1064 of the Civil Code. It turns out that in this Decision of the Constitutional Court of the RF, the court docked the possibility of application measures of tax coercion and civil law tort responsibility concerning the situation arising from the organization's failure to pay tax. In this case, there is the use of alternative legal structures — either tax legal or civil law. What is very important: if tax-legal, then exclusively to the organization, if civil-legal, to an individual, depending on the consequences created. Simply put, this Decision of the Constitutional Court of the RF has used "the possibility of subsidiarity, because civil legal responsibility began to be considered as a reserve in case of impossibility to apply measures of tax-legal coercion in connection with the failure to pay tax on time and the formation of arrears", but in respect of different subjects [1].

In addition to the above, today, there is an attempt to introduce the legal turnover of the civil law contract structure for the regulation of economic relations, allegedly not regulated by the legislator. The Federal Tax Service seeks to promote this construction, and it is called the "tax clause". The essence of this construction is as follows: the buyer should include in the agreement concluded with the seller the terms of the compensation for losses incurred by the buyer, if the seller, having executed a civil law obligation and subsequently acting as a taxpayer, does not pay VAT to the budget, according to the Federal Tax Service, this deprives the buyer, acting in the status of a taxpayer, of the right to a VAT deduction since the economic VAT chain is severed[1] [2, 3]. The tax clause is an attempt to introduce into legal turnover an alternative legal construction of tax situation settlement — a civil law contract because it is the opposite (alternative) construction of tax liability, which the tax authority must apply as a state-authorized body in accordance with its competence concerning the subjects that evade VAT payment.

The tax clause is a pseudo-alternative legal construct, for it is essentially illegitimate. The reasons for this are as follows:

First, the legislator in article 171 of the Tax Code, which establishes a list of tax deductions for VAT, which is exhaustive, did not deny the taxpayer the right to a tax deduction in connection with the break in the economic chain of the VAT movement. This concept is not used in the Tax Code at all. It follows from the fact that the establishment of a tax is the sovereign right of the state that it and only it may at any time change the legal structure of the tax by adding to it and eliminating some norms. In this connection, it should be taken into account that the sovereign right of the state to impose a tax means that the legislative regulation of any tax, including VAT, at any given moment is, by definition, complete and sufficient. In other words, it is a minimum legal regulation at each particular moment and does not require any improvement at that moment. Because of this, the economic analysis of the VAT movement existing in the practice of the Federal Tax Service, taking into account the break in the economic chain and, in connection with it, the unformed tax base for VAT calculation, has nothing to do with the legislatively established legal structure of VAT. Accordingly, attempts to improve this tax with the help of a civil law contract structure is a violation of the competence of the tax authority as an authorized body of the state, and ultimately, a violation of the sovereign will of the legislator.

Second, the "tax clause" as a phenomenon leads to a distortion of the concept of "tax". As we know, according to article 8 of the Tax Code of the RF, tax is "a compulsory, individually gratuitous payment levied on organizations and individuals in the form of alienation". If a bona fide taxpayer in the payment of VAT to the budget depends on the counterparty to the contract, i.e., on the fact of payment or not of tax to the budget, it follows that the tax itself, in principle, is a conditional payment in the sense that its payment to the budget is still not so imperative, as it follows from the Tax Code and is still subject to some derivative, not accounted in the Tax Code. It is not by accident that the Constitutional Court of the RF in its Decision No. 329-O dated October 16, 2003 stressed that the taxpayer is not responsible "for the actions of all organizations involved in a multistage process of payment and transfer of taxes to the budget".

Third, even if the buyer of goods, in the future a VAT payer (because he is going to add value to the purchased goods), is willing to "fend off" the claims of tax authorities, to conclude an agreement with the seller of goods on the tax clause, even today he cannot do it based on theoretical postulates of civil law and, accordingly, will not be able subsequently to protect their rights based on the objective impossibility to do so for the following reasons:

Civil law regulates relations of civil turnover (clauses 1 and 2 of article 2 of the Civil Code of the RF)[2], and obligatory relations in this branch of law, according to the doctrine, cannot arise from public law relations, except for obligations from the infliction of harm, i.e., tort obligations (article 1064 of the Civil Code), for example, a violation of traffic rules, which

[1] Subbotina E. In defense of the tax clause. URL: https://zakon.ru/blog/2021/11/16/v_zaschitu_nalogovoj_ogovorki#comment_592449; Rechkin R. Tax Reservations. A dozen knives in the back... to the delight of civilists. URL: https://zakon.ru/blog/2021/11/14/nalogovye_ogovorki_dyuzhina_nozhej_v_spinu_vostorgu_civilistov#comment_592350 (accessed 20.01.2023).

[2] Belov V.A. Civil Law. The General Part. Vol. 1. Introduction to Civil Law. Moscow, 2011. P. 43.

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caused harm to the victim. Accordingly, a civil law obligation cannot arise from the fact of non-payment of VAT, i.e., non-fulfillment of a tax obligation by a taxpayer-supplier because it, a tax obligation, being a public law one, does not belong to the sphere of civil circulation, and therefore, cannot generate a civil law obligation based on the autonomy of the will of participants in civil legal relations. Moreover, it cannot also be referred to as a tort obligation (article 1064 of the Civil Code of the RF), because the basis of the harm caused to the budget system (if the recovery of such would be lawful) is the failure to pay tax to the budget by the taxpayer-supplier, i.e., damage caused to the budget system, as a general rule, is recovered in accordance with the Tax Code of the RF in favor of the state, and only in some cases is recovered from an individual in favor of the state in accordance with article 1064 of the Civil Code[3], but in any case not in favor of the counterparty under a civil law contract.

In addition, judicial practice shows that some courts, realizing that civil obligatory relations do not arise from public legal relations as legal facts, require the buyer who has concluded a contract of tax clause to present an individual legal act of the tax authority, establishing non-payment of tax by the taxpayer-seller of products because civil legal relations may arise from the acts of executive authorities (article 8 of the Civil Code). Often, such an act is submitted to the court. However, the recovery of losses under such an act due to a tax clause is impossible given the following. First of all, in accordance with article 8 of the Civil Code of the Russian Federation, the acts of public authorities, which are stipulated by law as the basis of the emergence of civil rights and obligations, are the grounds for the emergence of civil rights and obligations. The acts of tax authorities, confirming the non-payment of tax by the taxpayer-supplier, are not envisaged by the law as the grounds for the emergence of civil rights and obligations. Second, in accordance with the civil law doctrine, such acts in their content should be aimed directly at the emergence of rights and obligations in a particular subject — the addressee of the act[4]. In other words, civil legal relations with a particular subject must arise based on this act, stipulated by law, and addressed to them. The individual legal act of the tax body cannot generate any rights and obligations for the taxpayer, as it is not foreseen by the law as an act generating thereby civil law consequences. Civil legal relations between the seller and the buyer arise without the acts of public authorities.

In addition to all of the above, many practices today defend the possibility of including a tax clause in the agreement between the seller and the buyer under article 406.1 of the Civil Code (as compensation for losses incurred in the event of certain circumstances in the contract), thereby wanting to protect the business in case of the imputation of article 54.1 of the Tax Code by the tax authority[5] [3].

Paragraph 1 of article 406.1 of the Civil Code states that “the parties to an obligation, acting in the exercise of their business activities, may by agreement provide for the obligation of one party to compensate the property losses of the other party, arising in the event of certain circumstances specified in such an agreement and not connected with the violation of obligations by his party (losses caused by the inability to perform obligations, the presentation of claims by third parties or public authorities to the party or a third party specified in the agreement). The amount of compensation for such losses or the procedure for determining it shall be determined by agreement between the parties”.

It seems that article 406.1 of the Civil Code of the RF cannot be applied when the parties agree on a tax clause. The fact is that this article of the Civil Code of the RF, like all the others, regulates the relations of civil turnover exclusively. This is emphasized in this article by the fact that the conclusion of an indemnification agreement is possible only by the parties acting in the exercise of entrepreneurial activity. The latter is defined in paragraph 3. Article 2 (1) of the Civil Code of the RF as an independent activity carried out at one’s own risk “aimed at systematic receipt of profit from the use of property, sale of goods, performance of works, and rendering of services.” At the same time, in the theory of civil law, it is noted that this norm was included in the Civil Code of the RF “solely for the purpose of limiting as much as possible the limits of public-law interference of the state in the economy”[6] because all civil law norms regulate only civil turnover[7]. This is highlighted in the Resolution of the Plenum of the Supreme Court of the Russian Federation of 24.03.2016 in the edition of 22.06.2021. It follows that only subjects of civil law — the buyer and the seller, the customer and the contractor, etc. — can be parties to an agreement on compensation for losses. At the same time, as noted in the aforementioned Resolution of the Plenum of the Supreme Court of the Russian Federation, this agreement cannot concern losses associated with the violation (non-performance or improper performance) of a civil law obligation concluded between the parties. Such an agreement can only relate to the performance, modification, or termination of a civil law obligation concluded between the parties. In addition, according to the interpretation given in the same Resolution, “compensation for losses is allowed if it is proved that they have already been incurred or will inevitably be incurred in the future” (clause 15 of the Resolution of the Plenum of the Supreme Court of the RF).

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[3] The decision of the Constitutional Court of the Russian Federation of 08.12.2017 No. 39-P.

[4] Civil Law. Vol. 1. Ed. by E.A. Sukhanov Moscow, 2002. P. 325.

[5] Subbotina E. Op. cit.

[6] Belov V.A. op. cit. pp. 45-46.

[7] Ibid. P. 43.

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Because of the foregoing, reimbursement of a purchaser's loss under a civil commitment as a future taxpayer (loss of tax credit) cannot be subject to a tax clause agreement for the following reasons:

1. Such an agreement in no way relates to the issues of fulfillment, change, or termination of a civil law obligation concluded between the parties to the contract as business entities. On the contrary, it concerns the actions of a taxpayer who has not paid VAT to the budget, carried out within the framework of not a civil, but a tax obligation. In other words, the agreement on losses under the tax clause goes beyond the boundaries of civil law. This is not possible under paragraph 3 of article 2 of the Civil Code of the RF, which, again, strictly protects civil turnover from public-law interference in the sphere of law enforcement.

2. An agreement on a tax clause cannot, in principle, be concluded also because upon the conclusion of the contract, there is no tax obligation yet, and whether it will inevitably occur and, accordingly, whether tax losses will inevitably arise (paragraph 15 of the Resolution of the Plenum of the RF Supreme Court) cannot be anticipated because such anticipation involves a clear interest of the future taxpayer, now the buyer of goods, in actions under article. 54.1 OF The TAX CODE. This is nonsense.

In general, it should be emphasized that the tax clause is a false and in this sense illegitimate legal mechanism because it is a model of docking the incongruent. This mechanism involves the connection within the framework of civil legal relations of the interests of two subjects independent from each other — taxpayers, who are in two unrelated vertical legal relations — tax-legal relations with the state. The taxpayer-seller must pay tax to the budget, and in the event of non-payment, they must be subject to state coercion measures from the tax authorities. The taxpayer-buyer, to pay tax in the future, must account for the amount of tax that they transferred as part of the price of goods to the taxpayer-seller in the accounting.

Analysis of legislation, rulings of the Constitutional Court of the Russian Federation, and the current judicial practice, as well as legal doctrine, lead to the conclusion that the limits of the introduction of alternative legal structures of tax situations can be defined as follows:

- When closing a gap in the tax legislation by a civil law construction, it should be understood that a gap in the tax legislation is at the legislator's discretion and that this construction is likely to be illegitimate and represent a conscious violation of the law. An exception, as shown by the Decision of the Constitutional Court of the Russian Federation of 24.03.2017, is the solution of the issue with the use of civil law constructions within the framework of case law regulation.
- When introducing civil law responsibility in the sphere of taxation, we must remember that the application to the same subject for the same offense of tax and civil law responsibility is impossible. This follows from the Decision of the Constitutional Court of the Russian Federation of 08.12.2017 № 39-P, which therefore allowed for the possibility of application along with tax and civil law tort liability (article 1064 of the Civil Code), that the latter is applied not to the organization, but to another entity — an individual, but within the general tax situation.
- When creating a civil law construction and introducing it into circulation, we must take into account the will of the sovereign. Thus, the introduction of the "tax clause" in circulation violates the will of the legislator, expressed in Chapter 21 of the Tax Code because the legislator does not bind the taxpayer to receive a tax deduction (article 171 of the Tax Code) with the fact of formation or non-formation of the tax chain of VAT payment. At each particular moment, the will of the legislator, expressed in the law, is the minimax, which is sufficient at the moment for legal regulation.

Introducing into circulation the construction of a civil law contract to regulate the tax situation, it should be understood that this construction cannot be used to regulate the relationship between the two taxpayers, and this concerns the tax clause directly. A civil law relationship is impossible between two taxpayers based on the peculiarities of the subject and method of tax law, and, accordingly, the peculiarities of tax-legal relations, one party of which is always the state as a ruling subject or a municipal entity. Civil legal relationships mediate only civil turnover, i.e., relationships between the subjects of civil law.

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