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Burnysheva L. V.

VERIFICATION OF THE LEGALITY OF TAX BENEFITS USE IN THE COURSE OF A CAMERAL TAX CONTROL

Burnysheva Larisa Vital'evna,
Senior lecturer of the Department of administrative and financial law at Omsk Legal Academy,
lorabu@mail.ru

Problems associated with checking the lawfulness of tax benefits use in the process of a cameral tax control are discussed and analyzed in the article. The author provides a review of the judicial practice in contentious matters.

Keywords: cameral tax control, tax benefits, discovery of documents.

The powers of tax authorities in the course of a cameral tax control have been significantly limited by the legislator since 2007 [2]. Making changes to the Tax Code is quite natural, because cameral tax audits have become little different from on-site audits, at that, tax officials often do not have time to browse huge number of documents requested, and taxpayers do not have any arguments to meet the demands of tax inspectors to document declaration details.

At present, in accordance with paragraph 7 article 88 of the Tax Code of the RF in course of performing a cameral tax audit a tax authority shall not have the right to require a taxpayer to provide additional information and documents unless otherwise provided by this article or unless the Tax Code of the RF requires such documents to be presented together with a tax declaration. The Tax Code provides for only three grounds for discovery of documents during a cameral tax audit:

1) when taxpayer uses tax benefits (paragraph 6 article 88 Tax Code of the RF);

2) upon the submission of a tax declaration for value added tax in which the right to a tax reimbursement is claimed (paragraph 8 article 88 Tax Code of the RF);

3) when audit declarations associated with the use of natural resources (paragraph 9 article 88 Tax Code of the RF).

In other cases in the event that a cameral tax audit reveals errors in a tax declaration and (or) inconsistencies in information contained in documents submitted, or reveals discrepancies between information presented by the taxpayer and information which is contained in documents possessed by the tax authority or which has been obtained by the tax authority in the course of conducting tax control, a taxpayer shall be informed of this and requested to give necessary explanations within five days or to make appropriate adjustments within the established time limit (paragraph 3 article 88 Tax Code of the RF). At that, the taxpayer has a dispositive right to submit the necessary documents in confirmation of reliability of information

It should be noted that tax inspectors often overlook difference in their powers to discover documents under the first three reasons listed above, and the situation when errors or inconsistencies are revealed in declaration, which means that employees of tax authorities are not authorized to demand documents from taxpayers. In this occasion, there are numerous disputes arising from the absence of clear regulation of certain definitions in the tax legislation.

In this article we will focus on the first of these reasons for discovery of documents, consider situations where a taxpayer uses tax benefits. To do this, one need to figure out what are tax benefits in tax law.

According to V. G. Panskov, tax benefits in Russia lead to many problems, first of all, they often do not reach the goal, and secondly, they lead to a large number of tax disputes [26.147].

Many scientific works are devoted to the issues of legal regulation of tax benefits in Russia [16; 18; 19; 21; 23; 24; 28].

Legal scholars, highlighting various authors' classifications of tax benefits, offer to distinguish tax benefits from tax preferences and tax subsidies, and some suggest that almost complete abandonment of the use of tax benefits is typical for the current Tax Code of the RF, at that, there is a more widespread use of tax deductions and tax exemptions [21, 26, 29]. Without going into the theory, let's look at the legal aspect of the matter.

In the tax legislation of Russia the category of tax benefits for the first time appeared in the Federal Law of the RF No. 2118-1 from December 27, 1991 "On the Fundamental Principles of the Taxation System in the Russian Federation", it should be noted that although there was not a definition of tax benefits in the law, but its 10th article contained an open list of tax benefits:

- tax-exempt minimum of an object of taxation;
- exemption from taxation of certain elements of an object of taxation;

- exemption from taxation of certain persons or categories of payers;
- lowering of tax rates;
- deduction from tax assessment (tax payment for a billing period);
- targeted tax benefits, including tax credits (deferred taxation);
- other tax benefits [3].

At present, the Law No 2118-1 is repealed, and the determination of tax benefits is contained in article 56 of the Tax Code of the RF, paragraph 1 of which stipulates that "benefits on taxes and fees shall be understood as **privileges** over other taxpayers and fees payers, which are provided for by tax and fees legislation and are granted to **particular categories** of taxpayers and fees payers, including the right not to pay a tax or fee or to pay a lesser amount thereof", at that, the Tax Code of the RF does not contain the list of tax benefits. However, paragraph 2 of article 56 defines a certain imperative for use of benefits: "taxpayer shall have the right to refrain from using a benefit or to suspend the use thereof for one or more tax periods unless otherwise stipulated by the Tax Code of the RF". On the basis of the literal reading of this paragraph it turns out that tax benefit is not a right, but a duty, from which it is possible to refuse.

Moreover, such a statutory definition is criticized virtually in every study devoted to tax benefits. In particular, among the main complaints to the legislator observed vagueness and blurring of the definition of benefits on taxes and fees: "... those signs that are established in the Tax Code of the RF currently allow representing of tax benefit as any statutory established tax exemption or condition, in respect of which a taxpayer is able to legally minimize the amount of tax payable to the budget" [21].

Also criticized the concept of "category of taxpayers", due to the fact that most of the norms for exemption from specific taxes do not contain the reference to "a category of taxpayers", in addition the Tax Code of the RF does not have definition of this concept. "Any payer, who has circumstances specified in "preferential" norms, has the right to believe that it has been provided a benefit. A different understanding means that exemptions granted to all taxpayers, who actually have the grounds for exemption from payment, are not benefits" [25].

It should be noted that in a special part of the Tax Code of the RF tax benefits directly determine privileges for taxpayers only in three chapters:

- chapter 25.3 of the Tax Code of the RF contains articles 333.35-333.39 that determine benefits on state duties;
- chapter 30 of the Tax Code of the RF by its article 381 determines benefits on tax on property of organizations;

- chapter 31 of the Tax Code of the RF by its article 395 determines benefits on land tax.

Norms of the Tax Code of the RF do not provide for the list of benefits on other taxes. "However, certain categories of taxpayers are provided a variety of privileges on many taxes, in particular VAT and income tax. These, for example, may include the exemption from VAT on revenues from performing certain works or provision of various services in accordance with article 149 of the Tax Code of the RF. Taxmen equate such privileges to tax benefits and because of that in course of cameral audits try additionally to request different documents from a taxpayer. However, this is not always lawful" [17].

For example, chapter 21 of the Tax Code of the RF enshrining basic provisions for the calculation of VAT, does not mention about benefits, at the same the chapter contains certain advantages to taxpayers:

- Exemption from the Fulfillment of Taxpayer Obligations (article 145 TC RF)
- operations that are not recognized as the objects of taxation (paragraph 2 article 146 TC RF)
- Non-Taxable (Tax-Exempt) Operations (article 149 TC RF)

In the latter two cases these operations should be reflected in section 7 of the VAT tax return. "As soon as a taxpayer reflects non-taxable transactions in this section, the tax authorities, referring to article 56 of the Tax Code of the RF (hereinafter TC RF), and considering them as benefits, request from the taxpayer documents confirming the right to these tax benefits. To date this issue is very controversial" [27].

A point in a long-term dispute related to transactions that are not objects to VAT (paragraph 2 of article 146 TC RF) was put by the Presidium of the Higher Arbitration Court of the Russian Federation [10]. The essence of the matter was that a taxpayer having sold a land plot has not submitted documents proving this transaction at the request of inspections that carries out cameral tax audit, , referring in support of its refusal to the absence of the object of taxation. Tax inspection after not having received the requested documents has imposed additional accrual of VAT and brought the taxpayer to responsibility under article 126 TC RF. The courts of cassation and appellate instance abolished the additional tax due to the fact that the taxpayer actually sold the land plot, but the fine under article 126 TC RF was upheld, thus confirming the obligation of the taxpayer to submit documents.

However, the HAC RF in the above Decision has concluded that the absence of the taxpayer's obligation to calculate and pay the VAT regarding the transactions on sale of land plots is directly provided for by the norms of tax legislation

and by virtue of article 56 TC RF is not a benefit. Consequently, the tax inspection had no right to send to the taxpayer the requirement to provide the documents and to bring it to justice under article 126 TC RF.

Thus, in the opinion of the HAC RF, transactions reflected in paragraph 2 article 146 TC RF are not benefits. In addition, the text of the Decision No. 4517/12 contains a reference that judicial acts of arbitration courts with similar factual circumstances, which came into force, may be reviewed on the basis of paragraph 5 part 3 article 311 Administrative Procedural Code of the RF [8].

Next it was the turn for resolving situations regarding transactions, which are not subject to taxation (tax-exempt), defined by article 149 TC RF. Up to 2012 judicial practice was controversial because in a number of decisions of the Higher Arbitration Court and Constitutional Court of the RF transactions described in article 149 TC RF in a particular context were referred to as benefits, [4; 5; 7; 8], however, in arbitration practice there were decisions, in which courts denied tax authorities the right to request supporting documents in the case if taxpayers used article 149 TC RF [31].

The above-mentioned Decision of the Presidium of the HAC RF No. 4517/12 from 18.09.2012, as it often happens in the tax legal relations, filled a gap in the legislation and became a kind of norm of law for lower courts. In this dispute, LLC "Techno Nicole – Building Systems" similar to the above dispute under article 146 TC RF did not provide documents confirming the right to benefits under subparagraph 26 paragraph 2 article 149 TC RF. Three levels of courts refused to meet the demands of the taxpayer. Further the case was transferred to the Presidium of the HAC RF for supervisory review, at that, the proceedings were suspended until the appearance of the motivation part of the Decision of the Presidium of the HAC RF No. 4517/12. Then, the company was denied to transfer to the Presidium of the HAC RF with a recommendation to go to court in the prescribed manner with the application for review of judicial acts in accordance with new circumstances. And now the courts of three instances, having revised the case under the new circumstances, decided the dispute in favor of the taxpayer, explaining their decision that the new circumstance is the change in the decision of the Presidium of the HAC RF of the practice of application of articles 146, 149 of the Tax Code of the Russian Federation. At that, the courts have rejected the reference of the inspection to the fact that in the case were requested documents for the transactions listed in article 149 of the Code, with the assertion that the given by the Presidium interpretation of article 56 of the Code applies not only to article 146, but equally to article 149 of the Code [32].

Equally relevant are such disputes related to the calculation of income tax. In Chapter 25, which regulates the calculation of income tax, also does not have a direct mention about tax benefits. However, tax authorities repeatedly in their clarifications called benefits:

- possibility to apply bonus depreciation (clause 2 paragraph 9 article 258 TC RF). (Though in later explanations referred to the fact that tax benefits are not provided for by chapter 25 TC RF);

- possibility of transferring into future a loss from previous years (article 283 TC RF);

- application of raising coefficients to the basic rate of depreciation for particular types of assets (article 259.3 TC RF);

- exemption from income tax of revenue in the form of property obtained by a Russian organization free from its founder, member or shareholder who owns more than 50% of its nominal capital (subparagraph 11 paragraph 1 article 251 TC RF), etc. [11-15].

Another very interesting tax dispute began in 2009. The reason for the dispute was filling of a revised tax declaration for income tax, in which the taxpayer in accordance with article 275.1 TC RF stated previously not reflected losses of the current tax period for the activities associated with the use of the objects of servicing industries and enterprises, including objects of housing-communal and social-cultural spheres. Not reflection of the loss resulted in, in the opinion of the taxpayer, the overstatement of income tax to be paid more than 16 million rubles. The tax authorities in the course of a cameral tax audit in accordance with article 88 TC RF required to document the loss, having assessed the situation as the use by the taxpayer of a preferential order of tax calculating.

In view of the fact that the documents were not submitted within the prescribed period, the tax authority took a decision on the illegality of the reduction of profits tax. Three levels of courts refused to meet the claim of the taxpayer, but the Presidium of the HAC RF sent the case for a new consideration [9].

And judicial machinery began to work in reverse order. And the first court instance issued a verdict that the argument of the tax authority on the use by the taxpayer of benefits in the disputed tax return for income tax and the discovery of documents in the course of cameral tax audit had been illegal. The established by article 275.1 TC RF features of determining the tax base by taxpayers engaged in activities related to the use objects of servicing industries and enterprises are not tax benefits in the sense of paragraph 1 article 56 of the Code. It was the turn of the tax authority to challenge the decisions of the courts.

The dispute lasted for four years, a lot of time and money was spent. At that, as in the above debates on VAT, the same scenario took place – the taxpayer appealing a decision of the tax authority, came to the highest court instance (three levels of courts had denied the complaint). Then the Presidium of the HAC RF directed the case for a new trial, and the vector of judicial decisions began to work in the opposite direction and three levels of courts recognized the rightfulness of the taxpayer. Thus, today, tax authorities have no right to demand in the course of a cameral tax audit the documents that confirm the use of benefits by taxpayers under articles 146, 149, 275.1 TC RF.

Disputes concerning benefits for other taxes are not so relevant. Yet, the requirement of the tax authorities in the framework of a cameral tax control to document the right to standard, social and property tax deductions for tax on income of physical persons is virtually unquestionable, and as for the professional tax deductions for tax on income of physical persons, there have been disagreements among both theoreticians and practitioners.

According to R. K. Kostanyan, “Article 221 TC RF applies only to those expenses that are directly related to the deriving revenue of individuals within their special legal personality, that is, this deduction is available only for certain categories of taxpayers. In addition, the right to obtain this deduction is delegated to the taxpayer’s discretion and depends on the willingness of the last” [23].

In our opinion more convincing is the position of S. D. Shatalov that “professional tax deductions cannot be treated as tax benefits, because they are directed to proper organization of taxation, which allows to reduce the incomes of certain categories of self-employed persons for the costs associated with obtaining these incomes” [22].

This position is consistent with the opinion of the Presidium of the HAC RF, which has envisaged in its Decision that “the providing to a taxpayer of tax on income of physical persons the right for obtaining professional tax deductions, specified in paragraph 1 article 221 TC RF, does not meet the signs of benefits for taxes and fees in accordance with article 56 TC RF, therefore, does not assume as a condition for obtaining deduction a preliminary audit of primary documents within the framework of a cameral tax audit” [6].

It should be noted that in this case arbitration courts use the position of the Presidium of the HAC RF as a norm of law [30].

All of the above problems are not relevant for taxpayers who use special types of tax treatment in view of the fact that the organization in this case are exempt from VAT and income tax, and entrepreneurs from paying tax on income of

physical persons. But the very use of special regime tax authorities often treat as a tax benefit, that is why in the course of cameral tax audits they require taxpayers to provide ledger of income and expenditure and other documents. We believe that these actions are also illegal, because special types of tax treatment can hardly be uniquely considered as benefits. "Through the use of individual types of tax treatment the taxpayers that correspond to the signs, which are required for their use, can significantly reduce tax burden in comparison to other taxpayers. But the special types of tax treatment for the most part bind the granting of any tax advantages not to the features of the legal status of taxpayers. As a rule, as basis here is also laid the nature of the activities they carry out" [21].

However, tax authorities' strenuous aspiration to control tax benefits is understandable, given that the tax advantages are often used by taxpayers for taxation minimization, and often to avoid paying taxes. Not very long ago the legislation has established a lot of benefits for handicapped, however, many organizations have not even scrupled to use handicapped as "dead souls", and even now "handicapped's privilege" is actual for the calculation of VAT. In order to reduce income tax some organizations illegally use higher rates of depreciation or create pseudo non-profit organizations. So, checking such possible abuses is needed and important, but in the course of a field tax control, where the powers of tax authorities are much wider than within the framework of a cameral control.

Regarding the considered by us problematic situations that arise in checking the validity of the use of tax benefits in the course of a cameral tax control, of course, it can be argued that the cause of controversy is the lack of a clear statutory definition of the notion of tax benefit, as well as multivariance of the terminological use of taxpayers' advantage in the various chapters of the Special Part of the Tax Code RF.

Sharing the view of O. P. Grishina, about that it is necessary to establish "specific normative mechanism of implementation that would ensure effective control of the state over the use of tax benefits, countering possible abuse by taxpayers, as well as protection of the rights, freedoms and legitimate interests of organizations involved in a multi-step process of payment and transfer of taxes to the budget" [20], we believe that it needs to develop clear classification principles of the notion of "tax benefit", adding them to article 56 TC RF. In addition, in our opinion, paragraph 6 article 88 TC RF must contain a specific list of articles, under which the use of benefits by taxpayers will give the right to tax authorities to carry out cameral tax audit with the discovery of supporting documents.

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