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Legal Instruments for Countering Tax Evasion in the Russian Federation: A General Overview of the Applicable Rules

Aleksandr Sergeevich Gurkin*

The paper is dedicated to a general analysis of various legal anti-avoidance instruments which are used in the Russian Federation.* The author did not have an objective to describe all legal mechanisms used in this area in the Russian Federation, since the volume of the paper is insufficient to do so. At the same time, the paper reveals the main directions of the state's activity in the field of anti-avoidance, analyses Russian rules and foreign experience perceived by Russia, and the issues of interaction in this area between the Russian Federation and foreign states.

Keywords: tax evasion, legal liability, general anti-avoidance rules (GAAR), special anti-avoidance rules (SAAR), judicial doctrines, business goal concept, unjustified tax benefit doctrine, step transaction doctrine, substance above form doctrine, tax residency rules, transfer pricing rules, controlled foreign company rules (CFC rules), base erosion and profit shifting (BEPS) action plan, international agreements, conventions, information systems and technologies, fiscal rescript, tax monitoring, basic principles of law, balance of private and public interests

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* Associate Professor • Department of Financial Law, Faculty of Law, Lomonosov Moscow State University • ✉ gurkin2004@yandex.ru • ORCID: 0000-0003-4175-9526

Issues related to the search for measures to counteract tax evasion should now be the focus of attention of any developed state, and they should also occupy a central place in its tax policy areas. The reasons for that are quite obvious.

On the one hand, taxes are an important basis for financing state functions. Thus, in the absence of tax revenues, the state is unlikely to be able to carry out its functions pro-socially, since the implementation of state functions should be provided with financial resources.

On the other hand, taxes are sometimes perceived by society as a negative phenomenon, which can entail the desire of some members of the society to avoid paying them. Therefore, the state, establishing and levying taxes should, first

* The Consultant Plus legal reference system was used by the author during the preparation of the paper.

of all, act pro-socially and proceed from the principle of ensuring a balance of private and public interests, the inadmissibility of its violation.

As Swedish economist and Nobel laureate in economics Gunnar Karl Myrdal pointed out precisely, "taxes are the most flexible and effective, but at the same time a very dangerous instrument of tax policy" (Pepelyaev, 2015, p. 35).

In Russia, tax revenues form the bulk of all budget revenues, their share in all budget revenues can reach 80%–90%. The rest of the budget revenues is generated from non-tax revenues and gratuitous revenues.

Thus, the state is interested in creating effective mechanisms for tax entities to fulfill their constitutional obligation to pay legally established taxes and fees, as embodied in article 57 of the Constitution of the Russian Federation.[1]

An important role in preventing actions aimed at tax evasion is performed by legal liability. At the same time, a number of Russian scientists identify the preventive function as one of the main functions of legal liability.[2] Others, for example, S. S. Alekseev, believe that the prevention (warning) of offences is achieved through a penalty, punitive function, which is aimed at preventing offences and plays a significant role in the education, alteration of people's consciousness (1982. p. 374). Responsibility for violation of tax legislation in the Russian Federation is a combination of different types of liability. That is, non-payment, incomplete or untimely payment of tax may result in the application of administrative or criminal liability to the violator.

However, the establishment of liability measures only is not a sufficient mechanism to counter tax evasion. Therefore, the state develops and legislates general rules (provisions) against tax evasion (general anti-avoidance rules, GAAR), and also introduces additional (special) anti-abuse rules to minimise tax payments (special anti-avoidance rules, SAAR). The existence in the legislation of Russia of both a general and special norm aimed at preventing tax evasion, on the whole, corresponds to the global practice of developed countries. As a rule, general rules presuppose fixing a general rule (ban) on tax evasion, or performing related actions, they are also aimed at a wide range of taxpayers (and not a specific group), and do not relate to specific areas of taxpayer activity. These norms are often formulated as general norms-principles and reflected in the legislation and judicial doctrines. Special rules are aimed at combating specific methods, and activities of taxpayers (or a certain group of taxpayers) used for tax evasion.

An example of a general rule aimed at preventing tax evasion is art. 54.1 of the Tax Code of the Russian Federation[3] ("the limits of the exercise of rights to calculate the tax base and (or) the amount of tax, fee, public insurance contributions"). The specified norm entered into force in 2017, and was enforced by Federal Law No. 163-FZ.[4] The purpose of introducing the mentioned norm was to establish by law a general rule that prohibits taxpayers from recognising the facts of economic life for tax purposes, the main purpose of accounting for which is non-payment or incomplete payment and (or) offset (refund) of tax amounts.

Prior to the introduction of Art. 54.1. to the Tax Code, the Decree of the Plenum of the Supreme Arbitration Court of the Russian Federation of 12 October 2006 No. 53 On the assessment by arbitration courts of the justification for obtaining tax benefits by a taxpayer (hereinafter Resolution No. 53) was widely used in court cases.[5]

In fact, the adoption of Decree No. 53 "was dictated by the need to adjust the arbitration practice in cases of tax planning and tax evasion" (Pepel-

[1] The Constitution of the Russian Federation of 12 December 1993 // Collected Acts of the Russian Federation. 04 August 2014. No.31. Art. 4398.

[2] See, for example:Lazarev (2002),p. 497.

[3] Tax Code of the Russian Federation. Part One. Collected Acts of the Russian Federation. 03 March 1998. No. 31. Art. 3824.

[4] Federal Law of 18 July 2017 On Amending Part One of the Tax Code of the Russian Federation. Collected Acts of the Russian Federation. 24 July 2017. No. 30. Art. 4443.

[5] Published in the *Bulletin of the Supreme Arbitration Court of the Russian Federation*, December 2006, No. 12.

yaev, 2007, p. 21). Thus, it was necessary to establish a unified practice for the courts to resolve cases with signs of tax evasion. Decree No. 53 noted that in the field of tax relations the presumption of a taxpayer's good faith is in force. Decree No. 53 proceeds from the fact that "the possibility of achieving the same economic result with a lower tax benefit received by the taxpayer by performing other operations provided for or not prohibited by law is not a basis for recognising the tax benefit as unjustified" (item 9). Thus, as rightly noted in an authoritative Russian textbook on tax law, the practice of Russian courts does not dispute the right of taxpayers to conduct their business operations so that tax consequences are minimal. However, in the transaction option chosen by the taxpayer there should not be a sign of artificiality devoid of economic sense (Pepelyaev, 2015, p. 768). Tax benefit cannot be considered as an independent business goal of entering into a transaction. The document also lists the circumstances that may indicate that the taxpayer has received unjustified tax benefits.

In fact, the concept of a 'business goal' and the doctrine of 'unjustified tax benefit' outlined in Decree No. 53 can also be an example of general anti-avoidance rules.

Thus, the general rules for counteracting tax evasion may not only be contained in the texts of statutory acts but also may be laid down in judicial acts. At the same time, the application of judicial doctrines to counter tax evasion is a global practice. In particular, the use of a number of doctrines (for example, business purpose doctrine, step transaction doctrine, substance above form doctrine and others) has become quite widespread in developed countries.

It appears that the adoption of Article 54.1. of the Tax Code of the Russian Federation is a consolidation of a number of provisions previously voiced in Decree No. 53. In particular, the business purpose doctrine was also found in it. On the one hand, the consolidation of the mentioned doctrine at the legislative level (and not only at the level of a court ruling) is a positive point, since judicial acts are not recognised as official sources of law in the Russian legal system. On the other hand, Art. 54.1 of the Tax Code of the Russian Federation is in many respects an abridged version of the provisions of Decree No. 53, which, in principle, does not create any additional guarantees for taxpayers, but at the same time loses a number of developments that were enshrined in the text of Decree No. 53. So, for example, in the text of Art. 54.1 of the Tax Code the concept of 'unjustified tax benefit' is not used, although the concept of unjustified tax benefit has not lost its importance.

At the same time, the question of the application of Decree No. 53 after the introduction of the provisions of Article 54.1 of the Tax Code in force is of interest. In particular, according to the tax authorities of Russia, Art. 54.1 of the Tax Code is a reflection of the new approach, and the provisions of Decree No. 53 cannot be applied due to the inclusion of Art. 54.1 in the Tax Code of the Russian Federation. In this case, the tax authorities, as noted in the explanations of the Federal Tax Service (FTS of Russia), according to the results of tax audits, should correctly qualify the circumstances identified during the audit with reference to a specific item of Art. 54.1 of the Tax Code.[6] However, this opinion, in our view, is controversial, therefore, the legal approaches specified in Decree No. 53 may well be applied by the courts when considering cases, especially in view of the small number of judicial practice under Art. 54.1 of the Tax Code. Thus, now the courts may apply the provisions of Art. 54.1 of the Tax Code of the Russian Federation.

In addition to the general rules prohibiting activities carried out for the purpose of tax evasion, in Russia special rules (special anti-avoidance rules, SAAR) were widely adopted and developed. Such standards in force in Russia include, in particular: tax residency rules, transfer pricing rules, thin capitalisation rules, controlled foreign company rules, CFC rules), the concept of determining

[6] Letter of the Federal Tax Service of Russia dated 31 October 2017 No. ЕД-4-9/22123@ On Recommendations for the Application of the Provisions of Art. 54.1 of the Tax Code of the Russian Federation. The Consultant Plus Reference Legal System 2020.

beneficial ownership (beneficial ownership rules) and others.

It should be noted that one of the main objectives (goals) of tax policy in recent years is the fight against tax evasion using low-tax jurisdictions. In 2013, under the chairmanship of Russia by the countries of the Group of Twenty (G-20), the Base Erosion and Profit Shifting (BEPS) Action Plan was approved.

The BEPS measures include the development of measures aimed at solving problems arising in the digital economy, toughening the rules for taxation of profits of controlled foreign companies and revising tax requirements for transfer pricing.

As rightly noted in the legal literature, the measures envisaged by the BEPS plan are focused on global problems that cannot or are unlikely to be completely resolved simply by introducing national instruments, and therefore, coordination of actions of states as well as achievement of a certain consensus is necessary regarding the rules of international taxation and avoidance of double taxation wherein these tools have often existed for a long time (Machekhin, 2016, pp. 110–111). Thus, the strengthening of international cooperation in the development of special standards to combat tax evasion should be an important component of the tax policy of any progressive state. At the same time, it seems that taking into account any international experience should be tailored to the peculiarities of national legislation.

It can be stated that in order to counteract tax evasion the tax legislation of Russia in the last decade has faced many important changes. Among the most significant of these can be attributed, for example, *the emergence of the institution of residence in relation to legal entities* (Russian legislation previously used the term 'tax residents' only in relation to individuals); *the creation of a mechanism for taxing profits of controlled foreign companies* (these rules apply in situations where taxpayers establish foreign companies in low-tax jurisdictions in order to carry out certain activities, while the norms should suppress the use of such low-tax jurisdictions in order to create unreasonable preferences and obtain unreasonable tax benefits); introduction of transfer pricing rules (these rules are used to control prices for goods, work, services in transactions concluded between interdependent persons).

If we give a general assessment of the special rules in force in the Russian Federation, it should be noted that the practice of applying a significant number of such norms has not yet been established. In many ways this is due to objective reasons. For example, many special rules that have been known to some foreign legal systems for decades and sometimes centuries and which continue to develop in accordance with the realities of the economy, have only recently been used in Russia. The above can be illustrated by the rules of tax residency, which, as V.V. Yeremenok states, were found in the practice of British courts as far back as 1874–1876, then received their further development in subsequent court decisions, and in the second half of the 20th century they were enshrined in British legislation, that is incorporated into statutory law.[7] In Russia, these rules were introduced only in 2015.

Thus, the need to adopt special rules to counteract tax evasion is overdue, and the Russian legislator is acting quite quickly here trying to take into account foreign experience that has been taking shape over many years. On the other hand, in many ways this haste quite often leads to the need to correct the seemingly just adopted norms, which, in many respects, indicates their insufficient elaboration. Thus, most of the special rules in the field of tax evasion adopted in recent years have been amended. However, not all of these amendments can be considered successful, and a number of such standards continue to need to be adjusted.

In addition to making changes and incorporating new norms and institutions into national legislation, Russia also participates in various international agreements containing rules or measures against tax evasion, combining the efforts of states in this area. The role of international agreements in the legal system of Russia is determined by Part 4 of Art. 15 of the Constitution of the Rus-

[7] See: Eremenok (2013).

sian Federation,[8] in accordance with the provisions whereof international treaties of the Russian Federation are part of its legal system and in case of conflict with the norms of national legislation have priority.

Thus, in 2019 Russia ratified the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting dated 24 November 2016.[9] The rules of the multilateral convention are aimed at preventing the abuse of taxpayers by international agreements in order to obtain benefits. Moreover, one of the objectives of the multilateral convention is to establish a single rule for all international agreements on the avoidance of double taxation that they cannot be used for tax evasion. In fact, the ratification of this multilateral convention is a logical continuation of the implementation of measures developed in accordance with the BEPS Plan.

Another example of international cooperation is Russia's accession in 2014 to the multilateral Convention on Mutual Administrative Assistance in Tax Matters, developed by the Council of Europe and the OECD in 1988.[10] As a result of joining this convention, the Federal Tax Service of Russia has the opportunity to exchange information with the competent authorities of foreign states with which there was previously no legal basis for administrative influence. This document provides for the possibility of several ways of exchanging information: information exchange at the request of the requesting state; automatic exchange of information (which requires the signing of additional agreements by the parties; involves periodic, regular exchange of information); initiative exchange of information. In fact, joining this convention expands the possibilities of the Federal Tax Service to receive financial information about taxpayers from foreign regulatory authorities, thereby preventing them from evading taxes. Currently, Russia is already actively involved in the automatic exchange of financial information with foreign countries. At the same time, in the main directions of the budget, tax and customs tariff policy for 2019 and for the planning period 2020 and 2021 (the document was approved by the Ministry of Finance of Russia), as one of important goals of the tax policy for these years, the need to develop a system for the automatic exchange of tax information was noted, as well as the implementation of the BEPS plan, as this contributes to 'ensuring the openness and competitiveness of the Russian tax system', and also enables to answer the challenges associated with the erosion of the tax base or tax evasion.

Thus, several main areas of cooperation between Russia and foreign countries within the framework of international agreements can be distinguished, namely, the establishment of special rules in them that prevent tax evasion and the provision of administrative assistance on tax issues.

Another important direction in the development of anti-avoidance measures is the development of information systems and technologies aimed at identifying violations in this area, and preventing such violations. In fact, these measures are also implemented by the state by means of their consolidation in regulatory documents. At the same time, consolidation of such measures implies the possibility of using modern breakthrough technologies to meet the new requirements for the tax system, which is especially important in the context of the digitalisation of the economy.

A number of researchers even single out organisational and technical measures as an independent (separate) direction of anti-avoidance measures.[11] The Head of the Federal Tax Service of Russia, presenting a report in 2017, noted that the Federal Tax Service of Russia "has made a qualitative breakthrough in the development of its own technological infrastructure", which has resulted in a "growth in tax revenues".[12] The tax authori-

[8] Collected Acts of the Russian Federation. 4 August 2014. No.31. Art. 4398.

[9] Collected Acts of the Russian Federation. 9 March 2020. Art. 1281.

[10] Collected Acts of the Russian Federation. 2016. No. 12. Art. 1586.

[11] For instance, see: Pepelyaev (ED., 2015), p. 757.

[12] https://www.nalog.ru/rn77/news/activities_fts/6973314//

ties are developing various information services, digital platforms that simplify the taxpaying procedure and acquisition of information (including information about counterparties) for the taxpayer, and introduce new programmes enabling automated control of the taxpayer's activities and preventing any possible avoidance attempts. Currently, various similar technologies are being used, and one of such programmes is the ACS VAT-2. This is a programme for automated control of the value added tax (VAT), which uses the information from taxpayer declarations and data from counterparty declarations to identify any inconsistencies (discrepancies) in the submitted data, and thereby, minimises the possibility of evading VAT. The application of ACS VAT-2 has increased VAT collection into the budget by billions of rubles annually. Thus, the introduction of information technologies and the gradual formation of a unified information space for administration have enabled a significant increase in the collection of budget revenues without increasing the tax burden.

In fact, the application of various information technologies and different automated control methods contributes to the implementation of the principle of transparency in financial control. Currently, the technological development and implementation of digital technologies in tax control are one of the priority areas in the development of the tax policy of the Russian Federation.

At the same time, it appears that avoidance cannot be completely ruled out in the absence of the taxpayer's desire to voluntarily fulfill their personal tax duties. Therefore, tax legislation should be fair, understandable, and stable. In this case, the tax authorities themselves must strictly comply with tax legislation and explain it to taxpayers.

And Russia still has much to do in this area. Thus, the tax legislation of the Russian Federation cannot be referred to as stable; dozens of laws related to the tax system are annually adopted, which introduce both new rules and amendments to the existing ones. Obviously, this can also indicate the modernisation of the tax system, but to a greater extent it implies the actual instability of the tax legislation, and the absence of clear long-term rules enabling taxpayers and investors to plan their activities for long periods of time.

Also, Russia has not developed the institution of cooperation between taxpayers and tax authorities in the form of obtaining preliminary conclusions on taxation issues yet. In particular, the rescript fiscal institution or its alternatives operates in many foreign countries (for instance, the USA, Australia, the Netherlands, France, etc.), suggesting that the taxpayer may request a tax authority's opinion on the tax consequences of a transaction prior to performing the transaction. The tax authorities, having expressed such an opinion, should subsequently follow it, that is, they are 'bound' by the declared position. The specified mechanism guarantees the taxpayer the certainty of tax consequences related to the taxpayer's transactions and prevents any possible abusive activity by the tax authorities.

A similar institution, 'tax monitoring', was introduced in Russia in 2016. Tax monitoring enables coordination of the approaches to taxation, counseling on completed and planned transactions by presenting motivated opinions of the tax authorities, and reduction in an organisation's expenses for the conduct of tax inspections. The concept for the development and functioning of the tax monitoring system,[13] approved in 2020 by the Government of the Russian Federation, involves an annual expansion of tax monitoring participants. However, it is presently available to a limited circle of taxpayers only. Thus, only 44 organisations participated in the tax monitoring mechanism in 2019 (these are major taxpayers who provided approximately twelve percent of all tax revenues to the federal budget). Thus, at present, tax monitoring in Russia is an institution 'for the elites'. The aforesaid confirms that, in many respects, some progressive institutions aimed at observing the principle of legal certainty in tax legal relations, as well as generating confidence and developing cooperation between the taxpayer and

[13] Order of the Government of the Russian Federation dated 21 February 2020 No. 381-p. Collected Acts of the Russian Federation. 2 March 2020. No. 10. Art. 1357.

tax authorities in Russia presently are of a declarative nature, rather than represent an effective legal instrument.

Summarising the current anti-avoidance rules in Russia, it should be noted that in recent years they have been widely developed (consolidated) in Russia and represent an entire range of various measures and rules, which have been developed with due account of the international best practices, and international cooperation is being practised.

The adoption of appropriate measures has favourably affected the growth of tax revenues in the budget system. At the same time, a number of adopted provisions require substantial refinement, while certain effective mechanisms are more declarative in nature and have not been widely applied. Moreover, the efficiency of the application of anti-avoidance mechanisms is directly dependent on the stability of tax legislation, its clarity, fairness, and understandability for taxpayers. It is also necessary to develop various forms of cooperation and interaction between taxpayers and tax authorities. Both parties should be interested in this, since the compliance with tax laws is the responsibility of both.

The tax authorities, when exercising tax control and developing new anti-avoidance mechanisms, should not only proceed from the principle of budget appropriateness, the need to replenish the budget by any means, but also comply with the basic principles of law: priority of human and civil rights and freedoms, legality, publicity (transparency) and humanism. As rightly noted by E.V. Ovcharova (2019), failure to comply with such principles reduces the level of legal and organisational guarantees of the implementation of the legal status of a taxpayer as an individual in the country. In any case, such situations ultimately undermine the public confidence in the government and lead to inobservance of state laws by the public, including avoidance attempts.

Thus, the voluntary fulfillment of the obligation to pay taxes in the state is impossible without maintaining a balance of private and public interests, and generating public confidence in the state, its institutions, and laws.

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· CONTACT ·
analysesandstudies@sgh.waw.pl · analysesandstudies.sgh.waw.pl · casp.sgh.waw.pl