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DISCRETION IN TAX LAW**A. V. Demin**

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Introduction: the article examines discretionary powers of the tax authorities. **Purpose:** to identify the main characteristics of the use of discretion in tax law. **Methods:** the study is based on empirical methods of comparison, description and interpretation, theoretical methods of formal and dialectical logic, and specific scientific methods: legal dogmatic method and method of legal norm interpretation. **Results:** Russian and foreign lawmakers are actively using discretionary powers of the tax authorities to achieve the objectives of legal regulation to overcome the uncertainty in tax law. **Conclusions:** discretion in tax law is designed so that in a situation of complete or relative uncertainty the tax authority could have the opportunity to choose the optimal solution from a number of legitimate alternatives. The attribute signs of discretion in tax law include: existence of legal bases; implementation of discretionary powers strictly within the competence; alternativeness of the choice, where each of possible alternatives is lawful; accounting of the specific situation in case of adoption of the discretionary decision (the situation-based approach); creative nature; a discretionary decision is made under the influence of both objective and subjective factors; discretion is limited by legal and extra-legal framework; the exercise of a discretion power results in choosing the optimal resolution for the case. Legal forms of discretion in tax law: the use of legal principles, anti-avoidance rules, valuation norms, presumptive taxation, analogy of the law, relative sanctions, etc.

Keywords: discretion; dispositivity; enforcement; freedom of choice; tax; tax authority; tax law; taxation

Information in Russian**ДИСКРЕЦИЯ В НАЛОГОВОМ ПРАВЕ**

Исследование выполнено при финансовой поддержке РГНФ в рамках проекта проведения научных исследований «Диспозитивность в налоговом праве и “партнерская” модель налогового администрирования», основной конкурс 2016–2017 гг., проект № 16-03-00044

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Введение: анализируются дискреционные полномочия налоговых органов. **Цель:** выявить основные характеристики использования дискреции в налоговом праве. **Методы:** используются общенаучные (диалектика, анализ и синтез, абстрагирование и конкретизация) и частнонаучные методы исследования (формально-юридический, сравнительно-правовой, технико-юридический). **Результаты:** российские и зарубежные законодатели активно используют дискреционные полномочия налоговых органов для достижения целей правового регулирования для преодоления неопределенности в налоговом праве. **Выводы:** дискреция в налоговом праве предназначена для того, чтобы в ситуации полной или относительной неопределенности налоговый орган имел возможность выбрать из ряда правомерных альтернатив оптимальное решение, которое позволит ему наиболее эффективно и справедливо реализовать намерение законодателя. Атрибутивные признаки дискреции в налоговом праве включают: наличие правовых оснований; реализацию дискреционных полномочий строго в рамках компетенции и предметов ведения; альтернативность выбора, где каждая из возможных альтернатив является правомерной; учет конкретной обстановки и свободное усмотрение при принятии дискреционного решения; творческий характер; дискреционное решение принимается под воздействием как объективных, так и субъективных факторов; дискреция ограничивается правовыми и внеправовыми рамками; результатом осуществления дискреционного полномочия является принятие оптимального решения по делу. Правовые формы дискреции в налоговом праве: использование правовых принципов, *anti-avoidance rules*, оценочных норм, расчетных методов налогообложения, аналогии закона и аналогии права, относительно-определенных санкций и т. п.

Ключевые слова: дискреция; диспозитивность; правоприменение; свобода выбора; налог; налоговый орган; налоговое право; налогообложение

Introduction

There is no doubt that scientific and practical research on discretion in tax law is of great current relevance. “Few aspects of revenue law generate stronger feelings than the exercise of discretionary power by tax authorities” [19, p. 1].

Today discretionary elements are well represented in private and public law. Tax law is not an exception. Such dispositive manifestations can concern both public actors (e. g., territorial entities, state and local authorities, officials) and individuals. “The principle of dispositivity in tax law is implemented in respect of all the subjects of tax legal relations. The Tax Code of the Russian Federation provides for dispositive regulation of rights and obligations of both taxpayers and tax authorities” [7, p. 39].

In this paper, discretion (discretionary power) is construed as a special kind of dispositivity. In this context, “it is important to overcome the stereotype prevailing in legal theory and practice according to which dispositivity is still regarded as a

principle only inherent in private actors. This perception of dispositivity no longer corresponds to the realities of modern development” [6, p. 104]. We consider it reasonable to support the formulation of the question about the existence in law of “autonomy in a broad sense of this word as the opportunity established by the law to act in various specific areas exclusively, independently and irrespective of other persons”, which leads to the recognition that “autonomy in a broad sense is peculiar not only to the subjects of private law but also subjects of public law” [14, p. 18].

Some authors believe that dispositivity as a legal technique is only applicable to individuals, but not to the state and its bodies, and an administrative act cannot be a means of implementing the discretionary beginnings, since it is based on competence and does not allow public actors to “shy away” from the exercise of the powers provided [5, p. 18]. Such an approach does not seem to deserve support as discretion as a special form of administrative activity just means a possibility

of public actors to act at their discretion and at their own risk depending on the developing situation, quite often including “the right to failure to act”.

Thus, dispositivity in the law system is characterized by a universal nature not only in relation to regulatory segments of the legal system (branches of law, sub-branches of law, legal institutions, legal and logical structures) but also in relation to various categories of actors.

1. The Concept of Discretion in Russian and Foreign Law

What is the relationship between the categories of “discretion” and “usmotrenie”? It seems they have a common origin and may be used interchangeably. Much depends on the position of a particular author. In this article, I consider the category of “usmotrenie” as a broader concept, which characterizes the dispositivity phenomenon in general and which is universally applicable to all participants in legal communication. As for the terms “discretion”, “discretionary” and their derivatives, they will only be used in respect of the legal status of public actors in order to emphasize the specificity of application of the dispositive beginnings with regard to the latter. Certainly, such “differentiation” is rather conditional. Eventually, the term “discretion” in most cases is defined through the term “usmotrenie”, that is the category of “usmotrenie” is a generic term here.

It appears that the elements of discretion as the opportunity to show the proactive attitude, the initiative, the creativity and the innovative approaches to solving problems by public actors can (and must) accompany any process of law-making, legal interpretation and enforcement. In this sense, it is possible to speak about discretion in the broadest sense, that is it is possible to speak about discretion which does not demand official legalization in the legislation and which normally accompanies any intellectual and strong-willed activity of people. The Russian commentator V. N. Dubovitsky regards discretion in the broad social understanding as any decision, opinion, conclusion in general [9, p. 49]. In this context, “the phenomenon of discretion permeates all human practice and can be considered one of the cornerstones of the theory of human action, characterizing its conscious beginning” [3, p. 8].

As for discretion in the narrow sense – as a specific legal tool – Russian and foreign authors

have developed numerous (and diverse) approaches and definitions. Some authors understand the administrative discretion not just narrowly – as an ordinary legal means, but “super-narrowly” – as the exclusive mean being only applicable in exceptional circumstances. In particular, in foreign literature there is an opinion that discretion in tax law “should be restricted to hard cases in which legal arguments fail to generate a single correct solution” [19, p. 14].

In foreign legal science, the issues of discretion are actively studied primarily in the context of judicial discretion and in the conditions of the total domination of sociological and logical-semantic law schools and traditions. The main discussion takes place not about admissibility of discretion *per se* in administrative practices – it actually is not challenged by modern experts, but around the limits and the scope (range) of the discretionary power. Specific approaches and definitions depend on the concept of law accepted by particular authors.

The most famous researcher of discretion is Kenneth Culp Davis, according to whom an official “has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction” [20, p. 4].

For Israeli scientist Aharon Barak, discretion is “the powers given to the person who shall be entitled to the power to choose between two or more alternatives, providing each of the alternatives is legitimate”.

According to the American prof. Harold Pepinsky, discretion derives from accountability: “Accountability means having to answer for one’s actions (or inaction). Accountability is thus synonymous with responsibility. Having to answer for one’s actions makes sense only if one could have chosen to do otherwise” [25, pp. 249–250]. Eventually, he comes to the conclusion that “discretion amounts purely and simply to variance in decisions an observer is unable to explain” [25, p. 251].

In relation to tax law, Ana Paula Dorado defines the term “administrative discretion” in its stricter sense as “the choice between two or among several different alternatives granted by law, and that choice implies a subjective assessment of the specific circumstances of the case which is not to be controlled by the courts”. Thereby, in her opinion discretion includes three elements: first,

it is either explicitly or implicitly granted by law, and whereas in the former case there will be an express authorization by the law or statute in that direction, in the latter case that will stem from vagueness and indeterminacy; second, it requires a case-by-case assessment; third, a subjective assessment goes beyond interpretation, and it must be performed by the tax administration and therefore is not to be controlled by the courts since, otherwise, a subjective assessment would be substituted for another one [21, p. 30].

In pre-revolutionary Russian jurisprudence, the issues of discretion in law were studied by such famous scientists as Yu. S. Gambarov, V. M. Hessen, A. D. Gradovsky, D. D. Grimm, A. I. Yelistratov, N. M. Korkunoff, M. K. Lemke, S. A. Muromtsev, F. V. Taranovsky, B. N. Chicherin, G. F. Shershenevich and others. One of the “pioneers” in this sphere was P. I. Lyublinsky. In 1904 he defined the term “discretion” in two ways: firstly, negatively – “as some freedom of a public body activity from legislative regulation” and, secondly, positively – “as the right of free-expedient assessment in application of the competences vested in this body, on the grounds specified in the law” [10, p. 3].

Modern authors continue to develop the national and foreign traditions of defining the concept “discretion”, using the terms “usmotrenie”, “power”, “choice”, “decision”, “limits”, “alternativeness”, “option” and so on. Thus, legal science develops a common (uniform) understanding of the essence of discretion as a general legal phenomenon. A discretionary policy is intended for the officials, under conditions of total or relative uncertainty in the law, to be able to select from a number of legally acceptable options the best solution that will allow for implementing the intention (purpose) of the legislator in the most expeditious and fair manner.

2. The Objective Prerequisites of Discretion in the Tax Law System

As is stated above, discretion is one of the forms of dispositivity in law. Therefore, the reasons for use of discretion in tax law coincide with the general factors that determine the use of dispositivity in law. In particular, these are the application of teleological legal interpretation; the need for specification (and even more so – the need for individualization) of the abstract normative (regulatory) models generated by the method of typifi-

cation of common features of social interactions; overcoming of excessive conservatism and formalism of statutory law and, as a consequence – overcoming of inconsistencies and fragmentation in the law.

As is pointed out by Edward Morse, some discretion is unavoidable due to the linguistic indeterminacy of legislation: “Some forms of discretion ... will remain a problem as long as human beings interpret language differently” [24, p. 448]. In addition, he argues that discretion also arises from the practical impossibility of drafting rules covering every situation that requires legal regulation; in the areas of legal uncertainty discretion allows us to fill “gaps” between the rules [24, p. 448–449].

Analyzing the new forms of tax administration, Judith Freedman emphasizes: “An adherence to the rule of law does not mean that we must stick to the old cat-and-mouse game of detailed legislation, which often provides opportunities for taxpayers and their advisers to find ways of subverting that very legislation – the game of ‘creative compliance’. The answer does not lie in rigid detailed legislation, literally interpreted; indeed, this is not the way most modern legal systems work, even in the tax area. It may be essential to leave some discretion in the hands of the tax authorities and the courts, but this must be bounded discretion” [23, p. 629].

Ultimately, discretion plays an important role for the optimization of administrative impact in the concrete conditions of tax administration, when it is required to react adequately, flexible and quickly to the specifics of individual cases, legal facts or legal relation in general.

3. Signs of Discretion in Tax Law

Attributive signs of discretion in tax law also coincide with signs of dispositivity as a general legal phenomenon and include: the availability of the legal framework; the exercise of discretionary powers strictly within the relevant officials’ competence; the alternativeness of choice, when each of the possible options is legitimate; taking into account a specific situation; a freedom of action in making discretionary decisions; the creative nature; the discretionary decision is made under the influence of both objective and subjective factors; the availability of the legal and extra-legal limits; the exercise of discretion results in the issuance of the optimal decision for the case.

Discretion should be primarily based on a legal framework, i.e. discretionary powers should be explicitly provided by law or implicitly ensue from the interpretation of legal rules and principles (e.g., application of law by analogy). Thus, official legalization of discretionary powers can be direct and indirect. The latter, as G. A. Prokopovich rightly points out, occurs when a state body or an official has a choice not due to the legal norm, although in general the issue in question falls within its or his scope of authority (terms of reference) [13, p. 8].

In the development and adoption of discretionary rules, the legislator consciously regulates social interaction with the “allowance” for the discretion of law-enforcers. The legal framework of discretion covers both the material-legal aspect (the right to discretion) and formal procedure (procedure for exercise of the right to discretion). At the same time, it is worth noting that even the clearest mandatory rules and regulatory structures always leave a space for their creative interpretation and development. “A law-applier (or a board of law-appliers), guided by the principle of fairness, can sometimes find non-standard legal decisions even in the most rigidly formulated legal rule, taking into account the circumstances of the particular cases” [4, p. 31].

Discretion should only be exercised within the public actors’ scope of authority established by law and within their jurisdiction. Thus, the limits of competence at the same time are also the limits of discretion. Many authors consider discretion to be exactly a subjective right of a law-applier, i.e. an element of the legal status of that. In addition, discretion may be regarded as a means of implementing the public actor’s competence on certain issues of jurisdiction.

In addition to competence, discretionary powers have to correspond to the intended purpose of the tax rules under which they are exercised. It should be kept in mind that the tax authorities have no their “own” goals and interests, they always serve the public purpose of financing the activities of the state and municipalities. This purpose is formulated and derived either directly from the statutory (legislative) acts establishing the right to discretion or from the political instruments formulating tax governmental policies (e.g., Budget Message of the President of the Russian Federation; Main Directions of Tax Policy sanc-

tioned by the Government of the Russian Federation, etc.).

An important sign of discretion is an opportunity of the alternative choice when making a decision on the basis of some initial data. The presence in tax law of clear regulatory models, which prescribe mandatory and unambiguous algorithms of activities, eliminates the possibility of discretionary manifestations. It can be argued that “freedom” and “choice” are generic categories in relation to the term “discretion”. In this context, a choice can be made both between action and inaction and between two or more actions: the former allows the tax authority to refrain from active actions (e.g., the right to replace the attachment of assets with a pledge of assets or not to do so – Art. 77, para. 12.1 of the Tax Code of the Russian Federation; the right to engage a translator to participate in tax control procedures or not to do so – Art. 97 of the Tax Code of the Russian Federation), while the latter eliminates such possibility (e.g., the obligation to choose one of the transfer pricing methods – Art. 105.7, para. 1 of the Tax Code of the Russian Federation).

In addition, a choice can be unlimited – from among an indefinite set of options (an open list of options), and limited, when all the options from which to choose are provided for by law (the closed list of options).

An example of the unlimited list of options can be found in Art. 90, para. 4 of the Tax Code of the Russian Federation, according to which a witness’s testimony may be heard at his place of residence if he is unable to appear at the tax authority owing to illness, old age or disability, and in other instances at the discretion of the official of the tax authority. As you can see, the legislator does not limit a tax inspector in establishing grounds for interrogation the witnesses at their place of residence.

On the other hand, the limited character of discretionary alternatives can manifest itself in two ways, namely:

1) the options may be directly provided for in the text of the tax law. For example, in accordance with Art. 69, para. 6 of the Tax Code of the Russian Federation, a tax payment demand may be handed to the taxpayer in person, sent by registered mail or transmitted in electronic form via telecommunication channels or through a taxpayer’s personal account.

2) they may be the result of the interpretation of tax rules. In particular, an on-site tax audit of one taxpayer may cover one or more taxes; the appropriate selection of the director (deputy director) of a tax authority is formalized in a decision about conducting an on-site tax audit. In this case, possible options of the discretionary choice are limited to only the current system of taxes and fees specified in chapter 2 of the Tax Code of the Russian Federation.

Discretionary powers enable public actors to make decisions within the law and on the basis of their free choice, taking into account the specific situation. The more complex and unique situation is, the more creative and even unconventional approach is required in order to resolve matters which arise. Thus, an attributive sign of discretion is manifestation of creativity in the process of intellectual and volitional search for an optimal individualized solution.

In relation to discretionary powers, each of the provided alternatives shall be legal and consequently the choice of one of them shall be caused by requirements of advisability, effectiveness and efficiency but not legality. “If the administration has discretionary power, its decision can only be estimated in terms of advisability: it will be appropriate or inappropriate, successful or unsuccessful, but will not be illegal as the administration is free in its actions” [8, p. 210].

The lack of freedom of choice means the lack of discretion even if the tax rule addressed to the tax authority contains several formally alternative options. Let us take a look at an example. In accordance with Art. 101, para. 7 of the Tax Code of the Russian Federation, based on the results of the examination of tax audit materials, the director (deputy director) of a tax authority shall issue one of the two “formally” alternative decisions: 1) on the imposition of sanctions for the commission of a tax offense; 2) on the non-imposition of sanctions for the commission of a tax offense. In this

example, the choice of an official should not be arbitrary, but should be determined by objective factors. The tax authority has to make the decision and at the same time it is obliged to choose the version of the decision which corresponds to the authentically established facts and circumstances. Alternativeness here is imaginary, not real because there is a rigid adherence of the legal consequences to the established facts (the fact of the tax offense determines the imposition of sanctions; the absence of the offense excludes the imposition of sanctions). The decision on the imposition of sanctions in case there is no proof of a tax offense (and vice versa) is illegal. An official does not have any freedom of choice in this case. The presence of some or other initial data causes unambiguous algorithm of activity: the tax authority is obliged to issue the only one right decision with virtually no choice, because any other decision would be unlawful.

As is rightly pointed out by one of the first Russian researchers of discretion Pavel Lyublinsky, “if the law connects the occurrence of a clear legal consequence with the only one clear legal fact, it creates a bright-line rule rather than a discretionary norm” [10, p. 22]. Aharon Barak adhered to a similar position: “When there is only one legal option, discretion does not exist” [1, p. 14]. To recognize the discretionary nature of a legal rule, beside the fact that the rule allows for alternative behaviors, each option shall be “equi-dimensional”; an official is entitled to choose one of the options at his discretion but not as a result of algorithmic procedure based on causation.

Discretion always has certain limits, i.e. legal and extra-legal borders within which the law permits the exercise of a discretionary power and the behavior model chosen by the official is explicitly recognized as legitimate. Such limits may be either express (officially formalized), when they are directly provided for by the law, and implied, when creative interpretation of legal texts is required.

Discretion of the tax authorities is limited, first of all, by their competence and jurisdiction. In addition, the formation of a discretionary decision is based on the legal means (legal rules, principles, legal objectives and values), judicial and law-enforcement practice, interpretative documents (official written explanations), soft law instruments, as well as business and other usages established in a particular area of activity. In some cases, discretion cannot be exercised without the relevant initiative or the consent of the individual (e.g., upon a petition of the interested person the authorized body has the right to adopt a decision concerning a temporary suspension of the repayment of debt by the interested person – Art. 64, para. 6 of the Tax Code of the Russian Federation). The discretionary choice of officials is also subject to contradictory influence of extra-legal determinants (e.g., moral values, political platforms, doctrinal sources, religious norms, national and cultural traditions, public opinion, individual and corporate social experience, common sense, logic, the predicted social consequences of the made decision), as well as emotional and psychological factors (e.g., emotions, feelings, stereotypes, moods, preferences and prejudices, social orientations, affects and so on).

Some difficulties arise in situations when the description of discretionary powers in the law looks like formally unrestricted. For example, according to Art. 89, para. 5 of the Tax Code of the Russian Federation, tax authorities shall not have the right to perform more than two on-site tax audits in relation to one taxpayer in the course of a calendar year, except the case when the head of the federal executive body in charge of control and supervision in the area of taxes and levies decides that on-site tax auditing shall be performed over and above that limit. As we can see, the head is endowed with a very broad discretion with regard to appointing repeat on-site tax audits, since the list of grounds by which he can be guided in the decision-making process is non-exhaustive. However, the absence of formal limits envisaged by the Tax Code does not mean that the discretionary power is absolute and unlimited, i.e. completely arbitrary. In any case, for the successful performance of its functions in the tax-regulatory system, discretion must be based on

the organic combination of legality, fairness, proportionality, good faith, effectiveness and efficiency requirements.

It should be noted that some of the discretionary powers cannot be objectively restricted as they are actually not of the legal but of the organizational nature. These include, for example, the choice of objects for on-site tax audit, namely: who should be audited; when, to what extent and with what intensity the relevant object should be audited; what tactics to choose; what kind of and in what sequence control measures will be more expedient to be applied, etc. Such questions cannot be regulated by legally binding rules; in these cases only “soft-law” recommendations within the risk-oriented strategy (tax risks management) can be applied.

Unfortunately, as a rule the law does not require that the tax authorities justify in some way their actions (inaction) in the exercise of discretionary powers. According to specialists and practitioners, the tax authorities are indifferent (very formal) even to the justification of decisions on the results of the examination of tax audit materials, not to mention less important decisions and non-normative acts [15, p. 18]. At the same time, appropriate justification of the discretionary decision made by the official significantly increases its legitimacy among other participants of legal communications. In addition, the absence of such justification complicates, if does not exclude at all, the possibility of an objective assessment of the discretionary decision by higher tax authorities or courts. “The non-normative act adopted on the basis of administrative or judicial discretion, as a rule, should include the motives for the body or official to use the right of discretion, which is an important safeguard against potential abuses on the part of the law-enforcement body” [17, p. 32]. To reduce the risks of possible arbitrariness, as well as of the negative impact of the ideological environment and subjectivity, it is advisable to enshrine in the law or to accept an authoritative informal directive with the requirement of obligatory justification of discretionary decisions. A non-normative act of the tax authority or its official adopted under their discretion should always contain a detailed motivation for the use of discretion and choice of the appropriate alternative.

Discretionary elements can be incorporated into any structural part of a legal norm. The latter contains discretionary elements in the event that “there is no comprehensive guidance on conditions for the rule of conduct to be in action (triggers), or the content of the body’s powers is not defined, or the norm does not include the accurately formulated set of elements of offenses and legal sanctions corresponding to them” [18, p. 14].

Sources of tax law most often contain discretionary rules with uncertain triggers, which do not specify the actual conditions for the exercise of powers; in such cases the legislator traditionally uses vague language – “in exceptional cases”, “except in urgent cases”, “when there is a need for”, “when there are sufficient grounds”, “where necessary”, “in the event that a reasonable need arises”, etc. These rules are sometimes called situational as they link the occurrence of the legal consequences with the specificity of special conditions (circumstances) of a particular situation. These rules usually refer to norms with exceptions as they work in situations that clearly deviate from the *ordo rerum*, i. e. from “normal order of things” (e.g., the attachment of assets at night-time shall not be permitted except in urgent cases – Art. 77, para. 8 of the Tax Code of the Russian Federation).

4. Legal Forms of Discretion in Tax Law

Discretion, as we define it, is a special kind of dispositivity, being a general legal phenomenon. Therefore, forms of discretion in tax law coincide in general with forms of dispositive manifestations *per se*, which, in turn, does not exclude the specificity in the sphere of taxes and levies.

First of all, discretion is connected with the right to interpretation, specification and application of tax norms of high abstraction, in particular legal principles. These are characterized by the highest level of regulatory generalization (abstraction). “The use of legal principles in tax law is problematic, because it is like trying to explain astrophysics through the poetic beauty of a star-studded sky rather than through a mathematical model. ... Floating in the galaxy of principles are a number of very general principles and concepts, which are seldom found in written texts of positive law, but are quite common in doctrine, jurisprudence and legal tradi-

tion and which are regularly used as instruments for the interpretation of law in general, and from time to time also in tax law” [26, p. 29, 33].

When using legal principles, discretion manifests itself in a dual manner: first, in the choice of the principle that is relevant in a specific situation, and second, in the interpretation of its content. Since in some cases legal principles can dialectically “conflict” with each other, law-enforcers should make the creative effort to reconcile them or to choose the principle which has a priority in the particular circumstances. If there are different interpretations of the tax rules or facts, it is necessary to resort to the interpretation which more accurately corresponds to the tax law principles. At the same time, legal principles are, as a rule, applied in the most difficult cases which cannot be resolved (settled, qualified) by using simple rules of conduct.

The principles are not only a source of discretion, but also a means (criterion) of its legitimation; they limit the freedom of action of the tax authorities within a well-defined framework. Any principles of tax law can act as such “limiters”, but in this context the principle of equal treatment and the principle of legitimate expectations have the greatest value. If a taxpayer was treated in a certain way for some time, and then it was decided otherwise with reference to the discretionary power, such taxpayer shall be entitled the right to demand the explanation from the officials and put the question of the violation of the principle of legitimate (or reasonable) expectations. If the tax authority issued a decision in respect of any taxpayer, but after a while the same or other authority issued a completely different decision in respect of another taxpayer who is in similar conditions, which is explained by the freedom of action in the exercise of discretionary powers, such decision – in the absence of reasonable justification – violates the principle of equal treatment, which is the legal basis of tax administration.

An important manifestation of discretion is specification of vague concepts in the exercise of tax rules. Examples include such concepts as “income”, “justified expenses”, “similar taxpayers”, “assets intended for everyday personal use”, “information

which is known to be false”, “valid reason”, “ancillary work (services)”, “difficult personal or family circumstances”, “insurmountable obstacle”, “normal conditions”, “regularly”, “sufficient grounds”, etc. The vague concepts in tax law are ambiguous and uncertain, their content is of open nature and the law often does not contain guidance on how they should be understood. Such specificity forces the addressee of the rule with a vague concept “to decode” its meaning individually and independently, putting his own understanding into it [2, p. 4]. The presence of vague concepts in tax rules increases significantly the discretionary capacity of the tax authorities and the courts. The open, i.e. incomplete structure of vague concepts allows law-enforcers to supplement them with new signs, new meanings.

The open-ended lists of certain legal concepts (so-called catalogs) enshrined by the Tax Code (e.g., interdependent persons; the circumstances which mitigate liability for the commission of a tax offense; the circumstances in which a person may not be found guilty of committing a tax offense; non-sale expenses; etc.) perform functions similar to those fulfilled by vague concepts in tax law. Like vague concepts, they allow the tax authorities and the courts to expand (to supplement) such list with new elements.

A special kind of relatively determined legal tools in the sphere of taxes and levies is so-called general anti-avoidance rules (GAAR). The necessity of referring to them is caused by the fact that the rigid and unambiguous tax law is not able to prevent aggressive tax planning, which sometimes borders on the illegal tax evasion. An individual may always find a loophole in the tax law, which allows him to circumvent the law, without formally breaking it. Such play with rules creates boundless opportunities for the aggressive tax planning and for the designing various kinds of artificial tax avoidance schemes that distort the meaning and the purpose of the tax legislation. Therefore, discretionary powers of the tax administration for the prevention of tax avoidance and tax evasion (anti-avoidance discretions) are quite often distinguished as a separate category of administrative discretion.

In general, anti-avoidance rules are super-abstract norms-principles that prohibit a tax payer from abuse of his subjective tax rights, from dishonest and abusive behaviors in the sphere of taxes and levies, but do not detail what constitutes such “abuse”. At best, taxpayers are offered unspecified and indistinct criteria and reference points devel-

oped by judicial and law-enforcement practice. The opposition to such standards used to be very strong around the world, however today they are implemented everywhere as the general principles of the tax legislation or as judicial doctrines.

In Russia judicial doctrines – the doctrine of unjustified tax benefit, the doctrine of the priority of substance over form, the sham transactions doctrine, the business purpose doctrine, the step transaction doctrine, the economic substance doctrine, the doctrine of piercing the corporate veil, the arm’s length principle – are actively applied. These legal techniques are an obvious and unconditional source of discretion in tax law. Of course, the use of judicial doctrines poses a real threat of blurring of lawful behavior boundaries. However, it should be noted that in this case the legislator has to choose not between the bad and the good but between the bad and the worse.

Discretion often manifests itself when the law gives an official the right to depart from the general pattern of behavior prescribed by the tax rule. In this case, the official can decide on his own whether to use this opportunity or not. For example, the legislator exhaustively lists the transfer pricing methods for taxation purposes to be used when determining income (profit, receipts) in transactions the parties of which are interdependent persons (Art. 105.7, para. 1 of the Tax Code of the Russian Federation). The comparable market price method shall be used on a priority basis for the purpose of determining the conformity of prices used in transactions to market prices; it is applied as a general rule. The use of other transfer pricing methods enshrined in Art. 105.7, para. 1 of the Tax Code of the Russian Federation (the resale price method; the cost plus method; the comparable profits method; the profit split method) shall be permitted where the comparable market price method cannot be used (e.g., where there is no publicly available information on prices in comparable transactions involving identical (similar) goods, work and services) or where the use of this method would not allow for a conclusion to be drawn on whether or not prices used in transactions conform to market prices for taxation purposes. The conclusion about the impossibility or the deficiency of the use of the comparable market price method, as well as the choice of one of the methods or combinations thereof is at the discretionary power of the federal executive body in charge of control and supervision in the area of taxes and levies. As a criterion for the choice of “the best” transfer pricing method(s),

the Tax Code states that the method to be used shall be the one which, taking into account the actual circumstances and conditions of the controlled transaction, best provides a reasoned conclusion to be drawn as to whether or not the price used in the transaction conforms to market prices. In selecting the method to be used in determining for taxation purposes income (profit, receipts) in transactions in which the parties are interdependent persons, account must be taken of the completeness and reliability of the initial data and of the appropriateness of adjustments made for the purpose of rendering compared transactions comparable with the tested transaction (Art. 105.7, para. 3, 4, 6 of the Tax Code of the Russian Federation).

A special kind of deviation from the general pattern of behavior are *relatively determined penalties* with lower and upper limits fixed. Individualization of punishment assumes the calculation of legal sanctions with the obligatory regard to the circumstances which mitigate or increase liability for the commission of a tax offense. The circumstance which increases liability shall be the commission of a tax offense by a person previously called to account for a similar offense (Art. 112, para. 2 of the Tax Code of the Russian Federation). Legal consequences of recurrence of tax offenses are established in the Tax Code imperatively and unambiguously (the amount of the fine shall be increased by 100 per cent). Any discretion is absent here. On the contrary, in order to take into account the mitigating circumstances the tax authorities and the courts shall be entitled to the exercise of discretion. Where any mitigating circumstance exists, the amount of fine must be reduced by *at least half* against the level which is prescribed by the relevant article of Tax Code (Art. 114, para. 3 of the Tax Code of the Russian Federation). As we see, the Tax Code establishes only a *minimum limit* of decrease in tax fines. Considering the relevant mitigating circumstances (e.g., the characteristics of the tax offense, the amount of damages, the total number of mitigating circumstances, the offender's identity, the financial and material status of the offender, etc.), the official of the tax authority has the right to reduce the amount of the fine more than twice¹. For the mitigating circumstances to be taken into account, the taxpayer is not even obliged to declare about the existence of such circumstances; the law-enforcer may consider this matter without a petition from the taxpayer². In addition, the catalog of mitigating circumstances is open-ended and is actively complemented by the tax authorities and the courts.

Discretionary powers may be given to the tax authorities in order to overcome the situation of the *actual uncertainty*, when other legal tools are ineffective or

absent at all. For example, where the provisions of the Tax Code do not make it possible to classify income received by taxpayers unequivocally as income from sources within the Russian Federation or as income from sources outside the Russian Federation, classification of income in terms of its source shall be carried out by the federal executive body in charge of control and supervision in the area of taxes and levies (Art. 42, para. 2 and Art. 208, para. 4 of the Tax Code of the Russian Federation). As we can see, the legislator has "delegated" the settlement of the above stated uncertainty to the Ministry of Finance of the Russian Federation. Since any official criteria for adoption of the optimal decision are not established by the law, therefore discretion is here officially unlimited. In this context, we can recall the famous classification of discretion into two types which was proposed by Ronald Dworkin: "weak" discretion means that for some reason the standards which an official must apply cannot be applied mechanically but demand the use of judgment; "strong" discretion means that on some issue an official is simply not bound by standards set by the authority in question [22, pp. 31–32]. In particular, discretionary powers of the Ministry of Finance of the Russian Federation provided for in Art. 42, para. 2 and Art. 208, para. 4 of the Tax Code of the Russian Federation should be called discretion "in a strong sense" in Ronald Dworkin's understanding.

In addition to universal sources of discretion, in the area of taxes and levies there are some *special* relatively determined tools which significantly expand the discretionary capacity of the tax authorities. Examples include the *imputed methods* of calculation of tax liabilities, which are based not on the actual financial results (indicators), but on the conditional assumptions, presumptions and analogies. In American tax literature, such methods are often referred to as "presumptive taxation". For example, tax authorities shall have the right to determine the amounts of taxes payable by taxpayers to the budget system of the Russian Federation using a calculation method on the basis of information which is available to them concerning the taxpayer and data relating to other similar taxpayers in the event that the taxpayer refuses to allow officials of the tax body to inspect production, storage, trading and other premises and areas which are used by the taxpayer for the derivation of income or are associated with the maintenance of objects of taxation, or in the event that the taxpayer fails to produce documents required for the computation of taxes to the tax authority for more than two months, fails to maintain records of income and expenses or records of objects of taxation or maintains records in a manner contrary to the established procedure with the result that it is impossible to calculate taxes, or the taxpayer which is a foreign organization not conducting activities in the territory of the Russian Federation through the permanent establishment fails to submit a tax declaration for tax on assets of the organization (Art. 31, para. 1, subsection 7 of the Tax Code of the Russian Federation). In this case, discretion is manifested above all in the search for and qualification of the third person as a "similar taxpayer" because a calculation method of taxation is

¹ The Resolution of the Plenum of the Supreme Court of the Russian Federation No. 41, of the Supreme Arbitration Court of the Russian Federation No. 9 of 01.06.1999 "On some issues related to the entering into force of the first part of the Tax Code of the Russian Federation". *Bulletin of the SAC RF*. 1999. No. 8.

² See, e.g., The Decision of the Presidium of the Supreme Arbitration Court of the Russian Federation of 12.10.2010 No. 3299/10 on the case No. A32-19097/2009-51/248. *Bulletin of the SAC RF*. 2011. No. 1.

founded on the assumption that the other taxpayer who is in good faith engaged in the same kind of activity under similar economic conditions, has the tax base the amount of which is most likely assumed to be the same as of the taxpayer audited [11, p. 148]. The basis for this discretion is the following presumption: similar taxpayers have the similar tax bases. Certainly, two completely identical businesses cannot be found, they just do not exist in nature. Therefore, presumptive methods of taxation are always only relatively accurate and relatively reliable, which however, does not call into question their legitimacy.

Most Russian scientists refer the analogy of the law which is applied in order to eliminate gaps in the law to a special kind of discretion. Unfortunately, the text of the Tax Code of the Russian Federation does not mention the analogy of the law, the judicial practice on this matter is inconsistent and contradictory, and in the doctrinal sources the fierce debate has been continuing for years. In my view, the analogy of the law is a universal tool to fill gaps in all the branches of Russian law including tax law. The procedural legislation applied by the courts in tax disputes (Art. 13, para. 6 of the Arbitration Procedure Code of the Russian Federation; Art. 1, para. 4 of the Civil Procedure Code of the Russian Federation) does not explicitly include any branch-wise restrictions on the use of the method of the analogy of the law in civil and arbitration proceedings. Of course, the characteristics of each branches of law should be taken into account: in particular, the analogy of the law shall not be permissible in the area of establishment of taxes and levies, in determining the elements of taxation, in the qualification of tax offenses, as well as in the application of tax penalties. There is no doubt that the conditions, procedures and limits of the use of the analogy of the law in the area of taxes and levies should be officially legalized in the tax rules (the legislative consolidation). Herewith not only the courts but also the tax authorities must have the right to use of the analogy of the law to overcome immediately the gaps in tax law which are revealed in the sphere of tax administration and which do not give individuals a possibility to exercise their tax rights and fulfil their tax obligations.

Some tax scientists refer so-called conflicts in the law to the sources of administrative discretion.

In particular, Yulia Starykh claims that discretion in tax administration follows from the essence of a collision per se [16, p. 84]. It appears that discretion can be applied only in the cases where the legal system has no clear mechanisms for overcoming collisions. However, if such mechanisms in the form of legal norms or traditions are presented in the legal system, it is impossible to speak about discretion; in this case, the authorized person has to use the algorithm of the conflict resolution established by the statutory law or in the case law. For example, in the case of a conflict between two tax rules with the different legal force we should apply the rule which possesses greater legal force; in the case of a conflict between two tax rules with the same legal force we should apply the famous maxims “*lex specialis derogat generali*” (a special law prevails over a general law) and “*lex posterior derogat priori*” (a later law prevails over incompatible the earlier law); and also the Tax Code provisions take precedence in the system of the tax legislation.

At the same time, discretion is really necessary when not ordinary legal rules but the legal principles get in conflict with each other. The latter tend to form pairs of opposites, and therefore, in practice, sometimes there are several conflicting principles applicable to the same problem [1, p. 45]. However, while the conflict between “ordinary” tax rules is considered inadmissible and should be seen as an emergency situation which is subject to elimination as soon as possible, the conflict between legal principles is a very common situation which is determined by their nature, structure and functions. Thus, because with regard to specific situations legal principles may contradict each other, an official is obliged to apply a discretionary effort to coordinate the relevant principles or to choose the principle having priority in the particular circumstances. When resolving a dispute, an official has to choose and justify (American colleagues say “weigh”) one of the principles which in this case is the most important; and at the same time the principles that conflict with each other remain in force as valid regulatory means. Moreover, if in a particular situation of “collision” between two legal principles a priority was given to one of them, it is possible that in another situation the other principle will receive a priority.

Conclusions

The use of such a complex legal tool as discretion can produce arbitrariness, corruption, mistakes, abuse of power. Therefore, the task of the tax community is to try to minimize the above-stated risks through joint efforts, if not to eliminate them completely. To address these challenges, social and legal means, including the legislation and judicial practice, should be applied in order to ensure a balance between the freedom of tax administration activities and their detailed formalization. The main thing here is to find the “golden mean”. Any imbalance produces significant risks to the effectiveness and efficiency of tax administration. Insufficient normative regulation entails such negative social effects as disorganization of the public relations and dangerous tyranny of bureaucracy. However, there are also negative consequences in the case of overregulation, when the legal system has a lot of redundant laws, over-detailed regulations, excessive formalization and bureaucratization, and so forth [12, p. 55]. At the same time, it is obvious that the complete refusal of using discretion is impossible and simply not necessary. After all, *ab abusu ad usum non valet consequential*.

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