

Forfeit in the Russian Tax Law¹

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Abstract

This article examines one of the issues of the Russian tax law, namely, the issue of accurate definition of forfeit under the legislation on taxes and charges. The paper analyses the change in the legal nature of forfeit under the Russian tax legislation, from the measure of responsibility for violation of tax legislation in the 1990s to the means of securing discharge of tax duty (with the entry into force of the Tax Code of the Russian Federation in 1999). The research identifies the reasons of the alteration of the forfeit definition under Russian tax law and assesses their consequences for maintaining the balance of public and private interests in tax law. In accordance with current tax legislation the forfeit is charged with the goal of securing the performance of tax duty, which it (the forfeit) cannot fulfill due to the lack of appropriate material resources. Unlike bank guarantee, a suretyship and pledge of property, the forfeit does not guarantee compensation of the potential amount of the tax arrears, and as defined by the Constitutional Court of Russia, the forfeit is a restorative measure of a compulsory nature, which compensates to the budget system of the Russia untimely and incomplete payment of taxes. With the change in approaches to the definition of forfeit in tax law, there is a situation where three branches of legislation — tax, budget and customs — provide different definitions of forfeit. Obviously, this circumstance in Russian legislation cannot be considered satisfactory. The article addresses matters related to the novel legislations, which amended the rules of calculation of forfeit for the taxpayers — organizations and individuals. The new rules for calculation of forfeit for tax arrears created by the organizations are aimed at making the long delay with the payment of taxes as unfavorable as possible. The changes that took place in 2017 in the system of public finance management in Russia and the establishment of a single fiscal channel that combined taxes, customs payments and insurance contributions make it necessary to take a fresh look at the relationship between the institute of securing the performance of tax duty and the institute of securing payment of customs duties and taxes in accordance with the customs legislation of the EAEU. On the base of a comparative method, author compares the means of securing payment of customs duties and approaches on defining the forfeit charged for untimely payment of customs duties and taxes in all EAEU member states. The research formulates proposals on improving legislation regarding tax relations for the computation and payment of forfeit.

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Keywords

tax law; fiscal principle; balance of public and private interests; tax duty; securing performance of tax duty; measure of responsibility for violation of tax rules.

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Introduction

The thesis about importance of tax revenues for the state and society hardly needs argumentation. Its obviousness is not in anyone's doubt, and the history of a few attempts of individual states to abolish taxes on their territory are among the historical curiosities.

The tax is the same fundamental feature of the state as its population, territory and public authority. By exercising tax sovereignty on its territory, the state establishes taxes and forms tax legislation, one of the principles of which is fiscalism.

The Principle of Balanced Fiscalism and the Achievement of a Balance between Public and Private Interests in Tax Law

The modern Russian taxation policy and the legislation on taxes and charges are distinguished by balanced fiscalism, which, on the one hand, is aimed at ensuring the state needs, including covering government expenditures for activities carried out within the framework of social policy, and on the other hand, takes into account legitimate interests of taxpayers, contributes to the creation of a favorable economic climate for development of entrepreneurship, attracting foreign investors to Russia.

The balance of public and private interests in the execution of state regulation, including taxation issues, is, in the words of the Constitutional Court of Russia Federation, “constitutionally protected values”. In its Decision of July 14, 2005 No. 9-P the Constitutional Court substantiated in the following words the need to achieve a balance between public and private interests in the securing of the constitutional duty relating to payment of taxes: “As an interference in the field of private property, taxes are an example of intrusion into the field of fundamental rights. At the same time, the constitutional duty to pay taxes is unconditional and binding. Based on the constitutional law, the purpose of the constitutional obligation to pay taxes is to raise funds that are necessary for public legal entities to cover public expenditures while simultaneously taking into account the private-law interests of taxpayers as an independent constitutional value. The search for an equilibrium between these two constitutional values is designed to ensure a constitutional duty

to pay taxes”. The Constitutional Court of the Russian Federation also adhered to this position in its subsequent decisions (Decision of March 24, 2017 No. 9-P, Decision of December 8, 2017 No. 39-P, etc.).

An Institute of Securing Performance of Tax Duty

The institute of securing performance of tax duty is aimed at protecting the fiscal interests of the state with the concurrent observance of the legitimate interests of taxpayers.

The nature of this institute of tax law, its substantial heterogeneity are conditioned to the peculiarities of the subject of legal securing, namely, the nature of the securing of tax duty. The fiscal principle of tax law is directly related to the ultimate result of the securing performance of tax duty.

Russian constitutional law, by assigning for each person a duty to pay legally established taxes and charges (Article 57 of the Constitution of the Russian Federation), at the same time specifies that in order to enforce this public (constitutional) duty, the legislator has the right to establish measures of legal enforcement, which may not only be fine (measures of tax responsibility), but also restorative measures, which ensure the securing of constitutional duty of taxpayer on payment of taxes — the payment of arrears and reimbursements of damage from untimely and incomplete payment of tax (Decision of the Constitutional Court of the Russian Federation of July 15, 1999 No. 11-P).

The Tax Code of the Russian Federation, without giving a definition to the institute of securing performance of tax duty, contains an exhaustive list of means in which the performance of tax duties can be secured. Three groups of approaches are provided in this list.

The first group consists of means of voluntary securing discharge of tax duty, or means of securing the payment of tax. This includes a pledge of property, a suretyship and a bank guarantee². These means were adopted by the tax law from the civil law. However, in order to regulate tax relations, which include a pledge, a suretyship or a bank guarantee, norms of tax law are used. Norms of civil law can only be applied if this is directly stipulated by the legislation on taxes and charges. Boundaries of civil law regulation of relations on securing performance of tax duty with the use of a pledge, a suretyship or a bank guarantee are also established in the Civil Code of the Russian Federation, according to which civil law does not apply, unless otherwise provided by law, to property relations based on administrative

² The bank guarantee was not immediately included in the list of means of securing performance of tax duty contained in the Tax Code of the Russian Federation. It was added to the legislation on taxes and charges only in 2013, after it was very effectively used as a means of securing performance of duty with regard to customs duties.

or other authority subordination of one party to another, including tax relations. (Article 2 of the Civil Code of the Russian Federation).

The use of means of securing performance of tax duty represented in the first group is associated, as a rule, with a change of the period in the performance of the tax duty and granting to taxpayers of a deferral (installment plan) of payment of taxes.

The challenging situation in the Russian economy as a result of sanctions policy of Western countries makes Russian taxpayers apply more often than usual for permission to postpone the performance of the tax duty and, as a consequence, use the means provided by the legislation on taxes and charges for the means of securing performance of duty with regard to payment of tax and customs payments. Such a situation requires achieving an optimal balance of the fiscal interests of the state and the legitimate interests of taxpayers.

The second group is represented by means of securing performance of tax duty, having an imperious, public nature. It includes suspension of operations relating to bank accounts and attachment of property. These securing means, in contrast to the ones classified in the first group, correspond to the coercive order of securing performance of duty and relate not to the voluntary payment of tax but to its exaction.

If the use of a pledge of property, a suretyship and a bank guarantee as a means of securing performance of duty is aimed primarily at assurance of the material interests of the state, then the means combined in the second group, first of all, make the taxpayer to properly (in full and timely manner) perform its tax duty. In the case that the value of the arrested property or funds relating to accounts whose operations were suspended are comparable to the size of the arrears, then these securing tools can also effectively perform the function of guaranteeing the state's material interests.

The public legal nature of the coercive means of securing performance of tax duty presupposes the existence of complicated procedures for their application (for example, in case of arrest of property — existence of the prosecutor's authorization, the presence of witnesses, the guaranteed presence of the taxpayer or his representative in the inventory of the property subject to arrest, etc.).

In the special — the third group, one should allocate a forfeit. Its incorporation in the tax legislation as a means of securing performance of tax duty raises numerous questions.

Forfeit as a Means of Securing Performance of Tax Duty: Several Inconvenient Questions to the Russian Legislator

The first question: what forced the legislator to radically change the assessment of the legal nature of a forfeit in tax law?

As it is known, the forfeit in modern Russian law did not emerge as a means of securing performance of tax duty, but in a “traditional” form customary for it — as a measure of responsibility for violation of legislation: “A taxpayer who has violated tax legislation, in the cases prescribed by law, is liable in the form of: <...> c) collecting forfeits from the taxpayer in the event of a delay in payment of tax in the amount of 0.2 percent of the unpaid tax amount for each day of delay of payment, starting from the established period for payment of the detected delayed amount of tax, unless other forfeits are provided for by the law. Forfeit exaction does not exempt a taxpayer from other types of responsibility” (Article 13 of the Federal Law of December 27, 1991, No. 2118-1 “On the Foundation of the Tax System in the Russian Federation”). Thus, from 1991 to 1999, a forfeit in Russian tax law was a measure of responsibility for violation of tax law, and since 1999 it has evolved from a tax sanction into a means of securing performance of tax duty. Such metamorphosis, unfortunately, is not uncommon for Russian tax law³, and they obviously do not contribute to the formation of dogmatic tax law.

What prompted the legislator to such a radical change in his views on the legal nature of the forfeit?

We can assume that the change in the assessment of forfeit was contributed by the established at that time law enforcement practice. The tax legislation then in force in the 1990’s defined the forfeit as a measure of responsibility for violation of tax legislation, and did not focus attention on the *restorative* character of such responsibility, and it turned out that for the same violation of tax legislation, a measure of punitive responsibility was imposed on the taxpayer twice — by fine and forfeit. This interpretation of the nature of forfeit resulted in a violation of the legal principle of non bis in idem (not twice for the same thing). The Constitutional Court of Russian Federation, in its decisions, explicitly supported the inadmissibility of repetitively bringing to legal responsibility: “Deviation from this principle would lead to clearly excessive restrictions that do not correspond to the purposes of protecting constitutionally significant interests and, in fact, to belittling constitutional rights and freedoms” (p. 4 of the Decision of the Constitutional Court of the Russian Federation of July 15, 1999 No. 11-P). In the same Decision, the Constitutional Court of Russia defined a forfeit under the tax law as a restorative measure of a compulsory nature, with the help of which compensation for damage from untimely and incomplete payment of tax occurs. However, instead of clarifying the legal nature of the forfeit as a compulsory measure of a restorative nature, the legislator in the Tax Code of the Russian Federation transferred it to the institute of securing of tax duty, placing it line with a pledge, a suretyship and a bank guarantee.

³ Recall at least the “history” with the legal nature of the customs duty, which the legislator assigned from 1991 to 2005 to federal taxes, and then recognized its non-tax nature.

Did the legislator have any other solutions? It seems that yes. And one of them could be the development of financial sanctions doctrine of in tax and budget legislation. It has to be noted that the concepts of financial responsibility and financial sanctions actively used in Soviet financial law (both positive and doctrinal) continue to be applied in the current legislation. Numerous examples of the use of these concepts in Russian laws are discordant with the terminology of Russian tax law. For example, Federal Law No. 127-FZ of October 26, 2002 on Insolvency (Bankruptcy) in Article 4 stipulates that “property and (or) financial sanctions, including for failure to perform the duty to pay mandatory charges.” are not taken into account when determining the presence of signs of bankruptcy of the debtor. Federal Law No. 167-FZ of December 15, 2001 “On Compulsory Pension Insurance in the Russian Federation” establishes in its Article 17 that the budget of the Pension Fund of the Russian Federation is formed by “insurance contributions, federal budget funds, forfeits and other financial sanctions ...”⁴. Moreover, the recently issued Presidential Decree in the first place concerns the issue of “measures of financial responsibility”.⁵

Question two: how can a forfeit secure performance of a tax duty, if it does not guarantee the payment of arrears?

As can be seen from the definition provided by the Tax Code, a forfeit does not at all guarantee payment of arrears, but represents “the amount of money that a taxpayer must pay in the event that the amount of taxes due <...> is paid in later than the statutory tax and collections time” (Article 75 of the Tax Code of the Russian Federation). Being credited to the budget, the tax forfeit⁶ acts as a public budget revenue of the corresponding level, compensating for late payment of taxes and, as a consequence, a delay in the enrollment of tax revenues to the budget system of Russia.

Forfeit cannot secure the performance of tax duty and guarantee the receipt of tax in the budget revenue, since it does not form a material source that would compensate for the complete performance of by the taxpayer of its fiscal duty. This characteristic of forfeit radically distinguishes it from other means of securing performance of tax duty, each of which creates such a material source: the property of

⁴ This example becomes especially important as the Tax Code of the Russian Federation began to apply to insurance contributions from 2016. In the above quotation, it is easy to see that the forfeit is viewed as a variety of a financial sanction.

⁵ Decree of the President of the Russian Federation of January 16, 2017 No.13 “On the Approval of the Fundamentals of the state policy of regional development of the Russian Federation for the period until 2025”// SPS Consultant Plus.

⁶ In this case, we are forced to use the notion of a “tax forfeit” to distinguish a forfeit payable in accordance with the Tax Code of the Russian Federation from forfeit, payment of which is provided by the Budget Code of the Russian Federation for non-return or late payment of a budget loan (Article 306.5) and non-transfer or untimely transfer payments for the use of a budget loan (Article 306.6). The forfeit envisaged by the budget legislation will be discussed below.

the taxpayer — in case of pledge or arrest of a property, the guarantor's obligation to fulfill the tax obligation — in case of a suretyship, etc.

The specifics of the forfeit's legal nature in accordance with the current Russian tax legislation are demonstrated in the fact that a forfeit is paid in addition to the amounts due in respect of the tax due and irrespective of the use of other means to secure performance of duty with regard to payment of tax, as well as measures of responsibility for violation of legislation on taxes and charges. The application of a forfeit may be supplemented by the use of any other means of securing performance of tax duty. Moreover, repayment of the formed debts on payment of forfeits, in turn, is guaranteed by application of other means provided by the Tax Code (pledge, bank guarantee, suretyship).

The uniqueness of the forfeit lies in the fact that it is able to actually change the size of the fiscal duty of the taxpayer to the budget. With the payment of forfeits for the delay in the tax payment, the quantitative parameters of the tax duty increase in accordance with the principle of fiscalism. However, such an increase in the amount of the tax duty proves to be incapable of ensuring its full payment.

The third question, rhetorical: can this situation be considered normal in public law, when the legislation uses several different approaches to determining the forfeit for delay in payment of compulsory payments?

By changing the legal nature of the forfeit in tax law and turning it from a responsibility measure (sanction) into a means of securing performance of tax duty, the Russian legislator created an unusual depiction of the forfeit as a fiscal public instrument.

In the *budget legislation*, forfeit means a coercive measure for committing a budget violation. By Article 306.2 of the Budget Code of the Russian Federation budgetary coercive measures are applied to the person who committed a budget violation, among which is the unobjectionable collection of forfeits for late refund of budgetary funds.

In the *customs legislation*, a forfeit is a measure applied to a taxpayer (declarant) for non-payment or incomplete payment of customs duties and taxes (VAT and excises from goods imported into the customs territory) within the time limits established by legislation, at the stage of compulsory collection of customs payments (Article 151 of the Federal Law of November 27, 2010 No. 311-FZ "On Customs Regulation in the Russian Federation"). And at the same time, the forfeit is not included in the list of means to secure payment of customs duties and taxes: the latter in the customs law includes pledge of property, suretyship, bank guarantee and deposit of funds. Thus, on the one hand, it turns out that in respect of domestic VAT and excise tax forfeits are recognized as a means of securing performance of tax duty, however, on the other hand, it is possible to secure the payment of external VAT and excises (from goods imported into the customs territory) using means established by customs legislation, among which forfeit is not present.

Procedure for Calculation of Forfeit under the Russian Tax Code

In accordance with the Russian Tax Code the forfeit shall be calculated for each calendar day of delay of performance of the duty with regard to the payment of a tax, commencing from the day following that established by the legislation for payment of the tax.

The number of days of delay for the calculation of forfeit is determined from the day following the date of payment of the tax under the legislation on taxes and charges and to the date preceding the day of payment of a forfeit by the taxpayer (the day of the performance of the duty with regard to the payment of a tax under p. 3 of art. 45 of the Russian Tax Code is not recognized as a delay and therefore no forfeit is charged)⁷.

The forfeit for each day of delay of performance of the duty with regard to the payment of taxes is calculated as a percentage of the unpaid amount of the tax. However the procedure of determining this percentage for the calculation of a forfeit is different for individuals and organizations.

For individuals, including individual entrepreneurs, the percentage rate of the forfeit applied shall be equal to one-three hundredth of the refinancing rate of the Central Bank of the Russian Federation prevailing at that time. If the refinancing rate applicable on the days of delay has changed, then the forfeit is calculated for each refinancing rate separately.

The applicable percentage rate for organizations depends on the number of days delay. For delay of performance of the duty with regard to the payment of taxes for a period of up to 30 calendar days inclusive the percentage rate of the forfeit applied shall be equal to one-three hundredth of the refinancing rate of the Central Bank of the Russian Federation prevailing at that time. If the delay exceeds 30 calendar days, then for the first 30 calendar days percentage rate shall be equal to 1/300, starting from the 31st calendar day — 1/150 of the refinancing rate of the Central Bank of Russia prevailing at that time. The rule, in accordance with which the percentage rate of a forfeit changes depending on the number of delay days, was introduced to the Russian tax law relatively recently (Federal Law of 30 November 2016 No. 401-FZ “On Amending Part One and Two of the Tax Code of the Russian Federation and separate legislative acts of the Russian Federation”) and are applied to the tax arrears created since October 1, 2017. New rules for calculating forfeit for an organization should prompt not to delay the performance of the duty with regard to the payment of taxes, since a long delay in the performance of the duty with regard to the payment of taxes will cost now more expensive.

⁷ Letter of the Ministry of Finance of the Russian Federation as of July 5, 2016 No. 03-02-07 / 2/39318 // SPS Consultant Plus.

The Russian Tax Code establishes cases when the forfeit shall not be charged on the amount of tax arrears.

Forfeit is not charged on the amount of tax arrears of the taxpayer that have arisen as a result of performance by the taxpayer the written explanations of the financial, tax and customs authorities on the procedure for calculating, paying taxes or on other issues of application of the legislation on taxes and charges that were given within their competence. Forfeit will not be charged also if the tax arrears were formed as a result of the taxpayer's performance of the reasoned opinion of the tax authority sent to the taxpayer during the performance of tax monitoring. However, if the mentioned written explanations or reasoned opinions of authorities are based on an incomplete or inaccurate information provided by the taxpayer, then there is no exemption from the payment of a forfeit.

Forfeit is not charged on the amount of tax arrears that the taxpayer could not pay off due to the fact that his property was arrested by the tax authorities. In this case, forfeit is not charged for the entire period of arrest of the property of the taxpayer.

Another case in which forfeit is not charged is connected with the situation when the taxpayer sends to the tax authority an application for offsetting the overpayment of tax for current tax payments and the tax authority adopts the decision on this matter before the deadline for payment of the tax. At the same time, the law enforcement practice differently qualifies the situation in which the taxpayer applies for the offset before the expiry of the tax payment deadline, but the tax authority adopts the decision on this matter after the expiration of the tax payment deadline.

In accordance with the Russian Tax Code, the duty with regard to the payment of taxes is considered to have been fulfilled from the date when the tax authority adopts a decision to set off an overpayment for the payment of the current tax, and the tax authority is given 10 days to adopt such a decision. In accordance with the Ministry of Finance charging forfeit is lawful in the event when the decision on the offset of overpayment of tax for current tax payments is adopted by the tax authorities after the deadline of payment of taxes, despite the fact that the statement of offset was filed by the taxpayer before the deadline of payment of taxes (for example, Letter of the Ministry of Finance of the Russian Federation as of February 12, 2010 No. 03-02-07 / 1-62, Letter of the Ministry of Finance of the Russian Federation as of August 2, 2011 No. 03-02-07 / 1-273). However, the courts can recognize charging of forfeit in the abovementioned situation as not legitimate, considering the duty with regard to the payment of taxes was performed regardless of the fact that the tax authority formally adopted the decision after expiration of the deadline for payment of taxes (for example, the Decision of Federal Arbitrage Court of Uralsk Circuit as of 16 October 2007 in case No. A50-6572 / 07, the De-

cision of Federal Arbitrage Court of Volga Circuit as of May 15, 2008 in case No. A57-14501 / 07-17).

Along with the general procedure for calculating forfeit, the Russian Tax Code also establishes special rules for charging forfeits (for example, charging forfeits for the payment of profit tax or a single agricultural tax, or when paying taxes on property of individuals in the territories of the regions of the Russian Federation which amended the calculation of tax from the inventory value to the cadastral value approach).

The possibility of reducing the amount of forfeit for the late performance of the duty for payment of taxes is not provided by the legislation on taxes and charges. The judicial practice also confirms the impossibility of reducing the amount of forfeit, rejecting the arguments of taxpayers about the possibility of reducing the amount of liability in connection with the existence of mitigating circumstances (for example, the Decision of the Federal Arbitrage Court of North-Kavkaz Circuit of May 5, 2008 No. F08-2293 / 2008, the Decision of the Arbitrage Court of the Uralsk Circuit as of April 28, 2015 No. F09-1842 / 15⁸) or because of the disproportionate amount of forfeit with tax arrears (for example, the Decision of Federal Arbitrage Court of East-Siberian Circuit of October 27, 2008 No. A78-972 / 08-C3-11 / 43-F02-4860 / 08⁹).

Forfeit in the Tax Legislation of the EAEU States

The study of the legal nature of forfeit in Russian tax law presupposes the need to go beyond the scope of Russian legislation and consider what approaches in this matter have been identified in the legislation of the EAEU states.

In the new version of the General Part of the Model Tax Code for CIS¹⁰ member states, the new recommendations on the issue of means of securing performance of tax duty were formed, which generally reproduced the provisions of the Russian legislation on this issue¹¹. However, they could not suretyship a uniform approach in the national legislation of the EAEU member states.

⁸ The courts explain such a position by the fact that the Russian Tax Code does not formally recognize forfeit as a sanction and it is charged irrespective of whether the taxpayer is guilty of violating the payment deadlines or existence of mitigating circumstances.

⁹ Judicial practice is based on the inapplicability to the tax regulation the provisions of Art. 333 of the Russian Civil Code, which provides possibility for the court to reduce the amount of forfeit penalty due to its evident disproportion to the consequences of breach of the obligation.

¹⁰ Adopted in St. Petersburg on November 29, 2013 at the 39th general meeting of the Interparliamentary Assembly of the CIS states // SPS Consultant Plus.

¹¹ The Model Tax Code of the CIS lists all the same means of securing the tax duty as in the Tax Code of the Russian Federation, with the exception of a bank guarantee. The article on the bank guarantee (Article 74.1) was included in the Tax Code of the Russian Federation in July 2013, when the text of the

The closest approach to the Model Tax Code of the CIS and, accordingly, the Tax Code of the Russian Federation at the moment are the legislative acts of the states that have become members of the EurAsEC Customs Union since its foundation — the Tax Code of the Republic of Belarus and the Code of the Republic of Kazakhstan on taxes on other mandatory payments to the budget. They practically completely reproduce the provisions of the Russian tax code on means to secure the performance of tax duty, including the definition of a forfeit in tax law (Articles 49 and 52 of the Code of the Republic of Belarus and Articles 116, 117 of the Code of the Republic of Kazakhstan).

The tax codes of the states of the “second wave” of the expansion of the Eurasian economic integration (joined the integration group at the time of the transition from the Euroasian Customs Union to the Economic Union of the EAEU) apply less harmonized legislative approaches on this issue. We are referring here to the tax codes of the Kyrgyz Republic and the Republic of Armenia.

The Tax Code of the Kyrgyz Republic differs from the Russian tax legislation and the Model Tax Code of the CIS by the means used to secure performance of tax duty. Kyrgyz tax legislation for this purpose allows the use of:

forfeits;

bank guarantee;

deposit of the taxpayer;

recovery of tax responsibility from cash funds, as well as funds from taxpayer's accounts or third parties (Article 70 of the Tax Code).

Thus, the Kyrgyz tax legislation does not allow the use of pledge, suretyship, or arrest of the taxpayer's property as a means of securing performance of tax duty. At the same time, the deposit of the taxpayer is recognized as a means of securing performance of tax duty — an instrument recognized as such in accordance with the customs legislation.

At the same time, in the matter of determining the forfeit, the tax legislation of the Kyrgyz Republic does not fundamentally differ from the Russian legislation, defining a forfeit as the amount of money that a taxpayer must pay in the event of failure to perform or a delay in performance a tax duty (Article 71 of the Tax Code).

This issue is regulated in completely different manner in the tax legislation of Armenia. In the Tax Code of Armenian Republic, the arrests of the taxpayer's property is recognized as the main means of securing performance of tax duty (Article 429). If it is not possible to apply the arrest of taxpayer's property or in case of insufficiency of the value of the arrested property, the securing performance of tax duty may be performed by the following means:

conclusion of a pledge agreement;

guarantee of a bank, other credit organization, insurance organization;

assignment by the taxpayer of the right of claim (Article 436 of the Tax Code).

Model Tax Code of the CIS was already agreed upon and was passing the adoption procedures.

The Armenian tax legislation is the only example of the legislation within the framework of the EAEU, in which the forfeit is not recognized as a means of securing performance of tax duty, but is defined as the *measure of responsibility* established by the tax code for non-payment of taxes or charges on time or for late payment (Article 4 of the Tax Code Code of Armenia).

The definition of forfeit contained in the Tax Code of Armenia corresponds to the legislative approaches to the forfeit in tax law, which were retained in Russian tax law right up to the adoption of the first part of the Tax Code of the Russian Federation in 1999.

We also note that this approach automatically removes almost all of the previously formulated questions to the legislator, who identified a forfeit in Russian tax law as one of the means of securing of performance of duty with regards to payment of taxes.

Securing of Performance of Duty with Regard to Payment of Customs Duties and Taxes: “Own Rules”

The situation in connection with the legal regulation of the securing of performance of duty with regard to payment of taxes is complicated by the fact that in Russian legislation for more than two decades, two parallel systems are developing: one established by the Tax Code of the Russian Federation and the other by customs legislation.

The system of securing of performance of duty with regard to payment of customs payments — customs duties, as well as VAT and excises from goods imported into the customs territory — is of particular importance for protecting the fiscal interests of the Russian state, since customs payments account for more than half of all revenue from the federal budget.

The Customs Code of the EAEU (Article 63) mentions only four means of securing of performance of duty with regard to payment of customs duties and taxes:

- cash;
- bank guarantee;
- suretyship;
- pledge of property.

It is easy to see that forfeit is not mentioned as a means of securing of performance of duty with regard to payment of customs duties and taxes among other means.

The provisions of the customs legislation of the EAEU on this issue can be adjusted in the national legislative acts of the EAEU member states on customs regulation.

The laws on customs regulation of the Russian Federation, the Republic of Belarus and the Republic of Armenia set forth the same four means of securing of performance of duty with regard to payment of customs payments, which are

stipulated in the Customs Code of the EAEU, and the forfeit is defined as an instrument for compensation for overdue payment of customs duties and taxes at the stage of *exacting* of customs payments (compulsory execution of fiscal duties).

The Code of the Republic of Kazakhstan “On Customs Regulation in the Republic of Kazakhstan” identifies means of securing of performance of duty with regard to payment of customs duties (Article 97) and means of securing of repayment of arrears in customs payments (Article 123). To the first, besides the means provided by the Customs Code of the EAEU (cash, bank guarantee, suretyship and pledge of property), an insurance contract has been added, and the second includes charging forfeits, suspending expenditure transactions on the payer’s bank accounts, suspending expenditure transactions at the payer’s cash desk, and also a limitation in the disposal of the payer’s property.

Thus, the forfeit according to the customs legislation of the Republic of Kazakhstan is defined as a means of securing of performance of duty with regard to repayment of arrears in customs payments, representing a payment that is calculated in the event of non-payment of customs payments for each day of delay (Article 124).

Just as in the customs legislation of Kazakhstan, the Law of the Kyrgyz Republic “On Customs Regulation in the Kyrgyz Republic” (Article 196) provides five means of securing of performance of duty with regard to payment of customs payments — pledge of goods and other property, bank guarantee, deposit of funds into the account of customs body (deposit), suretyship and insurance contract. As for the forfeit, it is not included in the system of means of securing of performance of duty with regard to payment of customs payments, it is defined as a compensation for late payment of customs duties and taxes (Article 202).

Comparison of the customs legislation of the Russian Federation and other EAEU member states leads to the conclusion that, firstly, the tax legislation and customs legislation of the EAEU states are still not harmonized on the issues of securing of performance of duty with regard to payment of fiscal duties. Moreover, differences remain between the customs laws of the EAEU states in terms of securing of performance of duty with regard to payment of customs payments.

At the same time, in none of the states of the EAEU in the customs legislation, a forfeit is not determined in connection with securing of performance of fiscal duty.

Conclusion

It is obvious that now more than ever it is required to unify the legislative approaches to the institute of securing performance of tax duty. The reasons for this are the reform of the public finance management system in the Russian Federation and the development of the Eurasian Economic Union, which involves the unification of customs regulation in the member countries of the EAEU.

As a result of the reform of the public revenue management mechanism in the Russian Federation and the creation of a single fiscal channel that combines tax and customs revenues into the federal budget¹², there is a need to unify the regulatory and legal regulation of the main aspects of securing performance of duty with regard to payment of taxes and customs payments, including securing of payment of such payments in case of granting a deferral or an installment plan for payment of tax and customs payments.

The development of economic integration within the framework of the EAEU also implies the unification of the tax and customs legislation on the issues of securing performance of duty with regard to tax and customs payments. Since the application of means of securing performance of tax duty is an obligatory condition for the deferral of the payment of taxes and customs payments, the means of securing themselves must be uniform in all the EAEU states and not burdensome for taxpayers. A taxpayer must have the ability to choose a specific means of securing of tax duty. The taxpayer's inclination to use "expensive" (costly) securing means (for example, a bank guarantee) adversely affects the investment and business climate in the country.

The analysis of the tax and customs legislation of the Russian Federation and other EAEU member states suggests that, in order to unify approaches to the legislative regulation of relations for securing of fiscal duties (for tax and customs law), it is first necessary to differentiate between the voluntary and compulsory securing of fiscal duty mechanisms, and, secondly, to remove the most controversial issues.

The need to distinguish between voluntary means of securing of obligations (pledge, suretyship, bank guarantee) and compulsory execution of a fiscal obligation (arrest of the taxpayer's property, suspension of operations with bank accounts) is stipulated by the difference in legal mechanisms applied in each of two cases: the use of civil-law instruments to ensure the voluntary performance of fiscal obligations and the use of exclusively measures of imperious coercion to enforce exaction of taxes and customs duties.

With regard to forfeits, the approach that was used in the 1990s in the Russian tax legislation and the approach found, for example, in the current tax legislation of Armenia seems more accurate, according to which forfeit is a measure of financial responsibility of a compensatory nature for the payment of taxes and customs duties after the period established by law.

Reversion of the Russian tax legislation in the late 1990s from the definition of a forfeit as a measure of responsibility for violation of the time limits for payment of taxes was based, most likely, by a desire to provide maximum guarantee for the

¹² This refers to the re-subordination of the FCS of Russia to the Ministry of Finance (Decree of the President of the Russian Federation of 15 January 2016 No. 12 "Questions of the Ministry of Finance of the Russian Federation") // SPS Consultant Plus.

fiscal interests of the Russian state, since a forfeit that is no longer recognized as a measure of legal responsibility can now be recovered without taking into account the guilt, limitation period and various kinds of mitigating circumstances. Such a metamorphosis of the legal nature of a forfeit significantly violated the balance of public and private interests in tax law and effectively deprived the taxpayer of the possibility to expect a reduction in the amount of forfeit if it was formed in the absence of the guilt of the taxpayer¹³. Such an approach of the legislator leads to ignoring the interests of the taxpayer even in circumstances such as force majeure, when the issue of acquittance from responsibility or, at least, its mitigation becomes more than obvious.

The return of the Russian tax legislation to the definition of a forfeit as a measure of responsibility would allow to extend to tax relations, relating to calculation of forfeit, the effect of Article 112 of the Tax Code of the Russian Federation, which establishes circumstances that mitigate the responsibility for committing a tax offense.



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¹³ For example, refer to FAS Decision of January 22, 2008 No. F03-A73/07-1/6214, where the court proceeded from the fact that the legislation on taxes and charges does not provide for the possibility of reducing the size of a forfeit.

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