

Trends in the Supreme Court of Russia Case Practice of 2014 (Tax Disputes)



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Abstract

Following the transfer of supervisory powers in the system of highest level arbitrazh courts to the Supreme Court of the Russian Federation, some 350 tax cases have been heard. On the basis of judicial acts passed, it is possible to establish the positions adopted by the Supreme Court of the RF in resolving tax disputes, set out the tax risks inherent in the process of performance of entrepreneurial activity, and also assess the outlook for court examinations with tax authorities. The article describes the general nature of acts of the Supreme Court of the RF and examines their significance in the formation of practice concerning tax disputes. The author addresses issues regarding the implementation of various judicial concepts (for example, the concept of the good faith of the taxpayer and due diligence). Attention is drawn to general questions of tax legislation in the part concerning application of the method of calculating tax obligations and distinction between various forms of tax control (cameral and field inspections). At present, the Russian government is paying particular attention to the administration of value added tax. A system of total control over payment of VAT is being instituted with the aid of electronic technologies (formation of the BIG DATA system). Consequently acts of the Supreme Court of the RF relating to disputes concerning VAT acquire special importance. The article analyzes the more interesting cases involving VAT examined by the Supreme Court in 2014. The author presents an evaluation of the feasibility of the approaches of the courts in resolving various disputes connected with VAT. In the practice of the Supreme Court of the RF, a significant number of acts touch upon questions pertaining to payment of tax on profit by organizations. This issue required their separate examination in the present article. Moreover, special attention is given to disputes connected with the application of agreements on avoidance of dual taxation upon the payment of tax on profit by organizations. The author notes the emergence of a negative tendency of divergence from the principle of the priority of international law in the resolution of tax disputes.



Keywords

The Supreme Court of the Russian Federation, the Supreme Commercial Court of the Russian Federation, tax disputes, good faith, due diligence, VAT, profit tax

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General Characteristics

An examination of the tax rulings authorized by the Supreme Court of the Russian Federation¹ shows that the majority share relates to the honesty of tax-payers (tangible transactions, due

¹ The acts of the Supreme Court of Russian Federation include, in particular, the decisions of the Judicial Board on economic disputes, as well as dismissal rulings taken by judges unanimously. Hence, the position of the Supreme Court is mostly analyzed through dismissal rulings. Currently, the status of dismissal rulings is unclear. However, an evaluation of tax-related consequences and risks requires an examination of the opinions from dismissal rulings and the definitions those opinions contain; those definitions are becoming references for the tax bodies.

diligence, and the optimization of taxation). Another relevant layer is represented by acts related to tax consequences of revising the cadastral costs of land plots. In addition, many disputes relate to the necessity to include subsidies allocated from the budget to compensate the losses of taxpayers when rendering services into the VAT.

As to the content of the rulings of the Supreme Court, they consistently contain a summary of the dispute, the position of parties (or inferior courts) and the position of the Court as to the conclusions contained in contested acts. Overall, this demonstrated content pattern allows a reader to understand the nature of the case and the approach of the Court, as the decisions should be taken into account by inferior courts when considering similar disputes. However, some rulings contain ambiguous text². Hence, the proposals to establish a fixed template of judicial acts hold³.

Please note that the Supreme Court refers heavily to the rulings of the former Supreme Commercial Court of the Russian Federation, which demonstrates judicial consistency. However, experts note that judicial approaches in tax disputes in the near future might be dramatically revised by the court's providing necessary clarifications⁴.

In most cases, the Supreme Court Judges do not see reasons to revise the rulings of inferior courts. In almost 400 cases, only five were given the courts attention and heard the by three member panels of the Supreme Court⁵. This statistic is incomparable to the activity of the former Supreme Commercial Court. The latter court examined about 500 cases, and 20% of these were tax-related cases⁶. At the same time, this insignificant number of cases chosen for review is probably explained by the special attitude of the Supreme Court, currently being formed. Correcting particular judicial mistakes is not the major function of the higher institution. The mission of the Supreme Court is developing general approaches (policy) for dispute resolution (the so-called American model). Reviewing specific cases is just one of the tools to implement this mission. The above approach started to be implemented already during the tenure of the Supreme Commercial Court.

In the case *Ryazan' Oil Refinery Company*⁷, the refusal to hear the case by the court was motivated by the fact that the opinion of the inferior court was *ad hoc* and, further, was otherwise an isolated case. In addition, the court stated that the supervisory review procedure is an exceptional stage of the litigation process, aimed at ensuring a correct and uniform interpretation of the law. The conclusions made in the ruling caused doubt among specialists, as the opinion lacked explicit statutory grounds⁸.

² In particular, Ruling the Supreme Court of August 21, 2014 № 308-ЭС14-469 // IPS Konsul'tantPlyus.

³ *Mikhaylova O.R.* Metodologiya sudebnogo resheniya po nalogovym sporam kak garantiya pravil'nogo primeneniya sudebnogo pretsedenta. Nalogoved, 2013, no 1, p. 24–29.

⁴ Verkhovnyy sud zaymetsya arbitrazhnoy praktikoy. Vyacheslav Lebedev rasskazal o planakh. Website zakon.ru. 11.02.2015 // Available at URL: http://zakon.ru/Discussions/verxovnyj_sud_zajmetsya_arbitrazhnoj_praktikoj_vyacheslav_lebedev_rasskazal_o_planax/16277.

⁵ Case *Edinaya Evropa* — S.B. (Ruling of the Supreme Court of 25.12.2014 № 305-KG14-1498); Case *IP Beluga Leonid Leont'evich* (Ruling of the Supreme Court of 24.11.2014 № 307-ES14-162); Case *KB «Interkommerts»* (Ruling of the Supreme Court of 13.11.2014 № 305-KG14-1350); Case *RN Kholding* (Ruling of the Supreme Court of 25.09.2014 № 305-ES14-1234); Case *Aviakompaniya «Sibir»* (Ruling of the Supreme Court of 23.09.2014 № 305-ES14-1210) // IPS Konsul'tantPlyus.

⁶ *Pepeyayev S.G.* Kak sokhranit'? Nalogoved, 2014, no 1, p. 4-6. Konsul'tantPlyus. During the comparable period of time, i.e. from August to December 2013, the Supreme Commercial Court Presidium considered 18 tax-related cases.

⁷ Ruling of the Supreme Court of 06.03.2014 № VAS-19880/13 // IPS Konsul'tantPlyus.

⁸ Kartina Mesyatsa. Nalogoved, 2014, no 6, p. 6–7.

V. Batsiev cites among the objective reasons for the economic board's inability to review a large number of cases a lack of adequate judicial staff⁹. However, the opposite logic may also be applied, i.e. the lack of judges may be the consequence, and not the cause of the trend to review a fewer number of cases.

As to the general approach of the Court when judging tax cases, in our opinion, the following trend is developing: fewer tax disputes are judged in favor of tax payers. In other words, a budget-oriented approach is being applied.

Honesty of Taxpayers

General Comments

Having considered the issue of taxpayer honesty and tax benefits, in 2014, the Supreme Court completely supported inferior courts which in turn followed the ruling of the Supreme Commercial Court no 53, October 12, 2006.

Notably, the number of judicial acts decided in favor of taxpayers and further confirmed by decisions of the Supreme Court is minimal. This situation may be explained by a tangible improvement in the work of regional tax bodies. The minimal number of acts decided in favor of taxpayers is likely to have contributed to the positive statistics of tax bodies — more than 78 % of the amounts disputed by tax payers in court were ruled in favor of the budget¹⁰. The above-mentioned budget-oriented approach should not be forgotten.

Studying the tangible nature of economic operations allows accumulating a large amount of data on:

- the viability of economic operations;
- the activity of counterparties (signatures of a shell company); and
- connections between the counterparty and other unscrupulous companies (with the research not being limited to sub-counterparties).

Usually the cases that reach the courts have a sufficient body of evidence that confirms the position of the tax bodies. Becoming rarer are cases similar to *Aliance Energostroy*, where the inspection was found to not have shown any absolute proof that the original documents did not confirm the reality of the disputable business transactions between the taxpayer and its counterparty, and that the transactions involved creating fictitious documents to obtain illegitimate tax benefits¹¹. Interestingly, when studying the issues of honesty and real nature of transactions, an important significance is given to the information about the movements on the accounts of counterparties¹². The lack of tax, administrative and commercial payments is

⁹ Chuvstvo prava. Nalogoved, 2015, no 1, p. 26.

¹⁰ Rukovoditel' FNS Rossii M.V. Mishustin podvel itogi raboty nalogovykh organov za 2014 god na rasshirennoy kollegii. Website FNS Rossii. Available at: // URL: http://www.nalog.ru/rn77/news/activities_fts/5316341/ (accessed: 24.02.2015).

¹¹ Ruling of Supreme Court as of 31.10.2014 № 306-KG14-3322 // IPS Konsul'tantPlyus.

¹² When evaluating information on accounts, tax bodies, taxpayers and courts should take into account the following criteria of transit accounts (transit operations) formulated by the RF Central Bank in the letter of December 31, 2014 no. 236-T:

- cash transfers to the client's account are made by a large number of other residents from the accounts open in RF banks, with a further withdrawal of the cash so transferred is performed;
- withdrawal of cash from the account is made within the period not exceeding two days after its transfer;
- the above operations are carried out regularly (daily);

extensively used by tax bodies as grounds for disputing transactions. In the case *Ural'skiy Zavod gornogo oborudovaniya*, the court stated that cash flow scheme did not represent or endorse the actual taxpayer payment for and the acquisition of goods from the organizations in question¹³.

The *Korporatsyya RIAL* case stated that the cash flow among the transaction participants can be considered “transit operations” and represent a closed cycle; the discovered scheme of cash flow and equipment exchange involved the taxpayer and interdependent persons; the transfer of cash was performed to create the impression of payments between the supplier and purchaser¹⁴.

In considering these types of cases, the court also takes into account the activity of the taxpayer and the subject matter of the transactions (work, services, etc.).

For example, in the *GT Sever* case, the court noted that disputable activities were to have been performed on the territory of a strategic enterprise of the military-industrial complex. However, the counterparty lacked the license to carry out work using information that constituted state secrets¹⁵.

In the case *Maslo Stavropolya*, the bad faith of the counterparty was shown by the lack of required storage space to store a specific commodity¹⁶.

New Approaches

Considering the issues of good faith, the Supreme Court has suggested that the lower courts look at the following circumstances:

- the possibility of carrying out the controversial transaction by the tax payer individually; and
- rationale for acquiring the products, goods and services.

In the case *Dorogi i tekhnologii*, the court took into account the taxpayer's ability to carry out the disputed amount of work by its own efforts¹⁷. As the taxpayer had an opportunity to acquire the disputable goods without intermediaries directly from the producers, such taxpayer was denied the tax benefit in the case *Barnaulskii molochinii kombinat*¹⁸.

The “rationale for acquiring goods” criteria was considered by the courts in the case *Energo-Gaz-Noyabr'sk*. The courts held that the subject-matter of the lease (8 block-modular boilers) was not part of the economic activity of the taxpayer and was not a source of profit; the taxpayer knew in advance about the impossibility of applying the subject-matter of the lease in its industrial activity and only owned the unusable objects (the boilers) to minimize its tax load by characterizing the lease payments as part of income tax expenses, thus providing VAT tax deductions¹⁹.

- the above operations are carried out during a long period (at least three months);
- the above operations do not involve the obligation of the account holder to pay taxes, or the related tax load is minimal;
- no taxes or other obligatory payments are paid to the RF budgetary system on the above operations compared to the actual amount of such operations, or the amount of taxes and obligatory payments is insignificant.

¹³ Ruling of the Supreme Court of 09.09.2014 no 309-KG14-980 // IPS Konsul'tantPlyus.

¹⁴ Ruling of the Supreme Court of 25.11.2014 no 305-KG14-4238 // IPS Konsul'tantPlyus.

¹⁵ Ruling of the Supreme Court of 21.08.2014 no 307-ES14-210. See Ruling of the Supreme Court of 27.11.2014 № 302-KG14-4494 // IPS Konsul'tantPlyus.

¹⁶ Ruling of the Supreme Court of 02.09.2014 № 308-ES14-489 // IPS Konsul'tantPlyus.

¹⁷ Ruling of the Supreme Court of 10.09.2014 № 310-KG14-940 // IPS Konsul'tantPlyus.

¹⁸ Ruling of the Supreme Court of 22.12.2014 № 304-KG14-3761// IPS Konsul'tantPlyus.

¹⁹ Ruling of the Supreme Court of 31.10.2014 № 304-KG14-2861// IPS Konsul'tantPlyus.

Finally, the new approach was conceptualized in 2015 in the case *Opytnii zavod Neftekhim*²⁰. Experts studied the case due to its procedural aspects, since, in their view, Judicial Board had in fact reassessed the evidence and sent the case for retrial²¹. However, the importance aspect of the dispute is in the following conclusions: in the absence of evidence of use of the claimed amount of controversial chemical raw materials in the production of the finished products, or sound economic justification of the need to acquire large shipment of such materials, the use of which in the production activities of the Company was minimal, the economic operations could not be considered as having been made with the intention of getting economic benefit as a result of entrepreneurial or other economic activity²². Further development of this approach may mean that to claim tax benefits, a party will be required to prove not only the reality of the disputed operations, but also their usefulness. This, in turn, can lead to a contradiction with the conclusions of the Constitutional Court on the inadmissibility of assessing the usefulness of incurred expenses²³.

Due Diligence

Regarding due diligence, a conclusion can be drawn from the case *Chip-N* that a full assessment by the counterparties of only civil law consequences of their transaction does not guarantee the lack of other adverse legal consequences. The parties should additionally take into account public law requirements, in particular the requirements of tax legislation²⁴. In other words, private actors in their activities should be guided by a public interest. This approach is unlikely to provide a balance between private and public interests, and with the absence of statutory regulations, the limits of taxpayers' obligations under due diligence in the face of public interests remain unclear.

Thus, the problem of including a special provision on taxpayer's due diligence responsibilities into the Tax Code remains relevant²⁵.

In addition, taxpayers should pay attention to the case *Promelektrosnab*, where the court states that a person or entity committing large expenses (costs) and core business activities to a transaction without evaluating the business reputation of its counterparties cannot be recognized as a prudent display of due diligence²⁶.

Hence, entities in major transactions should conduct the most thorough due diligence of their counterparties without limiting such due diligence to simply checking such counterparties' legal capacity.

Tax Optimization

Examining the issues of tax optimization by establishing companies applying special tax regimes, the Supreme Court as a whole has maintained the practice established by the Supreme

²⁰ See analysis of the case in: Vypusk nalogovykh novostey za yanvar' 2015. Kanal Yuzvaka Maksima YouTube. Available at: // URL: <http://www.youtube.com/watch?v=46IFZiKoajE>

²¹ *Shinyaeva N. VS razreshil sebe pereproverit' fakty v dele o nalogovoy vygode*. Website Pravo.RU. Available at: // URL: <http://pravo.ru/review/view/115081/> (accessed: 29.01.2015)

²² Ruling of the Supreme Court of 03.02.2015 № 309-KG14-2191 // IPS Konsul'tantPlyus.

²³ Ruling of the Supreme Court of 16.12.2008 № 1072-O-O, of 04.06.2007 № 320-O-P, of 04.06.2007 № 366-O-P // IPS Konsul'tantPlyus.

²⁴ Ruling of the Supreme Court of 28.11.2014 № 305-KG14-4524 // IPS Konsul'tantPlyus.

²⁵ *Yuzvak M.V. Genesis dolzhnoy osmotritel'nosti*. Nalogoved, 2014, no 11, p. 26–35.

²⁶ Ruling of the Supreme Court of 31.10.2014 № 309-KG14-2858 // IPS Konsul'tantPlyus.

Commercial Court. Hence, to recognize a tax optimization scheme as legitimate and legal, it is necessary to establish the independent nature of the relevant companies. The cases of *Farmperspektiva* and *AgroNiva* are illustrative in this regard.

In the first case, the courts have indicated that all entities in question have distinct material and technical resources to carry out their activities using their own capital assets and personnel. The fact that the taxpayer performs the book-keeping and tax reports of its own counterparties cannot show the groundlessness of the tax benefits because it does not refute the economic justification and the real nature of the agreements between the company and such counterparties²⁷.

In the second case, it was noted, on the contrary, that all the taxpayer's officers and those of the counterparties were not considered employees of different entities, and the funds received from the taxpayer were used only for the payment of wages to such employees. Based on these circumstances, the courts have concluded that the purpose of relations between the taxpayer and the counterparties was to create an artificial situation, aimed at obtaining an unjustified tax benefit in the form of non-payment of tax on personal income from monies paid directly from the taxpayer's income to the counterparties' personnel²⁸.

General Questions of Tax Law

Method of Calculation

Experts have regularly noted that the current regulations of the Tax Code regarding the calculation method to determine tax obligations leads to controversies in enforcement practice²⁹.

The disputes examined by the Supreme Court in this sphere confirm this conclusion. In particular, a clear position is missing on whether accounting data for similar taxpayers (similar transactions) is required when the calculation method is applied. Accordingly, there is a problem of unpredictability when determining the tax base and the size of tax liability by the calculation method, an issue which was raised in the Constitutional Court of Russia Ruling of 18.09.2014 № 1822-O and remains relevant today.

Disputes similar to the case *IP Shumakov Alexander Alekseevich* are quite common. The Court in that case held that utilizing data from other similar taxpayers when applying the calculation method is determined depending on the size and content of the information on the taxpayer available for a tax body and the absence of such data is not by itself grounds to rule the calculation erroneous or illegal³⁰.

However, such conclusion appears to lack a regulatory basis. Moreover, despite the fact that the calculation method allows determining only an approximate amount for tax liability³¹, it does not mean that the tax authorities should not seek a highly reliable calculation method. Applying data from similar taxpayers is not only much closer to the real indicators of taxpayer's

²⁷ Ruling of the Supreme Court of 10.10.2014 № 306-KГ14-1504.

²⁸ Ruling of the Supreme Court of 07.11.2014 № 309-ЭC14-1869.

²⁹ See: *Novichenko O.V., Obukhova M.I.* Osobennosti rassmotreniya arbitrazhnyimi sudami sporov o primeneniі raschetnogo metoda opredeleniya summ nalogov. *Nalogoved*, 2014, no 9, p. 41–47; *Churyaev A.V.* Opredelenie nalogovym organom summy naloga raschetnym putem: voprosy metodologii. *Nalogoved*, 2013, no 9, p. 39–47; *Yuzvak M.V.* Analogiya v nalogovom prave: monografiya. Moscow, 2014, p. 20–30.

³⁰ Ruling of the Supreme Court of 31.10.2014 № 305-KГ14-3032 // IPS Konsul'tantPlyus.

³¹ Decision of the Presidium of the Supreme Commercial Court of 22.06.2010 no 5/10 // IPS Konsul'tantPlyus.

liability, but it is also an important screening tool for the relevance of the information on the taxpayer, information which is used by the tax authorities when determining tax liabilities.

Nature of Office Tax Audit

Currently, no clear approach has been formed to differentiate an office tax audit from a field tax audit. An attempt has been made in the case *InTekhMontazh*, where the authority of the tax body on tax control in office audits was restricted by the provisions of Article 88 of the Tax Code. The restriction relates to both the number of documents subject to audit and possible sources for obtaining the necessary information or documents. As a result, the information obtained during a third-party audit procedure should be ignored within an office audit³².

However, this conclusion is likely to be an exception from the apparent tendency of merging of the two forms of tax audit. The possibility of implementing the powers under Articles 91 and 92 of the Tax Code as part of office audits, and the ruling of the Constitutional Court on the acceptability of checking the real nature of business operations within an office audit³³ show that the practice of dividing the forms of audit is unlikely to be implemented.

VAT

General Notes

Special attention should be drawn to the attitude of the Supreme Court to VAT. The year 2015 is associated with the struggle against unfair VAT deductions. Toughened VAT tax control has been announced by the head of the Russian Federal Tax Service. The application of BIG DATA provides an opportunity to generate electronic taxpayer profiles. Thus, persons who, in the opinion of tax experts, have resorted to unjustified tax deductions will be scrutinized. Further, law enforcement bodies have been advised to get involved in **office audits** (emphasis added — M. Yu.) on VAT³⁴. We should also expect a toughened judicial practice, which has already been noticed in 2014.

Deductions and Arrears

The case *RN Kholding*³⁵ touched upon the deep-rooted problem of the correspondence between excessive tax reimbursements and arrears. A new stage in the development has started in the case *Karabulalesprom*, in which the Supreme Commercial Court Presidium equated the attempt to charge an unjustly recovered amount of tax to arrears. In fact, the Supreme Commercial Court used an analogy, while violating the limits of its application³⁶. Notably, the artificial nature of this approach has been confirmed by the fact that even the codification of such approach in paragraph 8, Article 101 in the Tax Code does not exclude disputes that lack an obvious approach that could be taken by the courts³⁷.

³² Ruling of the Supreme Court of 30.09.2014 no 310-KG14-2017 // IPS Konsul'tantPlyus.

³³ Ruling of the Constitutional Court of 20.11.2014 no 2621-O // IPS Konsul'tantPlyus.

³⁴ Since 2015, the Federal Tax Service will arrange a dossier on every VAT payee. Website Klerk. Available at: // URL: <http://www.klerk.ru/buh/news/412274/> (accessed: 24.02.2015).

³⁵ Ruling of the Supreme Court of 25.09.2014. Case no 305-ES14-1234 // IPS Konsul'tantPlyus.

³⁶ *Yuzvak M.V.* Op. cit. P. 116–131.

³⁷ See: *Duyunov A.G.* Vzykanie sanktsiy za novyy vid nedoimki. Nalogoved, 2014, no 4, p. 61–65.

The case *RN Kholding* contained an issue on the possible penalty due under Article 75 of the Tax Code on the amount of excessive VAT reimbursements in situation when VAT tax deductions many times exceeded VAT amount. Thus, in any case, the taxpayer was not obliged to pay VAT. The controversy has been furthered by the lack of a single approach both among inferior and supreme courts. The panel of judges in the Supreme Commercial Court took into account the following:

- accrual of penalties was directly related to the late payment of taxes;
- the tax authority's reducing the size of VAT tax deductions confirmed by the taxpayer in tax returns does not involve the calculations of penalties if the VAT amount resulting from such reducing does not exceed tax deduction amounts.
- the opinion on *Karabulaleprom* was not applicable, as the Presidium which examined the case did not study the questions of liabilities and penalties.

However, the board of judges on economic disputes supported the side of the tax body and pointed out that the impossibility of accruing penalties under Article 75 of the Tax Code to the amount of unjustly recovered VAT would be a breach of the balance between private and public interests. In the opinion of the Court, the definition of arrears under paragraph 2 of Article 11 of the Tax Code is not an obstacle for accruing penalties to the amount of unjustly recovered VAT.

The case *RN Kholding* is a good example of a budget orientated approach where there is a gap in the tax regulations.

Searching VAT

Disputes on the presence or absence of VAT in the cost of products (works, services, are) are regularly studied by the commercial courts. To establish a single approach to resolve such cases, the Supreme Commercial Court in paragraph 17 of Decree no 53 set the disputable presumption of the VAT being included in the price. However, the explanation of the Supreme Commercial Court has not decreased the number of disputes on the issue. Moreover, the said paragraph 17 is currently subject to clarifications by the Supreme Court.

In particular, the case *Yashaltinskaoe dorozhnoe upravlenie*³⁸ notes that the explanations given in paragraph 17 do not imply that courts should rely only on the factual statements when establishing the price in agreements without including the tax amount. On the contrary, other circumstances, as well as other provisions of the agreement, require examination.

The case *IP Beluga Leonid Leont'evich*³⁹ says that when applying paragraph 17, the ruling of the Supreme Commercial Court on case *Astra*⁴⁰ should be taken into account. In that ruling, the court concluded that the price of the sold property determined on the basis of an evaluator's report includes VAT if no proof is provided that the market price of such property was determined without VAT. At the same time, the Supreme Court considered the reference to the case of *KUI g. Kamyshin*,⁴¹ unjustified. In this case, the court decided that when municipal property is sold and its price is determined by the evaluator without VAT, the rate 18/118 shall be used to calculate the tax. The Supreme Court explained its refusal to apply the case *KUI g. Kamyshin* by referring to the specific legal status of the case participants.

³⁸ Ruling of the Supreme Court of 17.12.2014 № 308-KГ14-3472 // IPS KonsultantPlyus.

³⁹ Ruling of the Supreme Court of 24.11.2014 № 307-ES14-162 // IPS Konsul'tantPlyus.

⁴⁰ Ruling of Presidium of Supreme Commercial Court of 18.09.2012 № 3139/12 // IPS Konsul'tantPlyus.

⁴¹ Ruling of the Presidium of the Supreme Commercial Court of 08.04.2014 № 17383/13 // IPS Konsul'tantPlyus.

Discounts, bonuses

Disputes continue on the necessity to adjust the tax basis and the amount of deductions in connection with the providing of reductions and premiums. The cases *Torgovaya Kompaniya Rodas*⁴² and *Altayoptfarm*⁴³ are worth studying. The court followed the position that the obligation to adjust tax consequences did not relate to following formal conditions: issuing an adjusted invoice or contractual provision on discounted price. Instead, one should consider an actual decrease in the price of product.

Overall, it should be stated that there is an absence of clear guidelines for the legal regulation of and enforcement approaches to the tax consequences related to discounts⁴⁴.

Other VAT — related Issues

In their operations, taxpayers should take into account the following disputes:

The tax consequences of an invalid transaction were touched upon in the case *Udmurtgeologiya*⁴⁵. In that dispute, the Supreme Court supported the opinion of inferior courts that all the adjustments are made in the month when the transaction was recognized invalid.

In the case *SiburTyumen'Gaz*⁴⁶, the court ruled that a partial restoration of deductible VAT in payment advances depending on the amount of preliminary payments (advance), calculated as part of the payment for the succeeding shipment did not contradict the Tax Code requirements.

Finally, air carriers should study the case *Donavia*⁴⁷, in which the court confirmed the right to apply a zero rate to code-sharing agreements (the ones used to transfer carrier liabilities from one carrier to another). A study of similar disputes continued in 2015⁴⁸.

Profit Tax

Cards, Money...

Probably, the most complicated (in terms of law) case considered by the Supreme Court in 2014 was the case *Edinaya Evropa — S.B.*⁴⁹. The Court needed to decide which of the norms

⁴² Ruling of the Supreme Court of 14.08.2014 № 305-ES14-130 // IPS Konsul'tantPlyus.

⁴³ Ruling of the Supreme Court of 14.11.2014 № 304-KG14-3204 // IPS Konsul'tantPlyus.

⁴⁴ See *Zolotareva A.B. Skidka bez izmeneniya tseny — paradoks ili ekonomicheskaya real'nost'?* Nalogoved, 2014, no 12, p. 53–61; *Savseris S.V. NDS s premiy: shatkoe ravnovesie.* Nalogoved, 2014, no 12, p. 62–65. In 2015 the Supreme Court in the case *Kemerovskiy avtotsentr KAMAZ*, having determined that the terms of supply agreement did not provide for the change of price of supplied goods based on the payment of bonus for achieving some level of supply by the payer, came to the conclusion qualification of such bonuses as sale discounts was unjustified because the bonuses in dispute did not reduce the price of the acquired goods. The lack of proof of adjusting the tax basis and invoices by the suppliers that could lead to the taxpayer's adjusting the tax basis for VAT was also taken into account. The court concluded that there was no legal ground for the taxpayer to restore the earlier deductible VAT in proportion to the bonuses of achieving a certain level of purchases (Ruling of the Supreme Court of 17.02.2015 № 304-KG14-3095 // IPS Konsul'tantPlyus).

⁴⁵ Ruling of the Supreme Court of 09.10.2014 № 309-KG14-2300 // IPS Konsul'tantPlyus.

⁴⁶ Ruling of the Supreme Court of 24.11.2014 № 304-KT14-3718 // IPS Konsul'tantPlyus.

⁴⁷ Ruling of the Supreme Court of 29.12.2014 № 305-KG14-3304 // IPS Konsul'tantPlyus.

⁴⁸ Ruling of the Supreme Court of 30.01.2015 № 303-KG14-4910 // IPS Konsul'tantPlyus.

⁴⁹ Ruling of the Supreme Court of 25.12.2014 № 305-KG14-1498 // IPS Konsul'tantPlyus.

(paragraph 8 or 18, Article 250 of the Tax Code) was applicable when calculating the amounts received from expired gift cards. Deciding for paragraph 8, Article 250 of the Tax Code, the judges considered the following:

Payment for the gift cards and their transfer to the legal entities that buy such cards constitute a complete sale and purchase agreement. Hence, the taxpayer has no obligation to return money.

The legal entities that buy gift cards are interested not in the money being returned to them, but in making a gift for a natural person;

The contractual terms that may allow the money return for the cards that have not been used is part of the marketing policy and does not influence the legal qualification of the relations between the parties.

However, the explanation provided by the court is subject to questions. V.V. Batsiev rightly notes that when determining the tax consequences of the relationship, such relationship should be considered comprehensively⁵⁰. In this case, the court considered certain stages of a single relationship (third party agreements) as discrete transactions with separate tax consequences. In addition, a point for concern is that when evaluating disputable amounts, the contractual terms on the money return on expired cards, as well as the implementation of such terms in practice (the actual money returns being made under the contract), were ignored.

The case *Edinaya Evropa — S.B.* should be a serious incentive for taxpayers using gift cards (certificates) to compare their accounting practice to the position of the Supreme Court and assess the risks they face. However, the Supreme Court provided some possibility to calculate the amounts on expired cards under paragraph 18, Article 250 of the Tax Code, which requires:

- the ability to control the performance of the agreements with regards to the obligation to return of money not used by natural persons;
- documental proof the amount of unused money; and
- the special contractual provision on the obligation to return money upon the presentation of an expired card.

Thus, changes to agreements will help decrease the claims but does not exclude the risk entirely.

Case Severniy Kuzbass is on

Unfortunately, the hopes of experts for revision of the practice confirming the priority of national legislation (Article 269 of the Tax Code) over international agreements paying interest on debt were dashed.

In all the cases of examining the related disputes, the Supreme Court followed the ruling of the Supreme Commercial Court⁵¹:

Case *Severneftegazprom*⁵² (agreement with Germany)

Case *British American Tobacco — Saint Petersburg*⁵³ (agreement with the Netherlands);

Case *Rzhevskiy Domostroitel'niy Kombinat*⁵⁴ (agreement with Cyprus).

One should not be surprised with the *consistency* of the Supreme Court. On the one hand, the Constitutional Court⁵⁵ did not notice anything wrong with the application of Article 269 of

⁵⁰ Chuvstvo prava. Nalogoved, 2015, no 1, p. 12.

⁵¹ Ruling of the Presidium of the Supreme Commercial Court of 15.11.2011 № 8654/11 // IPS Konsul'tantPlyus.

⁵² Ruling of the Supreme Court of 13.10.2014 № 304-KG14-2268 // IPS Konsul'tantPlyus.

⁵³ Ruling of the Supreme Court of 25.11.2014 № 305-KG14-4260 // IPS Konsul'tantPlyus.

⁵⁴ Ruling of the Supreme Court of 05.11.2014 № 307-KG14-3037 // IPS Konsul'tantPlyus.

⁵⁵ Ruling of the Supreme Court of 17.07.2014 № 1578-O // IPS Konsul'tantPlyus.

the Tax Code. On the other hand, judges see in such cases a rude means of tax minimization⁵⁶ the use of which shall be discouraged.

The presented practice shows that the Russian legal system neglects the principle of the priority of international law over national legislation. Moreover, it is suggested that provisions stating this principle⁵⁷ be excluded from the Constitution of Russia.

Miscellaneous

The first tax case reviewed by the Judicial Board on economic disputes was *Aviakompaniya Sibir*⁵⁸. However, it remains unclear why the cassation court⁵⁹ decided to support accruing penalties to a tax agent despite the presentation of residence certificates of a foreign company excluding the taxation of profits.

The Supreme Commercial Court has formed the position that the confirmation of a foreign person residency, even if such confirmation is issued before or after the payment period and is missing at the payment period itself, excludes any negative consequences for a tax agent⁶⁰. The Supreme Court continued the line of the Supreme Commercial Court and pointed out that as under Article 75 of the Tax Code penalties ensure the performance of tax liability and the inspection due to the on-site tax audits revealed an absence of this liability for the taxpayer, and as the responsibility for providing residence certificates after paying profit was not established by the Tax Code, the inspection lacked grounds to enforce the accruing penalty.

The case *KB Intekommerz*⁶¹ related to a special issue of calculating damages on currency sale and purchase transactions (conversion transactions). However, the approach applied by the Supreme Court is relevant to all taxpayers when determining tax consequences. In particular, the taxpayer in this case specified in its accounting policy that all the transactions in foreign currency are considered to be transactions with deferred supply. Due to this, the financial result on such transactions was calculated as part of the total tax basis. However, the court ruled that the disputable transactions are non-deliverable (cash settlement) transactions, which suggests a separate definition of a tax basis. Besides, the court ruled that the provisions of the accounting policy cannot be the sole ground for application of a simplified accounting method.

Thus, the tax consequences of business operations, including transactions, are determined by the surrounding circumstances but not the qualification given in the accounting policy⁶².

⁵⁶ Chuvstvo prava. Nalogoved, 2015, no 1, p. 16.

⁵⁷ The head of the Investigation committee suggested excluding from the Constitution the principle of priority of international law to the national one // website Interfaks. 26.02.2015. URL: <http://www.interfax.ru/russia/426619> (accessed: 26.04.2015).

⁵⁸ Ruling of the Supreme Court of 23.09.2014 № 305-ES14-1210 // IPS Konsul'tantPlyus.

⁵⁹ Ruling of the Federal Antimonopoly Service, Moscow District, 23.01.2014 № F05-16791/2013 // IPS Konsul'tantPlyus.

⁶⁰ Ruling of the Presidium of the Supreme Commercial Court of 06.02.2007 № 13225/06, of 29.05.2007 № 1646/07 // IPS Konsul'tantPlyus. The acts though related to the issues of tax liability under Article 123 of the Tax Code but set a trend in considering this type of disputes.

⁶¹ Ruling of the Supreme Court of 13.11.2014 № 305-KG14-1350 // IPS Konsul'tantPlyus.

⁶² In 2015, a similar approach was used in the case *Shaturskaya fabrika myagkoy mebeli* in which direct expenses included expenses on lease payments for using the facility for furniture assembly though the accounting policy on the list of direct expenses this type was not mentioned (Ruling of the Supreme Court of 12.01.2015 no 305-KG14-7150 // IPS Konsul'tantPlyus).



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