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TAX SOVEREIGNTY: FORMS AND LIMITS OF IMPLEMENTATION* *ANDREY KRASYUKOV**

Abstract

The article is devoted to the study of the problem of tax sovereignty. The author studied the sources of state sovereignty as well as the forms of its implementation. The analysis is aimed at testing the hypothesis that tax sovereignty is realized only through the activities of the legislative bodies of the state power, and one of the manifestations of tax sovereignty is the discretionary powers of the legislator. Basing on the study of the legal positions of the Constitutional Court of the Russian Federation the author concludes that it is necessary to establish clear limits of the exercise of discretionary powers in order to maintain a balance of public and private interests.

Keywords:

tax sovereignty, state power, taxation, discretionary power, limit, implementation.

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1 Introduction

In the legal doctrine it is considered that the state is a party only of those internal relations in which its sovereignty is directly expressed (Khalfina, 1974: 163). At the same time, scientists noted that the sovereign rights of the state in the field of financial activity are primarily affected by the budget and extrabudgetary funds (Karaseva (eds.), 2009 *Financial Law*: 111), i.e. objects of state property. In this connection, it is undeniable that the state participates in the relations in which the origin, change and termination of its ownership rights occur.

Understanding of sovereignty both in legislation and legal doctrine evolved and changed with time. In a simplified form this dynamic can be presented as a transition from an understanding of state sovereignty as the absolute power or absolute power of the state to a modern interpretation based on certain constitutional principles and limitations.

The sovereignty of the Russian Federation, based on the prevailing approach, presumes the supremacy, autonomy and independence of state power, the completeness of the legislative, executive and judicial power of the state on its territory and independence in international communication (Constitutional Court of Russian Federation: 10-P/2000). At the same time, state sovereignty in international relations has various forms of manifestation (Porokhov, 2010: 278–286) and legal consequences (Krasnyukov, 2010: 257–269).

In interstate relations, state sovereignty is, first of all, supremacy and power, since subjects capable of restricting or even encroaching on the independence of the state in internal relations simply do not exist.

However, the state power is divided into legislative, executive and judicial. This creates additional difficulties in understanding state sovereignty, since it is not clear whether sovereignty is exercised by all branches of the state power or not.

In addition, the legislation provides for federal, regional and local taxes, which raises the question of whether the subjects of the Russian Federation and municipalities have tax sovereignty.

Also, the problem of the limits of the exercise of tax sovereignty remains unsolved, which, in my opinion, is directly related to the problem of exercising discretionary powers in the field of taxation.

The problems voiced in the present work are supposed to be solved through an analysis of the legal positions of the Constitutional Court of the Russian Federa-

tion both in the sphere of taxation and in related spheres of realization of state sovereignty.

2.1 Tax sovereignty: the concept and ways of realization

As stated in the Constitution of the Russian Federation, the only source of power in Russia and the carrier of sovereignty is the people. The people can exercise their power (sovereignty) in two ways:

- 1) through a referendum and free elections – an immediate way, characterized by the fact that the people participate in the management of state affairs independently;
- 2) through the activities of public authorities – a mediated way when the people participate in the management of state affairs through representatives (Constitutional Court of Russian Federation: 337-O/2016).

It should be noted that the peculiarity of tax sovereignty is that such way of directly expressing the power of the people as a referendum is not applicable to the relations on establishing and abolishing taxes due to the relevant constitutional norm. Thus, tax sovereignty is always realized indirectly through the activities of state bodies.

According to the Constitutional Court of the Russian Federation (hereinafter referred to as the Constitutional Court of the Russian Federation), the sovereign will of the people materializes in objective results of the elections (Constitutional Court of Russian Federation: 17-P/2004). Accordingly, the conclusion suggests that the people participate in the exercise of power only through elective bodies of state power. Thus, sovereignty is realized through the activities of elected bodies of the state.

Speaking about the executive and the judiciary powers we must admit that the source of these types of state power is not the people themselves (except for elected officials) but the Constitution of the Russian Federation and the laws adopted in accordance with it which empower the people and representative (legislative) bodies (elected officials) forming their composition. In this regard, one cannot say that these bodies directly exercise state sovereignty.

Despite the fact that local self-government is not the creature of the state and draws its power directly from the Russian people through representative bodies (Constitutional Court of Russian Federation: 337-O/2016), we cannot talk about the existence of some kind of sovereignty of the municipal formations. As men-

tioned above, the source of sovereignty is the people. The term “people” is still applied in official sources concerning official subjects of the Russian Federation. When the law refers to municipalities, it uses the term “residents”. In this regard, it is impossible to talk about the existence of a source of sovereignty in municipalities. Regarding the subjects of the Russian Federation, this issue does not have an equally simple solution.

According to Article 71 of the Constitution of the Russian Federation, exclusive competence of the Russian Federation includes the issues that are necessary and sufficient for the protection of sovereignty and the supremacy of the Russian Federation, ensuring the integrity and inviolability of its territory, and the security of the state. The joint competence of the Russian Federation and its subjects, in accordance with Article 72, includes everything that cannot be solved by the Russian Federation alone without the participation of its subjects (Constitutional Court of Russian Federation: 4-P/2016).

If you interpret this legal position of the Constitutional Court of the Russian Federation literally, the exclusive competence of the Russian Federation is the defense of sovereignty. Particular areas of the realization of sovereignty (including in the sphere of taxation) belong to the joint competence of Russia and subjects of the Russian Federation. Does this mean that the subjects of the Russian Federation have some share of sovereignty?

Answering this question, the Constitutional Court of the Russian Federation pointed out that the Constitution of the Russian Federation does not allow any other bearer of sovereignty and source of power other than the multinational people of Russia, and therefore does not imply any other state sovereignty apart from the sovereignty of the Russian Federation and admits the sovereignty of neither republics, nor other subjects of the Russian Federation. At the same time, the fullness of the power of the subject of the Russian Federation does not mean that the subject exercises such power as a sovereign state. The powers and competence which is realized by these powers have not arisen from the will of the subjects and republics, but from the Constitution of Russian Federation as the highest act of sovereign power of the multinational people of Russia (Constitutional Court of Russian Federation: 10-P/2000).

The idea follows from this legal position of the Constitutional Court of the Russian Federation that since the elected bodies of the states of the Russian Federation are formed not by the multinational people of Russia as a whole, but only by its part, these bodies cannot exercise state sovereignty.

It is also assumed that the subjects of the Russian Federation and municipalities are bound by the sovereign power of the state, their power is not sovereign, it is subordinate to the state power, although they have their own competence (Chyrkin, 2007: 131). The power of constituent entities of the Russian Federation is defined as non-sovereign state power which has limited and subordinate character (Chyrkin, 2007: 157).

According to the legal position of the Constitutional Court of the Russian Federation, the laws of the subjects of the Russian Federation are secondary in nature and derived from the basic legal regulation established by the Constitution of the Russian Federation and federal laws, they concretize the general rule (Constitutional Court of Russian Federation: 32-P/2012; Constitutional Court of Russian Federation: 436-O-O/2008). The legislator of a constituent entity of the Russian Federation may exercise legal regulation of regional taxes provided that such regulation does not increase the tax burden and does not worsen the position of taxpayers in comparison with how it is determined by federal law (Constitutional Court of Russian Federation: 2-P/2001).

In this regard, the legal regulation of tax relations can be divided into three levels:

1. The basic level of legal regulation, consisting of the Constitution of the Russian Federation, the Tax Code of the Russian Federation and bylaws.
2. The exceptional level created by international agreements in the field of taxation. This level has a special character in the composition of subjects of relationship and in the content. In terms of legal force, this level exceeds the Tax Code of the Russian Federation, but is inferior to the Constitution of the Russian Federation.
3. Specifying level of legal regulation, derived from the basic level, including legislation of the subjects of the Russian Federation and local government, adopted in accordance with the Tax Code.

Legal regulation at this level is secondary, because in accordance with Art. 76 Part 5 of the Constitution of the Russian Federation, the laws of the subjects of the Russian Federation (especially the decisions of representative bodies of municipal entities) cannot contradict federal laws, should not reduce the level of federal guarantees, and cannot impose any restrictions on constitutional rights and freedoms.

The lack of a legal opportunity for the subjects of the Russian Federation to restrict constitutional rights and freedoms is clear evidence of their lack of any sove-

reign powers. The sovereignty of the state among other things lies precisely in the possibility of lawful restriction of the right or freedom of any constituent entity based on a fair correlation of public and private interest (Constitutional Court of Russian Federation: 14-P/2012).

The subjects of the Russian Federation and municipalities cannot even independently establish regional and local taxes and fees. Their competence includes only the establishment of several elements of taxation and only within the limits provided for by the Tax Code of the Russian Federation. Thus, their function in establishing taxes is reduced to the specification of the conditions of the tax obligation: the rate, the tax base, the payment term, and so on.

Today they are even deprived of the opportunity to refuse to establish regional and local taxes, since in this case taxes will be levied in the amounts provided for by the Tax Code of the Russian Federation. Some independence is preserved only with the introduction of certain special tax regimes.

2.2 Tax sovereignty and discretionary powers

Since sovereignty in interstate relations is realized by legislative bodies through restriction of the rights and freedoms of citizens and organizations by the law, it can be reasonably assumed that at the regulatory level sovereignty is also expressed in reserving discretionary powers, i.e. the ability of state bodies to act on their own discretion in certain situations.

At the same time, the Constitutional Court of the Russian Federation distinguishes several kinds of discretionary powers:

- Legislative discretion (Constitutional Court of Russian Federation: 6-P/2016);
- discretion of the law enforcer (Constitutional Court of the Russian Federation: 2-P/2016), including jurisdictions (Constitutional Court of Russian Federation: 1-P/2013) and the court (Constitutional Court of Russian Federation: 17-P/2015);
- Discretion of the participant of civil turnover (Constitutional Court of Russian Federation: 3-P/2004).

The last type of discretion is not directly related to the realization of state sovereignty, so we will exclude it from the present analysis.

The attitude of the Constitutional Court of the Russian Federation to the discretion of the law enforcer, based on an analysis of its legal positions, is ambiguous.

On the one hand, the discretion of the law enforcer is generally seen as a negative phenomenon, which is a consequence of insufficient legislative regulation (Constitutional Court of the Russian Federation: 215-O/2016) or defects in legislative technique (Constitutional Court of Russian Federation: 28-P/2012). On the other hand, according to the Constitutional Court of the Russian Federation, the discretion of jurisdictional bodies is necessary, and for the court - the immanence characteristic required for the implementation of justice (Constitutional Court of the Russian Federation: 816-O-O/2009) and originated from the principle of independence of the judiciary power (Constitutional Court of Russian Federation: 26-P/2014).

Decisions taken by the court and other jurisdictional bodies have the properties of obligation and authority, since they are usually accepted in the name of the Russian Federation. These acts are aimed at protecting law and order and are a prerequisite for the existence of the state. The measures of state coercion are realized through the decisions of the above-mentioned bodies. They are an extraordinary, special manifestation of the sovereignty of the state in case of deviant behavior of the subjects.

The discretionary powers of the legislator, on the contrary, are ordinary expression of state sovereignty, since they proceed from the content of the Constitution of the Russian Federation (Constitutional Court of the Russian Federation: 186-O/2016), which is a form of consolidation of people's sovereignty, and do not presume any special reason for their application.

Apart from the Constitution of the Russian Federation the discretionary powers of the legislator may also follow from international Conventions (Constitutional Court of the Russian Federation: 27-P/2015), as well as sectoral legislation (Constitutional Court of Russian Federation: 2999-O/2015). However, only the Constitution of the Russian Federation is the primary source of discretionary powers, all other sources are derived from it and inferior to it in legal force. Therefore, discretionary powers vested in federal laws, such as those of the constituent entities of the Russian Federation, are not an expression of state sovereignty. This is due to the fact that these powers do not belong to the subjects of the Russian Federation from the outset but are provided by federal legislation (Constitutional Court of Russian Federation: 7-O/2014). Consequently, the discretion is implemented by the legislative bodies of the subjects of the Russian Federation exclusively within the framework provided for by federal legislation (Constitutional Court of Russian Federation: 71-O/2005).

The exercise of discretionary powers of the legislator is made by choosing legal means, mechanisms and methods (Constitutional Court of the Russian Federation: 18-P/2010) aimed at concretizing the provisions of the Constitution of the Russian Federation (Constitutional Court of Russian Federation: 6-P/2016). The Constitution of the Russian Federation, as a rule, fixes only general principles and guidelines for the implementation of certain activities, therefore the legislator is given a certain discretion in their implementation through appropriate sectoral regulation (Constitutional Court of Russian Federation: 20-P/2011). At the same time, the legislator is free to choose the measures of legal regulation, which should not directly follow from the Constitution of the Russian Federation. This is the discretion of the legislator (Constitutional Court of Russian Federation: 1483-O-O/2010).

In various “subject areas” of tax regulation, the amount of discretion of the legislator may not be the same. When choosing the objects of taxation, determining tax rates or benefits, the amount of discretion of the legislator is broader. When it comes to applying measures of legal liability, discretion should be limited to a greater extent by constitutional principles of legal responsibility and equality before the law, as well as general interdisciplinary legal principles of public legal responsibility (Constitutional Court of Russian Federation: 9-P/2005).

Tax sovereignty is discretion in the choice of specific areas and content of the tax policy (Constitutional Court of Russian Federation: 14-P/2016). At the same time, tax discretion consists of the choice of legal means (Constitutional Court of Russian Federation: 1066-O-O/2010) of the implementation of tax sovereignty. The implementation of tax discretion always limits the constitutional right of ownership and freedom of economic activity. The conflict of constitutional rights and discretionary powers is solved by the Constitutional Court of the Russian Federation in favor of the discretionary powers if they are implemented for constitutionally significant purposes.

Scientists also believe that tax sovereignty as a variety of the state finds its expression in the establishment of taxes (Khalfina, 1974: 167; Khavanova, 2013: 43-44). According to other scholars, the state also realizes its sovereignty in case of tax collection (Karaseva, 1997: 297; Sadchikov, 2016: 18).

In my opinion, tax sovereignty is realized through the establishment of taxes and fees, but not their collection. Collection of a tax cannot be considered as a sovereign authority of the state, but is a form of realization of the established tax obligation. It is also confirmed by the mechanism of collecting non-tax charges which

are not stated by the public bodies. It often occurs without the participation of state agencies, which does not belittle their binding nature.

2.3 Limits to the Implementation of Tax Sovereignty

Possessing wide discretionary powers in the field of taxation, the legislator, however, cannot act arbitrarily. The Constitution of the Russian Federation defines the purpose of the legislator, which should be achieved as a result of exercising discretionary powers, as the creation of proper conditions for the fulfillment of the tax obligation by observing the requirements of formal certainty and completeness of the elements of the tax obligation, and also taking into account the objective characteristics of the economic and legal content of the tax (Constitutional Court of Russian Federation: 10-P/2009).

Thus, the discretion in exercising discretionary power is not absolute and has certain limitations:

- proportionality of restrictions to constitutionally significant goals;
- the need of observation of balance of the public and private interests.

This balance should ensure a reasonable coordination of fiscal interest and other related publicly significant interests of the state, on the one hand, and the creation of the most favorable conditions for the development of the economic system based on the stability of civil turnover and maintaining a sufficiently high level of mutual trust between all its participants, on the other (Constitutional Court of Russian Federation: 7-P/2013).

In addition, the choice of means and methods of implementing discretionary powers should correspond to:

- the existing system of legal regulation;
- general principles of branches of law;
- social, economic and other factors that determine the objective limits of discretionary powers (Constitutional Court of Russian Federation: 9-P/2016).

It should also be noted that in addition to the socio-economic and legal limits of the implementation of fiscal sovereignty of the state, political motives have significant importance. We can say that political conditioning is a feature of the legislator's tax discretion. The Constitutional Court of the Russian Federation repeatedly noted in its decisions that, when implementing financial regulation, the legislator

is guided by the need of implementation of state economic policy goals (Constitutional Court of the Russian Federation: 10-P/2006), including the financial policy (Constitutional Court of Russian Federation: 20-P/2011).

It should be noted that the limits of the implementation of fiscal sovereignty are formulated so vaguely that only the Constitutional Court of the Russian Federation can determine them in each specific case, and these definitions are often inconsistent.

Speaking about the establishment and abolition of tax benefits, the Constitutional Court of the Russian Federation repeatedly pointed out that the solution of this issue lies within the competence of the legislator and depends on his discretion (Constitutional Court of Russian Federation: 26-P/2013).

On the other hand, the Constitutional Court of the Russian Federation indicates that by establishing a tax privilege the legislator uses its discretionary power and, in the future, has no right to arbitrarily abandon already provided legal guarantee (Constitutional Court of Russian Federation: 445-O/2003). This legal position correlates completely with the more general principle that the state cannot arbitrarily refuse to exercise publicly accepted obligations (Constitutional Court of Russian Federation: 624-O-P/2007).

Moreover, according to a special opinion of Judge G. A. Gadzhiev when the tax benefits are abolished, the legislator should provide a constitutional and legal justification. Thus, the legislator cannot proceed from the presumption "I have established a privilege - I will abolish it"; it is limited in its discretion by the principles of the Constitution of the Russian Federation and constitutionally significant principles comprised in Article 3 of the Tax Code of the Russian Federation (Constitutional Court of Russian Federation: 26-P/2013).

In our opinion, to maintain the stability of civil turnover and a certain level of mutual trust between its participants and the state, it is necessary to define the limits of the implementation of tax sovereignty more specifically, at least by fixing in the Tax Code of the Russian Federation the principle of inadmissibility of an arbitrary refusal to assume obligations in the taxation by the state.

It is required to establish the limit of the tax burden on the taxpayer basing on sectors of the economy, as a quantitative limitation of fiscal sovereignty.

However, this measure will be effective if the state establishes the prohibition on overcoming the quantitative limit of fiscal sovereignty by establishing fiscal and other non-tax charges.

3 Conclusion

As a result of the study, we come to conclusion that tax sovereignty is realized exclusively through the activities of the elected bodies of the legislature to establish taxes and fees. The collection of taxes and fees is carried out in accordance with the current legislation and does not require any sovereign influence from the state.

Subjects of the Russian Federation and municipalities do not have tax sovereignty, since the source of their power is not in the multinational people of the Russian Federation, but in federal legislation. In this regard, their powers in the field of taxation have a concretizing nature and are shown in the possibility of clarifying certain elements of taxation.

The tax sovereignty of the state represents discretion in the choice of specific directions and content of the tax policy at the legislative level. At the same time, tax discretion consists in choosing legal means for the realization of tax sovereignty. The implementation of tax discretion is able to restrict the constitutional right of ownership and freedom of economic activity. The conflict of constitutional rights and discretionary powers is solved by the Constitutional Court of the Russian Federation in favor of the discretionary powers if they are implemented for constitutionally significant purposes.

Even though the legislator possesses wide discretionary powers in the field of taxation, the lawmaker cannot act arbitrarily. Freedom of discretion in the exercise of discretionary power is not absolute and has certain limits.

The limits of the exercise of discretionary powers are divided into:

- objective: social, economic and others;
- subjective: the balance of private and public interests, as well as political goals;
- Legal: sectoral principles, the system of legal regulation and compliance with constitutionally significant goals.

It seems that to maintain the stability of the civil turnover and a certain level of mutual trust between its participants and the state, it is necessary to define the limits of the implementation of tax sovereignty more specifically, at least by fixing in the Tax Code of the Russian Federation the principle of inadmissibility of an arbitrary refusal to assume obligations in the taxation by the state.

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