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Tax Law Principles: Concept and Forms of Legal Fixing in Tax Law Sources

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The article considers matters on general question theory of fiscal law principles and forms of legal fixing in fiscal law sources

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Point. Can the sphere of human activity exist without assuming some fundamental, starting principles in its basis? Obviously it cannot. Existing both in the system of scientific knowledge as a whole, and in its separate segments, principles serve as a universal category native to any kinds of social interactions – spiritual, political, economic, legal.

Significance of legal principles in taxation system is exclusively great. Even Roman lawyers understood, that *principium est potissima pars cuiuque rei* – «the principle is the major part of all». Decree on March, 21st, 1997 № 5-P the Constitutional Court of the Russian Federation highlighted: «the General principles of taxation and taxes are referred to the basic warranties which establishment by the federal law provides implementation and observance of the fundamental rights of the constitutional system, fundamental laws and freedom of the person and the citizen, federalism principles in the Russian Federation». Highlighting a special role of the fiscal law principles, the Slovaklawyer V.Babchak considers them «a sort of» blood-grooves» of fiscal law, vitally important functions supplying it as, figuratively speaking, fiscal law can be deemed as a live organism».

It is incorrect to consider fiscal law principles abstract declarations. Being present in this or that form in fiscal law sources, they are capable – as independently as in stable combinations with other norms – to order social interactions, to define and direct behavior of fiscal law subjects, to represent itself as a standard basis for tax disputes resolutions. The indicated circumstances determine the increased urgency, timeliness and the practical importance of scientific and applied researches of fiscal law principles.

Example. From Adam Smith's times the attention of an economic and legal science is riveted on taxation principles. In this area as in none of other sections of the fiscal law science, the branch analysis is inconceivable without application of other humanities – philosophical, sociological, ethical data. And it is not occasional. Principle – a fundamental category

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of interdisciplinary character with high degree of scientific abstraction. Owing to it, it is hardly probable to formulate its *unequivocal* definition. In the literature on philosophy the principle is defined both as первоначало, and as the basis, both as an axiom, and as a postulate, and as a knowledge precondition, and as a supervising idea, and as a central concept, and as a link between concepts, and as an explanation basic point, and as a theory starting position, and as basic theoretical knowledge, and as expression of necessity or the law of the phenomena, and as the relation between laws, and as one of logic functions of the law and as internal belief of the person and a view at things, etc. As we can see, «a principle of law» concept is *polysemantic*.

The institution of legal principles as a legal science section has the richest history. The legal literature analysis shows that approaches to concept «a principle of law» are diverse and versatile. Many authors, defining principles of law, combine patrimonial concepts in various combinations. Such pluralism proves complexity and diversity of the category under consideration. Thus every author defines «a principle of law» correctly in his own way – but from one side. That is, considering principles of law from a certain angle, it is possible to name them ideas, beginnings, provisions, and under certain conditions – rules of law.

In defining the fiscal law principles it is accepted to make a start from «a principle of law» concept, worked out by the general legal theory. Therefore in the literature *fiscal law principles* are defined as the general beginnings, and as supervising ideas (sets), and as initial directions, and as basic provisions, and as specialised norms of a special type. In definitions of the fiscal law principles the total variety of illegal approaches and research is being reflected.

As a rule the «taxation principles» category, integrating actually legal principles together with social and economic, political, organizational (technical) and other principle is considered the most general concept. So, for example, I.V.Kucherov along with legal principles allocates economic ones (define requirements which taxes should fit from an economic theory perspective) and organizational-functional principles (define internal construction of tax system and its functioning) which «in aggregate contribute to an extremely effective and simultaneously fair, socially-focused taxation system creation». Many experts give reason for organizational, social and economic, political, legal principles of the Russian tax system existence.

In our opinion, being involved in the system of legal regulation, any principle of taxation (despite its initial economic, political or ideological nature) acquires *legal character* and should be considered as a legal principle. Designating a legal principle as an idea, we mean *the idea embodied in law either way*; speaking about principles as bases, sets, beginnings, supervising provisions, it is necessary to talk about *the standard beginnings* of this or that branch of law as a whole. Social and economic, political, ethical and other categories, «refracting through a prism of the rule of law, acquire legal content». Besides the principles anyhow formalized in sources of fiscal law *doctrine* principles (principles-ideas) representing scientific or political theses, not having legally binding character are traditionally emphasized in legal literature. It is in this context in literature where legal principles are named a product of conscious creativity of scientists, their views on the formed phenomena of public life. With this in mind V.S.Belykh and D.V.Vinnitsky subdivide fiscal law principles into legal and illegal ones, excluding illegal ones from application sphere calling them ideas (beginnings) of law conscience, scientific conclusions. The given conclusions should therefore be agreed to. Scientific approach

always has personal, *subjective character*, therefore every researcher creates his list and names of doctrine principles which the tax system should fit, and it is impossible to achieve complete uniformity in this matter (and it is hardly necessary). This circumstance distinguishes doctrine principles between the principles anyhow legalized in sources of fiscal law and which are possible to be *systematized* and *unified to a certain degree*. Acting as significant elements of legal culture, doctrine principles are capable of making significant impact on legislative, judicial and lawenforcing activity, however, without being officially bound in this or that source of fiscal law they do not possess any normative quality. Diverse legal ideas and ideals become principles of law only when they are directly (legally expressed in regulatory legal acts or other forms of law. Legal principles are an essence of not simply an idea, but ideas always anyhow embodied in law and consequently proving to be obligatory, regulatory-guiding beginnings.With reference to principles of law in general and to fiscal law principles, in particular, the most debatable matter is one on *forms of their legalisation,* i.e. on forms of official expression and binding. In the domestic legal theory the position about possibility of implicit, *contextual binding* of principles of law in sources of law prevails. Following all legal traditions, we believe, that methods and ways *of official legalisation* of principles of fiscal law can be various. Problem «overpositiveness», i.e. Possibility of existence of principles of law in «a latent way» or outside of official texts of legal acts, has long-term history of scientific discussion. There are several points of view on this matter in jurisprudence, namely: 1) principles of law should always be bound in laws and by laws; 2) principles of law can be contained in any sources of law, and not only in regulatory acts; 3) principles of law can be out of system of standard regulation in the form of the settled elements of sense of justice. We adhere to the second of the named points of view. The Soviet legal doctrine recognised only a legal act as a source of law exclusively legal character of other *legal forms* – judicial and legal practice, legal customs, agreements – with rare exception was inadmissible. «Monopolism» of a regulatory act as a source of law has turned to one of «corner stones» of the Soviet jurisprudence. Now this «monopoly» is actively collapsing, the idea *of pluralism* of sources of law to which besides regulatory acts the majority of lawyers refer judicial precedents, regulatory contracts, legal customs. Can principles of law be contained in other sources of law apart from regulatory acts? We believe, it is necessary to answer this question in the affirmative. In particular, the contents of many principles of fiscal law reveals in judgements. Moreover, these or those legal principles are often «revealed» and formulated by *judiciary practice* in particular. For example, such major principles of fiscal law as liability for guilt, equality and harmony of taxation, nonabuse of law in tax legal relations, presumption of innocence of a tax payer and some others have been initially established by the Constitutional Court long before their formal binding in the legislation on taxes and tax collections. It is necessary to pay attention to the important feature of the Russian fiscal law. While the majority of other branches of law had already had significant doctrine, legislative and applied «luggage» of legal principles, by the moment of their reforming in the end of XX th century domestic tax study had to begin at really zero point.»Some 15 years ago very few people in our country had a system idea about taxes and their significance for the state and society, based on principles of law domination». Up to adoption of the first part of RF Tax Code principles of fiscal law had no adequate legislation in the tax legislation. Under» regulation creativity deficiency» conditions the large part of such principles, even before being

bound by the Law, had been formed by the Constitutional Court of Russian Federation in the course of interpretation of fundamental constitutional provisions, mainly, by inductive deducing from all legal (constitutional) principles – equality, social justice, the law and social state, supremacy of law, unity of economic space, freedom of the economic activity, proportionate restriction of the rights and freedom, etc. It is the judicial practice in this sphere that had predetermined the further development of the tax legislation, and norms-principles formulated in RF TC were «de jure recognition of those basic beginnings of taxation which had been earlier introduced by the Constitutional Court of Russian Federation». Due to a special role of the Constitutional Court in formation of bases of fiscal law, its decisions were bound by the role of '»driving mechanism of constitutional-legal regulation of tax relations» which «formulates legal provisions being an obligatory guideline for legislature, on the one hand, and directly regulating behavior of tax relations participants – on the other. Certainly, direct and immediate reproduction of principles in the norms of the tax legislation from the position of definiteness of legal regulation requirement looks preferable. However, fiscal law principles are often removed from the contents of operative rules by a *logic way*. It testifies that principles can be contained in legal substance not only in an accurately formalized way, but also in the «latent» one. In the latter case in order to formulate them in the form of accurate provisions, fit for legal application, the analysis of the current legislation, judicial and legal practice is required. For example, all legal concepts of justice and humanism are not formally bound in any concrete norm, however all branches of Russian law, including fiscal one are affected by them. Or the principle of conscientiousness and nonabuse of law which has not been formulated recently as an all legal one by the legislator but by the Constitutional Court, and is not bound in the norms of the Russian Federation Tax Code yet; the given circumstance, in our opinion, testifies that such a principle had not existed earlier, but only was initially present in the legal system *in the implicit form*, and was «revealed» by judicial interpretation of the general sense of the current legislation. Thus, principles of law are *initially* present in a certain regulatory-legal complex, revealing themselves directly in the contents of rules of law or in what that is known as «spirit of law». The developed judicial practice that is the legal custom apart from legislation and judicial acts may serve in our opinion as a source of principles of law. Not occasionally, one of the forms of objectification of legal principles in the literature is called «mass use of corresponding idea in ad hoc enforcement practice». So, for example, every lawyer is quite aware of a conflict of principles applied in case of a single level regulatory acts contradiction: a special regulatory act has a priority before a general act and an act issued later has a priority before an earlier issued one. These principles are actively applied to the tax disputes resolutions. However, they are bound neither directly nor indirectly in the Russian law norms. It is not obviously possible to introduce them by current legislation interpretation either. What is the source of general bindness of the given principles, i.e. their normativeness? Everything is quite simple: legal maxims *lex specialis derogat generali* and *lex posterior derogat priori* as imperative requirements have been initially formed in Roman law and since then lawyers all over the world have been applying them to practice for millennia, without questioning *axiomatic character* of these principles. They are the ground for judicial decisions, for higher law schools students' special cases decisions, and serve as a guide for the legal relations participants. Without being formalized in the norms of Russian

legislation, they have entered into «flesh and blood» of the domestic legal system. We believe that originally the *legal doctrine* was a source of these principles followed by the *legal custom* afterwards, i.e. it was a provision developed as a result of the repeated, long term application, conventional (including the state) and used commonplace in any sphere of social interactions without being officially bound in any regulatory act. In our opinion, fiscal law principles should either way always be present in legal sources (not obligatory in regulatory legal acts), but methods of their *official legalisation* can be various. However, they are not often directly bound in regulatory acts texts. Any subject of law can «find out» and form a fiscal law principle – at least in the form of a legal idea. Has not the claimant the right to justify his claims with references not only to fiscal law norms, but to legal principles as well which, according to the claimant, justify his claims? Has not the judge the right to support his decision with references not only to tax legal rules, but to principles of fiscal law norms as well which he has introduced by the analysis of the legislation on taxes and tax collections and considers possible to apply them to the case in question? In case of the general recognition and repeated use these ideas become real guides for participants of tax legal relations, i.e. they acquire *actual general bindness quality*, without being formalized in legislation. We believe, that legalisation of fiscal law principles as normative regulators can be implemented by the legislator as well- in the course of regulatory acts issues, and by judicial bodies – within the limits of discrete authorities of the courts, and by other participants of tax legal relations – in the form of legal customs, i.e. by formation corresponding law applicable practice and its subsequent authorisation by the state. In any case *the official recognition* of a principle by the state either in the form of direct lawmaking, or in the form of the subsequent authorisation is necessary. In order «principles of law to be converted into the law and order, should be transformed into more a concrete form of law (legislation, by laws, judicial precedents, etc.)».In a legal science the division of principles of law into general legal общеправовые, interbranch, branch and special (institutional) is generally accepted. There is a certain hierarchy among them: general legal principles are concretised and revealed in interbranch ones, while interbranch principles- in branch ones, and branch ones – in special principles. On the other hand, general legal and interbranch principles can render and a direct effect on branch legal relations. However, «same general legal principles in different branches of law are defined unequally and revealed differently, proceeding from concrete specific to the branch tasks, … depending on specificity of the given branch, a scope of its action, a subject and regulation methods». So, general legal the principle of liability for fault (subjective incrimination) has significant features in criminal, administrative, tax and civil procedure legislation. Thus, principles of law are impossible to be considered *separately from each other* as they are closely interconnected and interact among themselves, forming a system where one principle follows from another. An action of each of them is stipulated not only by its own contents, but by functioning of the entire system of principles as a whole. Such interconditionality allows to assert that principles of law form a *uniform set of the legal beginnings*. Moreover, non-observance of one principle, quite often results in infringement of other principles. On the other hand, with reference to a concrete legal situation principles can dialectically «conflict», contradict one another internally and then the law applier (the court) is required certain efforts to bring them into accord among themselves. What is the parity of principles and norms in tax-legal regulation?

There are opinions on identity of these concepts. However the more true position is deemed to be that according to which principles and norms are «overlapping», but not identical categories – they possess both general qualities, and essential distinctions. In particular, like other norms legal principles «have imperative, imperiously-imperative character they contain obligatory instructions which performance is provided by the entire arsenal of legal means». Some principles are formulated directly in the form of specialised norms of a more general (abstract) character, others – are only mentioned in a fiscal law source, the third are derived inductively from a context of variety of fiscal law norms.»Identification of a legal principle with a norm of law, – according to a true observation by V.P.Gribanov, – is practically equivalent to negation of legal principles in general, to a recognition of the fact that these principles and those of the kind do not exist, but there are only the rules of law differing by more general or more concrete contents among themselves». The principle of law positioning as a norm of current legislation exclusively is deemed not to allow to consider it an extremely significant legal provision of judicial practice in this sphere without which the institution of legal principles cannot be simply considered consistent at all today. It is important to emphasize, that *semantic filling* of a legal principle is much richer than any other norm of fiscal law. In this connection fiscal law principles are possible to name not simply as estimating, but «superestimating» legal categories demanding persistent and labour-consuming interpreting work of all participants of tax legal relations on revealing their contents. Therefore, a sensible wish of separate authors that «principles of branch of law should have a clear name and an accurate wording», are hardly probable to implement in full for the objective reasons (though it is necessary to aspire to it). Being directly reproduced in the fiscal law norm, the principle attributes *a specialised norm-principle quality to it*. The majority of such norms-principles are concentrated in item 3 of the Russian Federation Tax Code «Basics of beginnings of taxes and tax collections legislation». Incompleteness, scantiness, an illegibility and unsystematic character of a legal-technical exposition of legal principles in the text of the Tax Code of the Russian Federation causes the deserved criticism. According to a true remark of G.D.Gadzhiev and S.G.Pepelyaev «Their set is said to be if not random then chaotic.. – Furthermore, the contents of certain principles are disclosed insufficiently». With observance of regulatory economy requirement the legislator here has obviously been over diligent, having designated some of fiscal law principles in a rather schematic way, without opening their real contents completely. So, the legislator «has squeezed» the entire three legal principles into item 1 of article 3 of the Russian Federation Tax Code, two- into item 3. While many of the general fiscal law principles which are the subject to a long term and successful judicial practice operation, are not mentioned at all in the Code's text. Even the name of this or that principle causes numerous discussions. We believe that it is necessary to be guided by the scheme «each principle should be attributed to a separate article of the Law». In this respect positive experience of criminal law where principles are more accurately designated by their «separations» under separate articles of the Russian Federation Criminal Code is possible to make use of. The allocation of the independent chapter with a code name «General principles of taxation» with an itemized explanation of each principle in the first part of RF Tax Code is deemed expedient. It is necessary to indicate one more problem directly influencing completeness and instructive fullness of norms-principles. The special role of judicial practice in the course of formation of system of fiscal law principles is

commonly accepted and admits of no doubt. By means of analysis and interpretation of a legal reality courts reveal the «latent» legal principles, and also formulate the legal imperatives making their contents. However, if at an initial stage of tax reform the Russian legislator, as a rule, reacted to achievements of courts in this sphere sensitively, making modifications in the tax legislation operatively, afterwards the situation changed: legal provisions connected with judicial interpretation of the fiscal law principles, are more often ignored by the legislator and do not find adequate reflection in the Russian Federation Tax Code norms. The contents of fiscal law principles are much wider than their regulatory expression in the Law. They have more informational saturation, semantic capacity, open structure, their contents, as a rule are *dynamic* and do not fit the frames of one singe norm, but « is disclosed» by laborious (and, as a rule, – continuous) interpreting work of many subjects of the fiscal law, first of all – courts. Therefore, following E.V.Skurko, it is possible to name a principle of law the «revived» norm of «written law» which, however, has not reached (and is not reaching in general) the level of the reality, native to legal relation directly yet. Thus, it is impossible to limit the legal principle contents to «frameworks» set once and forever, as it is many-sided and develops together with the development of a tax-legal science and practice. In this sense a fiscal law principle is possible to present figuratively as a permanently constructing «building», to which addressees of corresponding norms periodically add (or remove) «bricks» in the form of additional structural elements. Thus, «the principle has rather a difficult structure consisting of diverse legal imperatives closely interconnected and interacting with each other. This «sum of legal imperatives» making contents of principles includes, as a rule, not only fiscal law norms, but judicial practice legal provisions as well. Besides, despite imperative character of principles, the legislator is entitled to foresee some withdrawals (exception) from them with the purposes of optimisation of the general mechanism of tax-legal effect. So, tax benefits and preferences can be considered as an exception to an equality principle, availability of бланкетных norms and estimated categories – to a principle of taxation definiteness. It is imperative to agree with the authors who state, that no other norm is a sum of legal imperatives, representing the unique rule; while in legal principles the essence of not the only rule of behaviour as in a usual norm but several ones at the time is concentrated. Let's consider this feature on an example of a principle of legitimacy of taxation. An axiomatic provision on «tax laws should be observed» lies in its ground. Thereby, a general legal principle bound in the second part of article 15 of the RF Constitution: «Public authorities, local governments, officials, citizens and their associations are obliged to observe the Constitution of the Russian Federation and laws» is concretized at a branch level. The important legal imperative disclosing one of the aspects of taxation legitimacy, is bound in item 5 of article 3of the Russian Federation Tax Code: « no one is obliged to pay taxes or tax collections, and also other installments and payments having signs of taxes or tax collections established by the present Code, not provided by the present Code or established otherwise rather than defined by the present Code». Other norm-principle establishes, that «nobody can be found liable for a tax offence otherwise than on reasonable ground and in accordance with the order provided by the present Code» (item 1 of article 108 of the RF Tax Code). Here the principle still known since the ancient Roman law is concretized: nullum crimen, nulla poena, sine lege – there is no crime no punishment without the law provision. Besides, action of a principle of taxation legitimacy can be «tracked»

in a number of other regulatory and guarding norms it literally penetrates the majority of tax-legal institutions. As we see, the contents of a considered principle are not limited to one axiom, norm-principle or provision deduced from a context, but «develops» from the whole set of legal ideas and imperatives which are «discovered» in sources of fiscal law otherwise. Considering complexity and diversity of a category «fiscal law principles», the latter can be defined as general beginnings, as supervising ideas (installation), as initial directions, as fundamental provisions, and as specialised norms of a special type. Methods and ways of official legalisation of fiscal law principles can be various. Fiscal law principles can be formulated directly in the form of specialised norms of the more general, abstract character, others can only be named (be mentioned) in a fiscal law source (however not necessarily in a regulatory act) or deduced inductively from a context of the whole variety of tax-legal norms. The main task the legal community faces is to make fiscal law principles *directly acting*, concentrate on their use in tax and judicial procedure, disclose their lawenforcing instrumental potential wider make it more effective, convince (and if it is necessary – teach) participants of tax legal relations to refer to principles of law in reasoning their positions, transform the latter from «colourful declarations» into a daily element of practical jurisprudence. A problem of the Russian legislator which he has not coped with yet – regular monitoring and regulatory binding of the fiscal law principles revealed by judicial practice in the norms of the Russian Federation Tax Code.

The summary. This article researches fiscal law principles as fundamental categories of an economic and legal science. The polysemy and polysemantic character of «fiscal law principles» concept which can be defined as general beginnings and as supervising ideas and as initial directions and as fundamental positions and as specialised norms of a special type is emphasised. According to the author methods and ways of official legalisation of fiscal law principles can be various: they can be bound by the legislator in regulatory legal acts, be formulated by courts during tax disputes resolutions, and also – be formed in the form of legal customs. The thesis is formulated that some fiscal law principles can be bound in the form of specialised norms, others can be only named (are mentioned) in a fiscal law source (however – not obligatory in a regulatory act), the third are deduced inductively from a context of the whole variety of norms. Highlighting an illegibility and unsystematic character of an exposition of legal principles in the Russian Federation Tax Code text ,the author suggests that the first part of the Tax Code of the Russian Federation should be added with the independent chapter under the title «General principles of the taxation» with a detailed explanation of the contents of each fiscal law principle.

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Принципы налогового права: понятие и формы легальной фиксации в источниках налогового права

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Статья посвящена общим вопросам теории принцпов налогового права и формам их закрепления в источниках права.

Ключевые слова: налог, прнцип, норма, право, идея, налогообложние, источники, прецедент, идея.