

Tax Authorities Should Strictly Follow Procedure

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During a tax inspection, any breach of procedure when considering materials can serve as a basis for rendering invalid the inspection's decision to bring the taxpayer to responsibility.

The provisions set out in Part 1 of the Tax Code of the Russian Federation regulate procedural issues surrounding tax inspections, scrutiny of results and bringing taxpayers to responsibility. In practice, however, the tax authorities often do not follow the letter of the law on procedure. This can be explained by the fact that the law divides procedural breaches into significant and insignificant. Only procedure breaches defined as significant can serve as the basis for canceling a decision by the tax authorities. There are no legal consequences defined for insignificant breaches, and in practice they are normally treated very calmly by the courts, a fact that does not fill employees of the tax authorities with determination to follow procedure exactly.

According to Clause 14, Article 101 of the Tax Code of the Russian Federation, a significant breach of the tax inspection materials scrutiny procedure serves as the basis for a superior tax authority or court to annul the tax authority's decision about bringing a taxpayer to responsibility for a tax violation. Significant breach conditions provide for the opportunity for the person under inspection to participate in the tax inspection materials scrutiny in person and/or for a representative to provide the possibility to present an explanation on the taxpayer's behalf.

Until recently, court practice mainly treated as significant breaches cases where the tax authorities did not call taxpayers up for scrutiny of the tax inspection materials, despite the fact that this is prescribed by law. Now, however, court practice has added one more case to the list of significant procedural breaches.

The legal bases contain a Ruling of the Presidium of the Supreme Arbitration Court of the Russian Federation dated Sept. 29, 2010, No. 4903/10. In this case, tried by the high court authority, the taxpayer defended the position that the situation when one official scrutinizes the inspection materials, and another one makes the decision on canceling, contradicts the provisions of the Tax Code. As it was stated by the Supreme Arbitration Court, proceeding from the systemic interpretation of the provisions of Article 101 of the code, the tax inspection materials and taxpayer's objections to the tax inspection should be considered by the head or deputy head of the tax authority by way of direct examination of all the evidence available on condition of providing the opportunity for the person under inspection to participate in the process of scrutinizing the tax inspection materials and consequent decision making by the same official of the tax authority. In this case, the decree, associated objections and other tax inspection materials, on which the inspection's decision was based, were scrutinized by the deputy head of the inspection, who in the end did not make any decision. However, the decision of the inspection was delivered by another official: the head of the inspection, who had not participated in the scrutiny of the inspection materials.

This meant that the head of the tax authority, when scrutinizing materials of the tax inspection and making a decision on them, did not offer the person under inspection the opportunity to participate in the scrutiny of the inspection materials. The circumstance whereby public representatives participated in the course of the scrutiny of the inspection materials by the head deputy of the inspection is of no legal consequence, since following the results of this scrutiny no decision was made, and there was no opportunity provided for the participation of public representatives during the head of the inspection's scrutiny of the inspection materials, following which the decision was made.

Therefore, the Presidium of the Supreme Arbitration Court concluded that significant breaches of the inspection materials scrutiny procedure took place in this case, which led to the violation of the taxpayer's (public) rights. The taxpayer was deprived of the opportunity to present clarifications on the inspection conclusions and tax inspection materials directly to the person who made the decision.

What consequences may such a precedent imply? Above all, taxpayers have received one more basis to render invalid decisions by the tax authorities due to procedural violations. Therefore, taxpayers who face a similar situation and whose valid term of limitation to go to court has not expired — three months from when the supreme tax authority approves the decision — may use this new legal position of the Presidium of the Supreme Arbitration Court. As for the tax authorities, to avoid mass losses of tax disputes on the procedural basis, they will have to plan their work on inspection materials scrutiny and making decisions more attentively. In addition, there is a hope that, as a result of such precedents, the tax authorities will change their general attitude toward the law and will follow the lawfully established procedure more strictly.

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