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# SETTLEMENT AGREEMENT IN CASES ARISING FROM PUBLIC RELATIONS: EXAMPLE OF TAX DISPUTES

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## *Abstract*

Considering the prospects for resolving tax disputes, often contradictory attitudes cause such a way of ending the conflict as a settlement agreement. The subject of the dispute may be both the rights of taxpayers and the public, including fiscal, interest, the "administrator" of which is the tax authority. In Russian pre-revolutionary legislation, transactions in treasury cases were simply prohibited. Over time, already in the Soviet period began to talk about certain cases when it is possible to conclude settlement agreements, and in the early 2000s – such practice was legalized. However, many modern researchers have noted 2012 as the beginning of the construction of the settlement agreement in court disputes with such public entities as tax authorities – the date of approval by the Presidency of the now abolished Supreme Arbitration Court of the Russian Federation of the settlement agreement in the tax dispute. The article studies the reasons and conditions for concluding a settlement agreement in tax disputes, defines the principles of construction and subject matter of the settlement agreement, defines the beginning of determination of the possibility of concluding a settlement agreement in tax relations by general principles of tax law, and analyses the separation of material and procedural features of the settlement agreement. The article contains an analysis of controversial situations of judicial practice, explanations of tax authorities. The academic approach helps to analyze the very essence of tax relations, and practical material allows it to be used in specific situations.



**Keywords:** Settlement agreement, tax obligation, fiscal obligation, reconciliation.

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## 1. Introduction

The settlement agreement, as a way of completing the dispute, can only be implemented in the stage of the trial (even if the design is used in the enforcement proceedings, its approval by the court is required). The conclusion of the legal conflict by an agreement can be carried out both in and outside the judicial process, but the institution of the settlement agreement itself belongs to the judicial process, both in the first instance from the trial stage, and in the appellate, cassation and supervisory bodies.

Tax disputes are dealt with under special rules established by chapters 22, 24 of the Arbitration Procedure Code of the Russian Federation dated 07.24.2002 N95-FZ. It should be noted that the reconciliation of the parties is not only a ground for the termination of the proceedings in the case, But also the duty of the court, at the stage of preparation of the case for the hearing, to explain such right to the parties and to assist them. Analyzing paragraphs 1 and 2 of the Resolution of the Council of the Supreme Arbitration Court of the Russian Federation dated 18.07.2014 N 50 (2018) "On Reconciliation Resolution of the Parties in the Arbitration Process, It can be noted that the task at the stage of preparation of the case for trial is reconciliation of the parties (Part 1 of Article 133 of the Arbitration Procedure Code) - refers to civil, not public, including tax, legal relations, but, on the other hand, cases arising from administrative and other public legal relations, are considered under the general rules of claim proceedings provided for in the Arbitration Procedure Code (Article 189 of the Arbitration Procedure Code).

Judicial practice prior to 2002 did not involve the conclusion of a settlement agreement in cases arising from administrative and legal relations. In the absence of the legal ban of agrarian and industrial complex of 1995 on the conclusion of settlement agreements in administrative disputes of Paragraph 12 of the Resolution of the Supreme Court of Arbitration of the Russian Federation of 31.10.1996 No. 13 (2018) "About application of the Arbitration procedural code of the Russian Federation by hearing of cases in court of first instance" explained that the conclusion of settlement agreements on the affairs arising from administrative legal relations (including on tax disputes), is not allowed. The modern Agricultural Code of the Russian Federation in article 190 provided for the possibility of settling disputes arising from public relations through various conciliation procedures and their results, including a settlement agreement, unless otherwise established by federal law. The literature suggests that article 190 of the Arbitration Procedure Code provides for various agreements to which the settlement agreement does not apply, as it is an independent institution (Ageeva & Lang, 2019). The conclusion of a settlement agreement in the arbitration court is regulated by the rules of special chapter 15 of the Arbitration Procedure Code "Conciliation Procedures," as well as paragraphs 4 and 5 of article 49, paragraph 2 of article 51, paragraph 2 of article 62, paragraph 2 of paragraph 1 of article 135, paragraph 2 of article 150, paragraph 9 of paragraph 2 of article 153, paragraph 4 of article 160 of the Arbitration Procedure Code.

## 2. Problem Statement

According to the legal definition of the institution of a settlement agreement in Russia, its conclusion requires the existence of a dispute before an arbitral tribunal or a court of general jurisdiction. On the contrary, Western doctrine firmly holds the position that the statement of claims and objections is not necessary for the conclusion of a settlement agreement, it is sufficient to differ in the legal

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assessments by the parties of the legal situation in their relations, that is, the existence of legal uncertainty between them. This approach is based on the doctrine of Roman law, on which the draft Civil Law of the Russian Empire is based, and it seems correct, because it allows not just to settle the dispute, but to prevent its occurrence.

The conclusion of any agreements between the tax authority and the taxpayer before the case is brought to court in Russian tax law is not prohibited, but they will be regulated by completely different institutions, but not by a settlement agreement. The deployment of elements of a social contract, the emergence in the legal and political field of civil society, as a counter party or employee of the State, make the process necessary and consistent (Bortnikov, 2019).

Conciliation procedures can be implemented by parties to a conflict in various forms, which in one way or another can be divided into two large groups: execution of an emerging obligation or innovation. The types of conciliation procedures can be as varied as the principle of freedom of contract allows, and a settlement agreement is certainly among them.

First of all, the settlement agreement is an agreed will compromise of the conflicting parties. But is the public entity or public body, at its discretion, entitled to refuse the dispute, make concessions to the other party, etc.? If the taxpayer enters into a settlement agreement in order to terminate the dispute, he also acts not only in his own interest, but even more so in the state body. And, the participant of tax relations is the Federal Tax Service of Russia, exercising control powers. In civil proceedings, however, the Federal Tax Service is already operating more widely. Issues of liability in court are resolved under already accepted and effective abnormal acts of tax authorities, which recorded and qualified improper behavior of the taxpayer and made a decision to bring him to tax responsibility.

By concluding a settlement agreement, the taxpayer and the tax authority not only terminate the dispute by mutual assignments, but also determine the volume, type, content, etc., of material relations. How to qualify such actions as innovation and derogation or as consent of the parties to qualify what brought them to court?

## 3. Research Questions

It will not be contrary to the tax legislation to define the settlement agreement as a innovation if the parties act within the limits of the powers granted to them by the NC of the Russian Federation. The definition of the content of material relations in the event of a dispute implies the refusal of one or both parties to "their vision" of the content and form of the legal relationship. But unlike a civil legal relationship, the tax party will not have the right to change the legal relationship, as its qualification by virtue of the law is carried out at the appropriate moment or period related to the moment of formation of the tax obligation.

In jurisprudence, there are different approaches in determining the nature of a settlement agreement and on other grounds:

- Is not a new transaction, but only determines the procedure for the settlement of obligations arising under contracts;

- is not the transaction, and represents the legal proceeding of the parties directed to the termination of the lawsuit which arose from certain economic relations.

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What are the reasons why the parties to the tax dispute go to a settlement agreement? The reason for the parties to close the case in peace may be:

- Desire to obtain for itself guarantees of a certain positive result;
- Removing the uncertainty of the judicial act (as it will be);
- Showing loyalty as a strategy;
- Saving time and effort in the dispute resolution process;
- Saving legal costs;
- The agreement cannot be reviewed, including unilaterally by the tax authority;
- Assistance and authority of the court in concluding a settlement agreement (argument in negotiations) (Ageeva, Lang, Loshkarev, Chugurova, & Churakova, 2018).

## 4. Purpose of the Study

The purpose of the settlement agreement is to terminate or prevent the dispute. When a settlement agreement is concluded by the parties, their previous rights and obligations in one volume or another, depending on the will of the parties, are eliminated and the conditions under which the settlement agreement is concluded come into force. That is, the settlement agreement is a combination (similar to civil law) of derogation, innovation, installments, etc. One can argue with this, of course, but the way the dispute ends can be agreed by the parties in any form not contrary to the law in a particular situation.

As noted in paragraph 9 of the Decision of the Council of the Supreme Arbitration Court of the Russian Federation No. 50 of 18.07.2014, A settlement agreement is an agreement of the parties, that is, a transaction, whereby to that agreement, Which is a means of protecting subjective rights other than procedural law, Civil law rules on treaties, including rules on freedom of contract, are applicable (article 421 of the Civil Code of the Russian Federation).

The conclusion of such agreements is possible at any stage of the arbitration process – in the court of first instance, as well as in the court of appeal, cassation and supervisory courts, and even at the stage of execution of the court decision. However, not all researchers, yes, and law enforcement, agree with the idea and practice of concluding a settlement agreement on tax disputes. The arguments of opponents of the possibility of concluding a settlement agreement in public (including tax) relations can be divided into the following groups.

1. Public relations involve mandatory regulation, and the conclusion of a settlement agreement is possible only if (Markham, 2019) the rules governing these relations are dispassionate, permissive (Bortnikov, 2018).

2. Public legal obligations are unilateral, where there exists only the obligation of the organization or citizen to the State, which the parties to the dispute cannot change by their decision (Bortnikov, 2018).

3. Despite certain similarities, the settlement agreement in the tax sphere differs from the "public agreement" (Bortnikov, 2017).

4. The settlement agreement cannot cancel the "objective obligation" to pay taxes, the obligation established by law.

5. It is unacceptable to conclude settlement agreements on administrative and legal disputes, as these relations do not allow for the replacement of the rights and obligations of the parties.

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## 5. Research Methods

Various methods of scientific knowledge were used in the course of the study. The method of materialist dialectics was used as the main one, allowing for the production and analysis of the problem. The use of a comparative legal method has led to a systematic analysis of the phenomena studied. The formal-logical method allowed to justify the conclusions and basic provisions of the study**.**

## 6. Findings

Before reviewing each proposed thesis separately, attention should be paid to the peculiarities of regulatory and protective tax relations. The tax right is based on providing the most convenience for the taxpayer in the process of fulfilling his tax obligation. For example, the taxpayer 's choice of object (and the possibility of its appearance) depends on the economic interest, the purpose of civil operations, the circumstances of the surrounding validity. Exclusively dispensative starts influence the fact of formation of tax obligation, will and actions of the taxpayer in accordance with article 44 of the Tax Code of the Russian Federation. All participants in tax legal relations are subject to the law, which contains all instruments of the mechanism of legal regulation of tax law.

In tax law, its dispensability is directly proportional to economic (from private legal relations) freedom and completeness of benefits: the more benefits - the more tax consequences, the less economic rights and facilities – the less tax obligations. The taxpayer himself, as a subject of civil legal relations, who is aware of the consequences of his private legal transactions, chooses which to accept the benefits and which tax consequences may arise. And, legally choosing various legal and economic results, for example, in legal form, the taxpayer carries out tax optimization.

On the one hand, "taxes are not negotiated," however, it is the taxpayer who chooses the form of taxation, preferential tax regime, comes with the initiative to conclude an agreement on investment tax credit, on agreement on the price of the transaction for tax purposes, etc.

In most cases, the authorization in tax law is formulated in the text of the tax code in the form of a direct grant of authority, where the taxpayer has the right to perform actions pre-determined by the tax code. But tax legislation also implies the existence of a legal authorization arising from a set of legal rules. Here the question should be raised about the nature of authorization in tax law as arising from a set of legal norms (from the Tax Code of the Russian Federation) or as separate institutions of tax law.

The very possibility of concluding a settlement agreement in relations of tax liability is based on the permits granted to the taxpayer and the corresponding obligations of the tax authorities to "submit" to the choice of the taxpayer. The choice of behaviour may be subject to settlement agreement regulation. In tax law, authorization can always have only a positive expression. This expression may have a clear formalization of the corresponding authorization or establish a general principle of behavior.

The internal source of development of tax relations is not only state power, but also activity, will of subjects, their subjective right. This is the reason for this wide application and importance, as opposed to administrative and financial law, of permits and prohibitions, of their diverse combinations. The wide field of permits not only gives the taxpayer the right to choose options of his behavior, but also obliges the tax authorities to accept them. If the taxpayer has not expressed in the accounting policy his

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"intentions" or a dispute has arisen about the qualification of transactions and actions of the taxpayer, will the parties to the conflict not have the right to agree on the content of the relevant relations and to formalize this by a settlement agreement?

The COP of the Russian Federation states that "granting the tax authority the power to act in a power-binding manner with undisputed collection of tax payments is lawful to the extent that such actions, first, remain within the framework of tax property relations, rather than becoming civil, administrative or criminal sanctions, and, second, do not abolish or diminish the rights and freedoms of man and citizen." (Decision of the Constitutional Court of the Russian Federation No. 20-P of 17 December 1996 "In the Case on the Verification of the Constitutionality of Paragraphs 2 and 3 of Part One of Article 11 of the Law of the Russian Federation of 24 June 1993 "On Federal Tax Police Bodies").

The effect of the mechanisms of protection of rights is differentiated for legal entities (subsequent judicial control) and individuals (preliminary judicial control), but the tax authority changes the legal qualification of the taxpayer 's transaction in accordance with paragraph 3 of Clause 2 of Article 45 of the Tax Code of the Russian Federation only in court.

A similar view is expressed in the literature. The contractual nature of the settlement agreement makes it possible to conclude it in all disputes where there is a dispensative regulation that allows to independently establish the content of the rights and obligations of the parties. Such norms exist in the sphere of public law branches of legislation, such as tax, customs, administrative, etc., and, of course, in procedural relations (Deltsova, Dorofeeva, Zubkova, & Tokmakov, 2019).

In the process of studying the nature of the settlement agreement and the possibility of its conclusion in cases arising from public legal relations, it is possible to highlight two approaches that have existed since the time of medieval glossators. A settlement agreement is concluded when there is a dispute about the existence of a right or when there is a dispute about the possibility of exercising a subjective right.

It should be noted that in tax relations completely different institutions regulate controversial relations, the consideration of which has passed to the court, and relations existing outside the court process. If in the first sphere of relations the settlement agreement is a method of dispute resolution, settled on a private basis on the contract by procedural legislation, the second – exclusively by the tax code through the institutions of installments and deferral, agreement of the transaction price for tax purposes, etc.

Procedural relations in which the settlement agreement is performed, based on procedural equality of the parties. All parties to the dispute have equal procedural rights, with certain exceptions. In procedural terms, there are no obstacles to the conclusion of peace agreements. The tax authority is a legal entity and in relations with the taxpayer it is individual. In certain relations with the taxpayer, there is not a system of tax authorities, but a specific inspection or administration of the Federal Tax Service of Russia. In the procedural sense, the administrative relations of tax authorities are irrelevant.

However, attention should be paid to the rules established within the system of tax authorities, which all participants in the process have to take into account. They are not of legal importance to the court or taxpayer in defining tax liability and rights and obligations in tax relations. These rules cannot be considered as legal and procedural.

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The Federal Tax Service of Russia indicated that draft settlement agreements are to be sent for approval to the Legal Department of the Federal Tax Service of Russia (Letter dated 02.10.2013 from the Federal Tax Service of Russia N CA-4-7/17648 "On the Practice of Concluding Settlement Agreements by Tax Authorities with Taxpayers in Courts"). In the absence of agreement, no settlement agreements shall be concluded. The heads of the departments of the Federal Tax Service of the Russian Federation for the constituent entities of the Russian Federation and the heads of the Interregional Inspections for the largest taxpayers of the Russian Federation are responsible for the execution of this order.

The independent nature of the legal position of a particular inspection or administration in procedural relations does not imply any agreement. The admission of administrative coordination remains at the good will of the court. Tax authorities have a special legal position in the insolvency of organizations and individual entrepreneurs. On the one hand, the tax authority may act as a creditor, on the other – acts as an authorized body.

## 7. Conclusion

It should be borne in mind that the legal facts underlying the formation of the tax obligation and the object of taxation are in the private legal sphere. For example: for the tax on property – the moment when the right of ownership or other property right arises, for the NDFL – the moment of receipt of income at the disposal and ownership, for the moment of transfer or occurrence of the right of ownership (with some exceptions), etc. These private-law phenomena, of course, can be regulated by a peace agreement. The settlement agreement is pre-emptive for the tax dispute, but it is not replaced by institutions of retreat and innovation. A settlement agreement may contain them, but it is always aimed at changing or ending legal ambiguity and dispute.

According to the approach established in legal science, a settlement agreement should be considered as an act of law-making and as an act of enforcement, determining the future program of activity of participants in a disputed legal relationship. The settlement agreement, made in its own form under the rules of civil and procedural legislation, aims to change, establish and terminate tax and procedural legal relations, that is, relations regulated by law. A settlement agreement in the tax sphere is a form of regulation of already existing or new tax legal relations; Details, specifies tax relations; Determines the pattern of behavior by applying the norm of the Tax Code of the Russian Federation or by determining the behavior of the taxpayer within the limits provided to him by the Tax Code of the Russian Federation.

A settlement agreement is a bilateral transaction, a transaction between the parties to a disputed material legal relationship. In the peace agreement, the parties make mutual concessions to each other, innovating existing obligations, or defining the form of a derogation, re-defining their rights and obligations under the disputed legal relationship.

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