

## CONSTITUTIONAL AND MUNICIPAL LAW

### КОНСТИТУЦИОННОЕ И МУНИЦИПАЛЬНОЕ ПРАВО


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#### Russian Constitutional Court jurisprudence of tax fairness

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**Abstract.** Public finance is subject to the principle of fairness, which has a vague character and rarely finds an appropriate reflection in law. Supreme Courts and Constitutional Courts of different countries may refer to this principle and disclose the content of fairness in public finance processes. The scope of the article includes legal establishment and realization of the principle of fairness in contemporary Russian tax law. The author investigates this issue mainly considering the Constitutional Court's legal positions. The Russian Constitutional Court actively refers to the principle of fairness to resolve disputes in taxation. The analysis of Constitutional Court judgements shows that the content of the principle of fairness for tax purposes depends upon a type of public fee. In some cases, the Court uses the principle of fairness in a broader legal meaning and does not interpret fairness for tax purposes using the vaguest terms and words for arguments. In other cases, the Court may use a more specific and narrow meaning of the principle of fairness in cases on imposition of tax and/or tax liability (tax fairness).

**Key words:** Constitution, fairness, taxation, tax law, tax fairness, case law

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## **Принцип налоговой справедливости в решениях Конституционного Суда Российской Федерации**

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**Аннотация.** Система публичных финансов подчинена принципу справедливости, который имеет расплывчатое содержание и редко находит надлежащее отражение в законодательстве. Высшие суды различных стран могут ссылаться на этот принцип и раскрывать содержание справедливости в публичных финансах. Проведен анализ правового закрепления и реализации принципа справедливости в современном российском налоговом праве. Автор исследует данный вопрос преимущественно с учетом правовых позиций Конституционного Суда РФ, активно ссылающегося на принцип справедливости при разрешении споров в сфере налогообложения. Анализ постановлений Конституционного Суда РФ показал, что содержание принципа справедливости для целей налогообложения может зависеть от вида обязательного платежа. В некоторых случаях Суд использует принцип справедливости в широком юридическом смысле и не толкует справедливость для целей налогообложения, используя для аргументации самые расплывчатые термины и слова. В иных случаях Суд может использовать более конкретный и узкий смысл принципа справедливости при разрешении дел о возложении налога (налоговая справедливость).

**Ключевые слова:** Конституция, справедливость, налогообложение, налоговое право, налоговая справедливость, прецедентное право

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### **Introduction**

The Russian Constitution is relatively young; — it was adopted only in 1993. The current Russian Constitution is not detailed; it just forms a framework for current laws in public finance. Only several provisions are devoted to public finance, including budgeting and taxation. Because of the undetailed character of the main legal act, the rulings of the Constitutional Court of the Russian Federation (CCRF) play a significant role in the legal framework for public

finance. This article is devoted to the principle of tax fairness, its legal establishment, and realization in contemporary Russian law with the focus on CCRF's legal positions. The main question is whether the principle of tax fairness might be a legal instrument for dispute resolution in courts? The goal of the article is to identify the mode of making judgements based on the principle of tax fairness in CCRF. It is of certain interest how the Court applies such a vague and blur principle for resolving particular cases. The author has attempted to derive the meaning of the principle of tax fairness from a series of CCRF's decisions.

The research is based upon the theory of presumptive positivism outlined by John Braithwaite (Braithwaite, 2002). The main theses of this theory are:

When the type of action to be regulated is complex, changing and involves large economic interests, (a) principles tend to regulate with greater certainty than rules; (b) binding principles, coupled with non-binding rules, tend to regulate with greater certainty than principles alone; (c) binding principles underlying non-binding rules are more certain if they are embedded in institutions of regulatory communication that foster shared comprehension.

Public finance is an exceedingly difficult and comprehensive sphere, involving opposing economic interests. It is the sphere where the public and private interests collide, so it requires specific regulation. Sometimes public finance needs to abandon a rule in favor of principle underlying certain relations.

Social fairness is a multidimensional, complex category depending on the historical and cultural context. Scholars of law, economics, politics, and sociology study this category, and analyze specific aspects of social fairness.

The theory of fairness originates from Aristotle's ideas of constitutions. According to his ideas on legitimacy, "[all] constitutions are a form of justice, for [a constitution is] a community, and everything common is established through justice (*EE VII9* 1241<sup>b</sup>13-15)" (Miller, 1997:68). Miller argues that Aristotle's treatise on justice deals not only with the virtues of justice, but also with what might be called the "formal" principles of justice, i.e., abstract principles allowing different, correct as well as incorrect, applications (Miller, 1997:68). Aristotle distinguishes two forms of justice, universal and particular, which are reflected in lawfulness and equality. These ideas have found their further development in numerous agreements, research papers, and law, including public finance law. Even nowadays, Aristotle's ideas on justice affect the development of public finance legislation. For example, the issue of proportional income tax with progressive tax elements used in Russia and alternative progressive income tax used in most developed countries is highly debatable, and both supporters and opponents try to defend their own points of view using the principle of fairness and interpreting it in their own way.

The paper highlights the fundamental principle in law with the focus of its interpretation in terms of constitutional justice in tax cases. For the article's purposes, the terms *fairness*, *justice* and *equity* are used as synonyms. This

approach is based upon the study of these terms in relevant literature and conclusion that these terms may be used in the same context regarding taxation.

The principle of social fairness has a constitutional character but is not directly established by clauses of the Russian Constitution and current legislation. In fact, the Preamble of the Russian Constitution reads as follows:

We, the multinational people of the Russian Federation united by a common fate on our own land [...], proceeding from the universally recognized principles of equality and self-determination of peoples, revering the memory of ancestors who have conveyed to us the love for the Fatherland, believe in the good and *justice*...

This is the single mention of social justice in the Russian Constitution. There are two viewpoints on the regulatory features of the Preamble. The first is that the Preamble does not have any normative provisions and, as a result, does not have a regulatory effect. The second point is opposite — the Preamble is a set of legal norm-goals or norm-principles of regulatory effect. In any way, the Preamble plays a significant role in CCRF's activities, especially if applied in interpreting the Constitution provisions. However, CCRF has never made decisions based inclusively on the Preamble.

Given the fundamental role of the principle of fair taxation, constitutions of other countries might have certain provisions related to fairness. For example, Article 282, Paragraph 1 of the Portuguese Constitution 1976 establishes the general procedure for enforcing a decision of the Constitutional Court according to which a law is declared unconstitutional. Whereas Paragraph 4 provides that for the “purposes of legal certainty, reasons of fairness or an exceptionally important public interest, the grounds for which shall be given, the Constitutional Court may rule that the scope of the effects of the unconstitutionality or illegality shall be more restricted than those provided” for general procedure.

The Russian Constitution does not contain a similar provision, but CCRF possesses the same powers, and often rules guided by reasons of justice. The Russian legal system belongs to the continental type of legal system, characterized by the reduced role of courts in law-making. However, CCRF's role is significant for understanding the principle of justice in tax law. The Court's judgements (*Postanovlenia* or *Opredelenia*) are reflected in legislation and practice of taxation. Largely, the principle of justice is of a declarative and vague character. Therefore, its implementation is more often observed at the highest level of justice for resolving the issue of law constitutionality. According to CCRF, the principles of justice and equality are the constitutional criterion for assessing rules<sup>1</sup>. As Charles Perelman wrote, “[...] equity can be achieved only by abandoning legal formalism in cases, where this entails contradictions” (Perelman, 1963:33).

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<sup>1</sup> Russian Constitutional Court (2014). Judgement of 8 July, Russian Federation Collection of Legislation 2014, No. 29, Item 4201.

Public finance, being a system of economic relationships directed at accumulation and distribution of public financial resources is a very important and complex mechanism implementing three functions; 1) regulatory function supporting macroeconomic stability; 2) distributive function supporting the redistribution of public resources within society; 3) function of financial provision for public goods (Musgrave, 2008). All three functions should work simultaneously, and it is possible to assess the state of public finance and public finance law in terms of achieving balance between all functions without any bias. Justice in the sphere of public finance has a specific concept and features reflected in law. Relations in this realm should be built in accordance with the ideas of social justice, where the main goal of public finance is to achieve social fairness and welfare. We believe that tax fairness as a legal principle may be understood and applied at different “levels” according to which the scope of the principle might be widened or constricted. If legislator relies on the widest scope of tax fairness, the supreme or constitutional court relies on narrower scope of tax fairness being “squeezed” in the frames created by the legislation.

### **Legal Principle of Justice or “Formal” Justice in Tax Law**

Charles Perelman singles out the category “formal justice”. He notes that formal justice may reconcile with the different philosophical views and codes of law, predetermining how to be fair in attributing the same rights to all people, and just in establishing different rights to different categories of people, *just* in accordance with Roman law and *fair* in accordance with German law (Perelman, 1963). Perelman points out that when we speak about justice, it should be defined in accordance whether we talk about formal justice or about “one of the innumerable conceptions of concrete justice” (Perelman, 1963).

We understand “formal” justice as the principle established by a country’s constitution, organic, and current laws. The Russian Constitution provisions do not establish the principle of justice directly unlike constitutions of some other countries. For instance, Canada Act, also called Constitution Act of 1982 (rev. 2011) mentions the principles of fundamental justice but does not reveal their content. Part I, section E (7) establishes that “everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”. As for Russia, the principle of justice can be contained not in the corpus of a constitutional act, but in the preamble, which is not of a normative nature, but plays a significant role in interpreting constitution’s articles. Constitutional acts do not often impose “general” justice in society establishing the requirement of justice in a particular social sphere. For instance, Constitution of South Africa 1996 contains Article 192, under which national legislation must provide for an independent authority to regulate broadcasting in the public interest, and to ensure fairness and diversity of views broadly representing South African society. Another example

is Constitution of Swaziland 2005, Article 33 (1), which establishes a requirement of fairness to administrative law and decision-making by the authorities regarding citizens. These examples show both the constitutional and fundamental nature of the principle of justice and that it can be enshrined in a legal act.

Although the general principle of justice is not directly enshrined in the text of the Constitution, in Russia, justice is recognized as an inherent legal principle that can be derived from the Preamble and is of a general character in law. The Russian Constitution of 1993, Article 19, sets forth the principle of everybody's equality before the law and the courts. CCRF indicates that the principle of equality has a constitutional content and forms the legal position related to this principle. For now, the Court applies Article 19 for its judgements and continues to develop it by interpretation.

Russian current legislation in public finance does not contain a single norm aimed at achieving social justice; it sets forth separate rules that, together with the constitutional provisions, form the legal basis for CCRF's decisions concerning social justice and what it "should be like" in Russia. John Rawls (Rawls, 2001) notes that legislation does not enshrine "the constitutional essence and issues of fundamental justice", although it touches upon these issues, which is relevant for tax legislation.

Paragraph 1 of Article 3 of The Russian Tax Code sets forth the universality and equity in taxation, the ability-to-pay principle, and the requirement to impose taxes only by laws. Paragraph 2 of Article 3 establishes the non-discrimination principle that prohibits discrimination based on social, race, nationality, religion and other similar grounds, as well as imposition of differentiated tax rates and tax benefits based on forms of ownership, citizenship of individual taxpayers, and origin of capital. Paragraph 3 of Article 3 contains prohibition on the arbitrary taxes without any economic basis.

Due to the lack of specific legal definition of justice and specific content of the principle, a legislator, public authority, and/or court may interpret this principle differently based on current legal approaches, traditions, existing relations, and previous court decisions, and apply this principle according to their understanding to resolve a particular dispute. Due to the vague and blurred concept of justice, a court can determine only some aspects and features of this legal principle. In one of the judgements<sup>2</sup> the Constitutional Court reasoned that justice, along with equality, neutrality, and non-discrimination, is a part of the equity principle set forth by Russian Constitution. However, earlier in the Yukos case<sup>3</sup> the Court referred to the principle of justice as an independent constitutional principle and did not consider it as an integral part of the general principle of equity under Article 19 of the Russian Constitution.

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<sup>2</sup> Russian Constitutional Court (2017). Judgement of 28 November, Russian Federation Collection of Legislation 2017, No. 49, Item 7532.

<sup>3</sup> Russian Constitutional Court (2005). Judgement of 14 July, Russian Federation Collection of Legislation 2005, No. 30 (Part II), Item 3200.

Sigrid Hemels studied tax fairness as a legal principle in EU law, including in the case law of European Court of Justice (ECJ), and concluded that ECJ does not directly refer to the principle of equity because of its uncertainty, being “highly subjective and leaving room for discretion” (Hemels, 2013), whereas the European Commission refers to it. Unlike ECJ, CCRF frequently resorts to the principle of justice concerning public finance and other issues. In the period from 1995 to 2022, CCRF made 3,440 decisions containing the phrase *principle of justice*. Regarding the principle of justice in taxation, the Court issued 289 judgments: 247 determinations (*Opređenja*) and 41 decisions (*Postanovljenja*) within that period. Following the Constitutional Court’s practice, Russian Supreme Court, courts of general jurisdiction and commercial courts often refer to tax fairness. However, despite the rich court practice of applying the principle of justice, the holistic concept of justice related to taxation has not been worked out.

### Literature Review

Fairness of taxation is a complex category based on the ethical and moral social norms and ideas. It is substantiated that fairness is an immanent feature of law. Many scholars have identified some of the features of justice in taxation and tax law by examining the principle of justice in general (Murphy & Nagel, 2002), or its individual elements and aspects<sup>4</sup>. Tax fairness is being explored both at national levels of taxation and at the level of international tax law (Seto, 2013). Often, scholars work out different approaches to taxation and construction of the tax system based on various philosophical ideas of social justice. More often, such issues as progressive versus proportional income taxation (Roach, 2010), direct versus indirect taxation, consumption versus income taxation are discussed in terms of whether these categories will promote social justice or not.

Allison Christians suggested an interesting approach, considering fair taxation as a basic human right (Christians, 2009). At first glance, this idea may seem obvious, but if we analyze current national tax policies, we may find that governments do not always view their actions through the lens of human rights. Tax fairness is a vague notion that is understood differently by scholars, public authorities, and the state. Alberto Alesina and George-Marios Angeletos highlight differences in the construction of national tax systems in the US and the EU concerning redistribution policies (Alesina & Angeletos, 2005). The principle of tax fairness predetermines not only the features of tax systems, but also taxes as such. If income and wealth taxes are based upon the ability-to-pay principle, then consumption taxes are based upon “welfare”, user charges are based upon goods

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<sup>4</sup> Rawls, *op.cit.* note 9; (Engelisch, 2014; Fried, 2003; Miklos, 2013); Linda Sugin, Theories of Distributive Justice and Limitations on Taxation: What Rawls Demands from Tax Systems, 72 Fordham Law Review (2004). Available at: <https://ssrn.com/abstract=555988>.

consumed, and a head (or poll) tax is based upon equal sacrifice principle (Dodge, 2005). According to Joseph Dodge, a tax fairness norm is a principle according to which the total tax burden is to be distributed among the population, as opposed to a principle, theory, or ideology concerning (1) the ratio of government revenue to GDP (which indicates the volume of state *intrusion* into the private sphere), (2) the legitimacy of government goals, and (3) a general theory of social justice (Dodge, 2005).

A detailed literature review concerning tax fairness is provided by Antony Infanti in *Tax Equity* (Infanti, 2008).

Following Musgrave's research of public finance, taxation, as mandatory withdrawal of a share of private property for public purposes, performs three functions (1) fiscal, aimed at generating public revenues, (2) regulatory, aimed at regulating economy and economic behavior and (3) distribution of property within society. The concept of tax fairness has different content depending on these three functions. David Duff assumes that the fiscal function of taxation relies on the *public benefit* approach and *ability-to-pay* theory whereas regulatory function relies on the fair balance between the tax, purpose of regulation, and distributional effects produced by the tax (Duff, 2008).

Some scholars identify the distinct economic and legal aspects of tax fairness. It is explained by differences between issues studied by academic economists and legal scholars. In Russia, justice in the economic aspect means equal distribution of the tax burden, i.e., distribution in respect of the actual ability to pay tax. Fairness in the legal aspect means equality of a taxpayer's rights and obligations, and non-discrimination on grounds of race, nationality, religion, and other factors. In Western literature, it is traditionally understood through vertical and horizontal equity (Galle, 2008). Vertical tax justice means fair distribution of tax burden between different categories of taxpayers, mainly between the rich and the poor whereas horizontal tax justice means fair distribution of tax burden among taxpayers of the same category. Such structuring of equity is reflected in the authoritative Russian textbook on the theory of taxation (Maiburov, 2010). Joachim Englisch emphasizes the difference between economic and legal views on the ability-to-pay principle as one of the components of social justice in taxation. While academic economists consider the solvency principle as one of the tax system features and believe that neutrality and efficiency are "the foundations of the optimal taxation approach", legal scholars "adopted the insolvency principle as the tax justice standard based on considerations of social solidarity and social redistribution" (Englich, 2014).

Many Russian scholars both in the field of economics and in the field of law have studied the principle of fairness in taxation, including within the dissertation research (Eremenko, 2018; Lopatnikova, 2011; Urubkova, 2011; Shepenko, 2006). Irina Urubkova argues that tax fairness has a comprehensive content and covers several different principles, such as 1) principle of universality,



2) principle of equality; 3) principle of solvency, and 4) principle of proportionality (Urubkova, 2011). This is the most traditional view of Russian jurists on the principle in question. Eugenia Eremenko looked at the principle of fairness in taxation in economic terms and offered to broaden the theoretical understanding of fair taxation according to the contemporary concept of justice. The author proposes a new understanding of fair taxation as tax inequality caused by differentiation of tax components that provide a higher standard of life for poorer taxpayers (Eremenko, 2018:26). Eremenko's theoretical ideas are based on Rawls' theory of justice. John Rawls developed two basic principles of justice that can be used in taxation as a social institution and as an element of the legal system (Rawls, 1999; O'Kelley, 1981). John Rawls argues that,

First: each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others. Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all (Rawls, 1999).

These ideas are consistent with Aristotle's theory of justice: "Unfair distribution will occur when equals receive unequal things or unequals receive equal things". Aristotle calls the governing principle here *geometrical proportion* (Miller, 1997:2, 70). Fred Miller notes that the idea that justice consists of proportionate equality is found in Aristotle's predecessors such as the Pythagoreans (5 1132<sup>b</sup>21-2), Isocrates (Nicocles, 15, and Areopagiticus, 21-2), and Plato (Laws, VI 757<sup>c</sup>1-7). Russian scholars, following Rawls' ideas of distributive justice and substantiating progressive individual income tax, as Eugenia Eremenko does, do not take into account that John Rawls suggested a flat rate consumption taxation instead of progressive income taxation as a better way to achieve tax equity<sup>5</sup>. Given attractiveness and obviousness of Eremenko's understanding of fair taxation, these ideas are poorly implemented in Russian law and taxation practices because of huge property differentiation, lack of non-taxable minimum income, and classical progressive income taxation. However, such understanding of fairness in taxation is not new to the Russian legal system and theory.

Nowadays, according to Russian legal doctrine, equality acts as a core element of justice in public finance. The general principle of equality established by Article 19 of the Russian Constitution is subject to differentiation based on objective criteria. Equality cannot be reached without adequate and appropriate differentiation since it implies equal rights and obligations only under similar conditions, or horizontal equality. This rule can be applied both to private entities, including taxpayers and recipients of grants and investments from government budgets, and to public entities, including federal (nationwide), regional

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<sup>5</sup> Rawls, *op.cit.* Note 9, 161.

(subnational) state authorities, and local governments. As William Anderson argues,

In an effort to achieve *justice* in taxation, the courts have developed the doctrine that when distributing the tax burden there should be *reasonable classification* of the subjects of taxation. Tax equity also requires that those in different circumstances bear appropriately different taxes and those in similar circumstances bear similar taxes thus ensuring optimal justice for all (Anderson, 1951:26).

Thus, tax fairness mainly affects the issue of tax burden; therefore, this article does not address the issue of intergovernmental distribution of tax revenues. Tax fairness, as a component of the principle of justice in public finance, refers to the balance of public and private interests and has nothing to do with fiscal federalism or the balance of interbudgetary interests. Concerning the latter scholars rarely refer to social justice as a criterion for optimal interbudgetary relations. In this case, scholars speak about effectiveness rather than fairness.

### **Equivalence in Taxes and Benefits Interaction as Components of Tax Justice or Understanding Tax Justice Concerning Social Taxes (Social Insurance Contributions) in CCRF's Decisions**

In 1999, CCRF formulated the principle of justice concerning insurance premiums for compulsory social insurance (social taxes). The Court determined that fairness of financial contributions for compulsory social insurance means recognition of the *informal equality* of insurance premium payers supported by differentiation of payer categories, and proportionality (non-excessiveness) of insurance premium rates and their correlation with pensions. The Court added that it was necessary to ensure *equivalence* between contributions paid into the budget system and future insurance benefits and that imposition of a non-equivalent tariff on labor pensions did not take into account the constitutional principles of fairness and equality<sup>6</sup>. To facilitate such equivalence, the Court proposed establishing a minimum income for collecting contributions and a maximum income limiting contribution payments, as well as inversely proportional progressive tax rates for higher incomes. Considering the requirement of fairness in the sphere of social insurance, the Court proceeded from the necessity to implement various tools and mechanisms to maintain the balance between payments and receipts from the payers' view. The Court points out, that failure to use any tools to differentiate payers, and establish excessive restriction of property rights is inconsistent with Articles 35 (Paragraphs 1, 2) and 55 (Paragraphs 2, 3) of the Russian Constitution. Thus, the Court recognizes some

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<sup>6</sup> Russian Constitutional Court (1999). Judgement of 23 December, Russian Federation Collection of Legislation 2000, No. 3, Item 353.

provisions of the Law on Tariffs of Social Insurance Contributions 1999 unconstitutional for violation of the principle of justice.

In *Flemming v. Nestor* 363 U.S. 603 the US Supreme Court examined another aspect of equivalence between social security contributions (payments into the public system) and social security benefits (payments out of the public system). The Court stated that:

each worker's benefits, through flowing from the contributions he made to the national economy while actively employed, are not dependent on the degree to which he was called upon to support the system by taxation. It is apparent that the noncontractual interest of an employee covered by the Act cannot be soundly analogized to that of the holder of an annuity, whose right to benefits is bottomed on his contractual premium payments.

In this case, the Supreme Court settled the dispute over the payment of social insurance benefits to persons who had been deported from the US according to immigration legislation. The opposing party viewed social security as an agreement between the US government and payers, so it stated that the US government could not waive its obligations. The US Supreme Court rejected that argument and drew attention to the public character of social insurance contributions. The concept of the necessity to achieve equivalence between paid contributions and received benefits should not be understood as equivalence from the view of civil law principles. Such equivalence is of a different kind.

CCRF understands the fairness with respect to social insurance in the way described above since these relations have a private law origin. Recently, they have been increasingly detached from civil law, acquiring a public law character, and bringing them closer to taxes. This thesis may be supported by the US Supreme Court case (*Flemming v. Nestor*). As for taxes, CCRF has never mentioned their equivalence since contemporary taxation is based upon the assumption that it is impossible to achieve a balance between taxes and public goods in all cases.

The 2003 CCRF Determination (*Opredelenie*) refers not to the equivalence but to the relation between the payer of social taxes (social insurance contributions) and potential benefits the taxpayer may receive. The case concerns the advocates' tax liability and social benefits they received. Tax legislation in force at that time set forth tax liability for advocates as self-employed persons including the obligation to pay uniform social tax which substituted social insurance contributions in 2002 — 2010. The advocates were intitled to pay the temporary disability insurance tax on the voluntary basis. However, they could not receive actual social benefits. Pointing out that such a disconnection between a payer and benefits is violation of legal framework, CCRF ruled that tax exemption of self-employed advocates and granting compulsory social benefits at the same time could mean shifting the burden of tax burden from advocates to other categories of taxpayers which is not consistent with the principle of fairness

and Paragraph 3 of Article 17 of the Russian Federation Constitution according to which implementation of human rights and freedom should not violate the rights and freedom of other people.

In fact, in Russia, the concept of equivalence as a component of fairness in taxation is not reflected in law. Since 2021, the actual personal income tax model has been based on a partially progressive tax rate scale with no exemption. That model imposed by Russian Tax Code has not been examined by CCRF from the view of its constitutionality. As William Anderson argues, “in the absence of constitutional restrictions, the legislature's legal authority to set *tax rates* is unlimited. Therefore, income tax rates in the top brackets may be brought to the very point of confiscation, if the legislator sees fit” (Anderson, 1951:32). The extremely high tax rates can be imposed in critical and difficult situations for a nation, such as war or emergency. Otherwise, tax rates and tax burden in general should be consistent with the principle of fairness in the times of peaceful existence. Social justice is a highly flexible category that changes under the influence of different factors. In every country and in every historical period, fair taxation has been understood differently.

### **Non-discrimination and Ability-to-Pay Approach as the Components of Tax Fairness in CCRF's Decisions**

Non-discrimination principle is a crucial element in the idea of tax fairness. This principle can be applied separately or as a part of tax fairness. Due to more sound and clear content of non-discrimination, it can serve as an independent requirement for taxation. Non-discrimination is essential in the issues of international taxation or tax benefits. Generally, non-discrimination principle is set out in Article 3 of the Tax Code. This provision prohibits to differentiate the amount of tax liability on social, racial, national, religion or likewise grounds. Differentiation of tax rates or advantages depending on the form of ownership, citizenship or origin of capital is prohibited. The issues of non-discrimination in international taxation are topical and should be subject of a separate scientific study. The purpose of this paper is to reveal understanding of tax fairness by CCRF in the cases of tax legal mechanism as a whole and/or individual tax liability components. The author has highlighted only those CCRF decisions that were based on the principle of tax justice while the principle of non-discrimination is deemed as a component of tax fairness.

In essence, non-discrimination principle requires ensuring tax equality including actual equality in the distribution of tax burden. In 1998, CCRF opposed the formal understanding of tax equality to substantial tax equality. At that time progressive income tax was applied. The Court pointed out that the equality principle established by Article 19 of the Russian Constitution requires compliance with the ability-to-pay principle in terms of personal income tax. CCRF directly referred to the requirement of mandatory solvency consideration

as a component of tax fairness. CCRF stated that in relation to tax liability (Art. 57 of the Russian Constitution) the equality principle in a welfare state means that equality should be achieved through fair distribution of income and differentiation of taxes and charges.

In 1996, CCRF examined a number of regional laws on migration issues. One of them, Moscow Law of 1994 established a fee for residence registration. The fee was found to be a violation of the tax paying capacity principle because the fee increased tax burden for those who moved domestically. In fact, the fee created barriers to move and reside freely within the country. CCRF stated that Moscow Law of 1994 did not take account of tax paying capacity of citizens and imposed a per capita tax, which meant charging a significantly larger share from the poor than from the rich. This case is a sound and rare example when CCRF identified tax fairness with the distribution of tax burden. Rareness of such decision can be explained by the fact that issues concerning the amount and distribution of tax burden are within the scope of tax policy. It is unlikely that CCRF will make such a decision again. Henceforth, the issues of proportional, progressive, or partially progressive income tax have not been in CCRF's focus. It should be noted that CCRF is a politically neutral authority, thus, the Court must clearly delimit the issue of compliance with the legal principle of tax fairness from the issues of fiscal policy. The latter explains why, at present, CCRF often refers to legislator's discretion to impose taxes, rates or benefits<sup>7</sup>.

In 2003 in CCRF's practice, the issue on non-discrimination was raised. Tax legislation in question imposed a state fee for all educational institutions except for those that were public organizations funded by the federal government. Thus, a municipal college had to pay the state fee while federal educational institutions did not. That fact was regarded by the municipal organization as discrimination on the form of ownership in violation of tax fairness principle, however, CCRF concluded that there was no discrimination because tax differentiation was not based on the form of ownership but on the source of funding. Unfortunately, CCRF did not examine the ownership criterion in the light of discrimination. It is obvious that form of ownership determines funding sources; the latter are closely related to the former and could be considered as its consequence. We assume that tax legislation under study could have induced discrimination, however, CCRF did not decide on the merits.

### **Procedural Due Process as a Component of Tax Justice in CCRF's Decisions**

Procedural due process facilitates fair and impersonal judgments in criminal and civil procedure law and is a very important component of fair taxation. In

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<sup>7</sup> CCRF's decisions No. 19-P of 2015, No. 34-P of 2017, No. 47-P of 2018; Definitions No. 169-O of 2004, No. 468-O-O of 2009, No. 2518-O of 2016 and others.

Russia, all taxes, public fees, and other charges are established only by law. CCRF has set forth this rule by interpreting Article 57 of the Russian Constitution. As CCRF stipulated, a tax or fiscal charge can be considered as legally imposed if all the necessary components of tax liability are established by a legislative act, i.e., in order to levy a tax, it is necessary to list all its mandatory elements only in a legislative act, not in a subordinate administrative act<sup>8</sup>. In fact, there is a difference between the imposition of a tax and the imposition of any other public fee. In 2008, CCRF declared that delegation of the federal legislator's power to establish a public fee to the Russian Government cannot be considered as arbitrary and unreasonable. The opposite would mean violation of the principle of fairness. The Court assumed that the charge set forth by the Government should be reasonable, fair, and commensurate with the costs for public services<sup>9</sup>. The Court recognized that the delegation of power to set forth a charge by the legislator to the government did not violate due procedure for collecting a license fee that was not included in the system of taxes and charges.

In Russia, the contemporary system of taxes and charges does not include all fees, but the most significant ones. This system includes all taxes and some other government fees, such as state duty for different public services. The system does not include customs duty, for instance. It is significant that in the aforementioned judgement the Court determined that a public fee should be fair and commensurate with public expenditure. Later the Court expressed the opposite point of view<sup>10</sup>. The Court ruled that the fee paid for a public service is a specific kind of fiscal charge, and that there was no need for its amount to be equivalent to the government spending on the service. The Court added that the fee should be levied by the federal legislator based on principles of fairness and proportionality on the assumption of the necessity of maintaining public order. Thus, in the 2008 judgement the Court tied the Government's power to establish fees with the costs of public services, and in the 2013 judgement the Court reversed its decision.

Interestingly, CCRF can recognize a fiscal penalty as fair considering the government's intentions expressed in the draft law only. In a 2016 judgement, the Court heard the fiscal charge case on heavy vehicles<sup>11</sup>. CCRF recognized that charge as constitutional and, among other arguments, pointed out that the Russian Government had submitted to Parliament the draft law which would set forth certain transport tax benefits for heavy transport owners. The draft law would optimize and reduce the tax burden for that category of taxpayers. The Court

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<sup>8</sup> Russian Constitutional Court (1997). Judgement of 18 February, Russian Federation Collection of Legislation 1997, No. 8, Item 1010.

<sup>9</sup> Russia's Constitutional Court (2008). Judgement of 16 December, Russia's Constitutional Court Review. 2009, No. 3.

<sup>10</sup> Russian Constitutional Court (2013). Judgement of 23 May, Russian Federation Collection of Legislation 2013, No. 22, Item 2862.

<sup>11</sup> Russian Constitutional Court (May 2016). Judgement of 31 May, Russian Federation Collection of Legislation 2016, No. 24, Item 3602.

announced that the government recognized the need to adjust the legal framework in accordance with the principles of proportionality and fairness. In such a way, CCRF recognized the tax penalty to be a fair liability based on the legislative initiative. Undoubtedly, the decision was based on a lot of other facts and arguments, but only that argument led the Court to recognition of tax liability as fair.

In 2016, CCRF examined another aspect of procedural due process as a component of fair taxation. The municipal government of the city of Bratsk stated that Federal Law No. 135-FZ of July 29, 1998, on Valuation in the Russian Federation, violated its right to tax and budgetary activities since it did not provide for any possibility to contest the cadastral value of lands within the locality<sup>12</sup>. The fact is that in Russia, the cadastral value of lands for taxation purposes is set by regional state bodies, despite the fact that the land tax is paid into municipal budgets. Only the landowner has the right to challenge the current cadastral value of a particular property. As Bratsk administration suggested, such a situation does not allow realizing its economic interests. The Court recognized the situation as constitutional based *inter alia* on the principle of tax fairness. It pointed out that cadastral evaluation in accordance with rules and procedures ensures certainty in taxation and creates preconditions for fair taxation. Otherwise, it would lead to unlimited opportunities for municipal authorities to change the cadastral value according to their fiscal interests. CCRF stated that the balance of public and private interests supported fair taxation, and the right of a local government to challenge the cadastral value would upset this balance.

CCRF has repeatedly stated that an appropriate procedure concerning formation of tax liability or tax administration facilitates legal certainty and justice in public finance, especially in cases of legal responsibility. In taxation cases, the Court applies the general principle of justice in relation to many different social areas and the specific principle of justice in relation to public finance law. For example, in the case of Yukos Oil Company (2005), CCRF applied the general principle of fairness for resolving the issue of the statute of limitations. CCRF determined:

The three-year statute of limitation established by Article 113 of the Russian Federation Tax Code is universal and single for all kinds of tax offences. [...] Meanwhile, the principles of fairness, legal equity, and of proportionality which connects to the former [...] stipulate the assurance of the same scope of legal guarantees for all taxpayers. These principles assume the use of another approach to those taxpayers, who counteract tax control and try to use the statute of limitation contrary to its assignment, other taxpayers' rights, and public interests.

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<sup>12</sup> Russian Constitutional Court (July 2016). Judgement of 31 May, Russian Federation Collection of Legislation 2016, No. 29, Item 4900.

Therefore, CCRF settled the Yukos case in favor of the tax administration using the general legal principle of fairness. CCRF often uses abstract and vague terms to resolve cases. In fact, CCRF deviated from the statute of limitation for tax fairness purposes. The case shows that CCRF exercises broad powers to interpret the provisions of the Russian Constitution. As Colin Diver wrote, “vagueness is a common affliction of regulatory standards, especially those that rely on such open-ended terms as ‘in the public interest’, ‘feasible’, or ‘reasonable’” (Diver, 1989). The use of open-ended terms and notions is not appropriate for creating laws, but it is appropriate for rulings by courts based on the use of legal principles. Therein lies the difference between principles and rules that John Braithwaite commented on (Braithwaite, 2002:1, 5—7). In the case of Yukos, the Court interpreted the Tax Code provisions in such a way that the previous understanding of the statute of limitation in tax law could not be used. All legal provisions are final, and decisions are applied according to them. New understanding of the rule means, in fact, a new rule. The Yukos case illustrates the validity of Braithwaite’s thesis on the presumptive positivism, “the rules have a priority, but not an absolute priority. If they produce a clearly unreasonable result, not merely a suboptimal result, when viewed from the perspective of the wider normative content, then the rule can be abandoned in favor of some more profound principle” (Braithwaite, 2002:25). Subsequently, the European Court on Human Rights (ECHR) recognized this legal position of CCRF as contradicting Article 1 of Protocol 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>13</sup>.

The ECHR position is consistent with the US Supreme Court decision in *Rothensies v. Electric Storage Battery Co.* of 1946 on the issue of the statute of limitations. From April 1919 to April 1926, a taxpayer paid excise taxes on certain sales and deducted the tax from income before calculation of its income tax. In July 1926, he applied for a refund of the excise taxes paid between 1922 and 1926 (refund of those paid earlier being barred by the statute of limitations), brought a suit and obtained a positive judgment in 1935. Subsequently, the Commissioner treated the refund as income for 1935 and charged additional income and excess profits taxes. The taxpayer paid the deficiency so assessed and filed a claim for a refund, arguing that the refund of the excise taxes was not income, but even if it is recognized as income, the taxpayer should satisfy his right to a refund of excise taxes paid beyond the limitation period, that is, in the period from 1919 to 1922<sup>14</sup>. In the case, the Supreme Court referred to the *Order of Railroad Telegraphers v. Railway Express Agency* of 1944<sup>15</sup> read as follows:

<sup>13</sup> ECtHR, *Yukos v. the Russian Federation*, ECtHR Judgement (20 September 2011) App. No. 14902/04.

<sup>14</sup> *Rothensies v. Electric Storage Battery Co.*, 329 U.S. 296 (1946). Available at: <https://supreme.justia.com/cases/federal/us/329/296/>

<sup>15</sup> 321 U. S. 342, 321 U. S. 348-349



Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that, even if one has a just claim, it is unjust not to put the adversary on notice to defend within the period of limitation, and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

Adhering to that position the Supreme Court decided in favor of tax authorities arguing that “...a statute of limitation is an almost indispensable element of fairness as well as of practical administration of an income tax policy... As statutes of limitation are applied in the field of taxation, the taxpayer sometimes gets advantages and at other times the Government gets them. Both hardships to the taxpayers and losses to the revenues may be pointed out. They tempt the equity-minded judge to seek for ways of relief in individual cases.” As Richard J. Wood, a US Supreme Court jurisprudence researcher on tax equity observed in that case, “...the individual fairness claim was subordinated to a systemic fairness claim of the statute of limitations” (Wood, 2006:434).

The CCRF case and the US Supreme Court case both deal with the issue of the limitation period in tax law; however, CCRF referred to *bona fides* of parties while the US case does not consider this circumstance. Thus, guided by tax fairness both courts decided differently, and we do not assume that the decisions were determined by fiscal interests, despite the fact that both were made in favor of the state. The issue of applying the statute of limitations in light of tax equity was continued by the US Supreme Court in *Badaracco v. Commissioner (1984)*<sup>16</sup>. The Supreme Court held: “where a taxpayer files a false or fraudulent return but later files a nonfraudulent amended return ... a tax may be assessed “at any time,” regardless of whether or not more than three years have expired since the filing of the amended return.” The comparability of *Badaracco case* and *Yukos case* lies in horizontal equality. The Courts have examined the opportunity of the same tax treatment to taxpayers in different situations. Distinct circumstances of the taxpayers were subjected in those cases. In fact, CCRF recognized that Yukos was not in the same conditions as other taxpayers and then applied the principle of fairness to substantiate a formal violation of the limitation period. *Badaracco* decision was made similarly.

The analysis of the rulings demonstrates that in some cases, CCRF uses the principle of fairness in a broad legal meaning to resolve cases on tax offenses and liability. In such cases, the Court does not interpret fairness for tax purposes and uses the vaguest terms and words for its arguments. Such cases demonstrate the reference to horizontal equity; whilst, in other cases, the Court may use a more

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<sup>16</sup> *Badaracco v. Commissioner*, 464 U.S. 386 (1984). Available at: <https://supreme.justia.com/cases/federal/us/464/386/>

specific and narrow content of tax fairness to justify the imposition of a tax or the amount of tax liability. The latter cases show the reference to vertical equity. In his analysis of US Supreme Court decisions on tax fairness, Richard J. Wood came to similar conclusions. He pointed out that the Court applied the principle of tax fairness differently depending on circumstances and, most importantly, the subject matter of the case. If the case concerns tax burden or tax liability, then the Supreme Court establishes “...the need for preliminary analysis concerning the relationship between taxes paid and benefits received in assessing tax equity.” Concerning the cases of non-discrimination or alike, the Court resorts to systemic horizontal equity analysis “...on the basis of readily ascertainable administrative consistency, regularity, and certainty, rather than on the frequently elusive substantive horizontal equity norms of income, wealth, and consumption” (Wood, 2006:479). The former approach referring to vertical equity has not been used by CCRF strictly rather than the latter.

### **Economic Basis as a Component of Tax Justice in CCRF’s Decisions**

The requirement to tax to rely on economic basis has been set forth in the Russian Tax Code, Paragraph 3 of Article 3 — Taxes must have an economic basis and may not be arbitrary. Taxes and charges that prevent citizens from exercising their constitutional rights are unacceptable. This requirement being an integral part of tax fairness strongly connects to the non-discrimination principle since both fundamental requirements protect human rights and freedom from obstruction.

In 2019, the disposal fee case was settled using the economic basis requirement. The case concerned paying the recycling charge for the temporary importation of a vehicle into the Russian Federation. The main applicant’s argument was that the vehicle would be exported in the future and the disposal process was planned to take place in another country, not in the country where the applicant should pay the fee. However, it was a continuous practice to levy a recycling fee regardless of the nature of import regime according to the Federal Law on Production and Consumption Waste No. 89-FZ of June 24, 1998. In 2019, the Court indicated that the fundamental constitutional principles of taxation, such as fairness, impartiality, and proportionality, should apply to all public fiscal charges, including the disposal fee. The Court announced it unfair that payers should pay the same charge in substantially different conditions; the environmental impact of vehicles after their import for permanent domestic consumption or for temporary consumption is different, so charges should be different as well. The Court stated that such an important taxation principle as the principle of the economic basis of tax has been derived from the three fundamental principles of taxation<sup>17</sup>.

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<sup>17</sup> Russian Constitutional Court (2019). Judgement No. 30, Item 4412 of 19 July, Russian Federation Collection of Legislation 2019.

In 2021 CCRF's case<sup>18</sup>, the economic basis requirement was not directly mentioned whilst that aspect of tax fairness was affected. The case concerned the value-added tax (VAT). The claimer was a company as a party to a lease agreement with the municipal government. The agreement was concluded at the VAT rate of 18 per cent but then the rate went up to 20 per cent. The company claimed to re-evaluate the price in the agreement, but the municipal government refused to change the terms because the lease fund had not been increased. The claimer stated that the increase in the amount of VAT at the same agreement price meant shifting of tax burden to the agreement performer that was inconsistent with the VAT concept as an indirect tax. In fact, the claimer stated that the tax must be paid out of its economic basis. CCRF's decision was adopted in favor of the municipal government because legislation in question set forth the right to change the agreement price within the initial budget allocation at its own discretion. If the volume of budget allocation is not sufficient to compensate for the difference in VAT amounts, the agreement price should remain the same. CCRF concluded that such legal framework is consistent with the principle of justice, the rule of law, equality, legal certainty, and supports citizens' trust in law and state. In effect, CCRF held that the legal framework based on the voluntary distribution of potential tax burden risks between private and public entities limited by initial budget allocation met the requirement of economic basis.

### **Conclusion**

1. Compared to European Court of Justice, CCRF as well as US Supreme Court actively refers to the principle of fairness to resolve disputes in taxation and decide whether tax law provisions comply with the provisions of the Constitution.

2. The analysis of CCRF judicial practice shows that the content of tax fairness depends upon the type of payment. As for social insurance contributions, the Court has emphasized the need to establish an equivalence between contributions and future insurance benefits. Tax fairness for "net" taxes does not include the requirement of equivalence. It is due to the different nature of social insurance premiums and taxes. Regarding the state duty which is a fee for a public service the Court has demonstrated a controversial position. In some judgements the Court assumes that a fair state fee should be equivalent to the cost of a public service, but in others it assumes that it is an optional requirement. Instead, US Supreme Court resorts to the analysis of the tax burden and related public benefits to resolve disputes on tax liability in the context of tax burden sharing and implementation of vertical tax equity.

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<sup>18</sup> CCRF's Determination (Opredelenie) No. 2134-O of 2021.

3. In some cases, CCRF argued fairness in a broad legal sense to settle cases on tax offenses or liability, without interpreting fairness for tax purposes and applying the vaguest terms and words for argumentation. Such cases demonstrate the reference to horizontal equality; whilst, in other cases, the Court has used a more specific and narrow content of tax fairness to justify the imposition of a tax or tax liability. The latter cases demonstrate the reference to vertical equality.

4. In a number of CCRF decisions on tax fairness there is a rare case (1996) where CCRF identified tax fairness with the distribution of tax burden in accordance with a progressive scale. It is obvious that issues on the amount and distribution of tax burden are within the tax policy. Henceforth, the issues of proportional, progressive or partly progressive income tax have not been in CCRF's focus. CCRF must clearly distinguish between the issue of the legal principle of tax fairness and the issue of fiscal policy. The latter explains why, nowadays, CCRF often refers to legislator's discretion to establish taxes, their rates and/or benefits.

5. The Constitutional Court of the Russian Federation is always bound by the current legal paradigm, political and economic context. The Court does not settle cases concerning the fundamental basis of the tax system such as the choice of proportional income taxation rather than the progressive model. The Court assumes that a prevailing system of relations is *a priori* fair, and it can only "adjust" some individual components of this system. No tax that has been examined by CCRF from the point of view of its constitutionality has received the verdict of being unfair.

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