NATIONAL RESEARCH UNIVERSITY
HIGHER SCHOOL OF ECONOMICS

Kozyrin N. Aleksandr

**A FORFEIT IN ACCORDANCE
WITH THE RUSSIAN TAX LAW: A
MEANS OF SECURING THE
PERFORMANCE OF TAX DUTY
OR A MEASURE OF
RESPONSIBILITY FOR A
VIOLATION OF TAX RULES?**

BASIC RESEARCH PROGRAM

WORKING PAPERS

SERIES: LAW
WP BRP 81/LAW/2018

**A FORFEIT IN ACCORDANCE WITH THE RUSSIAN TAX
LAW: A MEANS OF SECURING THE PERFORMANCE OF TAX
DUTY OR A MEASURE OF RESPONSIBILITY FOR A
VIOLATION OF TAX RULES? ²**

This article examines one of the topical issues of Russian tax law, namely, the issue regarding the definition of a forfeit under the current Russian legislation on taxes and charges.

The paper analyses the changes in the legal nature of forfeits under the Russian tax legislation—from the measure of responsibility for violation of tax legislation (in the 1990s) to the means of securing the performance of tax duty (with the entry into force of the Russian Tax Code in 1999).

The research identifies the reasons for the alteration of the definition of a forfeit under Russian tax law and assesses the consequences for maintaining the balance of public and private interests in the tax law.

The research formulates proposals on improving the legislation regulating tax relations for the computation and payment of forfeits.

Keywords: tax law; fiscal principle; balance of public and private interests; tax duty; securing the performance of tax duty; measure of responsibility for a violation of tax rules.

JEL Classification: Z

¹ Doctor of Juridical Sciences, professor, head of department of financial, tax and customs law of National Research University “Higher School of Economics”.

E-mail: kozyrine@hse.ru

² The article was prepared within Academic Fund Program at the National Research University Higher School of Economics (HSE) in 2017—2018 (grant №17-01-0063) and supported within the framework of a subsidy granted to the HSE by the Government of the Russian Federation for the implementation of the Global Competitiveness Program.

Introduction

The importance of tax revenues for the state and society is not in doubt, and the history of the few attempts of individual states to abolish taxes on their territory are historical curiosities.

Tax is a fundamental feature of the state as is its population, territory and public authority. By exercising tax sovereignty on its territory, the state establishes taxes and forms tax legislation, one of the principles of which is fiscalism.

The principle of balanced fiscalism and the achievement of a balance of public and private interests in tax law

The modern Russian taxation policy and the legislation on taxes and charges are distinguished by balanced fiscalism, which is aimed at meeting the state's needs, including covering government expenditures for activities carried out within the framework of social policy, and which, on the other hand, takes into account the legitimate interests of taxpayers, contributes to the creation of a favorable economic climate for developing of entrepreneurship and attracting foreign investors to Russia.

The balance of public and private interests in the execution of state regulation, including taxation issues, are, in the words of the Constitutional Court of the Russian Federation, "constitutionally protected values". In its Decision of July 14, 2005 No. 9-P the Constitutional Court substantiated the need to achieve a balance between public and private interests in securing the constitutional duty relating to the payment of taxes: "As an interference in the field of private property, taxes are an example of intrusion into the field of fundamental rights. At the same time, the constitutional duty to pay taxes is unconditional and binding. Based on constitutional law, the purpose of the constitutional obligation to pay taxes is to raise funds that are necessary for public legal entities to cover public expenditures while simultaneously taking into account the private-law interests of taxpayers as an independent constitutional value. The search for an equilibrium between these two constitutional values is designed to ensure a constitutional duty to pay taxes".

The Constitutional Court also adhered to this position in subsequent decisions (Decision of March 24, 2017 No. 9-P, Decision of December 8, 2017 No. 39-P, etc.).

An institute to secure the performance of tax duty

The institute to secure the performance of tax duty is aimed at protecting the fiscal interests of the state with the concurrent observance of the legitimate interests of taxpayers. The nature of this institute of tax law and its substantial heterogeneity are conditioned to the peculiarities of the subject of legal securing, namely, the nature of securing tax duty. The fiscal principle of tax law is directly related to the ultimate result of the securing the performance of tax duty.

Russian constitutional law, by assigning for each person a duty to pay legally established taxes and charges (Article 57 of the Constitution of the Russian Federation), at the same time specifies that in order to enforce this public (constitutionally legal) duty, the legislator has the right to establish measures of state coercion, which may include fines (measures of tax responsibility), and restorative measures, which ensure the securing of the constitutional duty of taxpayer on payment of taxes—the payment of arrears and reimbursements of damage from untimely and incomplete payment of tax (Decision of the Constitutional Court of July 15, 1999 No. 11-P).

The Tax Code, without giving a definition to the institute of securing the performance of tax duty, contains an exhaustive list of means in which the performance of tax duties can be secured. Three groups of approaches are provided in this list.

The first group consists of means of voluntary securing the performance of tax duty, or means of securing the payment of tax. This includes a pledge of property, a suretyship and a bank guarantee³. These means were adopted by the tax law from civil law. However, in order to regulate tax relations, which include a

³ The bank guarantee was not immediately included in the list of means of securing performance of tax duty contained in the Tax Code of the Russian Federation. It was added to the legislation on taxes and charges only in 2013, after it was very effectively used as a means of securing performance of duty with regard to customs duties.

pledge, a suretyship or a bank guarantee, norms of tax law are used. Norms of civil law can only be applied if this is directly stipulated by the legislation on taxes and charges. The boundaries of the civil law regulation of relations on securing the performance of tax duty with the use of a pledge, a suretyship or a bank guarantee are also established in the Civil Code, according to which civil law does not apply, unless otherwise provided by law, to property relations based on administrative or other subordination of authority by one party to another, including tax relations. (Article 2 of the Civil Code).

The use of means to secure the performance of tax duty represented in the first group is associated, as a rule, with a change of the period in the performance of tax duty and granting to taxpayers of a deferral (installment plan) of payment of taxes.

The challenging situation in the Russian economy, as a result of the sanctions policy of western countries, makes Russian taxpayers apply more often than usual for permission to postpone the performance of the tax duty and, as a consequence, use the means provided by the legislation on taxes and charges for the means of securing the performance of duty with regard to the payment of tax and customs payments. Such a situation requires an optimal balance of the fiscal interests of the state and the legitimate interests of taxpayers.

The second group is represented by means to secure the performance of tax duty with an imperious, public-legal nature. It includes the suspension of bank accounts and the arrest of property. These means, in contrast to the first group, correspond to a coercive order of securing the performance of duty and relate not to the voluntary payment of tax but to its exaction.

If the use of a pledge of property, suretyship or a bank guarantee as a means of securing the performance of duty is aimed primarily at the assurance of the material interests of the state, then the means combined in the second group, first of all, make taxpayers, in full and timely manner, perform their tax duty. In the event that the value of the arrested property or funds relating to bank accounts whose operations were suspended are comparable to the size of the arrears, then

these securing tools can also effectively perform the function of guaranteeing the state's material interests.

The public legal nature of the coercive means to secure the performance of tax duty presupposes the existence of procedures for their application (for example, in case of arrest of property—the existence of the prosecutor's authorization, the presence of witnesses, the guaranteed presence of the taxpayer or his representative for the inventory of the property subject to arrest, etc.).

In the third group, a forfeit should be allocated. Its appearance in the tax legislation as a means of securing the performance of tax duty raises numerous questions.

A forfeit as a means of securing the performance of tax duty: three inconvenient questions to the Russian legislator

Question one. What forced the legislator to radically change the assessment of the legal nature of a forfeit in tax law?

A forfeit in modern Russian law did not emerge as a means of securing the performance of tax duty, but in a "traditional" form customary for it—as a measure of responsibility for a violation of legislation: “A taxpayer who has violated the tax legislation, in the cases prescribed by law, is liable in the form of: [...] c) collecting forfeits from the taxpayer in the event of a delay in the payment of tax in the amount of 0.2 percent of the unpaid tax amount for each day of delay of payment, starting from the established period for payment of the detected delayed amount of tax, unless other forfeits are provided for by the law. A forfeit exaction does not exempt a taxpayer from other types of responsibility” (Article 13 of the Russian Law of December 27, 1991, No. 2118-1 “On the Foundation of the Tax System in the Russian Federation”). From 1991 to 1999, a forfeit in Russian tax law was a measure of responsibility for a violation of tax law, and since 1999 it has evolved from a tax sanction into a means of securing the performance of tax duty. Such a

metamorphosis, unfortunately, is not uncommon for Russian tax law⁴, and it does not contribute to the formation of dogmatic tax law.

We can assume that the change in the assessment of a forfeit was caused by the law enforcement practice established at that time. The tax legislation in force in the 1990s defined a forfeit as a measure of responsibility for a violation of tax legislation, and did not focus attention on the *restorative* character of such responsibility, and for the same violation of tax legislation, a measure of punitive responsibility was imposed on the taxpayer twice—by fine and a forfeit. This interpretation of the nature of a forfeit resulted in a violation of the legal principle of *non bis in idem*. The Constitutional Court, in its decisions, explicitly supported the inadmissibility of repetitively bringing to legal responsibility: "Deviation from this principle would lead to clearly excessive restrictions that does not correspond to the purposes of protecting constitutionally significant interests and, in fact, to belittling constitutional rights and freedoms" (p. 4 of the Decision of the Constitutional Court of the Russian Federation of July 15, 1999 No. 11-P). In the same Decision, the Constitutional Court defined a forfeit under the tax law as a restorative measure of a compulsory nature, with the help of which compensation for damage from an untimely and incomplete payment of tax occurs. However, instead of clarifying the legal nature of the forfeit as a compulsory measure of a restorative nature, the legislator in the Russian Tax Code transferred it to the institute of the securing of tax duty, placing it line with a pledge, a suretyship or a bank guarantee.

The legislator seemed to have other solutions. For example, the development of the doctrine of financial sanctions in the tax and budget legislation. The concepts of financial responsibility and financial sanctions actively used in Soviet financial law (both positive and doctrinal) continue to be applied in the current legislation. Numerous examples of the use of these concepts in Russian laws are discordant with the terminology of Russian tax law. For example, Federal Law No.

⁴ Recall at least the "history" with the legal nature of the customs duty, which the legislator assigned from 1991 to 2005 to federal taxes, and then recognized its non-tax nature.

127-FZ of October 26, 2002 on Insolvency (Bankruptcy) (Article 4) stipulates that “property and (or) financial sanctions, including for failure to perform the duty to pay mandatory charges” are not taken into account when determining the presence of signs of bankruptcy of the debtor. Federal Law No. 167-FZ of December 15, 2001 "On Compulsory Pension Insurance in Russia " establishes (Article 17) that the budget of the Russian Pension Fund is formed by "insurance contributions, federal budget funds, a forfeits and other financial sanctions ...”⁵. Moreover, the recently issued Presidential Decree concerns, in the first place, the issue of "measures of financial responsibility" (Decree of the President of the Russian Federation of January 16, 2017 No. 13 "On the approval of the Fundamentals of the state policy of regional development of the Russian Federation for the period until 2025").

Question two. How can a forfeit secure the performance of a tax duty, if it does not guarantee the payment of arrears?

The definition contained in the Russian Tax Code shows that a forfeit does not guarantee the payment of arrears, but represents “the amount of money that a taxpayer must pay in the event that the amount of taxes due [...] is paid in later than the statutory tax and collections time” (Article 75 of the Tax Code).

Being credited to the budget, the tax forfeit⁶ acts as a public budget revenue of the corresponding level, compensating for the late payment of taxes and, as a consequence, a delay in the enrollment of tax revenues to the budget system.

A forfeit cannot secure the performance of tax duty and guarantee the receipt of tax in the budget revenue, since it does not form a material source that would compensate for the complete performance by the taxpayer of their fiscal duty. This characteristic of a forfeit radically distinguishes it from other means of securing the performance of tax duty, each of which creates such a material source: the property

⁵ This example becomes especially important as the Tax Code of the Russian Federation began to apply to insurance contributions from 2016. In the above quotation, it is easy to see that the a forfeit is viewed as a variety of a financial sanction.

⁶ In this case, we are forced to use the notion of a "tax forfeit" to distinguish a forfeit payable in accordance with the Tax Code of the Russian Federation from a forfeit, payment of which is provided by the Budget Code of the Russian Federation for non-return or late payment of a budget loan (Article 306.5) and non-transfer or untimely transfer payments for the use of a budget loan (Article 306.6). The forfeit envisaged by the budget legislation will be discussed below.

of the taxpayer—in the case of pledge or arrest of a property, the guarantor's obligation to fulfill the tax obligation—in case of a suretyship.

The specifics of the forfeit's legal nature in accordance with the current Russian tax legislation are demonstrated by the fact that a forfeit is paid in addition to the amounts in respect of the tax due and irrespective of the use of other means to secure the performance of duty with regard to the payment of tax, as well as measures of responsibility for the violation of legislation on taxes and charges. The application of a forfeit may be supplemented by the use of any other means of securing the performance of tax duty. Moreover, the repayment of the debts on the payment of a forfeits, in turn, is guaranteed by the application of other means provided by the Russian Tax Code (pledge, bank guarantee, suretyship).

The uniqueness of the forfeit lies in the fact that it is able to actually change the size of the fiscal duty of the taxpayer to the budget. With the payment of forfeits for the delay in the tax payment, the quantitative parameters of the tax duty increase in accordance with the principle of fiscalism. However, such an increase in the amount of the tax duty is not able to ensure its full payment.

Question three (rhetorical). Can a situation when the legislation uses several different approaches to determining the a forfeit for delay in payment of compulsory payments be considered normal in public law?

By changing the legal nature of the forfeit in tax law and turning it from a responsibility measure (sanction) into a means of securing the performance of tax duty, the Russian legislation created an unusual depiction of the forfeit as a fiscal public instrument.

In the *budget legislation*, a forfeit means a coercive measure for committing a budget violation. In accordance with Art. 306.2 of the Russian Budget Code, coercive budgetary measures are applied to the person who committed a budget violation, among which are the unobjectionable collection of forfeits for the late refund of budgetary funds.

In the *customs legislation*, a forfeit is a measure applied to a taxpayer (declarant) for non-payment or incomplete payment of customs duties and taxes

(VAT and excises from goods imported into the customs territory) within the time limits established by the legislation, at the stage of the compulsory collection of customs payments (Article 151 of the Federal Law of November 27, 2010 No. 311-FZ "On Customs Regulation in the Russian Federation"). Further, a forfeit is not included in the list of means to secure the payment of customs duties and taxes: the latter, in the customs legislation, includes a pledge of property, suretyship, a bank guarantee or a deposit of funds. In respect of domestic VAT and excise tax forfeits are recognized as a means of securing the performance of tax duty, however, it is possible to secure the payment of external VAT and excises (from goods imported into the customs territory) using means established by customs legislation, among which a forfeit is not present.

A forfeit in the tax legislation of the EAEU states

The study of the legal nature of a forfeit in Russian tax law presupposes the need to go beyond the scope of Russian legislation and consider what approaches have been identified in the legislation of the EAEU states.

In the new version of the General Part of the Model Tax Code for CIS⁷ member states, new recommendations on the issue of the means of securing the performance of tax duty were formed, which generally reproduced the provisions of the Russian legislation on this issue⁸. However, they could not guarantee a uniform approach in the national legislation of the EAEU member states.

The closest approach to the Model Tax Code of the CIS and the Russian Tax Code at the moment are the legislative acts of the states that have become members of the EurAsEC Customs Union since its foundation – the Belarusian Tax Code and the Kazakhstani Code on taxes on other mandatory payments to the budget. They almost completely reproduce the provisions of the Russian tax code on the means to secure the performance of tax duty, including the definition of a forfeit in

⁷ Adopted in St. Petersburg on November 29, 2013 at the 39th plenary meeting of the Interparliamentary Assembly of the CIS member states.

⁸ The Model Tax Code of the CIS lists all the same means of securing the tax duty as in the Tax Code of the Russian Federation, with the exception of a bank guarantee. The article on the bank guarantee (Article 74.1) was included in the Tax Code of the Russian Federation in July 2013, when the text of the Model Tax Code of the CIS was already agreed upon and was passing the adoption procedures.

tax law (Articles 49 and 52 of the Belarusian Code and Articles 116, 117 of the Kazakhstani Code).

The tax codes of the states of the "second wave" of the expansion of the Eurasian economic integration (who joined the integration group at the time of the transition from the EurAsEC customs union to the economic union of the EAEU) apply less harmonized legislative approaches on this issue. We are referring here to the tax codes of the Kyrgyzstan and Armenia.

The Kyrgyzstani Tax Code differs from the Russian tax legislation and the Model Tax Code of the CIS by the means used to secure the performance of tax duty. Kyrgyzstani tax legislation for this purpose allows the use of:

- forfeits;
- bank guarantees;
- taxpayer deposits;
- the recovery of tax responsibility from cash funds, or funds from taxpayer's accounts or third parties (Article 70 of the Tax Code).

Thus, the Kyrgyzstani tax legislation does not allow the use of pledges, suretyship, or the arrest of taxpayer property as a means of securing the performance of tax duty. A taxpayer deposit is recognized as a means of securing the performance of tax duty, and is an instrument recognized as such in accordance with the customs legislation.

In the matter of determining the a forfeit, the Kyrgyzstani tax legislation does not fundamentally differ from the Russian legislation, defining a forfeit as the amount of money that a taxpayer must pay in the event of a failure to perform or a delay in the performance of a tax duty (Article 71 of the Tax Code).

This issue is regulated in a completely different manner in the Armenian tax legislation. In the Armenian Tax Code, the arrest of taxpayer property is recognized as the main means of securing the performance of tax duty (Article 429). If it is not possible to apply the arrest of taxpayer property or in the case of the insufficiency of the value of the arrested property, securing the performance of tax duty may be performed by the following means:

- the conclusion of a pledge agreement;
- the guarantee of a bank, other credit organization, or insurance organization;
- the assignment by the taxpayer of the right of claim (Article 436 of the Tax Code).

The Armenian tax legislation is the only example of the legislation within the framework of the EAEU in which a forfeit is not recognized as a means of securing the performance of tax duty, but is defined as the *measure of responsibility* established by the tax code for the non-payment of taxes or charges on time, or for late payment (Article 4 of the Armenian Tax Code).

The definition of a forfeit contained in the Armenian Tax Code corresponds to the legislative approaches to a forfeit, which were retained in Russian tax law right up to the adoption of the first part of the Russian Tax Code in 1999.

This approach automatically removes almost all the previously formulated questions about the legislation, which identified a forfeit in Russian tax law as one of the means of securing the performance of duty with regards to the payment of taxes.

Securing the performance of duty with regard to the payment of customs duties and taxes: "own rules"

The situation in connection with the legal regulation of securing the performance of duty with regard to the payment of taxes is complicated by the fact that in the Russian legislation, for more than two decades, two parallel systems have developed: one established by the Russian Tax Code and the other by customs legislation.

The system of securing the performance of duty with regard to the payment of customs payments—customs duties, VAT and excises from goods imported into the customs territory—is of particular importance for protecting the fiscal interests of the Russian state, since customs payments account for more than half of all federal budget revenue.

The Customs Code of the EAEU (Article 63) mentions only four means of securing the performance of duty with regard to the payment of customs duties and taxes:

- cash;
- bank guarantee;
- suretyship;
- the pledge of property.

A forfeit is not mentioned as a means of securing the performance of duty with regard to the payment of customs duties and taxes among other means.

The provisions of the customs legislation of the EAEU on this issue can be adjusted in the national legislative acts of the EAEU member states on customs regulation.

The laws on customs regulation of Russia, Belarus and Armenia set forth the same four means of securing the performance of duty with regard to the payment of customs payments, which are stipulated in the Customs Code of the EAEU, and a forfeit is defined as an instrument for compensation for overdue payment of customs duties and taxes at the stage of *exacting* of customs payments (compulsory execution of fiscal duties).

The Kazakhstani Code "On Customs Regulation in the Republic of Kazakhstan" identifies the means of securing the performance of duty with regard to the payment of customs duties (Article 97) and the means of securing the repayment of arrears in customs payments (Article 123). An insurance contract has been added to the first, in addition to the means provided by the Customs Code of the EAEU (cash, bank guarantee, suretyship and pledge of property), and the second includes charging forfeits, suspending expenditure transactions on the payer's bank accounts, suspending expenditure transactions at the payer's cash desk, and a limitation in the disposal of the payer's property.

Thus, a forfeit according to the Kazakhstani customs legislation of is defined as a means of securing the performance of duty with regard to the repayment of

arrears in customs payments, representing a payment that is calculated in the event of non-payment of customs payments for each day of delay (Article 124).

Just as in the Kazakhstani customs legislation, the Kyrgyzstani Law “On Customs Regulation in the Kyrgyz Republic” (Article 196) provides five means of securing the performance of duty with regard to the payment of customs payments—pledge of goods or other property, a bank guarantee, a deposit of funds into the account of customs body, suretyship, or an insurance contract. A forfeit is not included as a means of securing the performance of duty with regard to the payment of customs duties, it is defined as compensation for the late payment of customs duties and taxes (Article 202).

A comparison of the Russian customs legislation and other EAEU member states leads to the conclusion that, firstly, the tax legislation and customs legislation of EAEU states are still not harmonized on the issues of securing the performance of duty with regard to the payment of fiscal duties. Moreover, differences remain between the customs laws of EAEU states in terms of securing the performance of duty with regard to the payment of customs duties.

In none of the customs legislation of EAEU states is a forfeit determined in connection with securing the performance of fiscal duty.

Conclusion

Now, more than ever, is the unification of the legislative approaches to the institute of securing the performance of tax duty required. The reasons for this are the reform of the public finance management system in Russia and the development of the EAEU, which involves the unification of customs regulation in the member countries.

As a result of the reform of the Russian public revenue management mechanism and the creation of a single fiscal channel that combines tax and customs revenues into the federal budget⁹, there is a need to unify the regulatory and legal regulation of the main aspects of securing the performance of duty with

⁹ This refers to the re-subordination of the FCS of Russia to the Ministry of Finance of the Russian Federation (Decree of the President of the Russian Federation of 15 January 2016 No. 12 "Questions of the Ministry of Finance of the Russian Federation").

regard to the payment of taxes and customs duties, including securing payment in the case of deferrals or installment plans for tax and customs payments.

The development of economic integration within the framework of the EAEU also implies the unification of the tax and customs legislation on the issues of securing the performance of duty with regard to tax and customs payments. Since the application of the means of securing the performance of tax duty is an obligatory condition for the deferral of the payment of taxes and customs duties, the means of securing themselves must be uniform in all the EAEU states and not burdensome for taxpayers. A taxpayer must have the ability to choose a specific means of securing tax duty payment. The taxpayer's inclination to use "expensive" means (for example, a bank guarantee) adversely affects the investment and business climate in the country.

The analysis of the tax and customs legislation EAEU member states suggests that in order to unify the approaches to the legislative regulation of relations for securing of fiscal duties (for tax and customs law), it is first necessary to differentiate between the voluntary and compulsory securing of fiscal duty mechanisms, and, secondly, to address the most pressing issues.

The need to distinguish between voluntary means of securing of obligations (pledge, suretyship, bank guarantee) and the compulsory execution of a fiscal obligation (the arrest of a taxpayer's property, freezing bank accounts) is stipulated by the difference in the legal mechanisms applied in each of two cases: the use of civil-law instruments to ensure the voluntary performance of fiscal obligations and the use of exclusive measures of coercion to enforce the exaction of taxes and customs duties.

With regard to forfeits, the approach that was used in the 1990s in Russian tax legislation and the approach found, for example, in the current tax legislation of Armenia seems more appropriate; a forfeit is a measure of the financial responsibility of a compensatory nature for the payment of taxes and customs duties after the period established by law.

A reversion of the Russian tax legislation in the late 1990s from the definition of a forfeit as a measure of responsibility for the violation of the time limits for the payment of taxes was based, most likely, by a desire to provide the maximum guarantee for the fiscal interests of the Russian state, since a forfeit that is no longer recognized as a measure of legal responsibility and can now be recovered without taking into account the guilt, limitation period and various kinds of mitigating circumstances. Such a metamorphosis of the legal nature of a forfeit significantly violated the balance of public and private interests in tax law and effectively deprived the taxpayer of the possibility to expect a reduction in the amount of a forfeit if it was formed in the absence of the guilt of the taxpayer¹⁰. Such an approach leads to ignoring the interests of the taxpayer even in circumstances such as force majeure, when the issue of acquittance from responsibility or, at least, its mitigation becomes more than obvious.

The return of the Russian tax legislation to the definition of a forfeit as a measure of responsibility would allow an extension to tax relations, relating to the calculation of a forfeit, the effect of Article 112 of the Russian Tax Code, which establishes circumstances that mitigate the responsibility for committing a tax offense.

Kozyrin N. Aleksandr

Doctor of Juridical Sciences, professor, head of department of financial, tax and customs law of National Research University "Higher School of Economics". E-mail: kozyrine@hse.ru

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¹⁰ For example, refer to FAS Decision of January 22, 2008 No. F03-A73/07-1/6214, where the court proceeded from the fact that the legislation on taxes and charges does not provide for the possibility of reducing the size of a forfeita forfeit.