The Topical Issues of Public Law

SCIENTIFIC-PRACTICAL INFORMATIONAL EDITION
REGISTERED IN THE ROSKOMNADZOR. REGISTRATION NUMBER - EL. NO. FS 77-48634, 20.02.2012.
IS PUBLISHED MONTHLY. THE MAGAZINE HAS BEEN PUBLISHED SINCE JANUARY, 2012.

No. 3 (3) 2012

The issue allowed for posting on the web site
on the 28th of April 2012

Vypusk dopushhen k razmeshheniju na sajte
28.04.2012

•CONTENTS•

Universal Decimal
Classification 342.9

Kizilov V. V.

ADMINISTRATIVE OFFENCE OF A PUBLIC CIVIL SERVANT: CONTENT OF THE SUBJECTIVE SIDE

Kizilov Viacheslav Vladimirovich,

c.j.s, Associate Professor, Department of Administrative and financial law of the Non-State educational institution of Higher vocational education «Omsk Institute of law», Omsk.

Researches the various forms of guilt for committing by a public civil servant of an administrative offence. Examines the strong-willed and intelligent points of the willful guilt of a public civil servant. Here is given the author's position on correlation of intentional guilt and diligent misconception. Introduces a new kind of negligence that contains strong-willed and intelligent features which are different from the criminal law. Examines correlation of careless form of a guilt and juridical error.

Keywords: an administrative offence, a subjective side of an offence, a form of guilt, intent, negligence.

Subjective side of an administrative offence of a public civil servant is his mental attitude to an illicit deed and its consequences. The guilt of delinquent and optional signs such as purpose and motive are considered by legal science as an essential sign of the subjective side of an administrative offence.

Determination the guilt of a person in commission of offence is dictated by the presumption of innocence and the absence of fault in committed tort excludes the administrative penalty. As rightly pointed out in the commentary to article 2.2 of the Code on Administrative Offences of the Russian Federation edited by Salishheva "guilt is one of the most important features of any administrative offence" [9]. Determination of the fact of committing an administrative offence by a particular official is not enough for bringing him to administrative responsibility, should be determined degree and form of his guilt, motives and other inducements which have made the official to commit an administrative offence, i.e. to find out a subjective side of this administrative offence.

Due to the fact that the Code on Administrative Offences of the Russian Federation does not include differentiation of fault's content depending on the administrative and legal status of the delinquent – natural person, whom it as

a subject of the administrative responsibility has in a particular administrative and tort legal relation (natural person, official, driver, an individual entrepreneur, etc.) and in our opinion, forms of guilt may have different content, for example, for a natural person and public civil servant, we believe that it is necessary to consider the distinctive features of fault's content of classical forms of guilt occurring in administrative law.

Administrative offences of public civil servants, in our opinion, may be committed not only intentionally but also by negligence. The normative definition of intent, as we see it, does not allow its different interpretations.

The norms of the Code on Administrative Offences of the Russian Federation (CoAO of the RF) provides for a natural person, and more precisely for an individual subject of the administrative law, two types of fault – intent and negligence [1]. Many authors of legal literature agree that the Code on Administrative Offences of the Russian Federation distinguishes between direct and indirect forms of intent. For example, A.N. Guev associates with direct the intent of a delinquent such his actions in which the offender:

- realizes the wrongfulness of his actions (e.g., the person committing a pilferage realizes that unlawfully encroaches on another›s property);
- anticipate the injurious consequences of his deed;
- wishes their offensive [4].

A.N. Guev associates indirect intent with the realizing by the offender of unlawful nature of his actions and the foreseeing its harmful effects, however the offender «explicitly does not wish the harmful effects, but consciously allowing them to happen or does not care about them"[4]. The examples, given by A.N. Guev in the comments in the part of various types of intent, refer to delinquent – a natural person, but not to a special subject of administrative responsibility – an official and especially a public civil servant.

Should be accepted the correct remark of authors of the other comment to the Code on Administrative Offences, that the description of signs of both forms of guilt: intent and negligence in the CoAO of the RF is very close to the description of the form of guilt contained in articles 24-26 of the Criminal Code a the RF [9]. Close resemblance of the mentioned norms is natural, because the distinction between a crime and administrative offence largely follows the objective side of offences' structure rather than subjective [9].

There are a number of administrative offences' structures, the penalty for the commission of which comes only in the presence of intent in delinquent's actions, in articles of the Code on Administrative offences of the RF.

For example, intentional destruction or damage of printed materials relating to elections, referendum; intentional destruction or damage of another's property; intentional failure to meet the demands of a prosecutor; willful damaging or tearing down stamp; intentional damaging of an identification card of a citizen etc. [1]. However, with respect to a public civil servant, the presence of intent in administrative offense structure is not only an obligatory condition of administrative responsibility but rather aggravating factor for bringing to administrative responsibility.

The structures of intentionally committed administrative offences allocate the appropriate words and phrases in the dispositions of legal norms, for example: "concealment" (of documents, facts), "evasion" (of actions execution), "refusal" (in providing documents), "failure to follow", "compulsion" (to action execution), "dissemination" (of information), "impeding" (lawful activities or implementation of rights), "deliberately false" (drafting of documents), "interference" (into lawful activity). Professor D.N. Bakhrakh also noted the use by the legislator of the words "deliberately false", "deliberate", "concealment", "using hiding place", "willful damage" [3, 488]. We believe that no one should expect the recognition by the delinquent the intent in his administrative offence; therefore the legislator undertook consolidation of the necessary signs in the relevant articles of the special part of the Code n Administrative Offences of the RF, analyses of which in most cases lets to make a conclusion on the subjective side of an administrative offence structure.

Some authors have noted that there were formal structures of administrative offences in the Code on Administrative Offences of the RF, where intentional guilt is in understanding by person illicit nature of committed action or inaction [9]. This is acceptable, in view of the fact that the issue of recognition the wrongfulness of committed action does not arise, since it's an obvious inadmissible action. In these cases, you do not need the fact that delinquent exactly knows which body carries out administrative jurisdiction for fulfillment a certain action, what punishment will follow the commission of an offence.

It seems to us that in the material structure of administrative offences the willful guilt also includes attitude of offender to caused harmful effects. In the case with a public civil servant this subject of administrative and tort relations must anticipate these consequences and wish their offensive, or knowingly allow their offensive. Conscious allowance of harmful consequences' offensive describes intent as indirect if there is no desire of their occurrence.

Each of these types of intent includes inherent intelligent and strong-willed aspects. Intelligent aspect may be expressed in recognition by public civil servant committing an administrative offence of the harmful and illicit nature of his deed at the time of commission of the deed, an also in foreseeing of socially dangerous consequences of the deed. It is believed that when direct intent takes place there should be awareness of the opportunity or inevitability of dangerous consequences' offensive and when indirect one – only opportunity.

Volitional aspect of direct intent of public civil servants' tort deed consists of his wish of socially dangerous consequences' offensive and strong-willed aspect of indirect intent excludes such a wish but provides conscious assumption of socially dangerous consequences or indifferent attitude to them.

It seems to us that the awareness by the public civil servant socially dangerous nature of his tort deed means knowledge, understanding of the delinquent that committed by him action or refraining from doing this action harms to public legal relations.

A priori is considered that public civil servant in his professional activities should be governed by the laws and know them, the activity must be lawful and not cause harm to citizens and legal entities. For example article 15 of Federal Law No. 79-FL of July 27, 2004 on Public civil service of the RF establishes as obligations of public civil servant the compliance with the Constitution of the RF, federal constitutional laws, federal laws, other normative legal acts of the RF, constitutions (statutes), laws and other normative legal acts of subjects of the RF and also compliance with the rights and legitimate interests of citizens and organizations [2].

Therefore, to determine the intent of tort deed of a public civil servant it is not required, in our view, to establish the existence of the intellectual aspect which is inherent to intent, i.e. to prove that public servant was realizing the illegality of committed action. As we see it, this is perfectly consistent with the principle that ignorance of the law is no excuse. If a public civil servant didn't realize that his action or inaction was prohibited and punishable by law, it is clear that a person occupying the post of public civil servant does not correspond to the requirements for persons recruited for public civil service.

Indication of awareness of the harmful nature of the action or inaction in our view can take place in respect of a public civil servant with a view to strengthening the administrative responsibility for intentional tort deeds of a public civil servant in comparison with administrative offences committed by negligence.

But, as we know, there are exceptions to all rules. And as we see it, such exceptions can be in cases of administrative offences of a public civil servant that

is largely attributed to the discretionary powers of the public authorities, and secondly with the lack of an adequate legislative base. Professor D. N. Bakhrakh noted that "sometimes public administration is forced to act in the absence of an adequate legislative basis. For example, when it is "tricked" by the legislative, power adopting laws for execution of which Administration doesn't have Finance. Or this: in recent years, the Constitutional Court of the Russian Federation has adopted a number of decisions which have recognized unconstitutional some norms of Russian law, but the relevant legislative changes are not immediately introduced to the legislation. And then, the Administration has to act in legal vacuum" [3, 412-413].

It seems to us that in the administrative and legal torts of a public civil servant may be present good-faith misconception that is the will to commit a tort deed which corresponds with a lack of awareness of the action's delinquency, but, on the contrary, public servant, committing an illicit action, believes that his actions are legitimate. Legal practice knows cases of "good-faith mistakes" which have been more reflected in tax legal relations. For example, when considering tax disputes, take place cases of release from liability on the grounds of good-faith misconception of a person brought by a tax authority to responsibility for committing tax offenses. However, these cases are related to the offender, who is a managed party in public legal relations. As rightly noted by A. B. Bryzgalin, categories of "ignorance of the law" and "good-faith mistake" have different content and meaning. According to the opinion of the author of practical tax encyclopedia good-faith mistake is a "person's misunderstanding (erroneous interpretation) of the precise meaning of the legislation norm on taxes and fees, which objectively arises due to confusion, ambiguity and/or inconsistency of its content, but in conditions when the person acted with the necessary degree of diligence and prudence with a view of the proper execution of his obligations" [10].

Thus, identification of good-faith mistake of an offender in an administrative offence is only possible through determination of uncertainty, ambiguity and/or controversy of breached and guarded by the Code on Administrative Offences of the Russian Federation legislation norms to which the offender gave wrong (incorrect) interpretation, and the fact that the offender had taken measures aimed at understanding the correct meaning of the norms, but for whatever reasons he did not do it correctly.

Considering that legal relations protected by the Code on Administrative Offences of the Russian Federation are regulated by the norms of various sectorial laws, the possibility of good-faith mistake of a public civil servant in the interpretation

of legislation is sufficiently large. We are fully agree with A. V. Bryzgalin and ready to spread his conclusions about circumstances indicating an ambiguity of norms of the current tax legislation of Russia, in legislations regulating legal relations in other areas. In particular, A. V. Bryzgalin pointed to:

- subsequent clarification of the content of norm by a legislator, when the latter, in his amendments to the Act of legislation on taxes and fees introduces refinements, expanding and narrowing its content;
- facts of the consideration constitutionality of this or that norm by the Constitutional Court of the RF;
- application of a norm and disclosure of its content in the appropriate court's judgment by the Higher Arbitration Court of the Russian Federation, with a view to achieving uniformity of judicial practice (this fact in itself shows that until the consideration of a norm by the Higher Arbitration Court of the Russian Federation it did not have an uniform interpretation);
- ambiguous i.e. contradictory judicial practice of various courts of Russia (that is, when on the same issue, different courts make different conclusions) [10].

However, there is one but, the wording of article 19.1 of the Code on Administrative Offences of the Russian Federation takes into account the "good-faith mistake" of an offender and categorizes the deed committed under the misconception as an administrative offence – *unauthorized, contrary to federal law or other normative legal acts, implementation of their real or* ***alleged right****, not causing significant harm to citizens or legal entities.* It should be stressed that this norm of law involves infringement of the procedural norms of Law which define the "procedure for the exercise" of right.

Evidences supporting the existence of a "good-faith mistake" (otherwise juridical mistake) are administrative and legal disputes resolved judicially not in favor of the administrative jurisdiction bodies and disputes which have no effect on the officials of these bodies for unlawful decision, action or inaction giving rise of administrative and legal dispute. Unfortunately, the quite formed institute of appeal against unlawful decisions and illicit actions or inactions of the power authorities and their officials is not bordered by the institute of administrative responsibility on the part of power authorities' officials, which have made unlawful decision or committed an illegal action or inaction.

In contrast to the direct intent, strong-willed moment of indirect intent is that the perpetrator doesn't wish onset of socially dangerous consequences, but consciously allows their offensive or is indifferent to them.

In addition to dividing intent to direct and indirect in order to study the causes of administrative-legal delinquency of public civil servants in certain administrative-legal relations, its determinism, by analogy with the theory of criminal law, the intent should be distinguished with help of one more ground – the time of its inception, which shares the tort deed on premeditated and suddenly emerged.

As we see it, while a suddenly emerged intent (the time from its emergence up to its realization is minimal) tort of an offender will be single and short-lived. When it is possible to plan a tort or repeat it many times, this is evidence of a premeditated intent.

It is no secret that willful deeds of an offender have certain motivations and objectives. The motive is an incentive that forces the offender to commit an unlawful act, and the objective is a conception of the offender on the result of his actions. The motive for committing an administrative-legal tort by public civil servants might be an interpersonal or intergroup conflict between parties of administrative-legal relations and wish of public civil servant to vex his opponent [6]. Cannot be excluded personal financial interest of a public civil servant who through tortious conduct in the administrative-legal relations pushes the management subject to quite certain decisions.

Motive and objective are not mandatory signs of subjective side of specific structures of civil public servants' administrative offences that is why in the science of administrative law they have only tort meaning.

In the context of the proposed by us structures of public civil servants' administrative offences [8] intentional form of guilt is provided in torts involved with active wrongful actions of an offender:

hilee case of

- obstruction of the lawful activities of a lawyer,
- obstruction of the activities of public associations,
- official forgery (entering in official documents of knowingly false information, removal documents from the case materials),
- willful damage or elimination of documents,
- compulsion to give evidence,
- abuse of official powers and others.

It seems to us that the intentional tort action of a public civil servant has not only legal consequences, but also social and psychological. Administrative offences intentionally committed by a public civil servant discredit power authority as such not only to the victims but also to society as a whole. Therefore, the existence of

intent in the subjective side of an administrative offence of a public civil servant should be a ground for application to the offender of more stringent measures of administrative responsibility.

The second form of guilt, stipulated by law, is negligence which is divided in the legal literature to levity (arrogance) and inadvertence. The mentioned unit of negligence is traced in the text of part 2 of article 2.2. the Code on Administrative Offences of the Russian Federation, which highlights two possible circumstances of subjective side:

-offender foresaw the possibility of the harmful effects of his actions (inactions), but without sufficient grounds he or she presumptuously expected prevention of those consequences,

-the offender did not foresee the possibility of harmful effects, although he had to and could foresee them.

In the first case the negligence is referred to levity (arrogance), the second one is inadvertence.

It seems to us that of two types of negligence inadvertence is the most common because when committing any action public civil servant, as a rule, does not realize its unlawfulness, though must and could realize this. The reason for this is, in our opinion, "administrative enthusiasm" of a person on public civil service [13]. In the condition of the specified administrative enthusiasm public servant takes his action as a legitimate, accepts his rightness as absolute in any legal relation with a managed side. Public civil servant recognizing himself on a higher social level than others can only on this ground deny those who are below in the power hierarchy or have no relations to power.

It is considered that reckless guilt is defined in the law in relation to material structure of administrative offences and associated exclusively with the attitude of an offender to the consequences of his actions [9].

To determine the form of reckless guilt in an administrative offence of a public civil servant you should establish objective conditions in which was delinquent, and it should be remembered that the duty to foresee harmful effects is conditioned by the administrative and legal status of a public civil servant [2].

Reckless guilt is considered to be less dangerous than intentional one [11]. However, we believe that the consequences for the victim of an administrative legal tort committed by a public civil servant would not depend on the form of delinquent's guilt.

We should distinguish reckless guilt from innocent infliction of damage where a public civil servant is not responsible. For innocent infliction of damage

is typical that public civil servant is not obliged and cannot foresee harmful effects which arise from actions committed by him.

Under our definition of an administrative offence of a public civil servant [5, 123; 7, 122]:

Administrative offence of a public civil servant – punishable deed not leading to criminal responsibility of a person occupying post in civil service, which has been committed in the performance of or in connection with the performance of public civil servant's duties and resulted in violation of the statutory orders in legal relations the sides of which are not in authoritative subordination or direct dependence, and compliance with these orders is encouraged by the norms of public law with a view of protecting the state or public order; property; health, rights and freedoms of natural persons; established order of administration; and also property rights and interests of legal entities, –

Public civil servant always has an opponent (the other party and not optional) in an administrative legal relation. If the party is a natural person or a legal entity, they are quite active in defending their rights and interests and, in foreseeing the result of public civil servant's tort deed, show him the illegality of his actions or decisions and as a rule indicating the violated norms of Law. In such circumstances, it is incorrect to speak about the existence of guilt in the form of negligence which, in our view, although has taken place in the first moment of administrative and tort legal relation, but subsequently transforms into intent (in view of the clarification by the opposing party of legal relation of not only the inevitability of harmful effects, but also the essence of the tort action of a public civil servant). In our view, if after this the public servant would insist on qualification of mental side of an administrative offence as if it has been committed through negligence, and that he has not anticipated the possibility of harmful effects of his actions (inaction), and then it is appropriate to consider his compliance with the occupied position of the public civil service.

It seems to us that scientists studying administrative Law unreasonably pay little attention to the study of the characteristics of the different forms of guilt, relying on sufficient research in the framework of the criminal law. In our view the subjective side of an administrative offence of a public civil servant could be characterized by awareness (foresight) consequences of his actions with simultaneous confusion about legality (lawfulness) of his actions (inactions). Practice shows that the majority of administrative legal disputes which were resolved in favor of natural persons or legal entities were associated with this assessment of actions committed by public civil servants in the status of an official of the administrative jurisdiction body. Examples are:

- bringing to administrative responsibility of an innocent person,
- assignment of obligations to pay excessively assessed taxes (double taxation).

Guilt in the above case could be described as intent, if not a delusion (juridical mistake) of a public civil servant about the addressee of managing impact in the ongoing legal relation, objective side and object of legal relation. It seems to us that such a combination of a subjective side can be described as carelessness, but in the form of negligence. Exactly the definition of negligence contains necessary characteristic of a public civil servant's tort behavior – non-fulfillment or improper fulfillment of his duties because of dishonest or negligent attitude to the service.

Therefore should establish sectorial definition of negligence in administrative Law as a form of careless guilt characterized by an intellectual and strong-willed moment, when the offender is aware, foresees and wishes the consequences of his actions, but does not realize their unlawfulness.

Objective side of an administrative offence of a public civil servant, which has been committed on imprudence with the form of guilt "negligence" that forms juridical base of administrative responsibility, is expressed in committing, on behalf of the administrative jurisdiction authority, by this public civil servant actions expressed within his competence, aimed on achieving legally formalized and concretized in legal act objectives of activity of administrative jurisdiction authority in respect of managed subject that is not a proper party of the regulated legal relation. This form of guilt, it seems, should be distinguished from juridical mistake which is characterized by the delusion of a delinquent regarding the adequacy of the view about the factual circumstances of the committed by him offence.

We agree that reckless guilt is less dangerous than intentional one. But it is precisely this variety as negligence according to given by us definition has the greatest manifestation in the administrative and legal relations which lead to administrative and legal disputes between administrative jurisdiction authorities and subjects of management.

Officials of the public civil service, on matters relating to administration are obliged to compare their actions or inactions with the objectives laid down for them by law, and harmonizing the legitimacy and appropriateness, not to infringe upon the principle of primacy of human rights and freedoms. This conduct of a public civil servant is caused by administrative discretion, i.e. conferring

managerial powers on a public civil servant is implemented by law within a certain range of permissible and on the basis of feasibility of an action in a particular case he can vary his conduct.

Carelessness in the form of negligence is characterized by a lack of intellectual and volitional aspects, i.e. public civil servant in this case does not wish and does not suppose onset of the harmful effects of his actions, and even more does not foresee such a possibility. However, the deed of a public civil servant is considered to be guilty, because he has a duty to be careful and cautious about possible consequences if there is a possibility to foresee them.

As we see it, recognizing negligence as a form of guilt, legislator was guided by two criteria – objective and subjective ones. The first obliges, in our view, public civil servants to anticipate the probability of occurrence of the harmful effects of his actions, and the second criterion implies public civil servant to be able to anticipate them.

The essence of an objective criterion is that a public civil servant has the duty to anticipate the possibility of harmful consequences of this or that his actions because of his administrative and legal status, belonging to a particular body of administrative jurisdiction with its regulations, statutes and endowed with specific powers. For example, someone who orders instructions mandatory for execution and influences the emergence, modification or termination of the rights and duties of a managed subject, should have the duty to foresee the possibility of harmful effects as a result of his actions.

Subjective criterion of negligence is the ability, in our case, of a public civil servant to anticipate the onset of adverse consequences. The science of Criminal Law associates it with physical or intellectual data of a person in a particular situation. And besides, his individual peculiarities and specificity of the surrounding situation are important [11].

Establishing guilt in the form of negligence it must be proved that a delinquent has not shown the necessary attention and forethought as to implementation duties, and to the ability to foresee harmful effects. To recognize civilian public servants guilty of a form of guilt in the form of negligence needed set of objective and subjective criteria. To recognize a public civil servant guilty of negligence we need aggregate of objective and subjective criteria. It is well known that in criminal law, the absence of any of these criteria precludes guilt and, therefore, the criminal responsibility of an offender. However, it is unlikely such a rule suits an administrative offence of a public civil servant, because in this case the delinquent would simply evade responsibility.

If a public civil servant could not foresee the possibility of harmful consequences of his actions or inactions, then there is a case of inconsistency with the occupied position of a public civil service, excepting cases of committing administrative offences at the time of the insanity of the delinquent [1]. The cases, in which a public civil servant in performance of his professional activity should not foresee the consequences of his actions, are not allowed by law [2].

We allow an exception of public civil servant's fault, if an actual guilt in the form of negligence at the time of tort was a manifestation of the combination of extreme conditions requiring increased attention, immediate response and nervous-mental overloads caused by, for example, exhaustion, oppressing or overwhelming emotions, intellect, will, reaction to the news of the death of a loved one or his own terminal illness. The mentioned mental condition of the delinquent could also lead to a legal mistake, under which in the theory of criminal law is referred to the offender's misconception about the legal characteristics of a deed, or the actual circumstances determining the nature and degree of harm of the action.

Incorrect valuation of a public civil servant the deed committed by him, while in reality it is illegal (unlawful), can occur in the conditions of providing by law of wide discretionary powers to the public civil servant, when the legality of acts can be reliably assessed on the basis not of the letter but spirit of the law, and the guiltiness of the offender in such cases is difficult to prove. It should be borne in mind that in these circumstances, the assessment of public civil servants of his own acts quite strongly correlates with his intellectual and mental characteristics.

As we see it, going beyond the limits (excess) of discretion of a public civil servant does not correspond to neither ignorance of law nor his deliberate violation.

As can be seen from the analysis of stipulated by law forms of guilt, carried out with respect to a public civil servant, implementing the competence of the administrative jurisdiction authorities in the status of an official of these bodies he is a subject of administrative liability. What is more in many cases if he does not prove that while he was acting reasonably and prudent he undertook, within his competence, all relevant to normatively established criteria of effectiveness measures which are necessary to achieve legally formalized goal of activity of executive power body the guilt of a public civil servant will be considered established. A similar condition of guilt is proposed when applying disqualification as a punishment as a form of quasi-tort liability referring to an inefficient implementation of executive powers by a public civil servant [12].

It is felt that the guilt of an official (of a public civil servant occupying a post in executive power authorities) can be expressed through improper selection or supervision, and its normative vesting should be based on mixed (objective-subjective) approach, that together with the presumption of guilt forms the basis of a legal mechanism of responsibility for the inadequate management, which mediates the punishment of an official in case he or she will not prove that having acted reasonably and prudently undertook, within his or her competence, all relevant to normatively established criteria of effectiveness measures which are necessary to achieve legally formalized goal of activity of executive power body [12].

Summing up can be noted the following forms of guilt of public civil servants in their administrative and legal torts:

- intent: direct and indirect,
- negligence: levity, negligence and carelessness.

Moreover reckless form of guilt in the form of negligence relates some private cases of legal mistake (misconception), unlike those in the criminal law, to the guilty deeds referring to the specific of administrative and legal status of a public civil servant and the specific of committed by him administrative offences.

References:

1. Federal Law No. 195-FL of December 30, 2001, of The Code on Administrative Offences of the Russian Federation [Kodeks Rossijskoj Federacii ob administrativnyh pravonarushenijah ot 30 dekabrja 2001 g. № 195-FZ]. *System GARANT* [Electronic resource], Moscow: 2012.

2. Federal Law No. 79-FL of July 27, 2004 on the Public Civil Service of the Russian Federation [Federal'nyj zakon ot 27 ijulja 2004 g. № 79-FZ «O gosudarstvennoj grazhdanskoj sluzhbe Rossijskoj Federatsii»]. *System GARANT* [Electronic resource], Moscow: 2012.

3. Bahrah D.N. *Administrative Law of the RF: textbook* [Administrativnoe pravo Rossii: uchebnik]. Moscow: E'ksmo, 2010.

4. Guev A. N. Comments to the Code on Administrative Offences of the RF [Kommentarij k Kodeksu Rossijskoj Federatsii ob administrativnyh pravonarushenijah]. *System GARANT* [Electronic resource], Moscow: 2012.

5. Kizilov V. V. T*he administrative responsibility of civil servants of Russia: Prospection* [Administrativnaja otvetstvennost' grazhdanskih sluzhashhih Rossii: vzgljad v buduwee]. Saratov: Saratov University Publishing House, 2011.

6. Kizilov V. V. In help to entrepreneurs: let's protect a taxpayer [V pomoshh' predprinimateljam: zashhitim nalogoplatel'shhika]. *System GARANT* [Electronic resource], Moscow: 2012.

7. Kizilov V. V. The concept of administrative offences of a civil servant [Ponjatie administrativnogo pravonarushenija grazhdanskogo sluzhawego]. *Problemy prava – Problems of Law*, 2011, no. 4, pp. 119-123.

8. Kizilov V. V. The structures of administrative offences of civil servants proposed for normative enshrining in the Code on Administrative Offences of the Russian Federation [Sostavy administrativnyh pravonarushenij grazhdanskih sluzhawih, predlagaemye dlja normativnogo zakreplenija v KoAP RF]. *Problemy prava – Problems of law*, 2011, no. 3, pp. 108-116.

9. *Comment to the Code on Administrative Offences of the Russian Federation* [Kommentarij k Kodeksu Rossijskoj Federacii ob administrativnyh pravonarushenijah]. under general reduction of Salishheva N. G., Moscow: Prospekt, 2009

10. The Practical Tax Encyclopedia. Vol. 8. Definition and Structure of a Tax Offence. Conditions of bringing of a tax payer and tax agent to responsibility [Prakticheskaja nalogovaja jentsiklopedija. Tom 8. Ponjatie i sostav nalogovogo pravonarushenija. Uslovija privlechenija nalogoplatel'wika i nalogovogo agenta k otvetstvennosti]. under edition of Bryzgalin A. V., *System GARANT* [Electronic resource], Moscow: 2012.

11. *Criminal Law of the RF. General part. textbook* [Ugolovnoe pravo Rossii. Obwaja chast'. Uchebnik]. under red. Revin V. P., (2nd edition changed and added), Moscow: CJSC «Justitsinform», 2009.

12. Shmalij O. V. *Legal Support of Effectiveness of Executive Power (theoretical-methodological aspects)*: author's abstract, thesis of Doctor of Law: 12.00.14 [Pravovoe obespechenie e'ffektivnosti ispolnitel'noj vlasti (teoretiko-metodologicheskie aspekty)]. Rostov-on-Don: 2011.

13. *http://bibliotekar.ru/encSlov/a/55.htm* (accessed: 20.03.2012)

Universal Decimal
Classification 347.5

Kizilov V. V.

MATERIAL LIABILITY OF TAX AUTHORITIES FOR UNLAWFUL ACTIONS WHEN IMPLEMENTING TAX ADMINISTRATION

Kizilov Viacheslav Vladimirovich,

c.j.s, Associate Professor, Department of Administrative and financial law of the Non-State educational institution of Higher vocational education «Omsk Institute of law», Omsk.

Examines the norms of current Russian legislation with a view of consolidating in them some provisions, which in practice let to implement its mechanism of bringing of tax authorities to material liability for unlawful actions of theirs officials that have been performed during the tax administration and which have caused material damage to the subject of tax administration.

Here are considered legally meaningful actions of officials of the tax authorities, which are committed during the period of tax administration and contain potential delinquency.

Keywords: tax authorities, tax administration, unlawful actions of tax authorities, material liability of tax authorities.

E. A. Fedina, considering in 2006 the responsibility of tax authorities and their officials, under the Tax Code of the Russian Federation, noted the presence of reference norms on the liability of tax authorities for causing loss by unlawful acts (omissions) of tax authorities' officials [18]. The conclusion of this author in an article on the subject of the study is logical – "the current Tax Code of the RF does not answer the question, what action and (or) decisions will be unlawful. It can be assumed that illegal actions or inactions are such acts, which violate the norms of law, including the rules governing tax legal relations, i.e. illicit actions of tax authorities – is failure to comply with the tasks imposed to them by law" [18, 57].

It would be strange to expect that in the Tax Code, the purpose of which is to establish a system of taxes and fees, as well as the general principles of taxation and charges in the Russian Federation, could be norms governing the tort relations in tax area. For these purposes there are Criminal Code, Code on Administrative Offences and Civil Code of the RF stipulating, respectively, criminal, administrative and material (civil law) responsibility. Fundamentals of disciplinary responsibility of officials of tax authorities are laid down in the legislation governing the public civil service.

Article "On legal liability of tax authorities" of another author, although published in the 2011 year, contains, unfortunately, only well-known provisions on types of legal responsibility and does not represent practical value [12].

Only in the works of I. V. Usachev (including in co-authorship with I. V. Kokurina) is available to review practical aspects of use material liability of tax authorities for violation the procedures of tax control and fulfillment of torts by officials of the tax authorities (lists the various types of taxpayers' loss) [15: 17]. The main difference of I. V. Usachev's works from previously outlined by us legal grounds of material responsibility of tax authorities [13, 68-72] consists in offering to collect from a tax authority moral harm, from which we had refused at the time.

On the examples of our own arbitration practice we have devoted a full monograph to the analysis of specific unlawful actions of officials of tax authorities. We can only regret that some authors, taking up a research on issues of legal responsibility of tax authorities and their officials, do not notice published in this area works of their colleagues and their studies do not add anything to scientific knowledge.

Having long-standing practice of representing the interests of business entities in legal relations with tax authorities, we cannot accept the assertion of Ju. A. Artem′eva (in the article published in 2011) with reference to Paholenko A. I. (the article published in 2003) that the institution of civil law liability of tax authorities to natural persons "is relatively new to the Russian legislation, and in recent years – in the light of the major changes of the very foundations of the State, which have taken place in our country, and in its legislation – had been filled with completely other content and became more than relevant" [12, 51-52]. The statement of the author is rather strange due to the fact that issues of material liability of tax authorities are not innovation in the legislation of the Russian Federation, as in respect of any public body exist unified rules on material responsibility established by the Civil Code of the RF – tort obligations.

The provisions of article 16 of the Civil Code of the RF, establishing basics for material liability of public bodies and consequently tax authorities, are unchanged since the adoption of part one of the Civil Code of the Russian Federation. And the provisions concerning material liability of tax authorities in tax law had already taken place in part 1 of the Tax Code of the RF, which has come into legal force since January 1, 1999.

Considering the above we believe it is necessary to return to the topic of material liability of tax authorities envisaged for illicit actions in the process of the tax administration of management subjects.

The right to compensation for damage caused by the illegal actions (or inactions) of bodies of state power or their officials, comes from the provisions of article 53 of the Constitution of the Russian Federation. The above is confirmed by the Constitutional Court

in the ruling No. 22-O from February 20, 2002 – "civil legislation establishes additional guarantees for protection the rights of citizens and legal entities from unlawful actions (inaction) of bodies of state power, which are aimed at realization the provisions of articles 52 and 53 of the Constitution of the Russian Federation, according to which everyone has the right to compensation by the State of damage caused by the illegal action (or inaction) of bodies of state power or their officials, including abuse of authority" [7].

In the Tax Code of the RF is reflected the constitutional norm concerning the material liability of a state body – tax authority. Part 1 of article 35 of the Tax Code establishes that tax authorities shall be responsible for damages caused to the taxpayers, payers of fees and tax agents as a result of their unlawful actions (decisions) or omissions, as well as the unlawful actions (decisions) or omission of officials of tax authorities in the performance of their duties (i.e. when implementing tax administration).

It should be noted not a coincidence of distinction as delinquents of collective entity (tax authority) and individual entity – officials of tax authorities. The fact is that, from officials only Head and Deputy Head of the tax authority have the right to speak on behalf of the tax authority. However, during the activities of tax control, other officials of the tax authority are empowered to carry out on their behalf certain actions and make decisions, which under the current law do not require the sanction of the Head or Deputy Head of the tax authority.

This provision of the Tax Code is not an innovation to the Russian legislation, and, in its absence, the tax authorities should be materially liable for damages in accordance with the provisions of the Civil Code of RF, which stipulate material liability of any state bodies. In its essence the norm of part 1 of article 35 of the Tax Code of the RF is a "backup" to norms of articles 16 and 1069 of the Civil Code of the RF, with a few exceptions.

Article 16 of the Civil Code of the RF established that "The losses, inflicted upon a citizen or upon a legal entity as a result of illegal actions (the inaction) on the part of the state bodies, of the local self-government bodies or of theirs officials, including the adoption by the state body or by the local self-government body of an act, which is not in correspondence with the law or with other legal act, shall be compensated by the Russian Federation, by the corresponding subject of the Russian Federation, or by the municipal formation. The norm of article 35 of the Tax Code also established that the losses caused are compensated from the federal budget.

Article 1069 of the Civil Code of the RF almost repeats the rule enshrined in article 16 of the Civil Code of the RF, but with the legal category of harm, rather than losses – "The harm inflicted to a citizen or a legal entity as a result of unlawful actions (inaction) of state and local self-government bodies or of their officials, including as a result of the adoption

of an act of a state or self-government body inconsistent with the law or any other legal act, shall be compensated. The harm shall be compensated at the expense of the state treasury of the Russian Federation, the respective subject of the Russian Federation or the respective municipal formation".

It should be noted that the concept of loss is disclosed in paragraph 2 of article 15 of the Civil Code of the RF. Losses mean costs which a person has or is about to be made to restore his violated right, as well as loss of or damage to its property (actual damage) and the lost revenue that the person would have received under normal conditions of civil turnover, if his right has not been violated (loss of profit).

Chapter 59 of the Civil Code of the RF which outlines the obligations of the debtor (the person who has caused harm), in the case of harm, does not establish normative definition of the concept of harm. However, an analysis of the articles of that chapter allows making a conclusion that harm is broader the notion of losses and losses are an integral part of the harm which has been inflicted to the property of citizens and legal entities (in this case, it would be illogical to exclude loss of profit from the definition of harm).

Provisions limiting material liability of tax authorities (state bodies, in the context of the Civil Code of the RF) under the Tax Code and Civil Code of the RF are identical. Losses caused by lawful (legal) actions of officials of tax authorities, are not refundable, except in the cases stipulated by federal laws (the wrongfulness, illegality of actions or inactions is prerequisite for the onset of liability, see article 35, paragraph 4, article 103 of the Tax Code of the RF and paragraph 3 article 1064, article 1069 of the Civil Code RF).

Unlike article 35 of the Tax Code, laying down general provisions on the material liability of tax authorities for the whole period of implementation of the service activity of its officials, norms on the liability of the tax body, in article 103 of the Tax Code, are clearly limited in time and place. The rules of the said article determine material liability only for damage (losses) in the time of implementation of tax control. So you need to have a clear idea of what activities are of tax control and which are not.

According to part 1 article 82 of the Tax Code of the RF, tax control is activities of the competent bodies to monitor compliance with legislation on taxes and fees by taxpayers, tax agents and payers of fees in accordance with the Tax Code of the RF. Moreover with regard to the types of monitoring activities the legislator went to the establishment of an open list of tax authority's powers. Tax control is carried out by means of tax checks, obtaining explanations of tax payers, tax agents and fees payers, validation of accounting and reporting, inspection of premises and territories used to generate income (profit), as well as by other means stipulated in the Tax Code of the RF. For example, features of tax control during implementation of production-sharing agreements are determined by chapter 26.4 of the Tax Code of the RF.

Chapter 14 of the Tax Code of the RF provides certain specification of the forms and methods of tax control:

- cameral tax check,
- field tax check,
- interrogation of witnesses,
- access of officials of tax authorities to the territory or in premises to conduct tax check,
- inspection,
- discovery of documents (information) about tax payer, fees payer and tax agent or information about specific transactions,
- seizure of documents and things,
- examination,
- engagement specialist to assist in the implementation of tax control,
- engagement interpreter,
- involvement of attesting witnesses,
- summoning by written notice to the tax authorities taxpayers, payers of fees or tax agents to give explanations in connection with payment (retention and transfer) of theirs taxes and fees,
- drafting of a protocol during implementation of tax control,
- documenting the results of tax control (drafting a note, act)

All actions that are not covered by the list, are not the subject of tax control, but are subject to the tax administration. In our view tax administration includes:

- tax registration and deregistration,
- registration procedures related to the keeping by a tax authority register of subjects of entrepreneurial activity,
- changing the timing of the payment of taxes and fees,
- exaction of taxes, fees, penalties and fines,
- recognition of the arrears and debt of penalties and fines as uncollectible and their cancellation,
- return or set-off of excessively paid (exacted) taxes, fees, penalties and fines,
- suspension of operations on the bank accounts of the taxpayer, fees payer or tax agent,
- seizure of property of the taxpayer, fees payer or tax agent,
- determination of the amounts of taxes to be paid by taxpayers in the budgetary system of the Russian Federation, calculated on the basis of available information on the taxpayer,
- filing to courts of general jurisdiction or arbitration courts claims (statements),

- filing the motions of the revocation or suspension of license given to legal entities and natural persons for the right to carry out certain activities.

It seems to us that the border of tax control activities, carried out in the form of tax checks, is outlined by a court's judgment based on the results of tax inspections.

Thus, the material liability of tax authorities under article 103 of the Tax Code of the RF could take place in the event of misconduct by officials of tax authorities and in causing harm in connection with:

- opening of the premises (where are stored documents on the tax payer's income, tax calculations, etc.), with breaking the doors (stall of locks, hinges, breakdown of the door leaf, breaking from the wall of the door block) or latches (locks), penetration with destruction of walls, windows, floor rather than wait till the taxpayer will bring to the place of inspection the keys, will deactivate the alarm;
- violation of alarm, engineering telecommunication networks when the illicit penetration into protected by technical means territory of the audited subjects;
- burglary safe, closets, cabinets with documents or property, in cases where there are the keys and is not denial of their granting to reviewer;
- destruction, damage (disablement), loss of seized documents and objects, as well as the destruction and/or damage of documents and objects reviewed in on-site tax check;
- destruction, damage (disablement), the loss of the original documents obtained during cameral tax check;
- retention of items (seized from the taxpayer as a result of the withdrawal) needed to the taxpayer for the daily ongoing work (as a rule, it is hardware-software means to ensure accounting, tax accounting, technical programmes for management designing and technological developments, planning);
- transmission of documents, containing trade secrets (confidential information) to the expert, who has not made a commitment to preserve the tax, commercial and other secrets protected by the State.

It should be noted that the mere fact of appointment of tax checks outside the stipulated by law time limits can lead to harm, responsibility for which is provided in article 103 of the Tax Code of the RF. The taxpayer (tax agent) has the right to appeal against an unlawful decision on conduct of tax inspection, refraining tax authority officials from its implementation (it refers to the appointment of on-site tax check). The fact of the cameral tax check outside statutory time limits and, consequently, issue of illicit decision does not entail for the taxpayer (tax agent) legal consequences.

Such activities undertaken in the framework of tax control as interrogation of witnesses; discovery of documents; engagement specialist, translator, attesting witnesses;

invocation to the tax authority; drawing up of a protocol; processing the results of tax check, in our view, do not contain malicious potential which in case of illegal (unlawful), implementation of these actions could cause the audited subjects and their representatives loss or harm.

Losses indicated by article 103 of the Tax Code of the RF can be determined as an actual damage, i.e. expenses that the victim had made or will need to make in order to restore the infringed right, loss of or damage to its property. And loss of profit is a lost income, which would have been received by the victim of the actions of a tax authority's official under normal conditions of civil turnover if his rights had not been violated by officials of the tax authority.

Article 103 of the Tax Code of the RF also contains the term "illegal harm", the concept of which is not defined in the Code. Following the norm of article 11 of the Tax Code of the RF concepts and terminology of civil, family and other branches of the legislation of the Russian Federation, used in the Tax Code of the RF are applied in the sense in which they are used in these areas of legislation, unless otherwise provided by the Tax Code of the RF. The concept of harm is used in civil legislation, therefore, in addition to the harm caused to the property of a taxpayer, should be taken into account:

- moral harm (physical or moral suffering under article 151 of the Civil Code of the RF) of a natural person-taxpayer (or having the status of a tax agent, representative);
- harm to business reputation as of a natural person and the organization.

Rules of paragraph 3 article 103 of the Tax Code of the RF prescribe to apply measures of responsibility provided not only by the Tax Code of the RF but also by other federal laws. Therefore, in our view, in respect of the tax authorities may apply the rules on the liability of the Civil Code of the RF.

Unlike measures of tax control other actions of tax authorities and their officials implemented within the competence and powers of tax authorities in connection with the tax administration can have the character of the forcing in mind of ensuring unconditional fulfillment of tax obligations by managed entities. Fiscal objectives facing the tax authority objectively come in conflict with the interests of managed entities, which can cause tort infliction of loss to these entities.

Analysis of the current legislation and practice of resolving tax disputes allows us to emphasize three main types of losses occurring as a result of tort actions (inaction) of tax authorities and their officials in the implementation of the tax administration. This Is:

- costs associated with restriction of rights of managed entities to manage available funds (articles 76, 78, 79 of the Tax Code of the RF), compensated by interest payments;

- costs associated with restoring of breached rights of managed entities in judicial bodies, compensated in the form of court costs.
- losses compensated in contentious proceeding.

Each of these types of loss shall be compensated by its own rules, i.e. the mechanisms of the implementation of a managed entity right for compensation these costs have significant differences. For example, losses, compensated by payment of interest shall be compensated extrajudicially under instructive documents of the tax authority. The procedure of reimbursement of court costs is easier than contentious proceeding.

Consider first the legal regulation of compensation of costs through interest payment.

Tax code establishes peculiarities of losses compensation to taxpayer (tax agent) in a number of specific cases. For example, according to article 78 of the Tax Code of the RF refund of excessively paid tax is made in a month from the day of filing by a taxpayer of an application for refund upon conditions of absence of taxpayer's debt before the same budget in which there is an overpayment. If there is a violating term for returning of the amount of excessively paid tax which has not been returned by the due date, ***interests are charged at the rate of refinancing of CBR for each day of violation of repayment period.*** The rules established by article 78 of the Tax Code of the RF also applies to the offsetting or return of excessively paid amounts of advance payments, fees, penalties and fines, and applicable to tax agents, payers of fees and responsible participant of the consolidated group of taxpayers. Thus, the legislator actually restricts the size of the losses repayment from the late return of taxpayer funds by means of paying the interest at the rate of refinancing of CBR.

According to article 79 of the Tax Code of the RF establishing the order of refund of excessively exacted tax, fee or penalty the decision on refund of excessively exacted tax is taken by tax authority in 10 days from filing by a taxpayer of a written application for refund the amount of excessively exacted tax. The amount of overpaid tax is to be refunded with charged interest within one month from the date of receipt of a taxpayer's written request for refund of excessively exacted tax. Interest on the amount of excessively exacted tax is accrued from the day following the day of exaction up to the day of actual return. The interest rate is equal to these days' rate of refinancing of the Central Bank of the Russian Federation. In contrast to article 78 of the Tax Code of the RF, the legislator has equated the loss of a taxpayer in the case of excessive exaction of tax, fee and penalty to the amount of interest calculated at the rate of refinancing of CBR ***for the whole period of exaction the taxpayer funds*** to the appropriate budget in the form of tax, fee, penalty.

Considering the norms of articles 78 and 79 of the Tax Code, you can determine their analogy with material liability provided in the Civil Code of the RF in cases of non-performance of contractual obligations (for tax legal relations we can speak of quasi-contractual material liability). In the first case (article 78 of the Tax Code of the RF)

restriction on the calculation of interest corresponds with the delay of the creditor that has some significance – the taxpayer himself had made excessive tax payment. In the second case, the restriction on calculation of interest is absent due to forced exaction from the taxpayer of monetary means in payment of missing tax liabilities.

Material liability of a tax authority as seen from the norms' analysis of articles 78 and 79 of the Tax Code of the RF is not tortious. Also would not constitute tortious liability material responsibility of a tax authority for non-compliance with (violation of) terms of agreement on granting investment tax credit concluded with a taxpayer [11] (granting taxpayer investment tax credit is provided by articles' norms of chapter 9 of the Tax Code of the RF).

Innovation in tax legislation is the provision of paragraph 9.2 article 76 of the Tax Code of the RF, which establishes tax authority's material liability for violation of term of cancellation of the decision on suspension of transactions on accounts in a bank or of the period of delivery to the representative of the bank (submission to the bank) decision for cancelling, as well as for wrongful suspension of account movements in the bank:

"9.2. Where a tax authority fails to comply with the time limit for the cancellation of a decision on the suspension of operations on a taxpayer – organization's bank accounts or the time limit for the delivery to a bank representative (submission to the bank) of a decision on the cancellation of the suspension of operations on a taxpayer – organization's bank account, interest payable to the taxpayer shall accrue on the amount of monetary resources covered by the suspension for each calendar day of violation of term.

In the event that a tax authority unlawfully issues a decision ordering the suspension of operations on a taxpayer – organization's bank account, interest payable to that taxpayer – organization shall accrue on the amount of monetary resources covered by that decision of the tax authority for each calendar day commencing from the day on which the bank received the decision ordering the suspension of operations on the taxpayer's accounts up to the day on which the bank receives a decision cancelling the suspension of operations on the taxpayer – organization's accounts.

The interest rate shall be taken to be equal to the refinancing rate of the Central Bank of the Russian Federation which was in effect on days on which operations on a taxpayer – organization's accounts were unlawfully suspended or the tax authority was not in compliance with the time limit for the cancellation of a decision on the suspension of operations on a taxpayer –organization's bank accounts or the time limit for the delivery to a bank representative (submission to the bank) of a decision on the cancellation of the suspension of operations on a taxpayer – organization's bank account".

The mentioned rule has been introduced to the Tax Code of the RF by two laws – Federal Law No. 224-FL of November 26, 2008 [5] (the first and third paragraph of article)

and by Federal Law No. 229-FL of July 27, 2008 [6] (the second paragraph of article). Norms of articles 76, 78, 79 of the Tax Code of the RF on out-of-court calculation and repayment of interest are justified because otherwise a taxpayer, calling for protection of his violated right in court, will be additionally recover court costs from a tax authority.

Possibility to recover court costs from a tax authority is granted to a taxpayer (tax agent) by the current legislation only in case of full or partial satisfaction of his requirements in a tax or administrative dispute. The relevant provisions of articles 110 of the Code on Administrative Offences of the RF, article 91 of the Code of Civil Procedure of the RF and part 2 article 15 of the Civil Code of the RF, which determine losses as the costs which have been made or will be made by a persons for restoration of his violated right, are normative grounds for exaction of losses in the form of court costs.

Major questions in the part of exaction of court costs from tax authorities are about determining the price of services provided by representative of a taxpayer (a tax agent). However, in presence of the given legal position of The Constitutional Court of the Russian Federation in this issue [7], we need not fear judicial bodies' discretionary powers implemented in specific cases.

By regulating the grounds, conditions and procedure for compensation of losses, including by means of ensuring compensation of costs incurred to restore the right violated, the mentioned by us articles of federal laws implement enshrined in the Constitution of the Russian Federation the principle of protection by law of private property rights (article 35, part 1).

The considered articles of the Civil Code of the RF aimed at the realization of the right to compensation for harm caused by unlawful actions (or inaction) of bodies of state power cannot be applied in contradiction with their constitutional sense.

It should be noted that the costs of a taxpayer at restoring his infringed rights can take place in extra-judicial appeal against unlawful actions and decisions of tax authorities and their officials. This procedure is provided by chapter 19, 20 of the Tax Code of the RF, when a taxpayer implements the right to appeal to a higher tax authority (higher official). In this case, the cancellation by the higher tax authority (higher official) of appealed acts of tax authorities, actions or inaction of their officials in terms of their wrongfulness allows the taxpayer (tax agent) later to file a statement of a claim for reimbursement of losses (the costs incurred in connection with appealed acts, actions or inactions).

Reimbursement of losses in contentious proceeding is not limited by exaction of costs associated with the costs of restoration of the violated right of a taxpayer (a tax agent). All again depends on the circumstances of the infliction of harm (losses). If illegal actions of a tax authority and its officers were committed not in the period and not in connection with a tax check, then it would be legal to refund only the property damage inflicted to a

taxpayer (tax agent). If these actions were committed by a tax authority and its officials during tax check, the structure of refundable damage may be wider – reimbursement would also include inflicted non-property harm (if a taxpayer is a natural person or an individual entrepreneur). This conclusion is based on the analysis of the provisions of article 103 of the Tax Code of the RF and chapter 59 of the Civil Code of the RF.

Article 103 of the Tax Code of the RF provides liability of a tax authority for losses in the form of loss of profits (non-derived income), unlawful harm to inspected persons, their representatives or property in their possession, use, or at their disposal. Reference rule of part 3 article 103 of the Tax Code of the RF upon another legislation, according to which the tax authority may be responsible for causing harm, causes, as it seems to us, material liability depending on the aggrieved person under articles 1069, 1070, 1099-1101 of the Civil Code of the RF.

Article 1069 of the Civil Code of the RF "Liability for the Harm Inflicted by State and Local Self-government Bodies, and Also by Their Officials" envisage responsibility for the harm inflicted to a citizen or a legal entity as a result of unlawful actions (inaction) of tax authorities or their officials, including as a result of the adoption of an act that is inconsistent with the law or any other legal act of a tax authority. Compensation for damage caused by illegal actions of the tax authority or its officials is only possible in cash.

Considering the case on compensation of harm the court is obliged to be guided by the provisions of article 1083 of the Civil Code of the RF. Which means that the Court will examine all the circumstances of the harm inflicted by the tax authority (its officials), including possibility for the presence of victim's fault.

When filling a claim for compensation of losses to substantiate his claims a taxpayer (tax agent) must prove:

- existence of losses;

- causal connection between the losses caused to the taxpayer and illegal actions (inactivity) of tax authorities and officials of these bodies.

Matter-of-course is a preliminary resolving of a tax (administrative) dispute in judicial or extrajudicial procedure, which establishes the illegality of actions (inaction) of tax authorities and their officials.

Motivation part of a judicial act (or act of a higher tax authority) in respect of the tax dispute that has been resolved in favor of a taxpayer must reflect established legal fact – unlawfulness of actions (inactions) of a tax authority (its officials).

By the causal connection is recognized such a concatenation of events, where one of the events – reason (the wrongful actions of tax authorities and officials of the tax authority) not only predates the second event – consequence (infliction of losses), but also raises it (leads to its onset).

Plaintiff-taxpayer (tax agent) must prove not only the presence of loss (such as lost or damaged property), but also to prove the economic justification of expenditures that were necessary to prevent an even larger loss, as well as the costs of restoration of the infringed right (which do not belong to the judicial costs). The necessity of proving reasonableness of costs to prevent losses corresponds with the obligation of the plaintiff to prove that he has taken measures to prevent or to reduce the amount of damages.

Available practice of exaction loss of profit from the tax authority shows the multiplicity of conditions necessary to meet the stated requirements on compensation of loss of profits (non-derived income). Ju. M. Lermontov who is an author of a practical commentary to part one of the Tax Code of the RF draws attention to the ruling of the Federal Antimonopoly Service of the Moscow District No. KA-A40/7694-08 of 25.08.2008 indicating the need of proving in court proceedings the wrongfulness of tax body's actions, the amount of losses, the causal connection between the size of losses and the unlawful actions of a tax authority. By the way a taxpayer must take measures to reduce losses and documentary prove to the Court that he has taken these measures [16].

Ju. M. Lermontov notes that proving of already inflicted losses is more difficult. For example in the considered case the Court didn't accept as an evidence submitted by the taxpayer calculation of loss of profit on the basis that the calculation has the character of assumption [16].

According to the author, with whom cannot but agree, it is also difficult to prove a causal connection between the incurred losses and the decision of a tax authority, as the Court requires to submit evidences of which clearly follows the existence of a causal relation.

As proof of his findings Ju. M. Lermontov gives examples of the following court decisions: resolution of the Federal Antimonopoly Service of the Northwest District No. A26-6409/2006 of 28.11.2007; resolution of the Federal Antimonopoly Service of the North Caucasus District No. F08-939/08-333A of 11.03.2008; resolution of the Federal Antimonopoly Service of the Ural District No.F09-4487/07-S3 of 14.06.2007. However this does not mean that exaction of loss of profit is not possible in practice.

On the basis of legal provisions of the Constitutional Court of the RF set out in the decision No. 14-P of 16.07.2004 on the inadmissibility of causing unlawful harm when conducting tax control (articles 35 and 103) it can be argued about the inadmissibility of a leadership if it is being implemented by the goals and motives which are contrary to the existing legal order. "Excess of power by tax authorities (or by their officials) or use it contrary to the legitimate purpose and protected rights and interests of citizens, organizations, State and society is incompatible with the principles of a law-bound State, in which the exercise of the rights and freedoms of man and citizen shall not

violate the rights and freedoms of other people (article 1, part 1; article 17, part 3, of the Constitution)" [8].

Thus, it can be concluded that taxpayers (tax agents) in exercise of their right to compensation of harm caused by the actions (inactions) of a tax authority can reckon upon meeting the stated requirements in the cases where a court will install wrongfulness of actions (inactions) of tax authorities (officials of tax authorities), causal connection between these actions (inactions) and onset adverse consequences for a taxpayer (tax agent) [10].

The Tax Code of the RF does not contain rules of law providing ormtains9ese actions 9inactions) tax authorities), for reimbursement for taxpayer's moral harm caused by the illegal (unlawful) actions (inactions) of tax authorities and their officials. However, bearing in mind the provisions of paragraph 3 article 35, paragraph 3 of article 103 of the Tax Code of the RF and the provisions of the Civil Code of the RF on compensation for moral harm, it is possible to ascertain the existence of the liability of a tax authority for causing moral harm in the case of wrongful actions or inactions of officials and other employees of tax authorities (but only committed when implementing tax control).

The exaction of moral harm is settled by article 151 and chapter 59 of the Civil Code of the RF. In the resolution of the Plenary Session of the Supreme Court of the Russian Federation No. 10 of 20.12.1994 [9] and in its comments of legal scholars are quite in detail considered the main problems related with use of the legislation on compensation for moral harm. Therefore we do not put to this article details how to recover moral damage by seeing it not the prevalence in the tax administration, and presence only in the form of disclosure of information constituting tax secret. Therefore we do not make it a point of this article detailed description of the procedure of exaction moral harm due to its no prevalence in tax administration, and presence only in the form of disclosure of information constituting tax secret.

It should be noted that the execution of court decisions on compensation for harm by a tax authority, as well as exaction of judicial costs from a tax authority under executive writ is carried out for account of the Treasury of the Russian Federation. Statutory basis for this provision is laid down in article 1069 of the Civil Code of the RF as well as in part 1 of article 35 of the Tax Code of the RF, which establishes that "the losses inflicted to taxpayers, fees payers and tax agents shall be compensated at the expense of the Federal Budget in order stipulated by the current Code and other federal laws".

Mechanism for the execution of judicial acts at the expense of the Treasury (Federal Budget) on the tort obligations of a tax authority is provided by articles 242.1 and 242.2 of the Budget Code of the Russian Federation [2] and today is completely worked-out [19].

Due to the fact that the debtor in the obligation to compensate for the harm caused by unlawful actions (inactions) of state bodies, bodies of local government or their officials,

including the adoption by the state body or by the local self-government body of an act, which is not in correspondence with the law or with other legal act, is a public-law institution but not his bodies or officials of these bodies, we can call material responsibility of a tax authority conditional. And perhaps, because of that, tax authorities allow significant mistakes in their work – more than 60% of adopted decisions cancelled by arbitration courts in the 2008-2011 period (see briefing paper on consideration by arbitration courts of the RF cases involving tax authorities in 2008-2011) [20].

Summing up the study of material liability of tax authorities, deem it necessary to list really occurring types of material liability arising as a result of tortious deeds of tax authorities and their officials during tax administration. This is:

- interest for using other people's money which were paid at the request of a tax authority,
- court costs (judicial costs) exacted from a tax body on the base of a tax dispute resolved in favor of a taxpayer (tax agent),
- losses (compensation for harm), determined in the judicial act on the claim presented to a tax authority for compensation of losses (harm inflicted),
- compensation of moral harm.

BRIEFING PAPER

On consideration by arbitration courts of the RF cases with involvement of tax authorities in 2008-2011.

	2008	**2009**	**+/ – to 2008**	**2010**	**+/ – to 2009**	**2011**	**+/ – to 2010**
The total number of considered cases	**970 152**	**1409503**	***439 351*** *45,3%*	**1197103**	***-212 400*** *-15,1%*	**1078383**	***-118 720*** *-9,9%*
of which:							
arise from administrative and other public legal relations	**472 359**	**567 699**	***95 340*** *20,2%*	**341 453**	***-226 246*** *-39,9%*	**383 107**	***41 654*** *12,2%*
% to the total number of considered cases	*48,7*	*40,3*		*28,5*		*35,5*	
which include cases:							
connected with use of tax legislation	**99 681**	**87 872**	***-11 809*** *-11,8%*	**92 438**	***4 566*** *5,2%*	**98 313**	***5 875*** *6,4%*
% to the number of cases arising from administrative legal relation	*21,1*	*15,5*		*27,1*		*25,7*	

	2008	2009	+/ – to 2008	2010	+/ – to 2009	2011	+/ – to 2010
of which:							
on disputing normative legal acts in the field of tax and fees	**115**	**119**		**107**		**82**	
(% to the number of cases connected with use of tax legislation)	*0,12*	*0,14*		*0,12*		*0,08*	
met requirements	74	69		38		42	
	64,3%	*58,0%*		*35,5%*		*51,2%*	
on disputing non-normative legal acts of tax authorities, actions (inactions) of officials	**50 685**	**35 368**		**31 514**		**26 358**	
(% to the number of cases connected with use of tax legislation)	*50,8*	*40,2*		*34,1*		*26,8*	
met requirements	35 463	23 448		20 169		16 559	
	70,0%	*66,3%*		*64,0%*		*62,8%*	
on exaction of mandatory payments and sanctions from organizations and citizens.	**43 565**	**49 400**		**58 366**		**69 795**	
(% to the number of cases connected with use of tax legislation)	*43,7*	*56,2*		*63,1*		*71,0*	
met requirements	24 426	29 071		36 321		29 251	
	56,1%	*58,8%*		*62,2%*		*41,9%*	
requirements requested in the amount of (million RUR)	**19 658**	**15 530**		**13 380**		**32 757**	
requirements satisfied in the amount of (million RUR)	**4 683**	**4 971**		**3 678**		**3 581**	
on return from the budgetary funds the taxes which were excessively deducted by tax authorities or overpaid by taxpayers	**4 225**	**2 326**		**1 923**		**1 571**	
(% to the number of cases connected with use of tax legislation)	*4,2*	*2,6*		*2,1*		1,*6*	
met requirements	3 240	1 536		1 286		925	
	76,7%	*66,0%*		*66,9%*		*58,9%*	
on the elimination of organizations under claims of tax authorities	**1 745**	**2 734**	***989***	**1 896**	***-838***	**1 041**	***-855***
			56,7%		*-30,7%*		*-45,1%*
met requirements	632	999		712		362	
	36,2%	*36,5%*		*37,6%*		*34,8%*	
on disputing decisions of tax authorities on bringing to administrative responsibility	10 551	7 179	- 3 372	3 003	-4 176	2 292	-711
			- 32,0%		*-58,2%*		*-23,7%*
met requirements	6 041	4 839		2 099		1 423	
	57,3%	*67,4%*		*69,9%*		*62,1%*	
***							
Cases connected with use of tax legislation which were considered in appeals instance	**19 768**	**16 875**	***-2 893***	**17 611**	***736***	**14 645**	***-2 966***
			-14,6%		*4,4%*		*-16,8%*

	2008	2009	+/ – to 2008	2010	+/ – to 2009	2011	+/ – to 2010
% to the number of cases connected with use of tax legislation which were considered in first instance	*19,8*	*19,2*		*19,1*		*14,9*	
canceled, changed judicial acts (the number of cases)	**3 652**	**3 060**		**2 780**		**2 330**	
% to the number of cases connected with use of tax legislation which were considered in first instance	*3,7*	*3,5*		*3,0*		*2,4*	
***							
Cases connected with use of tax legislation which were considered in cassation instance	**19 838**	**15 602**	***-4 236*** *- 21,4 %*	**12 793**	***-2 809*** *-18,0%*	**10 074**	***-2 719*** *-21,3%*
% to the number of cases connected with use of tax legislation which were considered in first instance	*19,9*	*17,8*		*13,8*		*10,2*	
canceled, changed judicial acts (the number of cases)	**3 183**	**2 325**		**1 673**		**1 237**	
% to the number of cases connected with use of tax legislation which were considered in first instance	*3,2*	*2,6*		*1,8*		*1,3*	

References:

1. Arbitration and Procedural Code of the RF No. 95- FL (Federal Law) of July 24, 2002 [Arbitrazhnyj processual'nyj kodeks Rossijskoj Federatsii ot 24 ijulja 2002 g. № 95-FZ]. *System GARANT* [Electronic resource], Moscow: 2012.

2. Budget Code of the RF, No. 145-FL of July 31, 1998 [Bjudzhetnyj kodeks Rossijskoj Federatsii ot 31 ijulja 1998 g. № 145-FZ]. *System GARANT* [Electronic resource], Moscow: 2012.

3. Civil Code of the RF, No 51-FZ part one of November 30, 1994, No. 14-FZ part two of January 26, 1996. [Grazhdanskij kodeks Rossijskoj Federatsii. Chast' pervaja ot 30 nojabrja 1994 g. № 51-FZ, chast' vtoraja ot 26 janvarja 1996 g. № 14-FZ]. *System GARANT* [Electronic resource], Moscow: 2012.

4. Tax Code of the RF, No. 146-FZ part one of July 31, 1998 [Nalogovyj kodeks Rossijskoj Federatsii. Chast' pervaja ot 31 ijulja 1998 g. № 146-FZ]. *System GARANT* [Electronic resource], Moscow: 2012.

5. Federal Law No. 224-FZ of November 26, 2008 On making amendments to part one and two of the Tax Code of the RF, and to separate legislative acts of the RF [Federal'nyj zakon ot 26 nojabrja 2008 g. № 224-FZ «O vnesenii izmenenij v chast' pervuju, chast' vtoruju Nalogovogo kodeksa Rossijskoj Federacii i otdel'nye zakonodatel'nye akty Rossijskoj Federatsii»]. *System GARANT* [Electronic resource], Moscow: 2012.

6. Federal Law No. 229-FL of July 27, 2010 on making amendments to part one and two of the Tax Code of the RF and some another legislative acts of the RF, and also about recognizing as stale of separate legislative acts (provisions of legislative acts) of the RF in connection with the settlement of debt on payment of taxes, fees, penalty interests and fines, and another issues of tax administration [Federal'nyj zakon ot 27 ijulja 2010 g. № 229-FZ «O vnesenii izmenenij v chast' pervuju i chast' vtoruju Nalogovogo kodeksa Rossijskoj Federatsii i nekotorye drugie zakonodatel'nye akty Rossijskoj Federatsii, a takzhe o priznanii utrativshimi silu otdel'nyh zakonodatel'nyh aktov (polozhenij zakonodatel'nyh aktov) Rossijskoj Federatsii v svjazi s uregulirovaniem zadolzhennosti po uplate nalogov, sborov, penej i shtrafov i nekotoryh inyh voprosov nalogovogo administrirovanija»]. *System GARANT* [Electronic resource], Moscow: 2012.

7. The ruling of the Constitutional Court of the RF No. 22-O of February 20, 2002 under the claim of JSC "Bol'shevik" on violation of constitutional rights and freedoms by the provisions of articles 15, 16 and 1069 of the Civil Code of the RF [Opredelenie Konstitucionnogo Suda RF ot 20 fevralja 2002 g. № 22-O «Po zhalobe otkrytogo aktsionernogo obwestva «Bol'shevik» na narushenie konstitutsionnyh prav i svobod polozhenijami statej 15, 16 i 1069 Grazhdanskogo kodeksa Rossijskoj Federatsii»]. *System GARANT* [Electronic resource], Moscow: 2012.

8. Resolution of the Constitutional Court of the RF No. 14-P of July 16, 2004 under the case on verification of the constitutionality of separate provisions of part two of the article 89 of the Tax Code of the RF in connection to claims of citizens Egorov A.D. and Chuev N.V. [Postanovlenie Konstitutsionnogo Suda RF ot 16 ijulja 2004 g. № 14-P «Po delu o proverke konstitutsionnosti otdel'nyh polozhenij chasti vtoroj stat'i 89 Nalogovogo kodeksa Rossijskoj Federatsii v svjazi s zhalobami grazhdan A. D. Egorova i N. V. Chueva»]. *System GARANT* [Electronic resource], Moscow: 2012.

9. Resolution of the Plenum of the Higher Court of the RF No. 10 of December 20, 1994 «Some issues of use of the legislation on compensation of moral damage» [Postanovlenie Plenuma Verhovnogo Suda RF ot 20 dekabrja 1994 g. № 10 «Nekotorye voprosy primenenija zakonodatel'stva o kompensatsii moral'nogo vreda»]. *System GARANT* [Electronic resource], Moscow: 2012.

10. Decision of Federal Antimonopoly Service (FAS) of the Far East district No. F03-A37/08-2/1457 of June 12, 2008 [Postanovlenie FAS Dal'nevostochnogo okruga ot 12.06.2008 № F03-A37/08-2/1457]. *System GARANT* [Electronic resource], Moscow: 2012.

11. Order of the Federal Tax Service No. № SAE'-3-19/622@ of November 29, 2005 on Endorsement the Forms of Agreements on Investment Tax Credit

[Prikaz Federal'noj nalogovoj sluzhby ot 29 nojabrja 2005 g. № SAJe-3-19/622@ «Ob utverzhdenii form dogovorov ob investitsionnom nalogovom kredite»]. *System GARANT* [Electronic resource], Moscow: 2012.

12. Artem'eva Ju. A. On legal liability of tax authorities [O juridicheskoj otvetstvennosti nalogovyh organov]. *Voprosy rossijskogo i mezhdunarodnogo prava – Issues of Russian and International Law*, 2011, no.4, pp. 44-60.

13. *Kizilov V. V. Duties and responsibilities of the officials of tax authorities: an analysis of the curent legislation of Russia* [Objazannosti i otvetstvennost' dolzhnostnyh lic nalogovyh organov: analiz dejstvujuwego zakonodatel'stva Rossii]. Saratov: Saratov University Publishing House, 2006, 116 p.

14. Kizilov V. V. *Unlawful actions by officials of tax authorities* [Nepravomernye dejstvija dolzhnostnyh licts nalogovyh organov]. Saratov: Saratov University Publishing House, 2008, 376 p.

15. Kokurina I. V., Usachev I. V. Unlawfulness of actions as condition for bringing to civil and legal responsibility of tax authorities for violation of tort obligations [Protivopravnost' dejstvij, kak uslovie nastuplenija grazhdansko-pravovoj otvetstvennosti nalogovyh organov za narushenie deliktnyh objazatel'stv]. *Biznes v zakone – Business in Law*, 2011, no.3, pp. 52-54.

16. Lermontov Ju. M. Practical comments to part one of the Tax Code of the RF [Prakticheskij kommentarij k chasti pervoj Nalogovogo kodeksa Rossijskoj Federatsii]. *Prosto o slozhnom – Simply about Complex* (taking into account amendments which were made by the Federal Law No. 224-FL of November 26 , 2008 and came into force on January 01, 2009).

17. Usachev I. V. Pecularities of theoretic and legal enshrining of civil and legal responsibility of tax authorities [Osobennosti teoretiko-pravovogo zakreplenija grazhdansko-pravovoj otvetstvennosti nalogovyh organov]. *Biznes v zakone – Business in Law*, 2011, no. 3. pp. 49-51.

18. Fedina E. A. Juridical responsibility of tax authorities and theirs officials [Juridicheskaja otvetstvennost' nalogovyh organov i ih dolzhnostnyh lits]. *Vestnik Rossijskoj pravovoj akademii – Messenger of Russian Legal Academy*, 2006, no. 2, pp. 56-60.

19. Suvorova I. M., Mirza L. S. Legal development of execution of court's judgments under request of exaction by funds of the Budget system of the RF (1981-2011) [Pravovoe razvitie ispolnenija sudebnyh aktov po obrashheniju vzyskanija na sredstva bjudzhetnoj sistemy Rossijskoj Federatsii (1981-2011)]. *Juridicheskij mir – Legal World*, 2012, no. 2, pp. 28-32.

20. *Summary on consideration in Arbitration courts of the RF of cases with participation of tax authorities in 2008-2011* [Spravka o rassmotrenii arbitrazhnymi sudami RF del s uchastiem nalogovyh organov v 2008 - 2011 gg]. Available at: http://arbitr.ru/press-centr/news/totals/ (accessed: 11.03.2012).

Universal Decimal
Classification 342.9

Kizilov V. V.

PARADOXES AND IRRATIONAL IN THE ACTIVITY OF SUBJECTS OF ADMINISTRATIVE JURISDICTION OF RUSSIA

Kizilov Viacheslav Vladimirovich,

c.j.s, Associate Professor, Department of Administrative and financial law of the Non-State educational institution of Higher vocational education «Omsk Institute of law», Omsk.

Outlines the critical views on tort manifestations in activity of the subjects of administrative jurisdiction in carrying out control functions and functions of administrative prosecution of offenders – subjects of entrepreneurial activity. Discusses specific examples of norms of Russian current legislation, contributing to the irrational approach of the subjects of administrative jurisdiction to the evaluation of offenders' actions.

Keywords: administrative jurisdiction, subjects of administrative jurisdiction, activity of the subjects of administrative jurisdiction, administrative jurisdiction bodies.

Considering the existing discussion on administrative jurisdiction, it should be noted that there is no especial difference in the beliefs of scientists in respect of its essence. All the definitions of administrative jurisdiction, made by scientists, in one way or another, come down to subordinate legislation and law-enforcement activity of state bodies.

For example, A. P. Shergin gives the following definition of the category: "Administrative Jurisdiction is a part of executive and instructive activity, moreover of its separate part which is sub statutory and law-enforcement in its nature. This activity is one of the types of jurisdiction which has all the characteristics of the way of law enforcement (the existence of an offence, dispute; case proceedings of an adversarial nature; necessity of adoption of a legal act)" [15, 34-35].

Not so long ago, A. Ju. Guljagin wrote a review article where he reviewed the most important signs of administrative jurisdiction and examined the author's definitions of administrative jurisdiction of famous scientists studying administrative law"[10]. We are close to the position of this author that "administrative

and jurisdictional activities are closely linked to state administration. If we represent this connection in the most general terms, administrative and jurisdictional activities can be determined as the part of a management activity, during implementation of which applies both substantive and procedural law (primarily administrative one), i.e. resolving individual-specific cases in the area of state administration [10, 79].

Turning to the theory of law, here jurisdiction is understood as stipulated by law (or a normative act) complex of legal powers of appropriate state bodies for resolving legal disputes and cases on offences. In the theory of administrative law jurisdiction is regarded by most legal scholars also as a form of law-enforcement, activity of the state. It is well known that disputes' resolving and law-enforcement activity is being accompanied by an assessment of actions of administrative jurisdiction entities in terms of their legitimacy to apply legal sanctions against offenders.

It seems to us that the issue of co-relation of administrative procedure and administrative jurisdiction as common and particular has been settled long ago. Also there are no objections against emphasizing in administrative jurisdiction of proceedings on cases of administrative offences, disciplinary proceedings and proceedings on appeals of citizens and legal entities. Precisely this understanding of administrative jurisdiction was expressed by M. A. Lapina in article "Consolidated Concept of the Administrative Process System" [13].

Should be noted that the border between administrating (controlling, supervising) activity of administrative jurisdiction's bodies and administrative-jurisdictional activity itself is determined by legal facts - the emergence of a administrative and legal dispute or determining by competent and authorized body (an official) of administrative offence (as well as tax offence in the context of Tax Code of the RF).

While simultaneous studying both science and legal practice, constantly marks mismatch of problems of applied and theoretical plan. For example, law enforcer and management subjects are not interested in "battles" in an environment of scientists on doctrinal concepts of legal categories; various concepts proposed for solving theoretical problems do not arouse any interest. Issue number one in law enforcement is the legitimacy of the actions and decisions taken by bodies of administrative jurisdiction. Therefore, in this article we will consider some cases of practice which give grounds to assert about the presence of paradoxes and the irrational in the administrative jurisdiction of Russia.

Enough time has passed since the first statement of the Constitutional Court of the Russian Federation of its legal position on control functions carried out by the various State bodies within their competence established by the Constitution of the Russian Federation, constitutions and statutes of the subjects of the Russian Federation, federal laws. However, the conclusion of the Constitutional Court of the Russian Federation that every body of state power has autonomy in implementing this function and specific to each of them forms of its implementation [8], did not reduce the number of applications from citizens to the Constitutional Court of the RF in terms of existing negative point of view of the citizens, the law-enforcement practice of norms of federal laws by administrative jurisdiction authorities.

For example, in one of its acts the Constitutional Court of the Russian Federation had to explain that "the legislator may clothe with authority for verifying the correctness of calculation and timely payment (retention, and allocation) of taxes and fees the federal body of executive power which in its functional purpose is more adapted to their implementation. The need for regulatory ensuring realization of monitoring function of the State in the sphere of taxation derives from the Constitution of the Russian Federation, including its articles 72 (clause "i" part 1) and 75 (part 3), according to which establishment the general principles of taxation and fees in the Russian Federation is under the joint jurisdiction of the Russian Federation and its subjects, and the system of taxes collected to the federal budget, and the general principles of taxation and fees in the Russian Federation are established by federal law.

Tax control legislative regulation and activity of authorized bodies for the tax control are carried out in accordance with the constitutional principles of an administration and activity of state power bodies and local self-government bodies, including the limiting of public authorities by law and inadmissibility of intervention by the supervisory authority in the operational activities of an audited subject" [9]. As we see it, this provision on the inadmissibility of intervention in the operational activities of the subject which is being audited by a controlling body applies to any state body of the Russian Federation.

Study of the mentioned act of the Constitutional Court of the Russian Federation leads to understanding that "federal legislator must observe requirements arising from article 55 (part 3) of the Constitution of the Russian Federation in interrelation with articles 8, 17, 34 and 35, by virtue of which restriction the right to possess, use and dispose of property and entrepreneurial freedom by Federal

law is possible only if it meets the requirements of justice and if it is adequate, proportional, appropriate and necessary to protect the constitutionally significant values, including private and public rights and lawful interests of other persons, and does not affect the very essence of the constitutional rights, i.e. does not restrict the limits and application of the basic content of the relevant constitutional norms" [9].

The following legal position of the Constitutional Court of the Russian Federation, in our view, is a direction (guidance) to judicial authorities responsible for justice in tax disputes – "despite the fact that the courts are not empowered to verify the appropriateness of decisions of tax authorities (officials), which operate within the framework of discretionary power provided by law, the need to balance private and public interests in the tax field as in the field of state power activity assumes the possibility to verify the legitimacy of the relevant decisions taken in the course of a tax check on carrying cross checks, discovery of documents, appointment of examination, etc." [9]. However, arbitration courts do not always pay due attention to estimation of the appropriateness of the tax authority actions. For example, within the framework of the on-site tax check of one taxpaying organization the documents, which are not related to the activities of the audited entity were obtained from another organization. Arbitration Court "did not find" the absurdity of the statement made by the representative of a tax authority that in the course of the field tax audit of one taxpaying organization the requested documents were needed to establish "legitimacy of failure to include in the tax base on income tax on profit, paid in the form of dividends, cash amounting to 111 000 000 RUR" [17]. Dividends are always paid by net profits, and the tax base taking into account dividends is formed by the recipient of dividends, rather than the person paying them. In addition, the requested documents were unrelated to the "the payment of dividends" by the taxpaying organization.

Noting the inadmissibility of causing unlawful harm when conducting tax control (provided for in articles 35 and 103 of the Tax Code of the RF), we believe that the Constitutional Court of the RF condemns the situation when tax authorities in the implementation of a tax audit are guided by the goals and motives which are contrary to the rule of law. Tax control, according to the Constitutional Court of the RF, in such cases "can turn from an indispensable instrument of tax policy to an instrument of the repression of economic autonomy and initiative, the excessive restrictions on freedom of enterprise and right of property that

under articles 34 (part 1), 35 (parts 1-3) and 55 (part 3) of the Constitution of the Russian Federation is not allowed. Abuse by tax authorities (their officials) their powers or use it contrary to the legitimate goals and protected rights and freedoms of citizens, organizations state and society is incompatible with the principles of a constitutional state, in which the exercise of human and civil rights and freedoms must not violate the rights and freedoms of other persons (article 1, part 1; article 17, part 3 of the Constitution of the RF)" [9].

Analysis of data on cases considered in arbitration courts, that was implemented by us over statistics data of work of arbitration courts of the Russian Federation, best evidences abuse by administrative jurisdiction authorities its powers or use them in contempt of legitimate goals and protected rights and interests of citizens and organizations (see tables 1 and 2). This statement is confirmed by the fact that in the role of basis for the recognition of non-normative legal act invalid, the decisions and actions (inaction) unlawful serves determining in the Court the fact of their noncompliance with the law or other normative legal act, and violation of the rights and legitimate interests of complainants in the sphere of entrepreneurial and other economic activity (see part 1 article 201 of the Code on Administrative Offences of the RF) [2].

As can be seen from table 1 in categories of cases for clauses 1-3 percentage of satisfaction of the requirements stated by subjects of entrepreneurial activity is quite high. Despite the fact that the percentage of satisfaction of tax authorities' requirements on exaction from organizations and citizens compulsory payments and penalties is significant (41.9% of the minimum and maximum 62.2%), these "wins" of tax authorities appear in another form when using the criterion, measured in millions of rubles instead of the number of considered cases. The percentage of amounts adjudged to exaction for the cases of the category of clause 4 table 1 does not exceed 11 percent in the year 2011.

All this shows that tax authorities, as an organ of administrative jurisdiction and intended to be an obstacle to administrative (tax) offences really are generators of torts, but in other field of public legal relations. This, we believe, is the first paradox of administrative jurisdiction in Russia. Only with a qualification, it is possible to justify the tortious actions of tax authorities, since their main function is fiscal, and the task of filling the budget carries certain peculiarities in the legal sphere. However, the generators of torts in the administrative and legal sphere (sphere of management) are also other state bodies, only with the difference in the amount of committed offences.

Table 1.

Results of consideration by arbitration courts of the RF of cases connected with implementation administrative jurisdiction by tax authorities in 2008-2011.

Category of considered cases	Number of cases in each year			
	2008.	2009.	2010.	2011.
1. Cases on contesting non-normative legal acts, decisions and actions of tax authorities, including:	50685	35368	31514	26358
cases where were met requirements of claimants (percentage of the number of cases involving participation of tax authorities)	35463 (70,0)	23448 (66,3)	20169 (64,0)	16559 (62,8)
2. Cases on contesting decisions of tax authorities on bringing to material responsibility, including:	10551	7179	3003	2292
cases where were met requirements of claimants (percentage of the number of cases involving participation of tax authorities)	6041 (57,3)	4839 (67,4)	2099 (69,9)	1423 (62,1)
3. Cases on the return from the budget of funds excessively charged by tax authorities or overpaid by taxpayers, including:	4225	2326	1923	1571
cases where were met requirements of claimants (percentage of the number of cases involving participation of tax authorities)	3240 (76,7)	1536 (66,0)	1286 (66,9)	925 (58,9)
4. Cases involving tax authorities on exaction from organizations and citizens compulsory payments and penalties (through the court), including:	43565	49400	58366	69795
cases where were met requirements of claimants (percentage of the number of cases involving participation of tax authorities)	24426 (56,1)	29071 (58,8)	36321 (62,2)	29251 (41,9)
stated (satisfied) requirements, in mln. RUR.	19658 (4683)	15530 (4971)	13380 (3678)	32757 (3581)
(percentage of satisfied requirements, calculated from the amount of the claim)	(23,8)	(32,0)	(27,5)	(10,9)

According to the analytical note to the statistical report on the work of arbitration courts of the Russian Federation in 2011, the percentage of cases arising out of administrative and other public legal relations, for which the requirements of applicants were satisfied amounted averaged 52%. Most canceled the decision of bodies responsible for control over the use of land (64%), responsible for control in the sphere of environmental protection (63%), tax authorities (62%) [19].

With use of the fact sheet published on the website of the Higher Arbitration Court of the Russian Federation on consideration by arbitration courts of the Russian Federation of cases arising out of administrative and other public legal relations, in the 2008-2011 period we drew up table 2 with the results of consider-

ation by arbitration courts of the RF cases related to the implementation of administrative jurisdiction, for the 2008-2011 period.

Based on the data in table 2, we can tell that arbitration courts in more than half of the cases of administrative disputes took decision not in favor of the administrative jurisdiction authorities. What is more, the number of disputes lost by bodies of administrative jurisdiction is counted more than several tens thousand cases (i.e. is not unique, is not exceptional).

Table 2

Results of consideration by arbitration courts of the RF of cases connected with implementation administrative jurisdiction in 2008-2011.

Category of considered cases	Number of cases in each year			
	2008.	2009.	2010.	2011.
Cases arising from administrative and other public legal relations	472359	567699	341453	383107
(as a percentage of the total number of cases)	(48,7)	(40,3)	(28,5)	(35,5)
Including:				
1. Cases on contesting non-normative legal acts, decisions and actions of state bodies, local self-government bodies, other authorities, organizations empowered with separate state or another public authorities, officials, including:	90190	85943	90162	82957
Cases in which requirements of claimants were satisfied (as a percentage of the total number of cases)	50009 (55,4)	44664 (52,0)	45590 (50,6)	39589 (47,7)
2. Cases on contesting decisions on bringing to administrative responsibility, including:	43558	45587	41683	45920
Cases in which requirements of claimants were satisfied (as a percentage of the total number of cases)	25853 (59,4)	27479 (60,3)	23259 (55,8)	23959 (52,2)
3. Cases on exaction from organizations and citizens compulsory payments and penalties (through the court), including:	277010	379051	153854	197119
Cases in which requirements of claimants were satisfied (as a percentage of the total number of cases)	211434 (76,3)	194909 (51,4)	105041 (68,7)	130464 (66,2)
stated (satisfied) requirements, in mln. RUR.	40616 (15639)	54956 (24442)	37388 (16590)	38946 (6277)
(percentage of satisfied requirements, calculated from the amount of the claim)	(38,5)	(44,5)	(44,4)	(16,1)

The second paradox is noted by us in a situation with the ascertainment of an organization's guilt in committing a tax offense [12], the essence of which is as follows. The first part of the Tax Code of the Russian Federation in article 110 "Form of guilt when committing a tax offense" establishes a subjective imputing of an organization's fault for committing a tax offense:

"Guilt of an organization for committing a tax offense is determined depending on the fault of its officers, or its representatives, actions (inactions) of whom led to the tax offense."

As follows from the rule of law, the prerequisite for the incurrence of liability of organization is an action or inaction of officials or representatives of an organization who deliberately or recklessly committed a wrongful act, defined as a tax offence. However, search of judicial acts in the Reference Legal System "GARANT" conducted with reference to the fragment that contains accentuation of paragraph 4 of article 110 of the Tax Code of the RF in which represented subjective principle of organization's guilt determination, leads to a list of only 204 documents (Court's judgments of arbitration courts of various instances), despite the fact that the database contains more than 325 thousand judicial acts on tax disputes involving organizations [16]. It follows that arbitration courts without the presence (investigation) of evidences of organization's guilt, at least, without reflection of the guilt in a judicial act, rendered its verdicts regarding a tax dispute.

Analyses of judicial acts of arbitration courts, regarding tax disputes involving organizations in which the verdict was rendered in favor of a tax authority, showed that in most cases motivation part does not contain description of:

- what an official of an organization is guilty of committing a tax offense by this organization;
- what form of guilt is established by a tax authority when implementation of tax control or by an arbitrage in court proceeding on a tax dispute.

There is also no indication as to what form of guilt and what official of the organization identified in the decision of the tax authority on bringing to administrative liability in the motivation part of judicial acts.

We see different variants of solving the situation:

1. "Arbitration courts and tax authorities follow clear order of establishing organization guilt, through the fault of officials.

Decision of tax authorities on bringing organization to the tax liability must include in the descriptive (motivation part) the list of officials committed a wrongful and guilty deed which led to violating of tax legislation, and also form of guilt should be shown. And arbitration court should investigate the evidence of officials' guilt with reflection of the study in judicial acts. It should be noted that the presence of the presumption of innocence in tax law requires tax authorities during a trial to prove not only the reliability of his findings, but also the groundlessness of objections of person called to account [14, 494]. In this case are possible adjustments of laws in part of clarifying procedural issues,

but not in part of deviation from declared principles of subjective imputation in the Tax Code of the RF.

2. Legislator "surrenders" to law enforcer and makes switch-over in tax legislation from the principle of subjective imputation to the principle of objective imputation by analogy with administrative and tort legislation. That, according to some legal scholars, does not contribute to the uniformity of legal regulation.

The need for such a transition can be justified by presence in the current legislation the various approaches in determining the guilt of organizations: subjective-legal approach of the Tax Code of the RF, objective-legal approach of the Code on Administrative offences of the RF, Civil Code of the RF. There are opinions that different understanding of organizations' guilt by tax and administrative law complicates the perception of guilt as the basis of legal liability for ordinary taxpayers [11].

In addition to paradoxical cases that we have considered in administrative jurisdiction also takes place irrational behavior of entities, which is mainly connected with the divergence of the stated objectives (tasks) in federal legislation regulating a number of legal relations and as well as in provided by it mechanisms of implementation norms of law.

For example, the name of the Federal law No. 228-FL dated July 18, 2011 [7] contains the provided by legislator purpose of its introduction – protection the rights of creditors with a decrease in authorized capital, in cases where the value of the net assets becomes less than the authorized capital economic companies. This law makes changes to the Federal law No. 129-FL of August 8, 2001 "On the state registration of legal entities and individual entrepreneurs", Federal law No. 14-FL of February 8, 1998 "On limited liability companies" and the Federal law No. 208-FL of December 26, 1995 "On joint-stock societies", which introduce the obligation of the economic companies to submit to a registering body:

- information about the net asset value of a legal entity, which is a joint-stock company, as of the last reporting date;
- information about the net asset value of a legal entity, which is a limited liability company

Non-performance of the mentioned obligation is punishable by law. According to article 14.25 of the Code on Administrative Offences of the RF:

3. Failure to submit, or late submission or submission of inaccurate information on a legal entity or an individual entrepreneur to the authority responsible for the state registration of legal entities and individual entrepreneurs, in cases where this submission is required by law, entails warning or imposition of an administrative fine on officials in the amount of five thousand rubles.

4. Submission to the authority responsible for the state registration of legal entities and individual entrepreneurs, of documents containing deliberately false information if such action is not a criminal offence, entails imposition of an administrative fine on officials in the amount of five thousand rubles or disqualification for up to three years".

Thus, according to the aggregate of current norms of laws listed by us actually administrative responsibility is introduced for the mere fact of not submitting information on the net asset value of a legal entity, irrespective of the presence or absence of circumstances of reduction net assets below the amount of the authorized capital.

Due to the fact that in different reporting periods the production and commercial activities of a normally functioning legal entity will always result in different values of the net asset value, legal entities will have to quarterly submit the relevant information to the registering body. Additionally it should be noted that the mere fact of publication in the relevant registry information about net asset value in no way protects the rights of the creditor.

The following example of irrationality associated with application of the legislation on protection of competition. Part 4 of article 19.8 of the Code on Administrative Offenses of the RF establishes liability for failure to submit notifications to the Federal antimonopoly body, its territorial body under the antimonopoly legislation of the Russian Federation, the submission of notifications that contain deliberately false information, as well as for violation of procedure and time term for filing notifications established by antimonopoly legislation of the Russian Federation and. The provisions of this regulation do not raise doubts about the reasonableness. However, the norms of the Federal law No. 135-FL dated July 26, 2006 "On protection of competition" [6], which establish the conditions under which appears a duty of notifications submission, raise certain questions.

For example, part 1 of article 30 of the Law established transactions and other actions, the implementation of which must be notified to the antimonopoly authority, including:

5) *by persons purchasing* stocks (shares), *rights* and (or) property (except for stocks (shares), rights and (or) the assets of financial institutions), *on the implementation of transactions, other acts* referred to in article 28 of this Federal law if the total value of the assets on the last balance or the total profit from the realization of goods of a person purchasing stocks (shares), rights and (or) property, and his group of persons and person, whose stocks (shares) and (or) property and (or) the rights in respect of whom are being acquired, and his group of persons per calendar

year prior to the year of implementation such transactions, other actions, is more than four hundred millions rubles herewith total assets' value on the last balance sheet of the person whose shares and (or) assets are being purchased and (or) the rights in respect of which are being acquired, and his group of individuals exceeds sixty million rubles, not later than forty-five days from the date of implementation of such transactions or other actions."

Rule of paragraph 8, part 1, article 28 of the Law provides controlled transactions as transfer of powers on the exercise the functions of a sole executive body of the managed entity.

However, in respect of transactions involving the preliminary consent of the antimonopoly authority (arts. 28 and 29 of the Law), there is a special reservation clause on exceptions for persons belonging to one group of persons, and in cases of notification (article 30 of the Law, providing lesser degree of control of the antimonopoly authority), such a reservation clause is inexplicably missing.

In our opinion such an implementation of the norm of law is totally irrational, when the antimonopoly authority must be notified of the change in a managed economic unit the sole executive body – the Director-General (the Director) to the Manager (commercial organization), which is headed by the same natural person (who used to assume the post of Director-General of the economic unit), even more so that the management company belongs to one group of persons with economic unit and its Director-General.

In this case we see illogic (irrationality) of articles 28-30 of the Federal Law No. 135-FL of July 26, 2006 "On protection of competition".

The last example of irrationality in the administrative jurisdiction is related with the Federal Financial Monitoring Service activity.

Article 15.27 of the Code on Administrative Offences of the Russian Federation establishes administrative liability for failure to comply with the requirements of the legislation on combating the legalization (laundering) of income obtained by criminal means and the financing of terrorism. Part one of this article raises some doubts about its rationality. It seems to us that the following formulation of legal norms contains potential of powers abuse by administrative jurisdiction bodies – "failure to comply with legislation in part of organization and (or) implementation of internal control, which did not result in failure to provide information on *transactions subjected to compulsory monitoring* or on transactions in respect of which the staff of the Organization, carrying out transactions with funds or other property, has suspicion that they are carried out for legalization (laundering) of crime proceeds or the financing of terrorism, as well as *resulted in submission of these*

information to the authorized body in violation of the due date, except in the cases provided for in parts 2-4 of this article, which entail warning or imposition an administrative fine on officials in the amount of from ten to thirty thousand rubles; for legal entities – from 50 thousand to 100 thousand rubles.

The fact of the matter is that, although the Federal law dated August 7, 2001 No. 115-FL on Counteracting the Legalization (laundering) of Income Obtained by Criminal Means and the Financing of Terrorism [5] established a specific purpose – protection of rights and legitimate interests of citizens, society and the State, through the establishment of a legal mechanism for combating the legalization (laundering) of criminal proceeds and the financing of terrorism, as we think the level of actual control exceeds reasonable limits. Arrangement of internal control, which is understood as a collection of measures implemented by organizations engaged in transactions with funds or other property, including development of rules of internal control, appointment of special officials responsible for implementing the rules of internal control, at any moment can be recognized insufficient due to the powers of the Federal Financial Monitoring Service of the RF providing ability to change the model rules.

It seems to us that the norms of law obliging leasing companies, regardless of the types of transactions and their contracting parties to provide information to the Federal Financial Monitoring Service of the RF *for all operations involving money or other property*, equal to or greater than the value of limit of 600 thousand rubles established by article 6 of the Law, are not justified.

The obligatory for submission to the Federal Financial Monitoring Service of the RF amount of information from leasing companies hardly can be considered reasonable, in view of the fact that in large transactions involving technical re-equipment of industrial plants, one transaction during the lease term (usually three years) involves the same monthly payments (transactions in the context of law). And every time (when making a monthly payment) leasing company is obliged to submit to supervisory authority, the following information on transactions with monetary means or other property executed by their customers:

- type of an operation and grounds of its implementation;
- date of the transaction with monetary means or other property, as well as the amount by which it was concluded;
- name, taxpayer identification number, state registration number, place of state registration and location address of the legal entity doing the operation with monetary funds or other property;

- information necessary to identify a legal entity, at the request of whom and on whose behalf the operation with money or other property is being done, location address of the legal entity;

- information necessary to identify the representative of a legal entity, private attorney, agent, commission agent, trustee performing transactions with monetary funds or other property on behalf of, or for the benefit of, or instead another person by virtue of the power based on a letter of attorney, contract, law or authorized State or local self-government body's act, the residence or location address of the representative of a legal entity;

- information necessary to identify the recipient of a transaction with money or other property and (or) of his representative, taxpayer identification number (if any), location address of the recipient and (or) his representative, if required by the rules of the transaction.

Failure to submit the specified information is punishable by measures of administrative responsibility under part 1 article 15.27 of the Code on Administrative Offences of the RF. It seems to us that the analysis of the results of the administrative and jurisdictional activity of the Federal Financial Monitoring Service of the RF can raise questions about the appropriateness of its activity. For example, the report of the Federal Financial Monitoring Service of the RF for 2010 [18] does not show the effectiveness of this body work (19 thousand organizations are registered at the Federal Financial Monitoring Service of the RF; 7.2 million. received messages about operations, including required ones 2.5 million and 400 thousand messages from non-credit organizations; 28 thousand financial investigations involving the FFMS of the RF; instituted 2.5 thousand criminal cases, brought to the court 640, of which only on 150 cases were rendered accusatory decisions, including 60 under articles 174, 174.1 of the Criminal Code of the RF).

The analysis of the above leads to the conclusion about the need for participation of legal science in the rulemaking process, especially concerning the improvement of legislation regulating the implementation of administrative jurisdiction in Russia, and the need to audit with respect to the appropriateness of administrative coercion measures in different cases of the entrepreneurial activity subjects' delinquency manifestations.

References:

1. Constitution of the Russian Federation (accepted on National Voting, December 12, 1993) [Konstitutsija Rossijskoj Federatsii (prinjata na vsenarodnom golosovanii 12 dekabrja 1993 g.)]. *System GARANT* [Electronic resource], Moscow: 2012.

2. Arbitration and Procedural Code of the RF No. 95-FL (Federal Law) of July 24, 2002 [Arbitrazhnyj processual'nyj kodeks Rossijskoj Federatsii ot 24 ijulja 2002 g. № 95-FZ]. *System GARANT* [Electronic resource], Moscow: 2012.

3. Code on Administrative Offenses of the Russian Federation No. 195-FL of December 30, 2001 [Kodeks Rossijskoj Federatsii ob administrativnyh pravonarushenijah ot 30 dekabrja 2001 g. № 195-FZ]. *System GARANT* [Electronic resource], Moscow: 2012.

4. Tax Code of the RF, No. 146-FL part one of July 31, 1998 [Nalogovyj kodeks Rossijskoj Federatsii. Chast' pervaja ot 31 ijulja 1998 g. № 146-FZ]. *System GARANT* [Electronic resource], Moscow: 2012.

5. Federal Law № 115-FL of August 7, 2001 on Counteracting the legalization ("laundering") of income obtained by criminal means and the financing of terrorism [Federal'nyj zakon ot 7 avgusta 2001 g. № 115-FZ «O protivodejstvii legalizatsii (otmyvaniju) dohodov, poluchennyh prestupnym putem, i finansirovaniju terrorizma»]. *System GARANT* [Electronic resource], Moscow: 2012.

6. Federal Law No. 135-FL of July 26, 2006 on Competition Protection [Federal'nyj zakon ot 26 ijulja 2006 g. № 135-FZ «O zawite konkurencii»]. *System GARANT* [Electronic resource], Moscow: 2012.

7. Federal Law No. 228-FL of July 18, 2011, On making amendments to certain legislative acts of the Russian Federation in part of review of ways to protect the rights of creditor when reducing of the authorized capital and changing requirements to economic societies in the event of discrepancy between the authorized capital and net assets [Federal'nyj zakon ot 18 ijulja 2011 g. № 228-FZ «O vnesenii izmenenij v otdel'nye zakonodatel'nye akty Rossijskoj Federatsii v chasti peresmotra sposobov zawity prav kreditorov pri umen'shenii ustavnogo kapitala, izmenenija trebovanij k hozjajstvennym obwestvam v sluchae nesootvetstvija ustavnogo kapitala stoimosti chistyh aktivov»] *System GARANT* [Electronic resource], Moscow: 2012.

8. Resolution of Constitutional Court of the Russian federation No. 18-R of December 1, 1997 "on Case on inspection of constitutionality of separate provisions of article 1 of Federal Law of November 24, 1995 on making amendments and additions to the law of the RF on social protection of citizens which were exposed to effect of radiation due to the Chernobyl disaster" [Postanovlenie

Konstitutsionnogo Suda Rossijskoj Federacii ot 1 dekabrja 1997 goda № 18-P «Po delu o proverke konstitucionnosti otdel'nyh polozhenij stat'i 1Federal'nogo zakona ot 24 nojabrja 1995 goda «O vnesenii izmenenij i dopolnenij v Zakon RF «O social'noj zawite grazhdan, podvergshihsja vozdejstviju radiacii vsledstvie katastrofy na Chernobyl'skoj AJeS»]. *System GARANT* [Electronic resource], Moscow: 2012.

9. Resolution of Constitutional Court of the Russian federation No. 14-R of July 16, 2004 "on Case on inspection of constitutionality of separate provisions of part two of article 89 of the Tax Code of the RF in connection with complaints of citizens Egorova A.D. and Chueva N.V." [Postanovlenie Konstitutsionnogo Suda RF ot 16 ijulja 2004 g. № 14-P «Po delu o proverke konstitutsionnosti otdel'nyh polozhenij chasti vtoroj stat'i 89 Nalogovogo kodeksa Rossijskoj Federatsii v svjazi s zhalobami grazhdan A. D. Egorova i N. V. Chueva»]. *System GARANT* [Electronic resource], Moscow: 2012.

10 Gulagin A. Ju. Administrative Jurisdiction: characteristics and concept [Administrativnaja jurisdiktsija: priznaki i ponjatie]. *Vestnik Vladimirskogo juridicheskogo instituta – Messenger of Vladimir Institute of Law*, 2011, no. 2, pp. 77-83.

11. Ivanov I. S. Conceptual approaches to determining of organizations' guilt [Konceptual'nye podhody k opredeleniju viny organizacij]. *Rossijskij sledovatel' – Russian Investigator*, 2005, no. 10, pp. 16-20.

12. Kizilov V. V. Fiction of subjective fault imputing of tax offences to an organization [Fiktsija sub"ektivnogo vmenenija viny organizatsii v nalogovyh pravonarushenijah]. *Vestnik – OmJuI Messenger of the Omsk Institute of law* ,Omsk: 2011, no. 1(14), pp. 15-21.

13. Lapina M. A. The joint concept of the system of the administrative process [Ob"edinennaja koncepcija sistemy administrativnogo processa]. *Juridicheskij mir – Juridical World*, 2012, no. 3, pp. 38-42.

14. *Tax Law of the RF: textbook for higher schools* [Nalogovoe pravo Rossii: uchebnik dlja vuzov]. Editor in chief Doctor of Law, prof. Krohina Ju. A., Moscow: Norma, 2004. 720 p.

15. Shergin A. P. *Administrative Jurisdiction* [Administrativnaja jurisdikcija]. Moscow: Jurid. lit., 1979, 134 p.

16. *System GARANT* [Electronic resource], Moscow: 2012.

17. *Case No. A57-19253/2008*. Available at: http://kad.arbitr.ru/Card/7df0495f-425c-4015-9df6-5a564a1e0340 (accessed: 13.04.2012).

18. *Rosfinmonitoring* (in Russian). *Results of activity in 2010* [Rosfinmonitoring. Itogi dejatel'nosti v 2010 godu.]. Available at: http://www.fedsfm.ru/activity/annual_reports/annual2010.pdf (accessed: 13.04.2012).

19. *http://www.arbitr.ru/press-centr/news/totals/* (accessed: 14.03.2012).

Universal Decimal
Classification 347.9

Kizilov V. V., Markar'jan A. V.

JUDICIAL COSTS UNDER A TAX DISPUTE AS AN OBJECT OF CIVIL RIGHTS IN DEALS OF ASSIGNMENT OF RIGHTS (CLAIMS)

Kizilov Viacheslav Vladimirovich,
c.j.s, Associate Professor, Department of Administrative and financial law of the Non-State educational institution of Higher vocational education «Omsk Institute of law», Omsk;

Markar'jan Artem Vladimirovich,
Leading legal adviser of CJSS (closed joint stock society) "SANAR", Saratov.

Addresses the issues of the assignment of rights (claims) by the participant of the tax dispute in part of exaction of judicial costs from the tax authority at different stages of the mentioned legal action. Here introduced examples of arbitration practice with a critical analysis of the legal positions of judges, as the basis of taken court's decisions concerning the assignment of such object of civil rights as judicial costs. Justifies the legitimacy of transactions on assignment of rights (claims) regarding judicial costs at any stage of their exaction after consideration of the main dispute in Arbitration.

Keywords: judicial costs, assignment of rights (claims), assignment of rights (claims) regarding judicial costs, exa-ction of judicial costs from the tax authority.

The issues of exaction judicial costs by another person, not involved in a tax dispute, emerges due to the fact that the timing of the consideration by arbitration courts the taxpayer statements on the allocation of court costs exceed any reasonable limits. In addition, a feature of exaction judicial costs procedure under executive writ, in which the debtor is a tax authority, also postpones the moment of meeting the taxpayer monetary claims [1].

In practice, there are cases where the taxpayer, without waiting for the recovery of legal costs, enters into voluntary liquidation procedure by the owners and the liquidation Commission assigns the claim to a tax authority, to another person, e.g. a shareholder for repayment of shares (the company participant in repayment of share in the authorized capital). For example, OJSC "Signal", having won a tax dispute and received the executive writ on the case No. A57-7997/03-28-7 [8], later ceded the right of exaction judicial costs to LLC "Signal-Nedvizhimost'". In this case, was carried out the plaintiff's replacement procedure, stipulated by procedural legislation of the Russian Federation [1].

However, the variant of cessation of the taxpayer activity before the Court decision on the allocation of court costs is possible (recovery of judicial costs from a tax authority). And in this case, the assignment of the right (claim) is implemented by the tax dispute party in absence the judicially formalized tax authority's "promissory note" on judicial costs.

Despite the fact that the procedural succession (party replacement) is permitted by article 48 of the Arbitration and Procedural Code of the Russian Federation and does not raise objections from the party which is obligated to reimburse judicial costs, the mere fact of right (claim) cession of court costs without an execution writ is considered by a tax authority as a wrongful act, but also has a mixed assessment of the judicial community.

Illustrative for this case is case No. A57-3530/08 [9], in which LLC "Teploehnergopribor", having won the tax dispute, ceded the right of legal costs exaction to his partner – LLC "Trade House" Elton". LLC "Teploehnergopribor" applied to the Arbitration court of the Saratov region with a statement on the exaction of court costs on the case A57-3530/2008 from the Interregional Inspection of Federal Tax Service of the RF No. 7 in the Saratov region. Then (during consideration by the Arbitration Court of first instance the issue regarding the allocation of court costs) LLC "Trade House" Elton" announced its succession in the case on the basis of the contract of assignment the right (claim), the subject of which is the transfer of the LLC "Teploehnergopribor" right of court costs exaction claim related to the consideration at the Arbitration court of the Saratov region, including case No. A57-3530/2008 on the invalidation of the decisions of the Interregional Inspection of Federal Tax Service of the RF No. 7 in the Saratov region No. 13/16 dated 08.02.2008, for the amount of 406 524.81 RUR from the Interregional Inspection of Federal Tax Service of the RF No. 7 in the Saratov region. 31.05.2011 the Arbitration court of the Saratov region satisfied the claimed requirements in favor of taxpayer's successor [10].

Issuing judicial act Arbitration Court of the Saratov region explained its ruling in part of succession as follows:

"According to the act of acceptance-transfer of documents from 30.09.2010 to the mentioned contract on cession the right of claim, the Cedent (LLC "Teploehnergopribor") passed to the Cessionary (LLC "Trade House "El'ton") documents proving the Cedent right to claim court costs exaction for the amount of 406 524.81 RUR from the Interregional Inspection of Federal Tax Service of the RF No. 7 in the Saratov region, including: judicial acts of the Arbitration court of first, appeals and cassation instances on the case No A57-3530/2008, contract on providing legal

services, acts of completed works to the contract on rendering legal services, reports on completed works.

In payment for the named contract "Trade House" Elton" handed LLC "Teploehnergopribor" bill of THE No. 0001 in the amount of 4.1 million RUR under the act of acceptance-transfer of bills from 10/25/2010...

Tax Inspectorate having represented their objections to the petition, believes that a procedural change is impossible in view of the fact that the obligation of the tax authority to pay judicial costs in favor of the applicant before the conclusion of the contract of claim right assignment by LLC "Teploehnergopribor" did not occur because there was no judicial act to court costs exaction; the tax authority considers that on the date of appeal to the Court of Arbitration 01.11.2010. LLC "Teploehnergopribor" has lost the right of claim from the tax authority court costs because the assignment of the claim right was made before the date of application to the Court 20.04.2010. In addition, the tax authority requests to notice that "Teploehnergopribor" was eliminated on 05.05.2011, therefore, proceedings on the petition for replacement the party by its successor and the application for the exaction of legal costs shall be terminated.

According to part 1 of article 48 of the Arbitration Procedural Code of the Russian Federation in cases of withdrawal of one of the parties from the disputable or established by judicial act of the arbitration court legal relation, the arbitral court replaces this party by its successor and indicates this in a judicial act. Succession is possible at any stage of the process.

From the contents of the named legal norm it follows that the replacement of withdrawn party by its successor in the arbitration proceedings is possible when the succession has occurred in the material legal relation.

According to paragraph 1 of article 382 of the Civil Code of the Russian Federation (hereinafter CC RF) right (claim), which belongs to the creditor on the basis of obligations may be transferred to another person for a transaction (an assignment of a claim) or come to another person on the basis of the law.

In accordance with paragraph 1 of article 388 CC RF an assignment of a claim by a creditor to another person is allowed, if it is not against the law, other legal acts, or contract.

In support of the succession the society presented to the Court a contract on assignment of claim rights from 20.09.2010, concluded between LLC "Teploehnergopribor" and LLC "Trade House "El'ton", the subject of which is a transfer of LLC "Teploehnergopribor" right to claim court costs related to

the consideration at the Arbitration court of the Saratov region, including case No. A57-3530/2008 on the invalidation of the decisions of the Interregional Inspection of Federal Tax Service of the RF No. 7 in the Saratov region No. 13/16 dated 08.02.2008, for the amount of 406 524.81 RUR from the Interregional Inspection of Federal Tax Service of the RF No. 7 in the Saratov region.

At the time of conclusion the contract of claim right assignment (20.09.2010), drawing up an act of reception and transmission of documents (30.09.2001) and payment (25 October 2010) the decision of the Court of arbitration of the Saratov region on case No. A57-3530/2008 from 27.02.2009 which annulled the decision of the Interregional Inspection of Federal Tax Service of the RF No. 7 in the Saratov region No. 13/16 dated 08.02.2008 in part of profit tax in the amount of 11 212 565.57 RUR, the corresponding penalty and fine under paragraph 1article 122 of the Tax Code of the RF in the amount of 1 776 774.9 RUR, VAT in the amount of 7 778 296.9 RUR, the corresponding penalty and fine under paragraph 1 article 122 of the Tax Code of the Russian Federation in the amount of 1 307 395.52 RUR – entered into legal force, its legitimacy is confirmed by the Resolution of the Federal Arbitration Court of the Volga district from 30.04.2010.

Thus, during the period of the contract of claim right assignment LLC "Teploehnergopribor" had in virtue of law (chapter 9 APC RF) and an judicial act in legal force the right of claim the exaction of court costs from the tax inspectorate in the present case.

As has already been noted above, the content of the contract of claim right assignment shows that its subject is the transfer of the claim right of court costs in the established by the Contract amount of 406 524.81 RUR, Contract also provides for the transfer to the new creditor necessary documentation substantiating the basis of the emergence and size of the claim right; according to the act of reception and transmission all the documents to the Contract of claim right assignment were transferred to the new creditor.

Consequently, the parties have established not only the limits (amount) of the transferred claim right, but also have determined the documents which prove the transferred right.

Thus, the Contract of claim right assignment is considered to be concluded, because it is possible to determine the subject of the Contract and volume of the transferred rights.

The Contract of claim right assignment corresponds to the provisions of chapter 24 CC RF, and it has not been disputed by the parties.

The court did not find the signs of insignificance and gratuitousness (paragraph 9 of the Information Letter of the Higher Arbitration Court of the Russian Federation No. 120 of 30.10.2007)

Besides the court has determined that the Organization had incurred costs for the Contract on providing legal services, this follows from the transfer and acceptance act of bill No. 00001 TDEh series from 25.10.2010 nominal value of 410 000 RUR, evidence of repayment of the bill, this follows from the agreement on repayment of a promissory note from 04.04.2011, consignment note No. TD000000211 from 04.04.2011 and invoice No. 000000212 from 04.04.2011.

The tax inspectorate argument, that the tax authority obligation to pay court costs in favor of the applicant have not arisen at the time of the conclusion of the contract on the claim right assignment, is not accepted by the court as justified.

Agreement for the assignment of a right (claim), the subject of which is the right which has not emerged at the moment of concluding the agreement, does not contradict the legislation. Current legislation does not contain prohibition on the turnover of future rights.

The mentioned position is reflected in paragraph 4 of the information letter of the Higher Arbitration Court of the Russian Federation No. 120 from 30.10.2007 "Review of application by arbitration courts provisions of Chapter 24 of the Civil Code of the Russian Federation".

Tax inspectorate argument that on 06.05.2011, LLC «Teploehnergopribor» had been terminated and removed from the United State Register of Legal Entities, and in connection with which the replacement of the party by its successor was impossible, is not accepted by the Court, since at the time of conclusion and execution of the contract of claim right assignment dated 20.09.2010 the aforementioned company existed as a legal entity

The subsequent termination of the original creditor – LLC "Teploehnergopribor" - is not a ground for termination of proceedings on the petition for the replacement of a party by its successor and on the application for the exaction of court costs, since the proof of the succession in material legal relations on the basis of the transaction concluded by legally capable legal entities, implements a procedural replacement of the original creditor to the cessionary, which at the time of procedural succession is an existing legal entity.

In accordance with the rules of paragraph 1 article 150 of the Arbitration and Procedural Code of the Russian Federation proceedings on a case is to be terminated in case of liquidation of a party in the dispute, as it precludes its consideration what has no place in this case.

Since case materials confirm the presence of the succession of society in the material legal relation the petition under article 48 of the Arbitration and Procedural Code of the Russian Federation is to be satisfied, LLC "Teploehnergopribor" should be replaced by the cessionary - LLC "Trade House" El'ton".

The abovementioned position is reflected in numerous court's practice, including in the decision of the Eighteenth Arbitration Court of appeals No. 18AP-5367/2010 from 25.06.2010" [10].

Appeals instance having evaluated the evidences presented in the case materials came to the following conclusions:

"In accordance with paragraph 1 of article 382 of the CC RF the right (claim) that belongs to a creditor on the basis of the obligation may be transferred to another person in the transaction (claim assignment).

Thus, from the literal interpretation of article 382 of the CC RF follows that the assignment of a claim may be transferred to another person only if the claim belongs to the creditor on the basis of obligation.

In accordance with article 8 CCRF civil obligations arise from contracts and other transactions from the acts of the State bodies and local self-government bodies, which are provided by law as grounds for civil rights and responsibilities of the judicial decision that created the civil rights and responsibilities.

In accordance with article 8 of the CC RF civil obligations arise, including, from contracts and other transactions, from the acts of State bodies and Local self-government bodies, which are stipulated by law as grounds for emergence of civil rights and responsibilities, from the judicial decision that has established civil rights and responsibilities.

As follows from the case materials ***LLC "Teploehnergopribor" did not have such a circumstance at the moment of conclusion the contract on assignment right of claim from a tax authority court costs incurred during consideration the case No. A57-3530/2008.***

Reference of the Court of first instance and LLC "Trade House "El'ton" to the court's judgment on the case No. A57-3530/2008, which, according to the complainant and the Court, established the duty of inspection to pay court costs, the Court of appeals instance considers unfounded on the following grounds.

In accordance with part 2 of article 201 of the APC of the RF Arbitration court, having found that the contested non-normative legal act, decisions and actions (inactions) of bodies implementing public powers and officials do not comply with the law or other normative legal act and violate the rights and lawful interests of the applicant in the field of entrepreneurial and other economic activity, decides on

the recognition of non-normative legal act invalid, decisions and actions (or inaction) illegal.

Decision of the Court of Arbitration of the Saratov region of 27.02.2009 on the case No. A57-3530/2008 recognized as invalid the tax authority decision on the additional charge of tax, penalties and collection of fines. Thus, this judicial act established only the obligation of inspection on the removal of the infringed taxpayer's right and adopting measures to the exclusion of these amounts from the applicant ledger card.

At the same time the judicial act did not established the obligation of the tax authority to pay the court costs. For establishing this obligation LLC "Teploehnergopribor" appealed to the court only 01.11.2010.

The appeals instance considers that procedural law of the party on the case of the reimbursement of court costs provided for in article 106, 110 of the Arbitration and Procedural Code of the RF does not mean unconditional emergence of the losing side duties (obligations) on payment of such costs to the party in favor of which has been adopted the judicial act, until the adoption an appropriate court's judgment on the allocation of court costs.

According to article 112 of the Arbitration and Procedural Code of the RF distribution of court costs shall be settled by the arbitration court considering the case, by a judicial act, which ends the proceedings on the merits, or in the definition.

The Code does not preclude the possibility of considering by the Court of arbitration the statement on the allocation of court costs in the same case even when it is filed after the making decision of the Court of first instance, decisions of courts of appeal and cassation instances.

Herewith part 2 of article 111 the Arbitration and Procedural Code of the RF provides that the Arbitral court have the right to impose all court costs on the case to the person who abuses his procedural rights or fails to comply its procedural obligations if it has led to the collapse of the trial, delaying trial proceedings, obstruction of proceedings and adoption of a legitimate reasonable judicial act.

Thus, this norm confirms the conclusion of the Court that the ***stipulated by chapter 9 the Arbitration and Procedural Code of the RF right of a party to compensation of court costs*** (the duty of distribution of which is assigned to the Court) ***before its confirmation by the appropriate judicial act does not speak of*** unconditional ***obligations of the losing side to compensate court costs***.

In view of the above, the appeals instance considers unjustified the reference of the Court of first instance to paragraph 4 of the Information letter of the Higher Arbitration Court of the Russian Federation No. 120 of 30.10.2007 confirming

the legitimacy of the assignment of the not emerged at the time of the agreement conclusion right as not applicable to the situation.

By the way, in accordance with part 1 article 48 of the Arbitration and Procedural Code of the Russian Federation in case of withdrawal of one of the parties from the disputed or established by a judicial act of the Arbitration Court legal relation (reorganization of a legal entity, an assignment of a claim, transfer of debt, death of a citizen and the other events of persons change in the obligations), arbitrage court replaces this party by its successor and indicates this in a judicial act. Succession is possible at any stage of arbitration process.

Thus, within the meaning of the mentioned norm of law succession represents the transfer of procedural rights and obligations from one person to another in connection with material succession. Procedural succession is carried out by Court by replacing a party in the dispute with its successor.

Satisfying the LLC "Trade House "El'ton" statement, the Court was basing on the fact that in the disputed legal relations had been changed the person whose right was subject to judicial protection. However, in a dispute about the annulment of decisions of the tax authority, considered in the framework of the case No. A57-3530/2008, by judicial act which confirmed the violation the rights of LLC "Teploehnergopribor" in the disputed tax relation, the claimant was not changed, since LLC "Teploehnergopribor" had been terminated without transfer of rights and duties to other persons and LLC "Trade House "El'ton" was not its successor in the considered on the case dispute with tax authorities.

In accordance with the provisions of article 110 of the Arbitration and Procedural Code of the RF the claim right to exaction court costs belongs to the side of the case, in favor of which was adopted the judicial act.

As mentioned above, LLC "Trade House "El'ton" was not a party in the case No. A57-3530/2008, the rights and obligations by the disputed legal relation (contesting of non-normative legal act of inspection) established by a judicial act, was not transferred to it. ***There were not any court costs at the date of the contract conclusion on the cession of the judicial act which established the inspection obligation to compensate court costs to LLC "Teploehnergopribor".***

Consequently, in the absence of material succession between "Teploehnergopribor" and LLC "Trade House "El'ton" there is no basis for the procedural succession in accordance with article 48 of the Arbitration and Procedural Code of the RF, in connection with what the statement by the "Trade House "El'ton" to replace LLC "Teploehnergopribor" during the consideration of the claim on exaction court costs from the tax authority is not to be satisfied" [11].

Resolution of the Federal Arbitration Court of the Volga district from 02.11.2011 [12] left unchanged the decision of the Twelfth arbitration court of appeals from 09.08.2011 and cassation appeal of LLC "Trade House" Elton" without satisfaction. Currently, the supervisory instance of the Arbitration court has requested the case to settle the issue of the existence of grounds for revising contested court's judgments by way of supervision [13].

The legal position of the taxpayer (his successor) in that case is based on the following:

1. According to article 110 of the APC of the RF court costs incurred by persons participating in the case, in whose favor was taken a judicial act, are collected by Arbitration court from the party which lost the dispute.

   Disposition of the article does not imply and does not mean the actions of the party in whose favor was taken a judicial act, in part of proof of rights to reimbursement of court costs, and also need not the evidences of the emergence of the other party payment obligation.
2. Content of chapter 9 of the APC of the RF establishes the right of choice of the party, in favor of which was adopted the judicial act, to exaction court costs from the losing party, or refusing claim for their exaction. At the same time a party obtains the right of applying to court for the exaction court costs on the case as soon as is adopted the last not complained judicial act, which meets the requirements in the dispute.
3. Since the issue by the Court of cassation instance the resolution on the case No. A57-3530/2008 from 30.04.2010, which recognized as invalid the tax authority decision, LLC "Teploehnergopribor" in accordance with article 110 of APC of the RF obtained the right to appeal to the Court of arbitration of the Saratov region with a statement on the allocation of court costs, because in the adopted judicial acts on the case during of settlement the dispute on the merits the issue of court costs was not resolved.
4. The amount of claims against the debtor (which is the subject of arbitration in the allocation of court costs) was formed outside the relation "applicant - tax authority". The amount of the applicant's claim was determined by the contract with CJSC "SANAR" and its actual execution (were formed actually incurred costs).
5. From a legal position reflected in the Information letter of the Higher Arbitration Court of the Russian Federation No. 120 from 30.10.2007, follows that the assignment of right (claim) is valid only if the assigned right is

undisputed, had emerged before its assignment. Claim to the tax authority formed by the taxpayer before applying for reimbursement of judicial costs, before the conclusion of the cession agreement with LLC "Trade House "El'ton" (the date of the transaction is later than the completion date of the taxpayer's tax dispute with the Interregional Inspection of Federal Tax Service of the RF No. 7 in the Saratov region).

6. The right to reimbursement of court costs arises from the moment of the judicial act adoption on the main case, and it is undoubtedly in its legal nature. LLC "Teploehnergopribor" itself applied to the Court for exaction court costs, the arbitration court accepted the application, and the tax authority did not disputed the claimant right to legal costs. When the case was in the proceedings before the Arbitration court of first instance the tax authority was not filing statements of cessation of proceedings on the case due to the absence of the taxpayer's right to apply to the Court for the exaction of court costs. Consequently, the tax authority has admitted the obligation to pay court costs and the further subject of legal proceedings was only the determination of the amount's reasonableness of incurred court costs claimed for exaction from a party. The actions of the tax authority representative in the proceedings of the Court of arbitration of the Saratov region were aimed at delaying the decision on the allocation of judicial costs, evidence of excessiveness of judicial costs were not submitted. Obstruction of justice by the tax authority representatives had been carrying out till making an entry to The United State Register of Legal Entities about voluntary liquidation of LLC "Teploehnergopribor", which was made on 05.05.2011, in order to avoid further incurring material losses for unlawful decision that was cancelled by judicial authorities.
7. Having formed by 01.11.2010 necessary package of documents for claiming judicial costs to the Arbitration court, LLC "Teploehnergopribor" filed a claim in court for the exaction court costs in the order of chapter 9 of the APC of the RF, having executed its obligations to the assignee under the contract of claim right assignment from 20.09.2010, on the basis of which the right to collect court costs passed to LLC "Trade House "Elton". Transfer of the claim right has been paid by the cessionary to the taxpayer, and the fact of payment is not contested by the parties. The invalidity of the Contract was not considered by the courts of appeal and cassation instances as a necessary legal fact in the case which must be the base of judicial acts issuance by these court's instances.

Seven paragraphs of legal position's grounds of the party which has claimed for exaction judicial costs from a tax authority, derived by us from the party's procedural documents in this case. It seems to us that the legal position of the taxpayer's cessionary could be more justified with reference to the legal position of the Constitutional Court of the Russian Federation.

In our view the position of the appeals instance (and supporting cassation instance) of the Arbitration court does not hold water and that's why.

First, the arbitration courts of these instances do not take into account the Ruling of the Constitutional Court of the Russian Federation No. 22-O of February 20, 2002 "On the complaint of OJSC "Bolshevik" on violation of constitutional rights and freedoms by provisions of articles 15, 16 and 1069 of the Civil Code of the Russian Federation" [8], which determines the legal nature of judicial costs in a tax dispute. Judicial costs – is a special kind of loss, the procedure for compensation of which is determined by the procedural legislation (APC RF).

A similar understanding of the legal nature of court costs gives M. Kalinina, claiming that "most reasonable, to our point of view, is the approach in accordance with which the court costs by its legal nature are losses and represent real damage. This basic theoretical provision was taken by the Constitutional Court in the Ruling No. 22-O from February 20, 2002 "On the complaint of OJSC "Bolshevik" on violation of constitutional rights and freedoms by provisions of articles 15, 16 and 1069 of the Civil Code of the Russian Federation" which recognizes as losses the cost for a representative services in the arbitration dispute.

Paragraph 1 of article 15 of the Civil Code of the Russian Federation stipulates that a person whose right has been violated may demand full compensation for losses suffered, if a statute or a contract does not provide for compensation for damages in smaller size. Article 15 of the Civil Code of the Russian Federation applies when there is no specific procedure of infringed right protection, because it is of a general nature. In respect of court costs exists such a special procedure – it is stipulated by the procedural codes, which also limit the size of the representative costs – they are compensated within reasonable limits, but not in full, which is consistent with the general rule laid down in the Civil Code of the Russian Federation. Thus the norms of Civil and Arbitration Procedural Codes represent nothing more than "a special case of the provided under the civil legislation rule on reimbursement damages to the party whose right was violated with respect to the participants of civil proceedings" [6].

Indeed, the Constitutional Court of the Russian Federation indicated that "article 1069 CC RF provides that the harm inflicted to a citizen or a legal entity as

a result of unlawful actions (inaction) of state and local self-government bodies or of their officials, including as a result of the adoption of an act of a state or self-government body inconsistent with the law or any other legal act, shall be compensated respectively at the expense of the state treasury of the Russian Federation, the treasury of a subject of the Russian Federation or the municipal formation treasury. Satisfying the claim of reimbursement harm in accordance with article 1082 CC RF the Court depending on the circumstances of the case obliges the person responsible for the damage to compensate damage in kind or compensate the losses caused. The concept of loss is disclosed in paragraph 2 of article 15 CC RF: losses mean costs which a person has or is about to be made to restore his violated right, as well as loss of or damage to its property (actual damage) and the lost revenue that the person would have received under normal conditions of civil turnover, if his right has not been violated (loss of profit).

The legislator has not imposed any restrictions on reimbursement material cost of representation the interests of the person whose right is violated. Otherwise would contradict the obligations of the State to ensure the constitutional rights and freedoms.

Direct recognition in article 91 of Civil and Procedural Code of the RSFSR of provision on awarding by the court the party, in whose favor was taken the decision, the costs on payment representative services on the other hand does not mean that because of the lack of similar norm in the Arbitration Procedural Code of the Russian Federation the same costs cannot be collected when protecting by parties their rights by way of arbitration proceedings. Otherwise would contradict the enshrined in article 19 (part 1) of the Constitution of the Russian Federation principle of the equality of everyone before the law and the courts.

Regulating the grounds, conditions and procedure for compensation losses, including ensuring compensation for costs incurred to restore the violated right, the contested articles provide, moreover, the principle enshrined in the Constitution of the Russian Federation on protection private property right by law (article 35, part 1) and provide constitutional guarantees of the right to qualified legal assistance (article 48, part 1).

The examined articles of the Civil Code of the Russian Federation aimed at the realization of the right to compensation of damage caused by unlawful actions (or inaction) of State power bodies, cannot, therefore, be applied in contradiction with the constitutional sense"[4].

It should be noted that the Constitutional Court of the RF made this ruling with negative assessment of the Court of arbitration actions in the dispute of OJSC

"Bolshevik" with the tax authority – " the excluding costs for representation in court and for providing legal services from the losses, which are to be compensated in accordance with articles 15, 16 and 1069 CC RF in system connection with its article 1082, indicates that the interpretation of the mentioned norms aimed at ensuring the restoration of the violated rights of citizens and legal entities, including by way of compensation for damage caused by unlawful actions (or inaction) of State power authorities (article 53 of the Constitution of the Russian Federation), when considering a particular case was made against their constitutional and legal sense, which the courts were not entitled to do"[4].

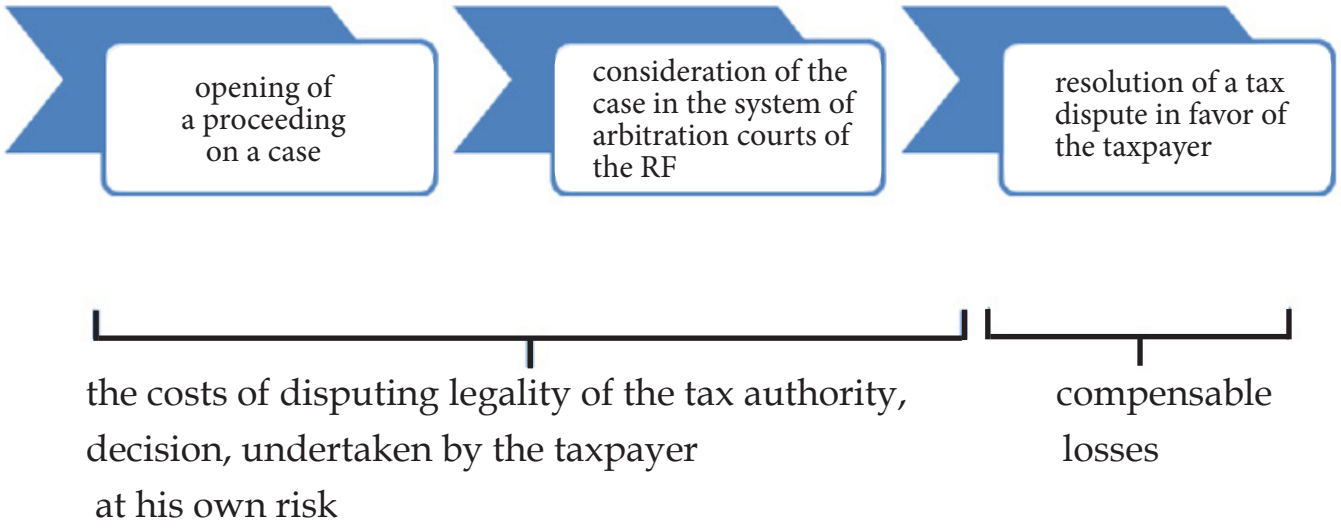
Thus, the legal qualification of judicial costs in a dispute with the tax authority in the role of damages in the case of a making decision on the dispute in favor of the taxpayer (a tax agent) provides to the taxpayer the right for compensation with the simultaneous imposition of obligations to the guilty party for compensation this type of loss (harm in the context of article 1069 CC RF).

Secondly, part 1 of article 382 CC RF establishing that the transfer of creditor rights to another person is based on commitment, together with part 2 of article 307 CC RF about the grounds of obligations (in our case the causing of loss (harm)) does not require the Arbitration court either to establish the fact of emergence of obligations of the tax authority to the taxpayer in part of reimbursement of court costs, or to establish not pre-existing commitments to the tax authority. The role of the judicial body is reduced only to compliance with statutory procedures of satisfying the claims of the taxpayer in that part of the loss (harm caused by unlawful decision (action) of the tax authority) which is specified by procedural legislation as court costs (judicial costs), with a view of ensuring a balance of interests between the parties (resolves the questions of reasonableness of incurred court costs).

The Twelfth arbitration court of appeals made a misinterpretation of the rules of law having identified arbitration court's powers to **collect** court costs (judicial costs) with the powers to establish the obligations of the tax authority before the taxpayer to pay the court costs (judicial costs). Part 1 of article 110 of the Arbitration and Procedural Code of the RF established that "the court costs incurred by persons participating in a case, in whose favor was taken a judicial act, are **exacted** by the Arbitration court from a party". The legislator did not accidentally use the words "**are exacted**" in part 1 of article 110 of the Arbitration and Procedural Code of the RF and repeated them it in part 2 of the same article. Different interpretation, as the powers of the Arbitration court on exaction monetary funds under having place circumstance, in our opinion is not admissible.

Dictionary of the Russian language defines the verb "to exact" (in legal context) as the activity associated with the penalty, bringing to responsibility, as well as identity of phrase "to make to pay" [7, 70]. That is the word "to exact" possesses punitive and coercive properties of the action that is executed by the Arbitration court which are absent in the concept of "to establish an obligation (duty)".

It seems to us, for a better understanding of the moment when the tax authority's obligations on judicial costs arose before the taxpayer, it is necessary to depict graphically the genesis of the legal nature of the court costs in a tax dispute.



As you can see from the picture, the taxpayer begins to incur its own costs on contesting the illegal decision of the tax authority before the start of the arbitration proceedings. And it is justified, since the filing a statement on the disputing the decision of the tax authority shall be accompanied by the preparatory work related to the study of arguments of the tax body, preparing evidences, writing statements, etc.

In consideration of a tax dispute in different instances of the Arbitration court the taxpayer incurs certain expenses related to the participation of its representative in court proceedings, conducting expertise, involving of witnesses in the case, etc.

Tax dispute by definition cannot lead to the reconciliation of the parties. In contrast to the tax authority with administrative resource, the taxpayer has to pay for every legal action. Taking into account that tax dispute comes through all the instances of the Arbitration court, and sometimes two times, the amount of court costs of a tax dispute transcends the sum of five zeros. These costs to the taxpayer could result in ineffective losses if the taxpayer does not win the dispute with the tax authority. And only in the event of a positive decision in the tax dispute, the taxpayer may rely on the compensation of his court costs in the procedure

provided for in chapter 9 of the Arbitration and Procedural Code of the Russian Federation.

Establishing the reasonableness of the taxpayer's position in the tax dispute, Arbitration court shall render its decision on the invalidation of the tax authority non-legislative act disputed by the taxpayer or about recognition as illegal actions (inactions) of the tax authority (or its officials), and thus restores the breached right of the taxpayer. Came into force judicial act, which has put an end in the tax dispute in this case is a legal fact that confirms the presence of certain circumstances (prescribed by the law, not the Court's discretion), which are the grounds of particular legal relationship – compensation of court costs (expenses) incurred in a tax dispute from the party losing a dispute.

The situation looks pretty strange, when you have to explain the basics of law. However, it is exactly the fundamental error of the Arbitration Court of appellate instance in determination legal facts has led to the imposition of illegal and unjustified resolution concerning distribution of court costs on the case No. A57-3530/08.

Thirdly, the Twelfth arbitration court of appeals motivates its decision by concepts missing in Chapter 9 of the Arbitration Procedural Code of the Russian Federation. Indeed, one cannot but agree with the Court's finding that "there was not the judicial act establishing the duty of inspection to compensate court costs for LLC "Teploehnergopribor" at the date of conclusion of the contract of assignment. In a statement of the taxpayer, in which was contested non normative acts of the tax authority, there was no claim for reimbursement of legal costs by the tax authority and the adopted judicial act on the tax dispute also did not establish the obligation of the tax authority for reimbursement of judicial costs to the taxpayer. However, the establishment the existence of the tax authority obligation for reimbursement of court costs does not require a specially issued court's judgment!judicialsate court costs that "

We have already considered above that court costs (judicial costs) as opposed to other kinds of losses are not compensated under the current legislation of the Russian Federation as losses, and are subject to exaction from a party. The powers of the Arbitral court in this case are limited by the distribution of legal costs under the rules stipulated in chapter 9 of the Arbitration Procedural Code of the Russian Federation. Arbitration court enforces the exaction of legal costs from the tax authority but does not oblige it to reimburse losses to the taxpayer.

Fourthly, even more strange is the conclusion of the Twelfth arbitration court of appeals on the existence of one party's right in the absence of obligations of the

other party. It is well known that legal science associates with the mutual rights and obligations both parties of legal relations. The one party's right always corresponds with the duty of the other party of a legal relation. The conclusion of the court that the taxpayer's right to the judicial costs does not corresponds to the unconditional tax authority obligation to reimburse it (in the context of specific circumstances and on the tax dispute permitted in favor of the taxpayer), is an innovation in legal science with far-reaching consequences.

Judicial error that has place, in our opinion, may be due to the fact that the issue of court costs allocation, which has affected the norms of civil law on a change in the obligations of persons, was resolved by the judicial board, which specializes in administrative and legal disputes (cases arising out of public law relations), which has committed negligence and improper interpretation of norms of substantive right – of the Civil Code of the Russian Federation in the part of obligation law. The basic idea of the disputed judicial act is an emergence of obligation of the tax authority on judicial costs before the taxpayer on the basis of a judicial act allocating court costs on the application of the taxpayer. This idea has a hidden motive. The fact is that from the Civil Code of the RF follows that only really existing right (claim right) may be assigned, and for assignment of rights (claim right), the creditor must have this claim.

Article 16 CC RF establishes that "The losses, inflicted upon the citizen or upon the legal entity as a result of illegal actions (the inaction) on the part of the state bodies, of the local self-government bodies or of the officials thereof, including the issue by the state body or by the local self-government body of an act, which is not in correspondence with the law or with the other legal act, shall be liable to compensation by the Russian Federation". On the basis of norms of the article follows that both sides of a legal relation at the same time are endowed with the corresponding rights and responsibilities. One cannot speak on the existence of a right, in our case the taxpayer's right, without corresponding obligation of the other party of this legal relation. And the mentioned rights and obligations of the parties in the tax dispute had arisen since the establishment of the legal fact that an act issued by the tax authority does not comply with the law. The question, would the taxpayer exercise his right or not, will be decisive for the execution of obligations by the other party of the tax dispute. That is not identical to lack of very responsibility.

The mentioned by us understanding of emergence rights and obligations in terms of exaction judicial costs from a party, complies with the provisions of article 8 CC RF, which establishes the grounds for the occurrence of civil rights and duties, among which are:

- events with which the law or other legal act connects the ensuing of civil-legal consequences;
- causing of harm;
- actions of citizens and legal entities.

The Federal Tax Service of Russia, as well as its territorial subdivisions, is a legal entity. Its illegal (unlawful) decision, cancelled by the Court of arbitration is a result of an action. And that decision has led to the loss of the taxpayer in the form of costs associated with the restoration of the infringed right. Obligation to reimburse such loss arises from the provisions of articles 16, 1069 CC RF, and the legislator associates the emergence of such an obligation with committing illegal actions (inactions) and adopting of an illegal act. This legal position is confirmed by the judicial act in which the contested unlawful decision of the tax authority is declared invalid from the moment of its making.

Fifthly, the assignment of rights (claim), the subject of which are judicial costs, has no legislative restrictions in respect of either a creditor or debtor. In the case of an obligation for compensation of losses (namely such legal content takes place in the part of judicial costs in the tax dispute, won by the taxpayer), the identity of the creditor is immaterial to the debtor. Monetary obligation associated with the violation of the LLC "Teploehnergopribor" rights has an independent property value.

Legislation does not contain provisions on the possibility of violation of the rights and interests of the debtor by the assignment of rights (claim) for compensation losses (in the form of judicial costs associated with the restoration of the violated right). Therefore, the right (claim) for compensation losses may be assigned to any third party [5].

In our view, in practice should be widely introduced the exaction of judicial costs in favor of the representative rendering legal services in the arbitration dispute on the basis of right (claim) assignment to this representative on court costs incurred by his client. It is quite possible on the basis of the report on the rendered legal services submitted to the client to commit simultaneously two economic transactions – to pay provided legal services and assign the right (claim) for exaction judicial costs from a party with a certain discount (not exceeding 20%). This discount will be a kind of bonus and at the same time the insurance in the part in which in a particular system of arbitration courts when resolving issues on the distribution of court costs judges reduce the amount of the exacted judicial costs. In addition, having assigned the right (claim) in the part of judicial costs to his representative, client

(taxpayer) will be spared from further participation in the trial. The representative who has justified cost of his legal services in a report will bear the risk of incomplete satisfaction due to the excessiveness of court costs which are determined by the Court. It seems to us that such a mechanism would help to reduce the cost of representatives' legal services and will exclude non-professional participants from the market of these services.

Having finished consideration of our own arguments in the part of the lawfulness the assignment of rights (claim) by the taxpayer for judicial costs which are to be exacted from a tax authority, we consider it necessary to refer to arbitration practice taking place in the transactions related to the assignment of rights (claims).

For example, in the decision of the Federal Arbitration Court of Northwest District No. 56-11103/2009 from December 28, 2009 [8] reflected the position of the judicial authority concerning the assignment agreement, when there is a dispute in respect of the transferred right. In that case, the cedent has assigned and the cessionary has obtained the right (claim) to the debtor (Bank) on the return of unjust enrichment arising from improper retention by the Bank of monetary funds (commission) from the current account of the cedent. The Bank, in the belief that the actions of the charging off the commission were legitimate and there was no subject of cession agreement appealed to the Court of arbitration for recognition of the agreement unconcluded. The Court of cassation instance rejected the Bank to meet the stated claims. It was found that the essential terms of the assignment agreement, including the subject, in the contract were agreed. According to paragraph 8 of the information letter of the Higher Arbitration Court of the Russian Federation No. 120 from 30.10.2007 "Review of application by arbitration courts provisions of Chapter 24 of the Civil Code of the Russian Federation" [8] admissibility of right (claim) assignment is not dependent on whether it is indisputable. In accordance with article 386 CC RF the Bank had the right to raise against the cessionary's claim its objections which he had against the society at the time of receipt of notice on rights transfer under the obligation to a new creditor.

By analogy to the considered example, the tax authority in case No. A57-3530/08 was entitled to put forward objections against the excessiveness of taxpayer court costs related to representative legal services from the date of entry into the proceedings LLC "Trade House "El'ton", rather than seeking opportunity to evade obligations to reimburse the taxpayer's costs for the restoration of the infringed right.

Generalization of the practice of applying by arbitration courts provisions of chapter 24 of the Civil Code of the Russian Federation explains a number of issues which were raised repeatedly by the tax authority in the case No. A57-3530/08

- is the assignment of future claims admissible,

- does the assignment of right (claim) for reimbursement losses contradict to the legislation,

- is the assignment of rights under executive writ the assignment of rights under agreement.

It seems to us that all the actions of the tax authority representatives in the proceedings related to the allocation of court costs incurred in a tax dispute in the case No. A57-3530/08 is an abuse of the law, the purpose of which is to avoid liability for an unlawful act, made in relation to the taxpayer.

Summing up the above said, once again turn to the article 128 CC RF, in which under the object of civil rights are referred "the things, among them money and securities, and also the other kinds of the property, such as the rights of property; the works and services; information; the results of intellectual activities, including the exclusive right to these (the intellectual property); the non-material values" [2]. Court costs are only possible in the form of money, which are the first in the enumeration of objects of civil rights. The very fact of existence of legal costs already generates the subject of claim, so the argument about lack of subject-matter in the agreement of cession of court costs (judicial costs) is false.

References:

1. Arbitration and Procedural Code of the RF No. 95-FL (Federal Law) of July 24, 2002 [Arbitrazhnyj processual'nyj kodeks Rossijskoj Federatsii ot 24 ijulja 2002 g. № 95-FZ]. *System GARANT* [Electronic resource], Moscow: 2012.

2. Civil Code of the RF, No 51-FZ part one of November 30, 1994, No. 14-FZ part two of January 26, 1996 [Grazhdanskij kodeks Rossijskoj Federatsii. Chast' pervaja ot 30 nojabrja 1994 g. № 51-FZ, chast' vtoraja ot 26 janvarja 1996 g. № 14-FZ]. *System GARANT* [Electronic resource], Moscow: 2012.

3. Federal Law No. 229-FZ of October 2, 2007 on executive proceedings, article 48 of the APC (Arbitration and Procedural Code) of the RF [Federal'nyj zakon ot 2 oktjabrja 2007 g. № 229-FZ «Ob ispolnitel'nom proizvodstve», st. 48 APK RF]. *System GARANT* [Electronic resource], Moscow: 2012.

4. The ruling of the Constitutional Court of the RF No. 22-O of February 20, 2002 under the claim of JSC "Bol'shevik" on violation of constitutional rights and freedoms by the provisions of articles 15, 16 and 1069 of the Civil Code of

the RF [Opredelenie Konstitucionnogo Suda RF ot 20 fevralja 2002 g. № 22-O «Po zhalobe otkrytogo aktsionernogo obshhestva «Bol'shevik» na narushenie konstitutsionnyh prav i svobod polozhenijami statej 15, 16 i 1069 Grazhdanskogo kodeksa Rossijskoj Federatsii»]. *System GARANT* [Electronic resource], Moscow: 2012.

5. Information Letter of Presidium of Higher Arbitration Court of the RF No. 210 of October 30, 2007 [Informacionnoe pis'mo prezidiuma Vysshego Arbitrazhnogo Suda RF ot 30 oktjabrja 2007 g. № 120]. *System GARANT* [Electronic resource], Moscow: 2012.

6. Kalinina M. *Exaction of judicial costs after consideration of a case* [Vzyskanie sudebnyh izderzhek posle rassmotrenija dela]. Available at: http://lawfirm.ru/article/index.php?id=955 (accessed: 30.03.2012).

7. Ozhegov S. I. *Dictionary of Russian Language* [Slovar' russkogo jazyka]. Under edition of Doctor of Philology, professor Shvedova N. Ju., Moscow: Russkiy Yazi'k, 1984, 70 p.

8. *System GARANT* [Electronic resource], Moscow: 2012.

9. *http://kad.arbitr.ru/Card?number=%D0%9057-3530/2008* (accessed: 30.03.2012).

10. *http://kad.arbitr.ru/PdfDocument/4dc061c9-c162-4639-9923-bae01797a247/A57-3530-2008_20110531_Opredelenie.pdf* (accessed: 30.03.2012).

11. *http://kad.arbitr.ru/PdfDocument/bf6361de-c8de-4467-aa76-eac163a003a4/A57-3530-2008_20110809_Postanovlenie%20apelljacii.pdf* (accessed: 30.03.2012).

12. *http://kad.arbitr.ru/PdfDocument/987cf934-7c87-4130-833e-bfa86e5bfced/A57-3530-2008_20111102_Postanovlenie%20kassacii.pdf* (accessed: 30.03.2012).

13. *http://kad.arbitr.ru/PdfDocument/6360ddbb-3cd8-40c1-854a-bf270b87683f/A57-3530-2008_20120307_Opredelenie.pdf* (accessed: 30.03.2012).