

## THE ADMINISTRATIVE RESPONSIBILITY OF A MANAGEMENT COMPANY: THE PROBLEMS OF LAW-ENFORCEMENT

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Examines normative grounds for bringing to administrative responsibility management companies and practice of application articles of the Code on Administrative Offences of the RF to management companies when administrative offenses have been committed by subjects controlled by them. Analyses options of forming control by subjects of economy, while the devolution of the sole executive body's authorities to commercial management company.

**Keywords:** administrative responsibility, administrative responsibility of legal entities, management company, administrative responsibility of officials

Participation of management companies in the activities of the economic units is due to the choice of the owner (shareholders) legal way to manage the current activities of legal entities [1; 2; 3; 5]. The transfer of powers of the sole executive body of economic unit is carried out on the basis of an agreement with a commercial organization, which in this case becomes a management company (organization). The society whose sole executive body's powers have been passed to management company or manager acquires civil rights and shall assume civil obligations through the management company or manager in accordance with paragraph 1, clause 1 of article 53 of the Civil Code of the RF.

However, from our point of view, mentioned replacement of a sole executive body (an official in the context of the Code on Administrative Offences of the Russian Federation) to the management company does not lead to unconditional punishment of the management company for administrative offences occurring in the management of the economic unit. Despite the fact that bringing to administrative responsibility of management companies shall be carried out in accordance with clause 9 of article 2.10 of the Code on Administrative Offences of the Russian Federation, the management company is seen in real legal relationships as a collective executive body within the category of an official that is defined by article 2.4 of the Code on Administrative Offences of the Russian Federation. Management company as well as the head of a commercial organi-

zation, carries out organizational and instructive, administrative and economic functions through specific officials who are given this powers in accordance with the staff list, organizational structure of management and internal normative acts. That is why the question of the definition of management company's (quasiofficial's) guilt cannot be considered on the principle of objective imputation of guilt that is applied to the economic unit – legal entity. From our point of view the person who conducts proceedings on the case should establish the guilt of the management company through company's officials, by analogy with the provisions of clause 4 article 110 of the TAX CODE of the RF. In the relation to the administrative offence of a management company the norm on establishment of guilt can consist in the following:

*Guilt of a managing company in committing of an administrative offence is determined depending on the fault of its officials, actions (inaction) of which have led to the commission of this administrative offence.*

Unlike the norm of clause 4 of article 110 of the TAX CODE of the RF in case of an administrative offence we exclude the guilt of the management company and here is why. In practice, there are two variants of building the system that administrate the current activities of the economy unit. The first variant is that the management of the managed subject is implemented through the highest official given with the powers of the management company; however this person is an employee of the managed subject (see Figure 1)

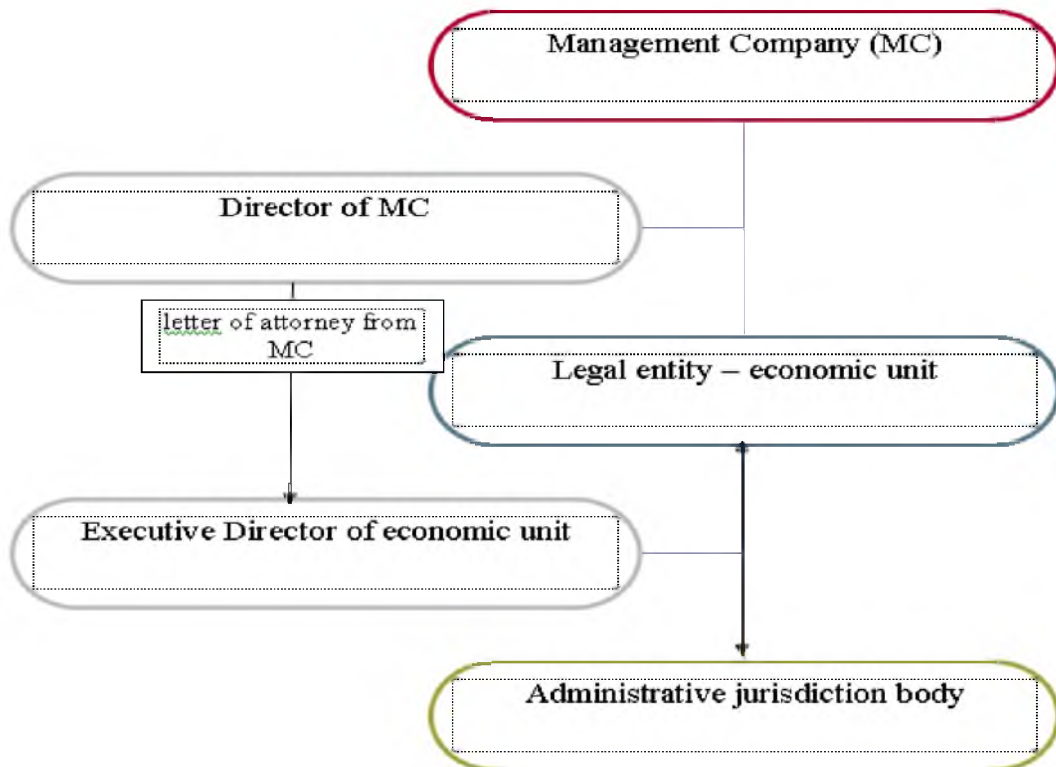


Figure. 1. The scheme of management of economic unit through the Executive Director of the economic unit.

The second version would be for the direct management of the economic unit by an official of the management company (a leader of the management company, or by an empowered official in the staff of the management company, see Figure 2).

Differences in schemes of management of economic unit, in our opinion should define when administrative responsibility should be born by the management company and when by a specific official which is given management company's powers.

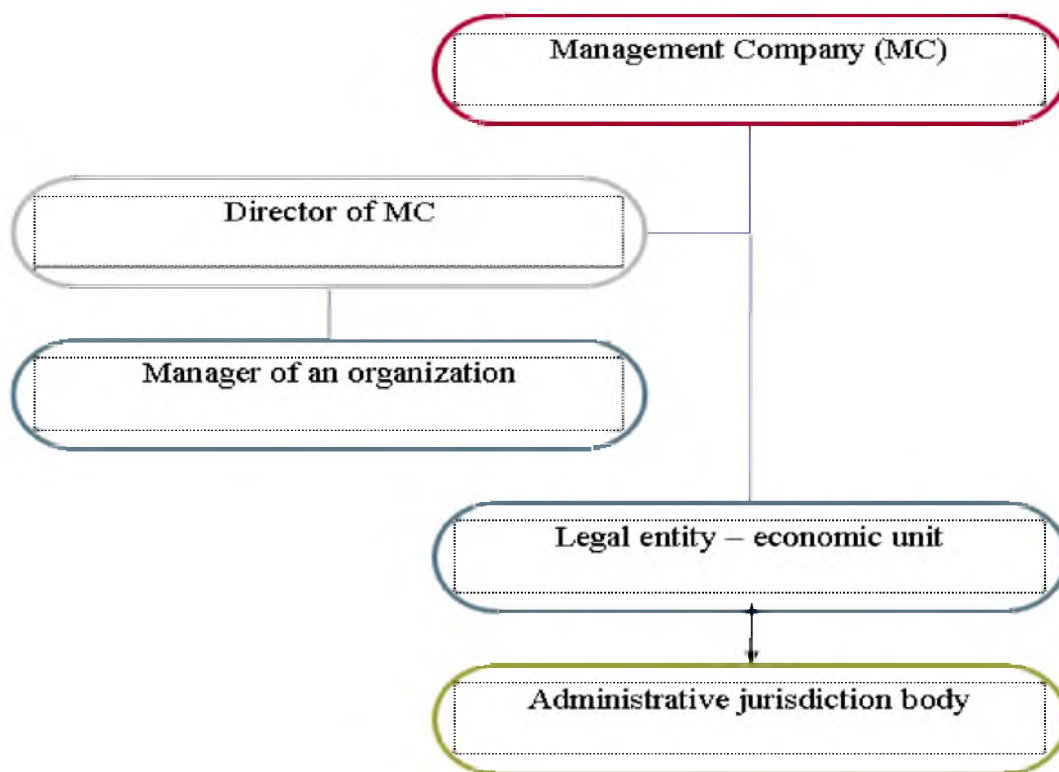


Figure. 2. Scheme of direct control of economic unit by officials of the management company.

The presence of the fact of administrative offence of economic unit – a legal entity is not sufficient to bring to administrative responsibility the management company which performs functions of the sole executive body of an economic unit. Clear evidences that the managing orders of the Management Company have led to committing an administrative offence by an economic unit are necessary.

We believe that the practice does not know any agreements for the implementation of functions of the sole executive body of an economic unit that would contain provisions aimed at the realization of organizational-instructive and administrative-economic functions through managed legal entity, which could lead to the commission of administrative offences by an economic unit.

Vesting of powers which are determined by legislation of the Russian Federation and charter of an economic unit for the manager of a joint-stock or limited liability company under the management company in the agreement on

performance of the functions of the sole executive body of an economic unit does not preclude empowering relevant powers (partial powers) to staff of the management company as well as economic unit's ones, with the definition of the limits of the allowed actions and level of responsibility. And in this case takes place delegation of powers of collective subject of law to individual entity.

Due to the fact that the annotation to article 2.4 of the Code on Administrative Offences of the Russian Federation within the category of official provides administrative liability not only to heads, but also to «other workers» for committed administrative offences, ignoring of this provision by the body of administrative jurisdiction can be explained only by the fact that the body (official) of administrative jurisdiction applies only to fiscal objectives in matters on administrative offences, where subject of liability is a management company. The amount of the fine from a management company is several times higher than from its official for committing of the same offence.

The introduced scheme of management of economic unit, through the executive director of the economic unit (see Figure 1), to our mind, in all cases excludes the administrative responsibility of the management company for administrative offences committed by economic unit and which provide responsibility for an official-offender – legal entity. The Executive Director of the economic unit shall be fully empowered the same rights and obligations of the Chief, but unlike the sole executive body, empowering is carried out on the basis of a letter of attorney issued by the management company. The Executive Director shall arrange monetary and material resources, perform all business correspondence and enter into relations with all persons on behalf of the economic unit, direct the staff, allocate rights and responsibilities among structural units and officials. The Executive Director is the highest official of the economic unit. In this case the management company only supervises the Executive Director and has minimal impact on economic entity. The existence of such a scheme is justified by the fact that the change of an official – the real head of the economic unit, occurs under the simplified procedure (through revocation of the letter of attorney), without meeting of shareholders (participants) of the company and without relevant notification procedures of the registering body (no entries in Unified State Register of Legal Entities; EGRYUL in Russian).

The practice of resolving administrative and legal disputes with the specified option of management of economic unit reflects the same approach to understanding of responsibility of an official and managing company of the author and judicial bodies. Thus, having brought to administrative responsibility leasing

company according to the article 15.27 of the Code on Administrative Offences of the Russian Federation for failure to comply with the legislation on combating the legalization (laundering) on the part of recording, storage and presentation of information about operations which are subjects of compulsory monitoring, Federal Financial Monitoring Service of the RF imposed an administrative penalty to the managing company on the same article having identified it with the guilty official who is responsible for compliance with law and relations with Federal Financial Monitoring Service of the RF [12]. As a result of judicial appeal – resolution of administrative jurisdiction body was declared illegal. Supporting the legal position of the management company, the arbitration court stated the following:

“Bringing to administrative responsibility CJSS “SANAR», Interregional Department (MRU in Russian) of Federal Financial Monitoring Service of the RF in Volga Federal District has not established, as required by the law (article 26.1 of the Code on Administrative Offences of the Russian Federation), persons-employees of LLC «leasing company “E’NAKS” who are guilty of committing administrative offence by and did not provide such evidences to the Court.

A contract for the performance of the functions of the individual executive body, according to which in the context of article 42 of the Federal law on the Limited Liability Companies JSC «SANAR» is a managing company, does not contain provisions which point to the existence of the rights and responsibilities, failure or improper performance of which by the JSC «SANAR» could result committing of an administrative offence by «Leasing company «E’NAKS».

In accordance with clause 2, article 7 of the Federal Law No. 115-FZ, JSC «SANAR» appointed to «Leasing company» E’NAKS» a special official responsible for compliance with the rules and implementation of the programmes mentioned in the Law.

Interregional Department (MRU in Russian) of Federal Financial Monitoring Service of the RF in Volga Federal District has not provided evidences that JSC «SANAR» obstructed the execution of statutory obligations envisaged by law by an official of LLC «Leasing company “E’NAKS” or dismissed this official from his duties.

In accordance with clause 4 of the Regulation on registration in the Federal service of financial monitoring of organizations conducting transactions involving monetary or other assets in the areas where there are no supervisory bodies (approved with regulation of the Government of the Russian Federation No. 28 of January 18, 2003) LLC “E’NAKS” provided to the Interregional Department (MRU in Russian) of Federal Financial Monitoring Service of the RF in Volga Fed-

eral District card of registration by form No. 1 CR (card of registration; KPU in Russian) approved by the Federal service for financial monitoring, clause 16 of which shows that Executive Director of LLC "Leasing company «E'NAKS» is an Organization's official that implements operations with funds and other assets, as well as is responsible for the compliance with the rules of internal control.

From the case materials has been established and not disputed by Interregional Department (MRU in Russian) of Federal Financial Monitoring Service of the RF in Volga Federal District that according to the order No. 1 of December 07, 2004 LLC "Leasing company «E'NAKS» appointed an Executive Director in the person of H.E.V., the duties of which are enclosed in the performance of the functions of the sole Executive Body of LLC "Leasing company «E'NAKS».

The Court considers that the argument of the administrative body that JSC "SANAR" is an official that is responsible for the Organization of internal control in the leasing company LLC "E'NAKS" is not well-grounded and placed on an incorrect interpretation of article 2.4 of the Code on Administrative Offences of the Russian Federation.

An official unlike a legal entity is an individual subject of law, and official's forms of guilt (art. 2.2 of the Code on Administrative Offences of the Russian Federation) differ from legal entity's ones.

Applying the principles of common directing of management company, JSC "SANAR" has not intervened in the ongoing activities of LLC "leasing company "E'NAKS" having appointed for the mentioned company the highest official who is the Executive Director who is included in the staff of the "leasing company "E'NAKS ".

The Law "on Joint-Stock Companies", the Law "on the Limited Liability Companies," Labor Code of the RF do not prohibit economic units to pass (charge) all or part of its governing and instructive powers, as well as the responsibilities for its non-implementation to person who performs management.

Due to the specific of legal relations which are regulated by Federal Law No. 115-FZ, , it is normatively vested that in these relations on the part of managed subject (in this case "Leasing Company "E'NAKS ") participates not just the head, but specifically empowered and trained person - the employee of "Leasing Company OOO "E'NAKS ".

Thus, a person with rights and responsibilities to act on behalf of "Leasing Company "E'NAKS" in legal relations with the Interregional Department (MRU in Russian) of Federal Financial Monitoring Service of the RF in Volga Federal District since assuming to the position of Executive Director of LLC "Leasing

Company "E'NAKS" and so far is the H.E.V. who according to article 2.4 of the Code on Administrative Offences of the Russian Federation is subject of responsibility for the offence stipulated under article 15.27 of the Code on Administrative Offences of the Russian Federation.

Interest in the case is that here takes place another circumstance that excludes responsibility and guilt of the sole executive body of economic unit; it is a normative vesting in role of a participant in public relations of the economic unit – the special subject of legal relations, to which are assigned duties and responsibilities. In leasing companies such a special subject is a special official who possesses certain competences [4].

Participation of the specially designated official (but not the leader of a legal entity) in legal relations with the Federal Service for Financial Markets have been provided for joint-stock companies, which themselves carry out keeping of the register of shareholders [8]. This official of a joint-stock company, in our view, would be responsible for administrative offences in the area of securities market under articles 15.19 and 15.22 of the Code on Administrative Offences of the Russian Federation.

It should be noted that areas of activity of economic units, which are regulated by the State, require in-depth knowledge and competencies on a number of issues which may be located outside the professional training of sole executive body. In this regard within economic units establishes the special services (subdivisions) which are responsible for safety, compliance with employment protection, industrial hygiene, ecology, etc. There are structures of the Chief Engineer, Chief power engineer, Chief Technologist in the industrial productions. Therefore, in addressing the issues of bringing to administrative liability of economic units' officials for administrative offences arising from unfair enforcement of responsibilities on the part of performance of administrative and economic functions, one should always install a particular person who is competent to perform those functions.

An interesting case No. A56-4947/2011 in which the management company challenged the decision of the Regional Branch of the Federal Service for Financial Markets in the North-West Federal District on bringing to administrative liability provided under part 9 of article 19.5 of the Code on Administrative Offences of the Russian Federation. Federal Arbitration Court supported the legal position of the managing company on the issue of its innocence in committing of administrative offence by its economic unit, having grounded its decision as follows:

The courts of first appeals instance have found that as a result of a field

inspection of Housing Accumulative Cooperative “Novyj Mir” Regional Branch gave this cooperative an order on removal of detected breaches.

In view of that, the subject of the administrative offence, whose objective side is expressed in fail to perform within the prescribed time-limit of lawful order of a federal body of executive power in the area of financial markets, is a person who has been given an injunction, the Court of first instance found that there was no structure of the Organization’s administrative offence, that in force of paragraph 2, part 1 of article 24.5 of the Code on Administrative Offences of the Russian Federation is a circumstance precluding proceedings on case of administrative offence” [11].

Similarly, the dispute was resolved with the same management company but with other managed subject [10]. Also in the other federal judicial district the Federal Executive Body in the field of financial markets lost administrative legal dispute, based on attracting management companies to administrative liability for failure to comply with injunctions for managed subjects who are participants to legal relationships in the area of financial markets [9].

As you can see from these examples, the Court focuses on targeting of an order to administrative jurisdiction body. The fact that the management company did not enter into legal relations with the administrative jurisdiction body, the Court considered bringing to administrative responsibility as an official (sole executive body) of the offender to be wrongful.

The following example, as we see it, shows how far officials of the administrative jurisdiction bodies (Federal Tax Service of the RF; FNS in Russian) from the proper implementation of articles of the Code on Administrative Offences of the Russian Federation for offences of an economic unit in the tax area with participation of the management company. In the viewed case the leasing company did not submit auditor’s conclusion of annual tax reporting, that was classified by a tax inspector as an administrative offence under article 15.6 of the Code on Administrative Offences of the Russian Federation (failure to provide information required for the implementation of tax control) committed by the sole executive body of the *management company*.

At the time of making up a Protocol on administrative offence under part 1, article 15.6 of the Code on Administrative Offences of the Russian Federation the official of Federal Tax Service was ignoring the existence of the labor contract between Executive Director (Official of the leasing company) and management company, according to which the Executive Director bears the rights and duties of the highest official in volume corresponding to the rights and obligations of



the individual Executive Body of the leasing company. The tax inspector has not adequately assessed that the Executive Director possessed a letter of attorney authorizing the Executive Director to sign outbound documents of the leasing company to the tax authorities, including quarterly and annual accounts, statements, explanations, declarations, applications for VAT refund, returning (offsetting) the amounts of excessively paid taxes, unlawfully collected sanctions. Also have been ignored facts of relations of the leasing company with the tax authority, which confirms participation in legal relations of Executive Director as the sole empowered by management company official of the economic unit.

Its position with regard to the bringing of the Director of the management company to administrative liability for the offence of an economic unit tax authority argued that the Director of the management company is a Director of the leasing company [13]. A justice of the peace has terminated proceedings on a case against the Director of the management company due to the lack of the administrative offence structure in official's actions. The Court found that a Protocol on administrative offence provided under part 1, article 15.6 of the Code on Administrative Offences of the Russian Federation was compiled against improper persons.

As you can see from the example, the tax inspector due to subjective reasons incorrectly identifies the Executive Director of the management company of an economic unit with the sole executive body of this economic unit. It seems to us that the tax inspector was led to essential error by the information from Unified State Register of Legal Entities (EGRYUL in Russian), which contains information on the sole executive body of the leasing company – the managing Organization (string 8 page 2 of form P 11001) and on the natural person who has the right to act on behalf of a economic unit (Leasing Company) without a letter of attorney. Also in the above case we see the reason of an error on the part of bringing of the official to administrative liability in the existence in the footnote to article 2.4 of the Code on Administrative Offences of the Russian Federation of the following phrase:

“Managers of organizations carrying out powers of sole executive bodies of the other organizations, bear the administrative responsibility as officials”.

At first glance, the focus of the legislator to leaders of organizations carrying out powers of sole executive bodies of the other organizations is not absolutely clear. So much so that before this phrase in the footnote, in the role of officials bearing the administrative responsibility, are mentioned managers and other employees who have committed administrative offences in connection with

the implementation of the organizational-instructive or administrative-economic functions. What is the difference between the functions of the leader of the management company and functions of the leader of a legal entity who is an ordinary subject of economic activity? As we see it, the answer to this question is that the powers of the head of the management company include instructive powers in respect of persons who are not directly influenced by him. The Head of the management company, we believe, has the powers of a representative of the authority over the managed subject's workers of an economic activity.

We believe it is necessary to note one more circumstance in the part of the administrative responsibility of managing companies. Clause 9 of article 2.10 of the Code on Administrative Offences of the Russian Federation was introduced by Law No. 9 of 09.02.09 [7] and has come in force since April 13, 2009. The clause shows that "in cases of administrative offences by the sole executive body of a legal entity with status of a legal entity, administrative penalty is assigned to him within the limits of the sanction applicable to legal entities". Before the coming into force of the mentioned norm, according to K. Trukhanov and A. Trushkov, sometimes management companies were imposed penalties provided for officials because they implemented powers of the head of an organization [14].

Legal Practitioners also note incidents of illicit involving of a management company liable for economic units' offences in the area which is regulated by the Law on Protection of Competition [6]. K. Trukhanov and A. Trushkov consider illegal when an administrative jurisdiction body issues an order to management company to transfer income obtained by managed subject through the violation of the Antimonopoly Legislation to the federal budget [14]. Their position is reasonable, since the management organization is not a subject that violates the legislative prohibition on abuse of a dominant position, and does not receive the income:

"Administrative liability for abuse of a dominant position in the commodity market is set by article 14.31 of the Code on Administrative Offences of the Russian Federation. The subject of offences, responsibility of which is provided in a specified article of the Code on Administrative Offences of the Russian Federation is the economic unit that occupies a dominant position in the commodity market. Management organization PJSC "B" is not such a subject, dominated position is only occupied by managed organization PJSC "A". Thus, PJSC "B" could not be regarded as a subject of the administrative offence under article 14.31 of the Code on Administrative Offences of the Russian Federation" [14].

Moreover, as rightly pointed out, "The administrative responsibility under article 14.31 of the Code on Administrative Offences of the Russian Federation is

established for legal entities in the form of fine, calculated as a percentage of the amount of the proceeds from the sale of the offender's goods (work, service) on market of which have been committed an administrative offence. PJSC "B" again, cannot have such proceeds *A priori*.

It also seems that the management organization cannot be held responsible under article 14.31 of the Code on Administrative Offences of the Russian Federation and as an official as it is not so according to article 2.4 of the Code on Administrative Offences of the Russian Federation" [14].

Summarizing the research, it can be stated that the administrative and tort legislation falls short on the issues of definition subjects of administrative responsibility from rapidly developing relations in business area.

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