

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

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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, exaction 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 1 article 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].

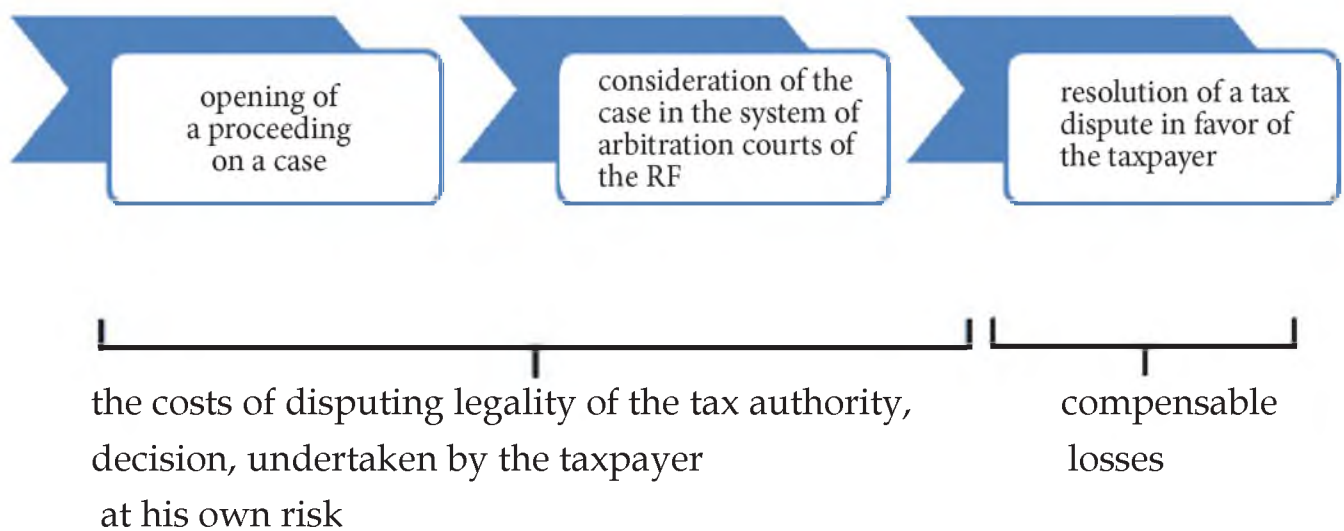
Thus, the legal qualification of judicial costs in a dispute with the tax authority in the role of damages in the case of a making decision on the dispute in favor of the taxpayer (a tax agent) provides to the taxpayer the right for compensation with the simultaneous imposition of obligations to the 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 uncompleted. 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.

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