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EVIDENCE OF THE REALITY OF TRANSACTIONS IN TAX DISPUTES

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In the article are considered the circumstances, documents, testimony of third parties, and other evidences which may be contrasted to the position of the tax authority asserting unreality of the taxpayer's transactions with a counterparty and obtaining by the taxpayer an unjustified tax benefit.

Key words: tax disputes, evidences, evidences in tax disputes, unreality of transaction, unfair counterparties and unfair taxpayers.

It is no secret the presence of unfair performing tax obligations by taxpayers who use "fly-by-night" and "shell" companies to reduce their tax burden, referred to in tax disputes as unfair counterparties. With these companies, taxpayers draw up documents on transactions without the real acquisition of their products and services. In such cases, we should agree with the tax authorities, accusing taxpayers in collusion with a counterparty providing illegal service, which allows taxpayers to receive unjustified tax benefit (reduction of the taxable base for tax on profit and VAT deductions).

It seems to us that in these cases there is the fact of making by a taxpayer an sham or feigned transaction, which, by Article 170 of the Civil Code of the RF is Insignificant. Boundary between the sham and ostensibility of transaction, you can determine just by setting all the circumstances of the transaction of a taxpayer (or a chain of related transactions involving multiple counterparties). The use by a taxpayer the combination of sham and feigned transactions is quite possible.

The authors of the Commentary to the Civil Code of the Russian Federation determine the sham as follows: "Sham transactions are actions performed

in order to deceive certain persons not involved in the transaction, by creating a false impression about the intentions of participants of the transaction. This can be done with a variety of purposes: a fictitious lease for the registration of a legal entity, a fictitious sale of the property under the threat of bankruptcy or confiscation of property for a crime, fictitious purchase in order to obtain a loan, and others. A sham transaction is associated with an understanding of the parties that this transaction does not bind them, and they do not intend to perform it or to demand its fulfillment" [9].

In the comments of other authors to Article 170 of the Civil Code of the RF is also considered only civil aspect of a sham transaction goal, although the goal of the subject of entrepreneurial activity transaction may well be getting unjustified tax benefits. As we have already said, a sham deal in tax optimization of a taxpayer may take place either in transactions of buying commodity stocks and supplies and the acquisition of services. However, it seems to us, to a greater extent, this optimization is used with immaterial objects, that is, services that are impossible to measure, evaluate in physical units of measurement.

With commodity stocks and supplies an unfair taxpayer is likely to apply transactions containing feigned elements. For example, really buying goods from the counterparties, in documents the taxpayer overstates the cost of its acquisition and accordingly the amount of VAT paid in the price of goods.

However, we do not set a goal of this article to explore the options of an unfair taxpayer's tax optimization schemes. More relevant is the task to protect a good faith taxpayer from applying to him by a tax authority similar technology of unlawful increase in tax liabilities due to qualification of actual transactions with counterparties as unreal (not occurring in real life).

The claims of a tax authority to a taxpayer usually occur in the absence of the documents requested in the third party audit from the counterparties of the taxpayer. In these cases, the taxpayer may be not only a victim of counterparty's tax unfairness (in the performance obligations of the counterparty on the transaction, the counterparty fails to perform subsequent tax obligations), but also face an unfair attitude to him in the form of refusal of the counterparty (its management bodies) from the transactions made with the taxpayer.

The position of the tax authorities in these cases is following – the taxpayer has not shown due diligence in the selection of counterparty, conducts the business on his own risk, and therefore should suffer the adverse effects of transactions with unfair counterparties. The exception of bringing the taxpayer to tax responsibility for the third person are cases where the taxpayer wins a tax dispute by providing

compelling evidence of the absence of collusion with an unfair counterparty and reality of transactions committed by an unfair counterparty.

It is quite difficult to prove the reality of transactions made with an unfair counterparty if the head of the counterparty when performing procedures of tax control refused:

- involvement in transactions;
- signature on documents;
- involvement in the activities of the counterparty as an official;
- to participate in the creation of a legal entity.

To strengthen the evidence base of unreality of deals at the mentioned behavior of the counterparty's head, the tax authority performs corresponding handwriting comparison of transaction documents of a taxpayer with a counterparty, as a rule determining the nonidentity of the specimen signature taken from the head of the counterparty, that has a place in the transaction documents of the taxpayer and this counterparty.

The motives of the tax authority for a special attention to transactions of the taxpayer with counterparties are the following facts:

- absence of a taxpayer's counterparty at the place of registration;
- submitting to the tax authority at the place of the taxpayer's counterparty registration of «zero» VAT declarations;
- submitting to the tax authority at the place of the taxpayer's counterparty registration of VAT declarations with turnovers less than specified in purchase book of a taxpayer under this supplier;
- the absence of any accountability to the tax authority under the taxpayer's counterparty that proves productive and economic activity of this counterparty;
- availability of information in law enforcement agencies about refusal of the taxpayer's counterparty head any transactions with anybody;
- the absence of taxpayer's counterparty's staff, property and other resources available to conduct commercial activities;
- registration of the counterparty at the place of mass registration of legal entities;
- registration of the counterparty by persons establishing multiple legal entities;

- presence of different graphic performance of signature on the transaction's with the counterparty documents with the clarification of the same official of the counterparty;

- the absence of documents proving the physical movement of goods from the counterparty to the taxpayer, etc.

On the basis of the tasks assigned to the tax authorities, which include control over the correctness of calculation, completeness and timeliness of payment (transfer) to the budget of the Russian Federation of taxes and fees, and in the cases stipulated by the legislation of the Russian Federation, the correctness of calculation, completeness and timeliness of (transfer) to the budget of the Russian Federation, other obligatory payments (see part 1 of article 30 of the Tax Code of the RF, [1]), "mistrust" of the tax authorities to the taxpayer's transactions with unfair counterparties is quite justified. All the more, the accusation of bad faith of the very taxpayer allows charging additional taxes from the taxpayer (tax on profit and VAT).

The tax authority does not accept the declared by the taxpayer deductions on transactions for the acquisition of goods from unfair suppliers and puts in doubt the very fact of these transactions, considering that they took place only on paper, and the taxpayer did not incur expenses of purchasing goods. In the act of Plenum of the Higher Arbitration Court of the RF [6] such a circumstance is considered as an unreliability (and / or divergence) of information contained in the documents, in other interpretation "fact of discrepancy with the reality of information reflected in the submitted taxpayer's documents" [11, 25].

Excessive suspicion of the tax authority to transactions of taxpayers is justified. Do not make secret illegal methods of reducing the tax burden used by entrepreneurs. Different kinds of tax optimization schemes are the subject of study by tax authorities, courts, [7], practicing lawyers [10, 11] and Jurisprudence [8]. However imperfect legislation and weak evidence base presented by tax authorities in many cases allows unfair taxpayer to avoid responsibility, and in contrast, imposes responsibility for unfair counterparty on good-faith taxpayer who was not prepared to dishonesty of counterparty emerged as a result of a tax audit.

It is difficult not to agree with E. A. Lysenko, who notes that courts settle tax disputes in favor of the tax authority, when in support of the decision of the tax authority is put information about the lack of records on organization-counterparty in The United State Register of Legal Entities, when the persons referred to as managers or owners of such organizations deny any involvement in their activities [11, 25]. In this case, a good-faith taxpayer will not only have to prove the reality

of transactions with the counterparty, but also contradict a witness (manager or owner of the organization, which is a counterparty of the taxpayer).

We believe that if the counterparty has not reflected in the accounting and tax accounting transactions with the taxpayer, the representative of the counterparty will definitely deny the supply of goods (providing services) to the taxpayer, because otherwise, he recognizes not only the fact of a tax offense, but the fact of a criminal offense under article 199 of the Criminal Code of the RF. Therefore, the only denying of the counterparty's representative to sign the documents on transactions with the taxpayer is not sufficient and other evidences are required. However, not all evidence may be reliable, for example, handwriting examination. There are cases when individuals possessing skills of writing signatures in different graphic styles, use these skills for unlawful purpose. Conclusive proof of signing invoices (bills, contracts and other documents on the transaction) by the authorized person of the counterparty (in the case of his refusal to write the signature) can be obtained only upon condition of the physical presence in the procedure of signing these documents and the implementation at this time a video or photo-documentation. Also undeniable proof can be provided by the procedure of signing documents in the presence of a notary. To prove signing / not signing invoices by authorized persons through handwriting expertise is possible only with a certain probability. Than further away in time from the tax dispute the date of drawing up invoices, the harder it is to provide the necessary material for handwriting expertise. During the examination it is necessary to ensure the identity of the conditions of signing documents and find out the fact if the heads of counterparty had (did not have) various techniques of signing, how many variants of signature used the heads.

However, as we see it, compliance with these procedures is unlikely to promote fair and lawful resolving of a tax dispute. Therefore, judicial authorities stopped on the issue of evaluation reality of transactions. Deserves special attention the position of the Constitutional Court of the Russian Federation, which said that "the resolution of disputes concerning the implementation of the obligation to pay taxes is a competence of arbitration courts, which should not only be limited to the formal determination conditions of application of the norms of the legislation on taxes and fees and in the case of doubt the correctness of application the tax legislation, including the legality of application of tax deductions, are required to determine, explore and evaluate the totality of important circumstances for the proper settlement of a case – the fact of payment goods (works, services) by a buyer, the actual relations of a seller and buyer, the presence of other, apart from invoices,

documents confirming the payment of the tax in the price of goods (works, services), etc." [2, 3, 4, 5].

In our opinion, the fact of the witness testimony (the representative of a counterparty), which give reason to doubt the reality of the transaction with the taxpayer unquestionably proves only one thing, that the taxpayer, at least, was not in collusion with the unfair counterparty in order to obtain undue tax benefit. In case No. A57-3530/2008 [12] these testimonies were parried by the taxpayer who presented evidence:

- statement of The United State Register of Legal Entities, in which as leaders of unfair counterparties were declared witnesses, who denied their involvement to the activities of the organizations-counterparties;
- cards of specimen signature provided to the Bank, when opening a settlement account;
- documents on registration of a legal entity;
- judicial act on another case in which a witness, admitted his involvement in the formation and activities of an organization-counterparty;
- testimony in the framework of procedural events held prior to institution of a criminal case by law enforcement agencies.

The above is only counter-arguments of some part of the arguments of a tax authority on the unreality of taxpayer's transactions. The judges resolving the tax dispute seek from the taxpayer tangible evidences of the actual implementation of economic operations on the transaction. For example, commodity stocks and supplies must be stored, moved, processed and sold. Therefore, as evidence of the reality of transactions on acquisitions of goods can be:

- road waybills of carrier, indicating the type of transport, state license plates (the real presence of the mentioned carriers' vehicles can be checked by the tax authority at the place of registration of vehicles);
- contracts for storage and documentation on the movement of goods in the warehouse (the real presence of warehouses for storage of goods can be checked by inspection procedure in the implementation of control activities by the tax authority);
- testimonies of drivers, freight forwarders, warehouse workers;
- photo and video documentation of loading and unloading works, warehousing places of the goods;

- registration data of security services performing the checkpoint regime in the territory and objects where locates the taxpayer;
- testimonies of buyers of goods (as a taxpayer cannot sell a product, which he does not have);
- provision of complete information on the chain of causal events (from the acquisition of goods (commodity stocks and supplies) from the counterparty prior to its sale to the buyer) with an explanation of the tax consequences on transactions of purchase and sale (for example, in case No. A57-3530/2008 was made a table, from which it followed that the taxpayer's tax liability arose from transactions with unfair counterparties – was calculated and paid the VAT and tax on profit).

But the best proof of the reality of the transaction with the counterparty is a reflection by this counterparty transaction with the taxpayer in its accounting and tax accounting, and the presentation of documents requested by the tax authority at the counter audit. Therefore, if the taxpayer is confident in his counterparty, has a connection with him, the taxpayer himself should ask the providing of documents on the transaction with a cover letter, especially in cases where the tax authority claims about the alleged absence of the counterparty at the place of registration and the counterparty's failure to provide documents on the counter audit. The fact of unfair conduct of the tax authorities during executing a tax audit in respect of a taxpayer, took place in case No. A57-8626/2010 [13], when under the appeal of the taxpayer the higher tax authority took off accrued to pay taxes, fines and penalties for transactions with an allegedly unfair counterparty, after the presentation from the counterparty the documents at the request of the taxpayer.

As we see it, savings in transport costs taking place in the taxpayer activities turns to his problems with the proof of the reality of transactions in cases of counterparty's misconduct and non-confirmation of the transaction by submitting documents on the counter audit. Lack of fixation in the documents of the taxpayer of another's vehicle which delivered the goods (where the obligation to deliver the goods to the warehouse of the taxpayer is assigned to the counterparty), also leads the tax authority to the question about the reality of the transaction.

Taxpayer performing the sale/purchase transactions without processing of goods, as a proof of the reality of transactions may submit documents on the sale of goods purchased from an unfair counterparty. Matching with product names, number of units purchased and sold with taking into account the balance at the store in a package of documents for the purchase and subsequent sale of goods and

also the absence of evidence of the tax authority about another source of acquisition of goods by the taxpayer contributes to the Court's conclusion about the reality of the transaction with the counterparty.

It should be noted that the claims of the tax authorities to the taxpayer regarding the unreality of transactions with an unfair counterparty are meaningless in case when between the taxpayer and the counterparty was conducted transaction on exchange of commodities. Conclusion and performance of transactions before witnesses, sureties, guarantors as well as liability insurance on the transaction are universal means of proof the reality of transactions.

In respect of transactions of the taxpayer, who purchases services or accepts contract work, we can only advise the taxpayer to be careful in choosing the counterparty and implement video fixation of contract works being performed for the taxpayer, from the beginning to the end.

In fact there are a lot of different circumstances and in the seeming similarity of cases there are certain nuances as a result of which one time the court adopts the position of the taxpayer, and another time the position of the tax authority. Tax dispute as a chess game, victory in the game depends on the skill of playing opponents, because both parties are governed by the same rules – rules of the Tax Code of the Russian Federation.

Absence of concepts in the Tax Code of the RF on the reality of transactions, tax benefit, valuation concepts of bad faith of a taxpayer, due diligence and diametrically opposite aims of the tax authority and economic entities lead to the fact that the number of tax disputes, in which basis are unreal transactions of a taxpayer, for a long time will not be having a tendency to decrease, despite the growing number of cases resolved at court.

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