Universal Decimal
Classification 342.9

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GUILT, PRESUMPTION OF INNOCENCE AND IMPUNITY IN THE CODE ON ADMINISTRATIVE OFFENCES OF THE RUSSIAN FEDERATION

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Analyzes the concept of guilt, forms of guilt and statuses of various subjects of legal relations in the Code on Administrative Offences of the RF. The content of the presumption of innocence is disclosed with taking into account the genesis of this principle by analogy with criminal and tax law. In the article is proved the existence of presumption of impunity for special subjects of the Code on Administrative Offences of the RF.

Key words: guilt, form of guilt, presumption of innocence, presumption of impunity, administrative offence, administrative responsibility.

In contrast to the earlier CAO of the RSFSR [2], among the principles of the legislation on administrative offenses provided for in chapter 1 of the CAO RF [3], here is included the principle of presumption of innocence enshrined in article 1.5. of the CAO RF, which consists of four parts.

In part 1 of article 1.5. of the CAO RF is defined, that "a person shall be administratively liable only for the administrative offenses where has been found his fault". This provision is embodied in the concept of an administrative offense, which, in accordance with part 1 of article 2.1. of the CAO RF, is understood as "a wrongful, guilty action (inaction) of a physical or legal person for which by this Code or the laws on administrative offences of the Russian Federation is provided for administrative responsibility."

So, first of all, guilt is a mandatory feature of any administrative offense; secondly, the fault is a mandatory condition for bringing to administrative responsibility of any subject of an administrative offense; thirdly, the guilt of a particular physical person or legal entity must be established with respect to the administrative offenses for which he has been brought to administrative responsibility.

Guilt is a subjective side of an administrative offense and may act in two types – either intent or negligence. An administrative offence shall be deemed willful, when the person who has committed it realized the wrongful nature of his action (omission), could foresee the harmful consequences thereof and wished these consequences, or deliberately permitted them, or treated them indifferently (part 1 of article 2.2. CAO RF). An administrative offence shall be deemed as committed through negligence, when a person who has committed it could foresee the harmful consequences of his action (omission) but self-conceitedly hoped to prevent such consequences, or did not foresee the appearance of such consequences, though he had to and could foresee them (part 2 of article 2.2. CAO RF).

It is quite obvious that designed in article 2.2. of the CAO RF forms of guilt reflect the mental attitude of a person to the committed by him deed and its consequences, so – they can be applied only to an individual and are not applicable in respect of a legal entity neither in theoretical, nor the more in practical aspect.

Simultaneously, part 2 of article 2.1. of the CAO RF contains details from which it follows, that "a legal entity shall be found guilty of an administrative offence, if it is established that it had the opportunity to comply with the rules and norms whose violation is administratively punishable under this Code or under the laws of a subject of the Russian Federation, but this person did not take all the measures that were in its power in order to comply with them". This can be seen as that, that the legislator does not extend the concept of "form of guilt" to legal entities. This means, that at the qualification of administrative offenses committed by legal persons, it is implied to establish guilt as such, regardless of its forms. Thus, the title of article 2.2. of the CAO RF should be amended to "forms of guilt of a natural person", and the term "person" replace by the term "natural person".

In the vast majority of administrative offences form of guilt is not a design feature. However, in some cases, it is a specific form of guilt is the reason to bringing an individual to administrative responsibility.

Only a deliberate form of guilt is provided for as a mandatory design features in nine structures of administrative offenses stipulating administrative responsibility for: destruction or damage of printed materials relating to the election, referendum (article 5.14); destruction or damage of another's property (article 7.17);

distortion of environmental information (article 8.5); deliberate obstruction to traffic, including by pollution of road surface (article 12.33); deliberate bankruptcy (part 2 of article 14.12); failure to meet the demands of a prosecutor resulting from his authority established by federal law, as well as the lawful demands of an investigator, an inquirer or an official carrying out proceedings related to an administrative offence (article 17.7); damaging or removing a stamp (seal), applied by a duly authorized official (article 19.2); damage of the identification card of a citizen (passport) (article 19.16); damage or loss of military registration documents (article 21.7).

With regard to the guilt only in the form of negligence are designed two structures of administrative offenses stipulating administrative responsibility for: damaging heating systems and fuel pipelines (pneumatic pipelines, oxygen pipelines, oil pipelines, oil product pipelines, gas pipelines) by negligence (article 9.10) and violation of the Traffic Regulations by a pedestrian, passenger of a vehicle or by any other road traffic participant (excepting the driver of a vehicle) that has caused by negligence the infliction of minor damage to the health of the victim (part 2 of article 12.30).

Thus, in part 1 of article 1.5. of the CAO RF is actually enshrined the principle of guilt of administrative responsibility subjects. This principle is drafted by analogy with part 1 of article 5 of the Criminal Code of the RF [5], from which it follows that a person shall be brought to criminal responsibility only for those socially dangerous actions (inaction) and socially dangerous consequences in respect of which his guilt has been established.

But, if part 2 of article 5 of the Criminal Code of the RF directly establishes that the objective imputation, i.e., criminal responsibility for innocent causing harm is not allowed, then in the legislation on administrative offenses the same judgment is only implicit. However, indirectly denying in part 1 of article 1.5. of the CAO RF the possibility of bringing any person to administrative responsibility for innocent infliction of harm as a result of an administrative offense, the legislator in part 2 of article 2.1. of the CAO RF forms the features of a legal entity guilt determination in such a way, that actually gives a law enforcer the excuse to bring this person to administrative responsibility for the mere fact of committing an administrative offense, that is, through objective imputation. This conclusion is based on the fact that the content of part 2 of article. 2.1. of the CAO RF may be interpreted as follows: "A legal person is deemed innocent of an administrative offense if it is established that it has not been possible to comply with the rules and regulations, for violation of which under this Code or the laws of a subject of the Russian Federation provides for administrative responsibility, under the condition that this person has

taken all possible measures to comply with them". But since, unlike the rights that may be either absolute or relative responsibilities are always absolute, the lack of opportunities of a person to comply with the rules and norms can be in only one case, namely, at the presence of force majeure. And this in turn means that at the present time, the principle of the presumption of innocence can only be applied to individuals, and does not have an appropriate theoretical framework to apply to legal persons.

In the legislation on administrative offenses the presumption of innocence was firstly enshrined in part 2 of article 1.5. of the CAO RF, from which it follows that "a person who is on trial for an administrative offence shall be regarded innocent until his guilt is proved in the procedure established by this Code and determined by a lawful decision of the judge, body or of the official who has considered the case". Thus, until the entry into legal force of the decision of a competent authority, official about the recognition of a person guilty of an administrative offense materials of a case on administrative offence reflect only the opinion of an authority regarding the guiltiness of the person in respect of whom is being conducted proceedings on an administrative offense.

Expanding the scope of the principle of presumption of innocence by the legislation on administrative offenses is an evidence of legal policy aimed at the real ensuring the priority of rights and freedoms of citizens, the protection of identity.

Initially, the principle of presumption of innocence has been embodied in the criminal law in strict accordance with article 49 of the Constitution of the Russian Federation [1]: "Everyone accused of committing a crime shall be considered innocent until his guilt is proved according to the rules fixed by the federal law and confirmed by the sentence of a court which has come into legal force". In turn, this article actually reproduces article 11 of the Universal Declaration of Human Rights adopted by the UN General Assembly on December 10, 1948: "Everyone accused of committing a crime has the right to be presumed innocent until his guilt is proved by legitimate procedure through open court proceedings at which he must be provided all the guarantees necessary for his defense".

However, the principle of the presumption of innocence became actually to be applied in the field of administrative and tort legislation even before the formal inclusion in the Code on Administrative Offences of the RF. This conclusion is based on the fact that already in 1998, the principle was laid down in part 6 of article 108 of the Tax Code of the Russian Federation [4]: "A person shall be deemed innocent of committing a tax offence until his guilt has been proven in accordance with the procedure which is envisaged by federal law, and established by an entered into

legal force court verdict…".The fact that a tax offense is not a crime, but it is an administrative offense involving the violation of the legislation on taxes and fees, follows from part 3 of article 108 of the Tax Code of the RF, which stipulates that the provided for by the Tax Code of the RF responsibility for a deed committed by an individual, occurs if the deed does not contain signs of corpus delicti provided for by the criminal legislation of the Russian Federation".

In the process of overcoming decodification of administrative and tort legislation, and more precisely since the introduction in action of the Code on Administrative Offences of the RF from July 01, 2002, clause 4 of article 91, article 124 and clause 3 of article 126 of the first part of the Tax Code of the RF have been declared void, and enshrined in them elements of tax offenses were excluded from the Tax Code, and included in chapter 15 of the Code on Administrative Offences – " Administrative Offences Concerning Finance, Taxes and Fees, as Well as Security Market". It is therefore logical, that along with this, to the CAO RF has been enabled the principle of presumption of innocence well-proven in the tax legislation. It is noteworthy that the provisions of parts 2-4 of article 1.5. of the CAO RF on the content side repeat the provisions of part 6 of article 108 of the Tax Code of the RF.

Parts 3 and 4 of article 1.5. of the CAO RF define the legal foundations arising between a subject empowered with state and authoritative powers in the field of administrative and tort relations (judges, bodies and officials authorized to consider cases on administrative offenses) and the person accused of committing an administrative offense, in the process of establishing the guilt of a person being brought to administrative responsibility.

Provision stating that "a person brought to administrative responsibility is not required to prove his/her innocence" (part 3 of article 1.5. of the Code on Administrative Offences of the RF) means that the burden of proof lies with the public authorities, and at the same time, that the subject brought to administrative responsibility is not required to prove his innocence. Commenting on this provision, Professor D. N. Bakhrakh notes, first, that a person brought to administrative responsibility is not obliged to justify himself, to prove his innocence; second, he cannot be compelled to give explanations, to present evidence; third, refusal to participate in proving cannot entail for the person any negative effects [6, 9]. The only thing that should be clarified: it is admissible to compel in terms of conviction, if these actions are carried out in the interests of this person and his legal rights, but the person cannot be forced.

Thus, proving of innocence is not a responsibility of a person called to administrative responsibility. However, in accordance with part 1 of article 25.1 of

the CAO RF, "a person in respect of whom proceeding on a case on an administrative offence is being conducted has the right… to give explanations, submit evidences…" including ones that prove his innocence. Implementation of this right is provided and owing to that under a general rule a case on administrative offence is considered involving the person in respect of whom the proceedings on an administrative offense are conducted. In the absence of the said person the case can be considered only in cases where there is an evidence of proper notice of the place and the time of the case consideration, and if from the person has not been received a request for postponement of the case, or if such a petition has been dismissed (part 2 of article 25.1 of the CAO RF). Along with this, it should be borne in mind that, with due account for the provisions of article 51 of the Constitution of the Russian Federation, there is obvious a person's possibility of refusal from giving explanations.

One of the manifestations of the principle of presumption of innocence is that in accordance with part 4 of article 1.5 of the CAO RF "irremovable doubts in respect of the guilt of a person held administratively responsible shall be interpreted in favor of this person". Doubts are considered irremovable in the case where the evidence collected on the case do not allow to make a clear conclusion about the guilt of a person to a committed administrative offense, for which the person has been brought to administrative responsibility, and herewith legal means of gathering evidence are exhausted.

Thus, the principle of presumption of innocence it is not an impossibility to bring a person to administrative responsibility, but a special procedure to prove the guilt of this person.

Establishment of person's guiltiness is a prerequisite to bring him to administrative responsibility. Absence of guilt of the person brought to administrative responsibility means the absence of subjective aspect of an administrative offense and is a basis for excluding proceedings on a case concerning an administrative offense (clause 2 of article 24.5. of the CAO RF). However, the failure to prove person's guilt is not identical to his innocence, it could mean that the guilt could not be established, including in the case of irremovable doubt interpreted in favor of the person brought to administrative responsibility.

Proceeding from the provisions of part 1 of article 2.1. and part 1 of article 3.1. of the CAO RF, an administrative offense is the only ground of administrative responsibility, and administrative penalty acts as its materialized manifestation. Herewith the ratio between an administrative offense and administrative responsibility cannot be led to the formula "committing of an administrative offence entails

administrative responsibility"; committing of an administrative offence may entail administrative responsibility.

The use in the considered legal design of the concept "person subject to administrative responsibility" is conditioned by enshrining in the legislation of the RF some categories of subjects, which, notwithstanding committed by them administrative offenses are not subject to administrative responsibility.

Firstly, an official, who has committed an administrative offence, only in connection with his failure to discharge his official duties or improper discharge of his official duties, shall be administratively liable (article 2.4. of the CAO RF).

Secondly, Military servicemen and citizens engaged in military refresher training shall bear responsibility for administrative offences in compliance with military disciplinary manuals, and officers of the police, bodies of criminal execution system, State Fire-Fighting Service, bodies for control over the traffic of narcotics and psychotropic substances and customs bodies shall bear responsibility for administrative offences in compliance with the normative legal acts regulating service in said bodies; except commission by them specifically stated in article 2.5. of the CAO RF administrative offences, for the commission of which they are responsible under general conditions.

Thirdly, the issue of the administrative responsibility of a foreign citizen, who is immune from the administrative jurisdiction of the Russian Federation in compliance with the federal laws and international treaties of the Russian Federation and who has committed an administrative offence on the territory of the Russian Federation, shall be resolved in conformity with the rules of international law (article 2.6. of the CAO RF).

Fourthly, deputies, judges and prosecutors are endowed with immunity from administrative responsibility.

Thus, there may be isolated a category of subjects of the administrative offense not subject to administrative responsibility by virtue of the current Russian legislation.

Applicability of the principle of presumption of impunity must be distinguished from the very possibility of bringing a person to administrative responsibility – in the presence of circumstances precluding proceedings concerning an administrative offense (article 24.5. of the CAO RF), including not attainment the age of sixteen years old by the moment of committing an administrative offence (part 1 of article 2.3. of the CAO RF).

Separately the legislator stipulates two possible releases from administrative responsibility:

- person at the age between of sixteen and eighteen years – with application to them the measure of impact provided for by the federal legislation to protect the rights of minors (part 2 of article 2.3. of the CAO RF);
- at insignificance of a committed administrative offense – with the announcement of an oral admonition (article 2.9 of the CAO RF).

All this allows us to formulate the following conclusions.

1. Administrative penalty cannot be imposed on a person who is not subject to administrative responsibility.

2. A person subject to administrative responsibility cannot be subject to an administrative penalty as long as in an established by law procedural order is not proven his guilt of an administrative offense and the decision on the case on an administrative offense has not entered into legal force.

These provisions can be defined as the principle of presumption of impunity.

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