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CODE ON ADMINISTRATIVE OFFENCES OF THE RUSSIAN FEDERATION: ASSESMENT OF PROBLEMATIC POINTS

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Considering the critical views of legal-scholars on problematic points of the Code on Administrative Offences of the Russian Federation, and expressing observations in respect of the poor coordination by legislator of the norms of tort legislation and the legislation that regulates the budget and tax spheres, the sphere of execution proceedings, here is being justified the necessity of normative consolidation for the notion of an administrative offense, the division in the code grounds for bringing to administrative responsibility and determination the guilt of individuals and legal entities. Here is given the author's definition of the concept "warning" in order to introduce to official turnover the concept "state of administrative punishment".

Key words: administrative responsibility, administrative offence, the elements of an administrative offence, administrative and tort legislation, grounds of administrative responsibility, forms of guilt, sanctions

Laws, like people, have their own destiny. Many still remember the troubles around the preparation and adoption on the second try of the Code on Administrative Offences of the Russian Federation [2], though it has already passed its tenth anniversary.

Although by July 01, 2002, in Russia›s recent history had been adopted 16 Codes, the CAO RF among other codes in the legal family of codes has a special place. According to the weighty opinion of Professor V. D. Sorokin, "the adoption of the new Code on Administrative Offences of the Russian Federation on a number of grounds is not an ordinary event, as it is a member of the fundamental laws of the Russian Federation – the systematic normative acts of long-term effect that govern on the federal level extensive areas of state and public life... Even more increases the role of this event, when it comes to the code regulating the most common type of legal responsibility – administrative. Whether it is necessary to prove that each provision of the law, especially the norms of its General part establishing the rules of fundamental properties, bears a very serious social charge in the form of state coercion that comes for administrative offenses" [19, 30, 39].

There is no doubt of the positive effects of the introduction of the CAO RF, but the effect could be even greater if there are not so many issues in the Code.

Thus, Professor Yu P. Solovey, criticizing some of the conceptual provisions of the CAO RF, expresses disagreement with the name of the Code [26, 3-9]. In his view, the new (the same old) name of the Code clearly does not allow to limit the range of regulated by it public relations. CAO RF can be viewed as a "younger brother" of the Criminal Code – "the code on crimes". However, unlike the latter, the subject of regulation of the CAO RF is also relations developing in the proceedings on an administrative offense and executiin of imposed administrative penalties, i.e., those, to which by the analogy are devoted the Code of Criminal Procedure and the Penal Execution Code of the RF. Thus, the Code on Administrative Offences, in fact, should be named as the Code on Administrative Responsibility.

He has also criticized the legislative definition of the concept of administrative offence.

According to Professor D. N. Bakhrakh, "it is difficult to recognize correct the position of the legislator, who excluded recall of licenses from the penal system, and did not include suspending licenses in the list of interim measures. This is a great gift to the bureaucracy, the system of administrative arbitrariness... Besides, having established the duty of the subjects of executive power, which have instituted and investigated the relevant cases on administrative offenses, to refer them to the courts of general jurisdiction for consideration, the legislator has not decided

the issue of the rights and duties of the bodies (officials) that have sent cases to the courts in the course of judicial proceedings. Anything has not been said about these subjects of the authorities in chapters 25, 29 of the CAO RF" [9, 11].

In fact, complaints about the quality of the CAO RF begin from the first article. As noted by N. G. Salishcheva, despite clear provision of part one article 1.1 of the CAO RF on the composition of the legislation on administrative offenses, as before, the Tax Code of the RF, in fact, provides for administrative responsibility for non-payment of taxes by taxpayers. For the CAO RF have been "left" offenses, mainly of officials for violation of terms of tax registration, procedure of submitting necessary information, etc. (articles 15.3-15.9).

In the Budget Code of the Russian Federation [1] there are enumerated elements of administrative offenses (article 283), but many of them are not included in the Special part of the CAO RF (torts in the field of regulating budget legislation are provided for in articles 15.14-15.16 CAO RF), that requires some clarification of positions of both codes.

So from the above article 283 of the Budget Code on violations of the budget legislation of the Russian Federation in the Code does not disclose the concept the following offenses:

- failure to perform the law (decision) on the budget;
- denial to confirm the accepted budgetary obligations, except the grounds established by the Code;
- failure to comply with the regulations of the financial costs of providing State or municipal services;
- failure to comply with the limits of deficit of budgets, State or municipal debt and expenditures of state or municipal debt servicing established by the Code;
- opening accounts in credit institutions if on the concerned territory present institutions of the Bank of Russia, having the opportunity to serve the accounts of budgets of the budget system of the Russian Federation;
- failure to comply by the Chief disposer of the federal budget resources, representing in the court the interests of the Russian Federation with the term of transfer to the Ministry of Finance of the Russian Federation the results of court proceedings on a case, established in clause 2 of article 242.2 of the Code;
- late or incomplete executing of court judgments providing for levy of execution on budget funds of the budgetary system of the Russian Federation.

A number of articles of the Budget Code, revealing the content of offenses from budget offences listed in article 283 of the Code, contains reference rules on stale RSFSR Code on Administrative Offences (see articles 292-300, 302-306) and,

accordingly, there are no elements of administrative offences in the CAO RF. Saving in the Budget Code reference rules on the not applicable tort legislation for more than a decade evidences not only of weak legislative technique when making amendments to the federal laws, but also the absence of the desire of the legislator to reinforce by measures of responsibility public relations regulated by the budget legislation.

Despite the fact, that in the CAO RF bailiffs are defined as subjects of administrative jurisdiction, like officials of the Federal executive body authorized to exercise the functions of compulsory execution of writs of execution and ensuring the established procedure of the court activities (article 23.68 of the CAO RF), and articles 17.14 and 17.15 of the CAO RF provide for bringing to administrative responsibility of persons guilty of violating the legislation on execution proceeding, the legislator has left an additional fiscal measure of responsibility in the very legislation on execution proceeding.

The Federal Law "On Execution Proceeding" provides for exaction from the debtor an execution fee in the amount of seven per cent of the amount to be exacted or the value of the property that shall be exacted, but not less than five hundred rubles from a debtor-citizen and five thousand rubles from the debtor-organization (article 112 of the Law [4]). At its core, this fee is a fine sanction for late performance or non-performance by a debtor of a court order. This penalty imposed by bailiffs is administrative, as it has a function of compulsion to commission of an action in public-law relations.

Special attention is required by the correlation of norms of the CAO RF and the Arbitration Procedure Code of the RF [24, 27].

Normative-legal basis of administrative responsibility, i.e., enshrining in legislation of any offense which entails administrative responsibility, is expressed in the legislative consolidation of the administrative offense's elements, which are the legal basis of administrative responsibility.

Because, unlike the concept of "administrative offence", the concept of "elements of an administrative offence" is not legislatively defined, it is not surprising, that there is no single point of view on the content of this definition in the legal literature.

The issues of elements of an administrative offence have been considered in the works of a number of authors [5, 33-42; 13, 110-125; 18]. Therefore the diversity of wordings used to disclose its essence is quite natural.

According to Yu. A. Denisov, set of elements of an offense is an empirically allocated structure of an offense, enshrined by legal definitions in different

branches of law and in the conceptual system of sciences exploring these branches [14, 72]. This conclusion is interesting on a general-theoretical level, but at the same time is devoid of any practical value.

In turn D. N. Bakhrakh under the set of elements of an offense understands the established by law totality of signs, in the presence of which an antisocial deed may be recognized an administrative offense [8, 478]. The vulnerability of such a definition of the set of elements of an administrative offense is that the recognition of an antisocial deed an offense is only a statement of the fact of law breaching. It appears that the set of elements of an offense is necessary not just for the recognition of a wrongful act a certain statistical unit, but as a factual basis for bringing an offender to administrative responsibility. More preferable is the position hold by a large part of scientists studying administrative law, who inclined to think that "set of elements of an administrative offense is a totality of enshrined by normative-legal acts signs (elements), the presence of which may entail administrative responsibility" [7, 227-228; 31, 101].

Deserves consideration the point of view of A. B. Agapov, who states that "set of elements of an administrative offense is a totality of elements that characterize social danger of the offense, these include: content of tort (objective aspect), psycho-emotional status of participants (subjective aspect and the subject of the set), and the object of an unlawful encroachment; the lack of any of them exclude the presence of a corpus delicti as a whole, and, accordingly, application of state sanctions" [5, 33].

The advantages of this definition should include the following: a) are named the elements of a corpus delicti; b) is clearly stated that the existence of the corpus delicti as a whole is possible only in presence of each of its elements. However, there are moments that seem controversial or cause disagreement. First of all, it refers to the part, which says that elements of the set of elements of an offence characterize social danger of an offense. First, is taken only one of the signs of an offense, besides the one that is traditionally used for separating crimes from administrative offences [10; 11; 15; 21; 29; 30; 32; 33] and the existence of which in administrative offenses is recognized by far not everybody [34; 42; 20, 19-20], including legislators [2, article 2.1.]. Secondly, it turns out that the elements of the set of elements of an offense characterize not an offence itself, but only its social danger, so if we assume that administrative offenses are deprived of social danger, then this definition does not pertain to them. In addition, from the wording does not imply that the presence of the set of elements is a ground for administrative responsibility; the presence of the set of elements is only associated with the possibility to apply state sanctions.

The definition of "sanction" can be interpreted in different ways, such as: 1) approval of an act that gives it legal force; 2) a part of a legal norm, law article; 3) impact measure applied against the violators of a contract; 4) approval, permission [25, 442].

The definition of "sanction" can be interpreted in different ways, such as: 1) approval of an act that gives it legal force; 2) a part of a legal norm, article of a law; 3) retaliation applied against the violators of a contract; 4) approval, permission [25, 442]. In this regard, there is little doubt that state sanctions are used by A. B. Agapov in the meaning of an element of the prohibitive norm of law. But the determination of the set of elements of an administrative offense is important, not just in the terms of application state sanctions, more precisely, administrative penalties, but as a legal basis for bringing a delinquent to administrative responsibility, at this administrative penalty is a measure of responsibility applied to the person who committed an offense.

Attracts attention the fact that in a number of domestic textbooks on administrative law, this definition is either not disclosed [12; 22; 28], or reduced to a simplistic formula like "a set of elements of an offense includes an object, objective aspect, subject and subjective aspect" [6, 106].

This kind of ambiguity, contradiction and uncertainty can be avoided if legislatively enshrine the concept of "set of elements of an administrative offense". Obviously, that this necessity is conditioned by the fact that among the circumstances precluding proceedings on a case concerning an administrative offense the Russian legislator indicates the absence of the set of elements of an administrative offense [2, p. 5.24], without revealing its contents [13, 109]. Simultaneously, in the CAO RF should be included an article enshrining the concept of "grounds of an administrative responsibility".

Similar suggestions have been expressed before, at the time when the Administrative Code of the RSFSR as the subjects of administrative offences and therefore administrative responsibility considered only individuals. For example, the essence of my suggestions was to introduce to chapter 2 of the Code an article, having embodied it to read as follows:

"Grounds for bringing a natural person to administrative responsibility.

1. Person who has reached the statutory age of bringing to administrative responsibility, must and can be subject to administrative responsibility only if the guilty act committed by him constitutes a set of elements of an administrative offense provided for by an administrative-law norm or another legal standard, for violation of which provides for administrative liability.

2. Set of elements of an administrative offense is a system set of features that characterize its elements: object, subject, objective and subjective aspects of the administrative offense, the presence of each of which is necessary and sufficient to admission the fact of commission by a particular person an administrative offense and is the only reason for bringing an individual to administrative responsibility.

Note:

Object of an offense is a something that has been encroached – public relations governed by the rule of law and protected, in the case of their violation, by administrative penalties.

Objective aspect of an offense is an action or inaction that resulted in violation of a norm of law; in the cases provided for in the very norm of law juridical importance have: time, place, method, means, and the nature of committing the deed and consequences.

Subject of an offense is an individual who has committed the deed, the signs of which are described in the article, which provides for administrative responsibility, on the condition that he/she is sane and has reached the age of bringing to administrative responsibility.

Subjective aspect of an offense reflects the mental attitude of a natural person to the offense, his guilt in the form of intent or negligence; determining of the motive and the purpose of committing a specific administrative offense is needed in the cases if these signs are indicated in a norm of law".

Inclusion in the article the note revealing the content of each of the four elements of an administrative offense, I argued, first of all, by the need to raise information awareness of citizens that do not have legal training, and by the fact that one of the conditions for compliance with the law by citizens is their understanding of the essence of legal norms.

In formulating the concept of "set of elements of an administrative offense", I proceeded also from the fact that, according to the Russian legislation, "a person who has attained the age of sixteen years old by the moment of committing an administrative offence shall be administratively liable" (article 13 of the CAO of the RSFSR; article 2.2 of the draft of the CAO of the RF).However, this definition should not be regarded as identical to the definition of a person, who committed an administrative tort, and a person brought to administrative responsibility. Thus, in accordance with the Russian legislation, for military service shall be called up citizens who have reached the age of eighteen, but this does not mean that all of them will be called up, for example, due to the fact that there are provided the release and the postponement of military service (articles 22-24 of

the Law on Military Service [3]). The legislator has established only the age, at which a person may be responsible for administrative tort, in other words, defined a general border of occurrence the ability to bear administrative responsibility. But bringing such a person to administrative responsibility requires a number of additional conditions, in particular, sanity of a person (article 20 of the CAO of the RSFSR) [13, 109-111].

In addition, in some cases, the achievement by a person the age defined in article 13 of the CAO of the RSFSR (article 2.2 of the draft of the CAO of the RF) does not allow to recognize this person as the subject of an offense. In other words, a sane person who has reached the age of sixteen not always can be held administratively liable. Thus, the subjects of an administrative offense, the objective aspect of which is covered by the fact of bringing a minor to a state of intoxication, can be parents or other persons who are above the age of 18 (under article 163 of the CAO of the RSFSR; drawing minors into the use of alcoholic drinks or stupefying substances – part 2 of article 6.10 draft of the CAO of the RF).

Unfortunately, the suggestions that have been introduced by me in the period of validity of the CAO of the RSFSR have not been applied in the preparation and adoption of the CAO of the RF. However, it appears, even now they have not lost the urgency; of course, on condition of the correction certain concepts in view of the fact that in the CAO RF as the subjects of offences act not only physical persons, but also legal entities. Condition of the Russian legislation on administrative responsibility of legal entities on the eve of the adoption of the new CAO RF can be characterized by the following main points:

1) widely using the design of objective imputation the legislator has not abandoned the practice of adopting laws, in which guilt is a mandatory feature of offenses committed by legal entities;

2) there is no basis for the claim that the preference was given to laws allowing or not allowing the possibility of objective imputation;

3) it is rather difficult identify the consistent pattern that allows to clearly understand what did exactly guide the legislator in resolving the question of presence or absence of guilt;

4) in many acts that establish administrative responsibility of legal persons, along and at the same time with them, natural persons are recognized as the subjects of administrative responsibility;

5) there is no clear and convincing explanation in respect of what is meant by the guilt of an legal entity in any legislative act providing for the presence of guilt as a mandatory feature of an offense;

6) have been adopted a significant number of acts, the norms of which do not contain the requirements of determination of guilt for the recognition the fact of an administrative offense and bringing a person to administrative liability, the subjects of which include not only legal, but also natural persons.

This state of affairs for a variety of reasons could not be called normal. First, establishing administrative responsibility for this or that sphere of social relations, the legislator each time had to decide one and the same question, which of the two options to prefer: presence of guilt as a mandatory feature of an offense or objective imputation. So, everything, ultimately, was contingent on the will of the legislator, which was often notable for variability and inconsistency in decision making.

Second, the preference for one or another variant of administrative responsibility was given depending on the scope of legal regulation. In particular, the presence of guilt of a legal entity as a mandatory sign of an administrative offense is a characteristic of the environmental legislation, and the lack of it – for business activities. At the same time, it remains unclear whether were taken into account peculiarities of this or that sphere in selection the variant of responsibility, and if so, in what manner or were persecuted purely financial interests?

Third, in the current legislation were not made and is not being made distinction in the forms of guilt of a physical and legal person. The above said can be illustrated by the following example. In accordance with article 107 of the Tax Code of the RF, responsibility for tax offenses is borne by organizations and individuals. At the same time from part 1 of article 110 of the Tax Code of the RF follows that, "a person who has committed an unlawful act deliberately or through negligence shall be deemed guilty of committing a tax offence". But out of this version of the article it becomes clear that a "person" can be any – both physical and legal. Subsequent parts of this legal innovation also do not make things clear. Content of intent and negligence (parts 2 and 3) can be applied only to individuals. As for the guilt of an organization in committing a tax offense, it "is determined by the guilt of its officials, or its representatives, actions (inaction) of which caused the commission of this tax offense" (part 4).

In these circumstances, the subjects of administrative jurisdiction are forced to solve the issues of bringing legal persons to administrative responsibility differently.

The problem, which is not simple in itself, is compounded by the fact that "the theory of administrative law hardly accepted, and still hardly accepts this institution" [16]. The lack of elaboration of this issue is evidenced at least by the fact that in textbooks administrative responsibility of legal persons either not considered, or

covered only in passing. One cannot help distinguish the position of V. D. Sorokin, who fundamentally disagrees with the use of objective imputation in administrative law, and also claims that the institute of administrative responsibility of legal persons is alien to the Code on Administrative Offences and destroys the integrity of its subject of regulation [27].

It is important to note that the disputes between the opponents and supporters of the institute of administrative responsibility of legal entities are of conceptual in nature. First insist that responsibility should be only individual, the others note that along with it, also has the right to exist collective responsibility. At this, to prove their rightness both sides give enough good arguments.

I hold to the fact, that the institution of administrative responsibility of legal persons has not only a right to exist, but also requires a deep theoretical research, and the relevance of this to a large extent due to the needs of practice. Recognizing that the problem needs an independent study, and not one, I limit myself to outlining my positions on how objective imputation is consistent with the legal state.

The principle of presumption of innocence enshrined in article 49 of the Constitution of the Russian Federation should be literally understood as being related to a person accused of a crime. Since the Russian legislation does not provide for criminal liability of legal persons, there is every reason to believe that this principle applies only to individuals. In other words, objective imputation with respect to legal persons is not contrary to the fundamental provisions of the Constitution of the RF. In literature was suggested the thought that "we need to finally move away from the tradition of uncritical transfer of criminal-legal structures of guilt to administrative law" [16, 23]. I believe that this statement is true only halfway. Inasmuch crimes and administrative offenses committed by natural persons have one nature, the form of guilt of an individual administrative offender is the same as the form of guilt of a criminal. However, it is fair that the structure of guilt for legal persons must be different.

Thus, not disputing the fact that guilt should serve as a mandatory sign of an administrative offenses committed by natural persons, I cannot agree with those who in principle rejects the possibility of objective imputation against legal persons. And in this regard does not seem excessive to consider the correlation of "guilt" and "responsibility" in the criminal and civil law.

Criminal law explicitly regulates that "objective imputation, i.e., criminal responsibility for innocent infliction of harm, shall not be allowed" (part 2 of article 5 of the Criminal Code of the RF). Thus, guilt is a necessary subjective prerequisite for criminal responsibility and punishment.

On the contrary, civil-law responsibility is characterized by the fact, that "the law may provide for compensation for harm also in absence of guilt of a tortfeasor" (part 2 of article 1064 of the Civil Code of the RF), in particular, an example of objective imputation is the responsibility of a contractor for the improper performance of design and survey works (article 761 of the Civil Code of the RF).

Without a doubt, the guilt should be regarded as a mandatory criterion in establishing responsibility of a natural person, and therefore objective imputation in criminal law and administrative law (for this category of subjects) – is unacceptable. However, unlike criminal law and civil law, administrative law should be considered as a branch of law, in which the principle of presumption of innocence of individuals combines with the principle of presumption of guilt of legal entities.

By the way, if to analyze part 2 of article 2.1 of the CAO RF on the determination of guilt of a legal entity, we will find out that this legal innovation is actually built on the principle of objective imputation.

I do not exclude that in the future administrative responsibility of legal entities will be based solely on objective imputation, however, I am far from the thought, that such a step would be hasty and poorly reasoned. There is a need for a thorough theoretical substantiation of the problem, including from the position of the general theory of law. In addition, only on the basis of solid empirical data can be assessed the reasonableness of various theoretical positions.

And one more remark about the guilt. Despite the obvious fact that the classical form of guilt – intent and negligence – may be applied only to individuals, with tenacity the legislator does not want to admit it and distributes them to any person, including legal one. Despite the obvious fact that the classical form of guilt – intent and negligence – may be applied only to natural persons, with tenacity the legislator does not want to admit it and distributes them to any person, including legal one. This gross mistake is easy to remove by making amendments both to the title and the content of article 2.2 of the CAO RF, through replacing the words "forms of guilt" by the words "forms of guilt of a natural person", and the word "person" by the words "natural person".

It is quite logical that the penalties applicable to legal persons should be adequate to their legal status. Naturally, a fine, as the universal form of punishment, plays a dominant role among the measures of responsibility for that category of subjects of an offense. However, it is necessary to form and legislatively enshrine the system of various measures of administrative responsibility of legal persons. Among the sanctions applied to collective entities, which have committed an administrative offense can be included: obligation to eliminate the consequences of

the damage caused; suspension and termination of license; deprivation of tax exemption and subsidies; forcing to increase the amount of insurance of production risks; forcing to form a compensation fund.

Simultaneously, in order to expand the individualization of imposing administrative penalties, it is advisably to introduce a warning, as measure before the imposition of other administrative penalties, to the sanctions of all the articles of the Special part of the CAO RF, which enshrine administrative offenses providing for or allowing the opportunity of their commission by negligence. In addition, it will eliminate the confusion about what the legislator is guided by, when introduces warnings to sanctions of some articles, but not to others.

Besides it is quite logical also to enshrine some other limitations of applying warnings. It is hardly justified to apply this measure to a person who gravely or systematically breaches the legislation on administrative offenses, or to persons who, at the time of consideration of a case on an administrative offense, are under "administrative penalty", that is, until the date one year after the end of execution of the order on the imposition of a previous administrative penalty.

Based on the above said, I suggest to embody article 3.4 of the CAO RF in the new edition:

"Article 3.4. Warning.

1. Warning is a rendered in writing official admonishment to a natural person or legal entity from the opportunity of the commission by them illegal action (inaction).

2. Warning cannot be imposed on a person who is under "administrative penalty", that is, until the date one year after the end of execution of the order on the imposition of a previous administrative penalty, or in the case of gross or systematic violation of the legislation on administrative offenses, or if the subjective side of an administrative offense, committed by an individual, is characterized by a deliberate form of guilt".

This version also allows entering into the official turnover the concept of "state of administrative punishment".

Unfortunately, remarks towards the developers of the CAO RF and the deputies who adopted it in the current edition, can be continued.

However, this is not about unsubstantiated reproaches. Representatives of science and practices are ready for a constructive dialogue with legislators [17]. As rightly pointed out by B. V. Rossinskiy, "the accumulated over these years practice of proceedings on administrative offences indicates that the provisions of the CAO RF have a lot of gaps and contradictions, which in some cases considerably

complicate the work of the subjects of administrative jurisdiction, other bodies and officials empowered with appropriate law-enforcement powers, causes the violation of rights and legitimate interests of the participants of proceedings on the cases of this category" [23, 493].

If such a dialogue takes place and if we can overcome the growing pains and overcome old mistakes that accompany the "life" of the current CAO RF, then it will be awaited by much longer than quindecennial fate of its predecessor the CAO RSFSR.

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