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ABOUT THE FORM AND DEGREE OF GUILT OF A LEGAL ENTITY FOR COMMITMENT OF AN ADMINISTRATIVE OFFENCE

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On specific examples of law enforcement in the article is considered the actual implementation of normative consolidation in the Code on Administrative Offences of the RF of the concept of legal entity guilt. Notes mismatch of definition of legal entity guilt in the general part of the CAO RF and the guilt of a legal entity stipulated in the elements of administrative offences in the special part of the CAO RF. When imposition of an administrative penalty to a legal entity here is suggested to take into account degree of guilt of the legal entity, determined according to the guilt of its officials.

Key words: administrative responsibility, administrative responsibility of a legal entity, guilt, forms of guilt, administrative offence

The general formula of guilt of a legal entity in committing an administrative offense is contained in part 2 of article 2.1 of the Code on Administrative Offences of the Russian federation (hereinafter – CAO RF) [1], and is significantly different from the forms of guilt of an individual, which are defined in article 2.2. By virtue of Part 2 of article 2.1 of the Code on Administrative Offences of the RF a legal entity is guilty of an administrative offense if it is established that it had the ability to comply with rules and norms, for violation of which the Code or the laws of the Russian Federation provide for administrative responsibility, but that person did not make all his best efforts to comply with them. If we compare this norm with the norms provided for in article 2.2 of the CAO RF, then it is hard to escape a conclusion that the guilt of a legal entity can only be expressed in the form of negligence. In fact, the failure of a legal entity to take all possible from him measures to comply with certain rules and norms is a manifestation of negligence, carelessness, and only shows a careless form of guilt.

Thus, contained in Part 2 of article 2.1 of the CAO RF concept of guilt of a legal entity does not imply the possibility of committing an intentional administrative offense. It is clear that the legal entity, as opposed to physical, person cannot have any mental attitude to a committed unlawful act (action or inaction), and, accordingly, his guilt cannot be expressed in the form of intent or negligence. This fact is indicated in the literature and jurisprudence [9, 122; 12, 29-30; 10, 60; 5; 6]. Apparently legislator proceeded from these reasons in formulating the norm of part 2 of article 2.1 of the CAO RF. At the same time in a number of articles (parts of articles) of the Special Part of the CAO RF is provided for administrative responsibility of legal persons for administrative offenses, the disposition of which directly indicates only to willful form of guilt. These administrative offences include, for example, concealment, or willful distortion of complete and reliable information about the state of the environment and of natural resources (article 8.5); concealing information about a sudden murrain or about simultaneous cases of animals falling ill on a mass scale (article 10.7); deliberate concealment of an air accident or incident (article 11.30); deliberate obstruction to traffic (article 12.33); deception of consumers (14.7); inclusion in declaration about the volume of production and turnover of alcohol and alcohol-containing products deliberately distorted data (article 15.13); unintended use of budgetary funds and assets of state non-budgetary funds (article 15.14); making forged documents, stamps, seals or blanks, and their use, transfer or sale (article 19.23). In this regard, in the case of committing by a legal person of any of the above, and similar administrative offenses it is necessary to establish the existence of intent for committing

the appropriate action or omission. This is evidenced by the judicial practice, in particular on cases of bringing legal entities to administrative responsibility under articles 12.33 and 15.13. of the CAO RF [4; 8]. Otherwise, a legal entity cannot be brought to administrative responsibility in connection with the absence of the event and of the corpus delicti of the appropriate offense.

Obviously, in such cases, is not applicable the general formula of a legal entity's guilt contained in part 2 of article 2.1 of the CAO RF. Consequently, the guilt of a legal entity when the commission of the mentioned administrative offences shall be determined on the basis of the presence or absence of a deliberate form of guilt of individuals acting on behalf of the legal entity (director, his deputy, other employee responsible for compliance with the appropriate rules). If herewith will be established the presence of intent of a legal entity's responsible employee to commit illegal actions (inaction) forming the event of a corresponding administrative offense, then the legal entity should be recognized as guilty of the offense. A similar approach should be applied, from our point of view, and in those cases where a legal person is imposed an administrative penalty for committing an administrative offense, the form of guilt for commission of which is not explicitly stated in the disposition of the relevant norm of the Special Part of the CAO RF or Russian Federation subject's law on administrative offences (administrative responsibility), that is, when a guilt can be expressed both in the form of intention, and in the form of negligence. These administrative offences include, for example, violation of the legislation in the area of securing the sanitary-and epidemiological well-being of the population and legislation on technical regulation (article 6.3 of the CAO RF); violating the rules for maintenance and repair of dwelling houses and (or) living quarters (article 7.22 of the CAO RF); damaging electric power circuits (article 9.7 of the CAO RF); violating veterinary-and-sanitary rules of transportation or slaughter of animals, the rules of processing, storage or sale of livestock products (article 10.8 of the CAO RF) and etc. In all such cases, the determination of the form of guilt of legal entity's employees who have directly committed illegal actions (inaction) and have been brought to administrative responsibility, at the same time will be the determination of guilt form of the very legal entity. Respectively, depending on the determined form of guilt – intent or negligence – should be decided the question on the type and degree of severity of an administrative punishment being assigned to a legal entity.

In connection with the above understanding of the guilt of a legal entity, objectively arising out of the system interpretation of provisions of the General and Special parts of the CAO RF, arises the question with regard to the correctness of

the wording contained in part 2 of article 2.1 of the CAO RF, to its relevance to the real state of affairs. And this provision is such that it conforms to a much greater extent not to the norm provided for by part 2 of article 2.1 of the CAO RF, but by part 4 of article 110 of the Tax Code of the Russian Federation [2], according to which the guilt of a legal entity of committing a tax offense is determined by the guilt of its employees. Accordingly, the guilt of an organization under the provisions of article 110 of the Tax Code of the Russian Federation may take the form of intent or negligence. In this regard, it may be worthwhile to borrow from the Tax Code of the Russian Federation exactly this approach to the determination of guilt of a legal entity in relation to an administrative offense and normatively enshrine it in the CAO RF. With that said deserves attention the position on the issue expressed by Maksimov I. V., who offers in determination a legal entity guilty of an administrative offense to consider both subjective and objective aspects, that is, both the behavior of individual employees of a legal entity, and the behavior of the very entity as a whole [11, 100-104]. In any case, the mentioned issue is controversial [14, 6-13; 13, 13; 15, 411-418], and its solution requires additional special research. However, to date it is clear that at the imposing to a legal entity administrative penalties for administrative offenses, which can only be done intentionally, it is necessary to establish this form of guilt for the respective actions (or inaction) for the employees of a legal entity brought to administrative responsibility, and take into account its presence with respect to such entity itself.

Let us turn then to the issue of degree of a legal entity guilt of an administrative offense and how it should be taken into account when imposing him an administrative penalty.

It seems that the degree of entity guilt of an administrative offense characterizes the amount, size of guilt of this entity in comparison to other persons involved in the commission of the offense or who contributed to its commission. Illegal actions (inaction), which form the events of relevant administrative offenses, are committed on behalf of legal entities by their leaders and other employees. In this regard, in addition to taking into account a legal entity employees' form of guilt of committing an imputed against him administrative offense, you must also take into account the size of their guilt in comparison with the guilt of the legal entity as a whole. For example, in administrative and jurisdictional practices in bringing legal entities to administrative responsibility under part 2 of article 14.5 of the CAO RF for non-use of cash registers in the sale of goods and services are accounted the measures that have been taken by legal entity in order to ensure fulfillment by its employees, particularly by the seller, of the legislation on

the use of cash registers (conclusion of employment contract, coaching, control, etc.) [3; 7]. Thus is determined the degree of guilt of a legal entity in comparison with the guilt of its employee who improperly executes his duties. In the same way may be determined the degree of legal entity guilt also when committing other administrative offenses, for example, ones provided for in articles 6.3, 7.22, 8.1-8.2, 9.7-9.8 and other articles of the CAO RF. At the same time, if it is established that a legal entity represented by its leaders has taken all necessary measures to prevent the violation of the relevant rules on the part of its employee, its guilt of committing an administrative offense shall be recognized minimum. In some cases, on the contrary, the guilt of committing certain administrative offenses may be more vested on a legal entity, but not on its leaders or other employees. This refers to cases where it is difficult to establish specific employees of a legal entity, direct actions (or inaction) of which have led to committing an administrative offense or where the offense was committed collectively, that is, by a large number of employees or the whole collective of the legal entity simultaneously. For example, an analysis of administrative and jurisdictional practice shows that it is not always possible to establish the guilt of specific employees of a legal entity who carried out an illegal storage of production waste (article 8.2 of the CAO RF); unlawful cutting, damaging or digging out of trees (article 8.28 of the CAO RF); damaging electric power circuits (article 9.7 of the CAO RF); damaging roads (article 12.33 of the CAO RF) and etc. Examples of administrative offenses, which may be committed by a significant number of employees or the entire staff of a legal entity, may include: violating the rules for operation water-management and water-protection structures and devices (article 8.15 of the CAO RF); exhausting harmful substances into atmospheric air s (part 1 of article 8.21); violating the forest use rules (article 12.33); violation of the requirements of design documents and normative documents in the field of construction (article 9.4); engaging in business activities without a special permit(license) (part 2 of article 14.1); abuse of the dominating position on the commodity market (article 14.31). In all the above and other similar cases the degree of legal entity guilt of committing an administrative offense is greater than the degree of guilt of its employees. Accordingly, this fact should be taken into account in determining the type and size of an administrative punishment being imposed to a legal entity. Meanwhile in practice, the degree of guilt of a legal entity is usually not established and is not taken into account in the imposing to it an administrative penalty. The given circumstance gives rise to the conclusion of the need of normative enshrining in part 3 of article 4.1 of the CAO RF of the relevant rule.

References:

1. Code on Administrative Offences of the Russian Federation of December 30, 2001, No. 195-FZ [Kodeks Rossijskoj Federatsii ob administrativnyh pravonarushenijah ot 30 dekabrja 2001 g. № 195-FZ]. *System GARANT* [Electronic resource], Moscow: 2012.

2. Tax Code of the Russian Federation, part one, No. 146-FL of July 31, 1998 [Nalogovyj kodeks Rossijskoj Federatsii. Chast' pervaja ot 31 ijulja 1998 g. № 146-FZ]. *System GARANT* [Electronic resource], Moscow: 2012].

3. Decision of the Federal Arbitration Court of the Volga district from March 16, 2004 on the case No. A12-17657/03-S19. *System GARANT* [Electronic resource], Moscow: 2012].

4. Decision of the Federal Arbitration Court of the East-Siberian district from August 12, 2004 on the case No. A19-6102/04-21-F02-3116/04-S1. *System GARANT* [Electronic resource], Moscow: 2012].

5. Decision of the Federal Arbitration Court of the Nord-West district from October 21, 2005 on the case No. A66-5835/2005. *System GARANT* [Electronic resource], Moscow: 2012].

6. Decision of the Federal Arbitration Court of the Volgo-Vyatski district from March 19, 2008 on the case No. A79-9256/2007. *System GARANT* [Electronic resource], Moscow: 2012].

7. Decision of the Federal Arbitration Court of the West-Siberian district from April 22, 2008 on the case No. A70-3087/2007. *System GARANT* [Electronic resource], Moscow: 2012].

8. Decision of the Federal Arbitration Court of the Volgo-Vyatski district from March 20, 2008 on the case No. A82-13542/2007/29. *System GARANT* [Electronic resource], Moscow: 2012].

9. Denisenko V. V. *Systemic Analysis of Administrative and Tort Relations* [Sistemnyi analiz administrativno-deliktnykh otnoshenii]. St. Petersburg: 2001.

10. *Comments to the Code on Administrative Offences of the Russian Federation* [Kommentarii k Kodeksu Rossiiskoi Federatsii ob administrativnykh pravonarusheniyakh]. Under edition of Nozdrachev A. F., Moscow: 2010.

11. Maksimov I. V. *Administrative Penalties* [Administrativnye nakazaniya]. Moscow: 2009.

12. *Scientific and practical guide to the application of the CAO RF* [Nauchno-prakticheskoe posobie po primeneniyu KoAP RF]. Under edition of Serkov P. P., Moscow: 2006.

13. Ovcharova E. V. *Administrative responsibility of legal entities*: thesis abstract of candidate of legal sciences [Administrativnaya otvetstvennost' yuridicheskikh lits: avtoref. dis. … kand. yurid. Nauk]. Moscow: 2001.

14. Petrov M. P. *Administrative responsibility of organizations (legal entities)*: thesis abstract of candidate of legal sciences [Administrativnaya otvetstvennost' organizatsii (yuridicheskikh lits): avtoref. dis. … kand. yurid. Nauk]. Saratov: 1998.

15. Polivanov G. S. The Main Problems of Application Administrative Responsibility to Legal Entities [Osnovnye problemy primeneniya administrativnoi otvetstvennosti k yuridicheskim litsam]. *Ros. pravovoe gosudarstvo: itogi formirovaniya i perspektivy razvitiya – Russian Constitutional State: Results of the Formation and Prospects of Development* ,Voronezh: 2004, part 3.