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VIOLATION OF TAX CONTROL PROCEDURES BY EMPLOYEES OF THE FEDERAL TAX SERVICE

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In the context of established by the tax legislation procedures of tax control here are discussed possible and having a place to practice offenses committed by officials of tax bodies in the implementation of these procedures, and are evaluated their administrative and legal misbehavior.

Keywords: tax control, tax control procedures, offences of tax bodies' officials, administrative and legal delinquency of tax bodies' officials, violation the rights of taxpayers.

Under tax control procedures, in the context of this article, we understand the established by the norms of the Tax Code of the RF methods and procedures for actions of tax authorities' officials in the implementation of tax control in all its manifestations, including:

- in the process of attachment of property,
- in the process of seizing documents
- when passing on the territory or premises a taxpayer (tax agent),
- in the process of considering cases on tax offences.

In chapter 14 of the Tax Code of the RF is given a definite specification of the forms and methods of tax control:

- cameral tax audit,
- field tax audit,
- interrogation of witnesses,

- access to territory or premises by tax officials for the purposes of exercising tax control,

- inspection,

- demanding and obtaining documents (information) about a taxpayer, payer of fees and tax agent or information on specific transactions,

- seizing documents and other objects,

- examination,

- recruiting a specialist for assisting in exercising tax control,

- inviting of an interpreter,

- participation of attesting witnesses,

- summoning upon a written notification to the tax authorities of taxpayers, payers of taxes or tax agents to give explanations in connection with their payment (retention and transfer) of taxes and fees,

- compilation of a protocol in the actions on exercising of a tax control,

- registration of results of a tax control (compilation of a warrant, act).

However, according to some authors, tax control may also include preliminary forms. If we agree with the view L. V. Burnysheva about the presence of prior tax control, to which she attributes state registration and account of taxpayers [18], to the list of offenses of tax authorities' employees should be added torts committed by them in the exercise of:

- tax registration and deregistration,

- registration procedures relating to the keeping by the tax authority the register of business entities

Tax procedures, attributed by L. V. Burnyshevoy to a prior tax control, we have previously defined as the procedures of tax administration (but not of tax control), to which included the following:

- changing the terms of payment of taxes and duties,

- collection of taxes, fees, fines and penalties,

- recognition arrears and debts on fines and penalties non-recoverable and their writing off,

- returning and offsetting the amounts of excessively paid (collected) taxes, fees, fines and penalties,

- suspension of operations on the accounts of a taxpayer, fee payer or a tax agent in banks,

- putting property of a taxpayer, fee payer or a tax agent under arrest,

- determination of the amounts of taxes to be paid by taxpayers in the budgetary system of the Russian Federation calculated on the basis of available

information about the taxpayer,

- filing to courts of general jurisdiction or arbitration courts claims (applications),

- filing the petitions of the revocation or suspension of license for the right to carry out certain activities given to legal entities and natural persons.

We have already noted that the norms on the responsibility of a tax authority, which take place in article 103 of the Tax Code of the RF, are clearly limited by framework for action in time and place. Rules of the article determine material responsibility only for infliction damage (losses) at the time of implementing tax control measures. So you need to be clear on which activities belong to tax control and which are not [20].

According to part 1 article 82 of the Tax Code of the RF, tax control is activities of the competent bodies of monitoring compliance with legislation on taxes and fees by taxpayers, tax agents and payers of fees in accordance with the Tax Code of the RF. Moreover with regard to the types of monitoring activities the legislator followed the path of establishing open list of tax authority's powers. Tax control is carried out by means of tax checks, obtaining explanations of tax payers, tax agents and fees payers, *data verification of recording and reporting*, inspection of premises and territories used to generate income (profit), as well as by other means stipulated in the Tax Code of the RF. For example, features of tax control during implementation of production-sharing agreements are determined by chapter 26.4 of the Tax Code of the RF.

Rights of tax authorities and their officials regulated by the Tax Code are implemented in tax control procedures. Violation of these norms, in our opinion, can be characterized as arbitrariness, that is " unauthorized exercise, contrary to a procedure established by a federal law or by any other normative legal act, of one's real or alleged right" (see article 19.1 of the CAO RF).

On the objective side these offenses are usually active actions. These actions are aimed at the implementation of a real or supposed right and do not appropriate to the enshrined procedure of exercising these rights. Consequences of this corpus delicti imply infliction of insignificant harm to citizens or legal entities. The recognition of this or that damage substantial is decided in consideration of each particular case, taking into account the significance of damage caused to victims [21].

Analysis of legal relations, arising during a tax control, allows us to determine the following types of tort actions of tax authorities' officials at their violation of law norms and the legitimate interests of individuals in course of cameral and field tax audits:

- opening of the premises (where are stored documents on the tax payer's income, tax calculations, etc.), with breaking the doors (tearing down of locks, hinges, breakdown of the door leaf, breaking of the door block from the wall) or latches (locks), penetration with destruction of walls, windows, floor rather than waiting till the taxpayer will bring to the place of inspection the keys, will deactivate the alarm;

- violation of alarm, engineering telecommunication networks when the illicit penetration into protected by technical means territory of the audited subjects;

- effraction of a safe deposit, closets, cabinets with documents or property, in cases where there are the keys and no one denies their granting to a tax inspector;

- destruction, damage (disablement), loss of seized documents and objects, as well as the destruction and/or damage of documents and objects during inspection in course of on-site tax check;

- destruction, damage (disablement), the loss of the original documents obtained during cameral tax check;

- retention of items (seized from the taxpayer as a result of withdrawal) needed to the taxpayer for the daily ongoing work (as a rule, it is hardware-software means to ensure accounting, tax accounting, technical programmes for implementation designing and technological developments, planning);

- transfer of documents, containing trade secrets (confidential information) to the expert, who has not made a commitment to preserve the tax, commercial and other secrets protected by the State.

Such activities undertaken in the framework of a tax control as interrogation of witnesses; discovery of documents; engagement specialist, translator, attesting witnesses; invocation to the tax authority; drawing up of a protocol; processing the results of tax check, at first glance, do not contain malicious potential, which in case of illegal (unlawful) implementation of these actions could cause the loss or harm to audited subjects and their representatives.

However, the author is aware of cases where:

- took place the facts of drawing up of two different in terms requested documents of requirements of a tax authority to submit documents (as a result of not submission of "requested" documents according to a copy of a tax authority requirement a taxpayer paid punitive damages under article 126 of the Tax Code of the RF);

- took place the cases of involving by tax inspectors of leaders and founders

of unscrupulous taxpayers to perjury at drawing up records of the interrogation in cases with good-faith taxpayers.

In greater detail we will focus on consideration of those torts of tax authorities' employees, which are performed by them in the exercise of tax control, which may cause damage to the property interests of a taxpayer.

The first worthy of attention torts we consider violations by tax authorities' officials the procedure (order) of attachment of property under article 77 of the Tax Code of the RF.

The Tax Code provides for the following conditions of seizure implementing:

- availability of sanction of procurator,
- taxpayer's fallure to fulfill tax payments on time,
- availability of the tax authority's sufficient reason to believe that a taxpayer will take steps to hide or conceal his property [12],
- Arrest can only be applied to ensure the collection of taxes at the expense of the taxpayer's property in accordance with article 47 of the Tax Code of the RF [5; 13],
- subject to seizure only the property that is necessary and sufficient to fulfill tax obligations,
- should be issued a decision on arrest, signed by the head (deputy head) of a tax authority in the form of appropriate ruling,
- a seizure is implemented in presence of attesting witnesses,
- refusal of a taxpayer (its representative) to be absent at attachment of property is not allowed,
- conducting attachment of property at night is not permitted (except in cases of urgency)
- required drawing up a report, inventory of the property attached,
- determination of the place where must locate seized property.

Therefore, failure to perform any of the mentioned procedural aspects will be in violation of the whole procedure of arrest. As we see it, the most likely committed violations are the attachments of property in the absence of the tax authority's sufficient reason to believe that a taxpayer will take steps to hide or conceal his property. However, in practice, any contesting the decision of a tax authority to attach property on this ground is futile, since the law norm in this part envisages for a tax authority, in our opinion, unlimited discretionary powers.

We believe, may be a variant of the following tort – attachment of property in excess of the required level to ensure the fulfillment of the tax obligations of a debtor. This tort may be provoked by a collision of norms in parts 4 and 5 of article

77 of the Tax Code of the RF, which, on the one hand, provide an opportunity to the seizure of all property of a taxpayer, and, on the other hand, limit the seizure of property by the level necessary and sufficient for the implementation of obligation to pay tax, fines and penaltles. Misinterpretation of norms of the law may result in tax officials' tortious deeds.

Next violation of tax control procedures by tax authorities' officials we see in tort deeds at seizure of documents that provided for in article 94 of the Tax Code of the RF.

In accordance with the provisions of paragraph 3 of part 1 of article 31 and part 14 of article 89 of the Tax Code of the RF during tax audits tax authorities are entltled to seize from a taxpayer or a tax agent the documents proving the commission of tax offenses, in cases where there are reasonable grounds to believe that these documents will be destroyed, concealed, altered or replaced [9]. The procedure of seizure (withdrawal) by tax authorities of documents and objects from a taxpayer is regulated by article 94 of the Code and the Instruction on the procedure for seizure by an official of the State Tax Inspectorate of documents, proving concealment (decreasing) of profit (income) or other objects concealed from taxation, from enterprises, institutions, organizations and citizens approved by the letter of the Ministry of Finance of the RSFSR No. 16/176 from of 26.07.1991.

According to article 94 of the Tax code of the RF The seizure of documents and items shall take place on the basis of a substantiated order of the tax authority official carrying out an on-site tax audit (ruling on seizure must be approved by the director (deputy director) of the relevant tax authority). Moreover, this article established a number of mandatory requirements for seizure procedure, the violation of which can be used by the audited entity for appealing against actions of an official of the tax authority. Mandatory requirements include:

- issuing of a reasoned decision on a seizure, including in the case of delay by a taxpayer the period of their provision, under article 93 of the Tax Code of the RF [11; 15];

- not allowing the seizure of documents and items at night-time;

- documents and items shall be seized in the presence of attesting witnesses and the persons whose documents and items are being seized (where necessary, a specialist shall be invited to participate in the seizure);

- before the seizure commences, the tax authority official shall present the order to carry out the seizure and shall explain to the persons present their rights and obligations;

- a tax authority official shall request the person whose documents and items

are to be seized to hand them over voluntarily;

- opening premises or other places where the documents and items, which are to be seized, may be kept avoiding unnecessary damage to locks, doors and other objects;

- a report on the seizure of documents and items shall be drawn up;

- documents and items which have been seized shall be listed and described in the seizure report or in attached lists with an exact indication of the name, quantity and individual characteristics of the items and, where possible, the value of the items;

- all documents and items which are seized shall be shown to the attesting witnesses and other persons participating in the seizure;

- a copy of the report on the seizure of documents and items shall be delivered against receipt to the person from whom the documents or items were seized [19].

Besides, the article establishes that documents and items which are not relevant to the subject of the tax audit may not be seized.

Violation of any of these requirements constitutes a violation by tax authorities' officials the procedure for seizure of documents established by article 94 of the Tax Code of the RF. Usually a tax authority seizes all the documentation relating to financial and tax accounting. The author does not know any case of "targeted" seizure of documents. Contextual search in reference-legal system "GARANT" by reference to article 94 of the Tax Code of the RF in judicial acts of the FAC of Counties finds 389 documents, that indicates the existence of tax disputes between taxpayers and the tax authorities on the procedure for seizure of documents and items, including with recognized by the courts facts of tortious deeds of tax authorities' employees [14].

Numerous violations at carrying out tax audit, in our opinion, are due to violation of the time terms of tax audits.

Part 2 of article 88 of the Tax Code of the RF establishes that cameral tax audit must be carried out within three months from the date of the taxpayer's submission of the tax declaration (calculation) and the documents attached to this declaration (calculation), except for cases in which the Tax Code may provide for other time terms (for example, at reimbursement of VAT).

A field tax audit can be conducted for both two and four, and in exceptional cases six months (see part 6 of article 89 of the Tax Code of the RF). The grounds of prolonging a field tax audit up to four and (or) six months can be:

1) carrying out audits of a taxpayer, which is classified as the largest;

2) obtaining during a field tax audit of information from law enforcement,

regulatory bodies or other sources, which evidences on the existence of tax legislation violations of a taxpayer, fee payer, tax agent, and requires additional audit;

3) the existence of force majeure (flooding, flood, fire, etc.) in the area where an audit is being carried out;

4) conducting audits of organizations that are composed of several separate subdivisions, namely:

four or more separate subdivisions – up to four months;

less than four separate subdivisions – up to four months, if the share of taxes paid attributable to these separate subdivisions is not less than 50 percent of the total amount of taxes paid by the organization, and (or) the share of assets on the balance of separate subdivisions is at least 50 percent of the total assets of the organization;

ten or more separate subdivisions – up to six months;

5) failure to submit by a taxpayer, fee payer, tax agent in established in accordance with paragraph 3 of article 93 of the Code time term of the documents necessary for a field inspection;

6) other circumstances. In this case, the need for and timing of the extension of a field tax audit are determined on the basis of the duration of the audited period, the volume of documents scanned and analyzed, the amount of taxes and fees to be checked, the number of ongoing activities of the audited entity, sophistication of organizational and economic structure of the audited entity, the complexity of technological processes and other circumstances [17].

Moreover, the taxpayer (tax agent) has no means in any way influence the adoption (rejection) of the decision on the extension of a field tax audit.

During the independent field tax inspection of branches and representative offices of a taxpayer time terms of the audit may not exceed one month.

Due to the fact that breaks take place during a field tax audit, only the very checking days are taken into account.

Head (deputy head) of a tax authority has the right to suspend a field tax audit for the purpose of:

1) requesting and obtaining documents (information) in accordance with article 93.1 of the Tax Code of the Russian Federation;

2) obtaining information from foreign State bodies under the terms of international agreements of the Russian Federation;

3) the performance of expert examinations;

4) the translation into Russian of documents presented by a taxpayer in a foreign language (see part 9 of article 89 of the Tax Code of the RF).

The total period of time for which the conducting of an on-site tax audit is suspended may not exceed six months. However, if a tax authority has been unable for six months to obtain requested information from foreign State bodies under the terms of international agreements of the Russian Federation, the period of the suspension of that audit may be increased by three months.

So, if you calculate the maximum calendar period from the start date of a field tax audit up to compiling by a tax authority the warrant of its completion, it may reach fifteen months. Moreover, according to the decision of the Constitutional Court of the Russian Federation No. 14-P from July 16, 2004 [4], the duration of the on-site tax inspection is a sum of the periods, during of which inspectors are in the territory of an audited taxpayer, which means a real authorization by the legislative and highest judicial body of the country "dimensionless" timing of field tax audit.

Violation by tax authorities' officials of deadlines of tax audits, unfortunately, cannot be the basis of recognition the results of these audits invalid. Law enforcement practice does not restrict a tax authority in the right of taking decision on the results of cameral audits outside of the established by the Tax Code deadlines for their implementation [16]. However, everything is not so simple. Dissenting opinion of judges of the Constitutional Court of the Russian Federation indicates that there are two estimations of the constitutionality of the tax legislation provisions regarding the timing of tax audits [4]. We deem it duty to represent in this work the basic aspects of dissenting opinion of a judge of the Constitutional Court of the RF Kononov A. P.:

"...Obviously, that a tax audit as tool of power for administrative control, detection and suppression of tax offenses substantially affect the rights or interests of a taxpayer, creates for him a problematic situation, in a certain way interferes in its economic activities, burdens him with a number of additional obligations to a tax authority, that is especially true for field tax audits directly in the taxpayer's territory.

Given the presence of these encumbrances and the possibility of adverse for a taxpayer consequences of tax audits, on the basis of general criteria of legal responsibility and proportionality of the required restrictions of rights to constitutionally protected values (article 55, part 3 of the Constitution of the Russian Federation), the legislator should give tax authorities clear powers to regulate their duties and to provide for such a procedure for their implementation, which would ensure the effective protection of the rights and interests of taxpayers as a weaker party in such public relations.

One of these procedural guarantees is an establishment the limit of duration of a tax audit, because indefinite duration and not time-limited intervention of the control authorities to the economic activities of a taxpayer may be a threat to its business reputation,

credibility, relations with partners, stability and planning of business transactions, creates unacceptable uncertainty of its legal position, which can become quite comparable to that of a suspect in the commission of an offense. Obviously, such a position cannot continue indefinitely long time, that has been actually recognized by the Constitutional Court, which has formulated the principle of the "inadmissibility of excessive or unlimited in duration tax control measures and substantiation the deadlines of conduction for field tax audits".

That is why the legislator has established deadlines for tax audits.

Meanwhile, these clear and strictly formulated by the legislator demands on the timing and duration of a field tax audit have been questioned in law enforcement practice through unjustified assigning to the uncertain and controversial provisions of the same article 89 of the Tax Code of the Russian Federation about that "period of inspection includes the time of the actual location of auditors in the territory of a taxpayer".

In tax and judicial practice these provisions have become to be seen as an opportunity of interruption (including repeated) or suspension of the two-three-month preclusive periods of a field tax audit, that actually allowed tax authorities (as in the cases of applicants), having done some actions "in the territory of an audited taxpayer" and obtained the necessary documents, to continue control activities in office mode for indefinitely long time, defining terms of drawing up the final warrant in its sole discretion and without being bound to any procedure.

This uncertainty of the legal norm, which implies the possibility of its arbitrary interpretation and application to the detriment of the constitutional rights and freedoms and, as in this case, affects the freedom of entrepreneurial activity of applicants (article 34, part 1 of the Constitution of the Russian Federation), in accordance with the position of the Constitutional Court of the Russian Federation contradicts to article 19 (part 1) of the Constitution of the Russian Federation.

Based on the uncertainty and divergence of the contested provision of article 89 of the Tax Code of the Russian Federation, the tax authorities at carrying out field tax audits have arbitrarily introduced suspend of audit in respect of the taxpayer, citing the need to conducting counter audits and other circumstances. The term "suspension" was legalized by the instructions of the Ministry of Taxation of the Russian Federation No. 60 from April 10, 2000 "On the procedure of drawing up the protocol of a field tax audit and case proceedings on violation of the legislation on taxes and duties". At the same time neither Article 89 of the Tax Code of the Russian Federation nor any other provisions of the tax legislation contain references to the tax authorities' powers to suspend field tax audits and, thus, arbitrary extend the limits on their duration. Second part of article 4 of the Tax Code of the Russian Federation defines normative acts of the Ministry of Taxation of the Russian Federation as mandatory only for its units and does not relate them to the acts of legislation on taxes

and duties. Meanwhile, the suspension of field tax audits materially affects the interests of taxpayers.

In a number of court's judgments, including in the cases of applicants on the present case, the facts of the suspension of tax audits are not considered as a violation of the law, because the tax legislation does not contain such prohibitions. Constitutional foundations of a legal democratic state (article 1, part 1 of the Constitution of the RF) define binding the executive power to the law, responsibility and predictability of its activity, which is possible only under the condition, that the powers of managerial bodies are based on the law. Therefore, in contrast to the principle of optionality underlying private-legal relations, the definition of the powers of public authorities in the sphere of public law does not allow their own discretion and should be governed by the principle of "allowed only what is permitted by law", which is a necessary guarantee against arbitrariness and abuse of power. In accordance with article 55 (part 3) of the Constitution of the Russian Federation any limitation of constitutional rights and freedoms may be only on the basis of a federal law.

Characteristically, that there is in general no mention of the suspension of tax audits, which is a major motive in the applicant's complaints, in the Decision of the Constitutional Court. This position eliminates the need to assess the legal competence of tax authorities, the analysis of which would inevitably lead to negative conclusions. However, the Constitutional Court went a step further by providing, in fact, the tax authorities carte blanche to determine the timing and duration of a field tax audit and release them even from the formalities of an act of suspension. In search for the constitutional sense (?) The Constitutional Court without any justification overturned for this case the general order of calendar calculation of terms established by article 6.1 of the Tax Code of the Russian Federation, and have come to identification the timing of a field tax audit solely with the sum of the periods of inspection on the territory of the taxpayer. From its point of view, these terms must not include periods of conducting cross-audits and periods of completing formalities in respect of the results of inspection. Why, indeed, must not, if it is obvious that a cross-audit and presentation of results is the essential components of a tax audit? There is no any argument given, must not - that's all. Meanwhile the legislator clearly does not identify the concept of "deadlines of a tax audit" and "the period when a tax authority is in the territory of a taxpayer" when establishes that the duration of an audit includes the time of actual location of inspection in the territory of a checked entity. It is clear that the time of an audit is wider than the time of "actual location". Otherwise, such an audit would have no meaning.

The interpretation of the duration of a tax inspection as "the sum of periods" of a tax authority location in the taxpayer territory is completely unacceptable both in its content and by the objectives and legal consequences. Such an interpretation is, in fact, a justification of arbitrariness, because it allows tax authorities repeatedly and at any time

to interrupt the period of an audit and renew it at their own discretion almost indefinitely, thus covering the sluggishness of tax services and the possibility of abuse on their part. Who and how will clock their actions? The declared balance of private and public interests is clearly absent. Taxpayer is actually deprived of legal guarantees of stability and certainty of his position, constantly staying at the mercy of a tax authority, under the pressure of suspicion and the threat of responsibility. The possibility of judicial protection seems to be a poor consolation, since courts are deprived of a formally defined legislative framework for a decision in the absence of objective criteria for assessing the discretion of tax authorities and excessiveness of an audit period.

The need for rigidly defined timing of tax audit has one more important procedural aspect of protection from unwarranted bringing to responsibility on the results of an audit.

In its decisions, the Constitutional Court stated that enshrined in the Constitution of the Russian Federation procedural guarantees of judicial protection against unwarranted bringing to legal responsibility have a generally-legal nature and are applied to all types of court proceedings (Decision from May 28, 1999). These principles, certainly, include the presumption of innocence (Article 49) and the rule of admissibility of evidence: at administration of justice is not allowed to use evidence obtained in violation of federal law (Article 50, paragraph 2).

The Tax Code of the Russian Federation proceeds from similar grounds. Thus, in accordance with part 7 of its article 3 all unresolvable doubts, contradictions and ambiguities in acts of tax and levy legislation shall be interpreted in favor of the taxpayer (levy payer). In accordance with part six of article 101 of the Code, failure of tax authority officials' to comply with procedural requirements at the proceedings and issuing judgment on the case of tax offense committed by a taxpayer may be a reason for cancellation of the tax authority's decision by a superior tax authority or court.

Proceeding from the aforesaid, it is inadmissible to bring taxpayers to the tax responsibility on the basis of evidence obtained in violation of terms for site inspection stipulated by the article 89 of the Tax Code of the Russian Federation.

Proceeding from the aforesaid, it is inadmissible to bring taxpayers to the tax responsibility on the basis of evidence obtained in violation of terms of a field tax audit stipulated by the article 89 of the Tax Code of the Russian Federation. Otherwise, the established by the legislator limits of duration of such an audit lose legal sense as a taxpayer guarantee against arbitrariness and excessive intervention by a tax authority in his economic activities, what deprives the taxpayer of protection against such violations.

Thus, the provisions of the second part of article 89 of the Tax Code of the Russian Federation in the meaning, attributed to them by the current law enforcement practice, of permitting the interruption or suspension of the deadline for a tax inspection or identifying

with these time terms only the time of the actual location of inspectors in the taxpayer's territory do not comply with articles 1 (part 1), 19 (part 1), 34 (part 1) and 55 (part 3) of the Constitution of the Russian Federation".

Despite the fact that, since the adoption of judgment of the Constitutional Court of the Russian Federation No. 14-P from July 16, 2004, article 89 of the Tax Code has evolved, its norms, in our opinion, allow tax authorities to abuse their rights. The author knows cases of the direction a taxpayer at the time of a field tax audit requirements for documents calculated in the range of ten thousand copies. At such times, the taxpayer's accounting office was simply paralyzed and was not fulfilling its functions of accounting and tax accounting.

As we see it, the facts of misconduct of a tax authority, expressed in excess of time terms for a tax audit can be used by taxpayers to the extent, that recognition of the illegal suspension of the field tax audit (extension of inspection) will lead to the fact, that the act of tax audit will be made up outside of terms established by the Tax Code, what, in turn, will enable the formal basis of its appeal, as well as of the issued by the Act decision of the tax authority.

It is our opinion, deserves consideration such an offense as a tax authority's failure to draw up the results of a tax audit.

The Tax Code of the Russian Federation establishes two types of tax check – cameral and on-site ones. If on the results of an on-site check drawing-up a document of prescribed form (act or warrant) was always provided for, then this obligation in the process of cameral audits legislator had not being provided for up to January 01, 2007. On the basis of the results of an on-site tax audit a tax audit report must be drawn up within two months from the day on which a certificate of the performance of an on-site tax audit is drawn up (see part 1 of article 100 TC RF).

Since January 2007, the legislator has established obligation of a tax authority to draw up an act on the results of an on-site audit, if inspection has revealed violations of legislation on taxes and fees (see part 5, article 88 of the Tax Code of the RF). The very procedure for drawing up an act is provided for in article 100 of the Tax Code of the RF. In contrast to the deadlines for drawing up acts of an on-site inspection, drawing up an act on the results of a cameral tax check has lesser term – just ten days.

The author is not aware of cases of failure to prepare acts on the results of an on-site inspection, however, the practice of participation in representing the interests of a taxpayer at field tax audits shows non-compliance with obligations under paragraph 15 of article 89 of the Tax Code of the RF, which prescribes drawing up of a certificate of public officer about the conducted inspection at the last day of

the inspection, in nine out of ten cases of tax inspections. Non-fulfillment of this obligation, it would seem, does not carry property risks and does not affect the rights of taxpayers. However, according to Article 100 of the Tax Code of the RF from the date of the certificate begins the period of two months preclusive term, stipulated by the legislator for drawing up an act of an on-site tax inspection.

Legislation establishes a list of mandatory information that must be specified in the act, but the consequences of non-compliance with established form of a tax audit act and completeness of information are not determined. The required information includes:

1) the date of the tax audit report. That date shall be understood to be the date on which the report is signed by the persons who performed the audit;

2) the full and abbreviated name or surname, first name and patronymic of the audited person. Where an audit of an organization is performed at the location of an economically autonomous subdivision of the organization, in addition to the name of the organization there shall be entered the full and abbreviated name of the audited economically autonomous subdivision and the location of that subdivision;

3) the surnames, first names and patronymics of the persons who performed the audit and their titles, stating the name of the tax authority which they represent;

4) the date and number of the decision of the director (deputy director) of the tax authority on the performance of the on-site tax audit (in the case of an on-site tax audit);

5) the date of the submission to the tax authority of the tax declaration and other documents (in the case of an in-house tax audit);

6) a list of documents presented by the audited person in the course of the tax audit;

7) the period in respect of which the audit was performed;

8) the name of the tax in respect of which the tax audit was performed;

9) the dates of the commencement and completion of the tax audit;

10) the address of the location of the organization or of the place of residence of the physical person;

11) information concerning tax control measures conducted when carrying out the tax audit;

12) documented violations of tax and levy legislation which were found in the course of the audit, or a note to the effect that none were found;

13) conclusions and recommendations of the inspectors with respect to the rectification of violations and references to articles of the Tax Code in the event that

this Code prescribes responsibility for the violations of tax and levy legislation in question (see part 3 of article 100 of the Tax Code of the RF).

In addition, the legislator ordered a tax authority to attach to a tax audit report the documents confirming violations of tax and levy legislation which were discovered in the course of an audit (see part 3.1 of article 100 of the Tax Code of the RF).

The absence of a taxpayer's act of a tax audit creates the risk that next tax authority may take a decision to bring the taxpayer to responsibility for a tax offense, without the opportunity for the taxpayer to submit the full evidence of his innocence and the lack of offense.

However, the lack of drawing up of the results of tax audits by a tax authority, allows taxpayers to use an additional ground for invalidating the decisions of tax authorities made on the results of audits. In our opinion, failure to draw up must be considered both as a lack of acts and their inconsistency in the content to requirements of article 100 of the Tax Code of the RF, which is confirmed by court practice. For example, if:

- if there are no references to the document that confirms the conclusion on commission of the tax offenses by the taxpayer in the act, the decision in a tax dispute can be taken in favor of the taxpayer [8];
- The results of an additional check of the taxpayer by the tax authority are not drawn up, and the taxpayer has not been familiarized with the obtained information, and therefore, the taxpayer has been denied the opportunity to present his explanations and objections, what has violated his legal rights [6].

The following considered by us violation of tax control procedures is a violation by tax authorities' officials of the established order (procedure) of access on the territory or premises of a taxpayer.

The Tax Code establishes that officials of tax authorities who are directly involved in carrying out a tax audit shall be allowed access to the site or premises of the taxpayer, levy payer or tax agent upon presentation of their official identity cards and the decision of the director (deputy director) of a tax authority concerning an on-site tax audit of that taxpayer, levy payer or tax agent (see article 91 of the Tax Code of the RF). A taxpayer, in our opinion, may, without any consequences for himself, not allow to his territory a tax authority official in the absence of any of the documents: service certificate or order on conducting an on-site tax audit.

Remarkable the fact that the CAO RF has an administrative offense for which a tax authority's official may be held administratively liable. It is an unauthorized

penetration into an object guarded in the established procedure, which shall entail the imposition of an administrative fine in the amount of from three hundred rubles to five hundred rubles (article 20.17 of the CAO RF). As a protected object can be an enterprise (or its individual items) relating to military-industrial complex (MIC), nuclear industry, strategic objects that make up the property subject to tax control (inspection) of a taxpayer (tax agent).

According to the Federal Law from April14, 1999 "On the Departmental Security Service" *protected objects* are buildings, structures, buildings, adjacent land and water areas, vehicles, and cargo, including during transportation, cash and other property subject to protection from unlawful infringements.

The list of protected objects is determined by the federal executive authorities, which have the right to establish a departmental security service, and approved in accordance with the procedure established by the Government of the Russian Federation [3].

On the basis of article 11 of the Law employees of departmental security service are entitled to:

- to require officials of tax authorities engaged in tax control in protected facilities compliance with access mode and internal security policy;

- to check on protected objects identity documents of tax authorities' officials, as well as documents that entitle them to enter (exit), entry (exit) of vehicles, importation (taking away) of the property to protected sites and from protected sites;

- to perform administrative detention and bringing to a departmental security office or internal affairs body of persons who commit crimes or administrative offenses in protected sites, as well as perform personal examination of individuals and things, seizure of objects and documents that are instrument or a direct object of the offense, provide protection of the place of incident and the safety of the mentioned objects and documents;

- to use physical force, special means and firearms (in the cases and manner prescribed by article 13, 14, 15, 16 of the Law);

- to enter to the premises of the protected sites and examine them without restriction during the prosecution of individuals who have iliegally infiltrated into secured facilities, and for the detention of persons suspected of committing a crime or administrative offenses.

Thus, an official of a tax authority, which has arrived for a check on the protected area, must have a service certificate, an order to conduct a tax audit, in some cases, a certificate of admission to the State Secrets. Internal security policy can stipulate the pass into the territory of protected sites accompanied by Security Officer

and/or the making of an appropriate permit at the time of a tax audit on protected objects. A tax authority official also must observe these rules.

The events of violations the procedure of consideration of cases on tax offenses deserves special attention.

Despite the fact that the procedures for consideration of cases on tax offences has been completely prescribed in articles 101 and 101.4 of the Tax Code of the RF, even here, officials of tax authorities manage to commit a number of offenses. In our opinion, the offenses are committed fully realized, because employees of tax authorities seek a quicker way to make a decision based on checks' materials with additionally charged to a taxpayer tax payments and penal sanctions in those cases, when they realize that it is not possible for them in the future more convincingly justify tax claims presented to a taxpayer.

However, depriving the taxpayer the opportunity to participate in the process of consideration tax inspection materials entails the abolition of a tax authority's decision without participation of the taxpayer [10].

One of taking place in practice offenses committed by a tax authority is a making the decision on bringing a taxpayer to tax responsibility prior to the scheduled date of consideration tax inspection materials, which is, as a rule, specified in a notification addressed to the taxpayer or at all without any notification of the taxpayer [7]. The author in his practice had the opportunity to see it. So, in making the tax authorities decision on the results of the cameral audit of one of VAT returns in 2007, submitted by LLC "Leasing Company "ENAKS" to the Interregional Inspectorate of the Federal Tax Service of the Saratov region No. 7, the chief accountant of the taxpayer was notified by phone, and in consequence was received a notification on the appointment the date of consideration of inspection materials on January 18, 2007, but the decision was made without the participation of the taxpayer January 17, 2007.

The position of the taxpayer in this tax dispute was so strong, that it was not needed to resort to the argumentation based on the violation by the tax body the provisions of article 101 of the Tax Code of the RF, the case was resolved in favor of the taxpayer.

It is surprising that some of the leaders of the tax authorities disregard the provisions of part 14 of article 101 of the Tax Code of the RF, which states that a violation of significant terms of the procedure of consideration tax inspection materials is a ground for cancellation of the tax authority decision on bringing to responsibility for a tax offense by a higher tax authority or court. These essential terms under the Tax Code of the RF include:

- ensuring possibility of the person, against which has been conducted an audit, to participate in the process of consideration tax inspection materials in person and (or) through its representative, and

- ensuring possibility of the taxpayer to submit explanations.

The next type of offense committed by tax authorities is an obstruction of a taxpayer in exercising the right to submit an explanation in his defense. This obstruction is implemented by hiding from a taxpayer the materials of counter audits regarding counter parties of the taxpayer, audits in respect of counter parties of the taxpayer conducted by MIA bodies for the presence of criminal corpus delicti in the economic activities. As a rule, a tax authority practices providing a taxpayer only a tax authority act with the calculations of penalties accrued by tax inspectors on the results of their own interpretation of the tax consequences of transactions made with counterparties of the audited entity, and at this they forget to provide for the taxpayer the results of counter audits of these counter parties.

So in the tax dispute which has arisen on the result of a field tax audit of LLC "Teploenergopribor", tax authority (Interregional Inspectorate of the Federal Tax Service of the Saratov region No. 7) by referring to the results of the counter audits of counter parties made a note in the act, and subsequently, in its decision about the obligation of the taxpayer to pay VAT, as deductions claimed by LLC "Teploenergopribor", according to the tax authority, was calculated on the base of commercial invoices signed by unidentified persons. Evidences of the tax authority's position were reduced to availability of copies of documents received in respect of the taxpayer counterparty at the counter audit of this counterparty in business transaction with a third party. Before the appointment of the review date of field tax audit materials the taxpayer's request of the following content was sent to the tax authority:

"To prepare objections on the act of the field tax audit of LLC "Teploenergopribor" (ITN 6449033002/KPP 644901001) No. 13/117 dated 27.12.2007, we request you to provide the materials of counter audits regarding the specified act".

However, the taxpayer was unable to obtain from the tax authority the copies of requested documents on the counter check of counterparties. Only under the petition that had been satisfied by the arbitration court, these documents were demanded from the tax authority to the court, but were not represented to the taxpayer. Thus, there was a fact of obstruction to the taxpayer in the realization of the right to a defense.

The provisions of the Tax Code provide a number of guarantees to protect the rights of taxpayers in respect of which the decision on tax audits is taken. Legislator enshrined these guarantees not only in article 101 of the Tax Code, but also

introduced to the Tax Code of the RF a special article 101.4 (effective from January 01, 2007) "Legal Proceedings in Respect of Tax Offences Envisaged by This Code", part 12 of which establishes that: "...failure by officials of tax authorities to comply with requirements established by this Code may constitute a basis for a decision of a tax authority to be rescinded by a higher tax authority or a court.

A violation of significant conditions of procedures for the examination of a report and other materials relating to tax control measures shall constitute a basis for a tax authority's decision to be rescinded by a higher tax authority or a court. Such significant conditions shall include ensuring that a person in relation to whom a report has been prepared has the opportunity to participate in the process of the examination of the materials in person and (or) through his representative and ensuring that the person concerned has an opportunity to present explanations.

Other violations of the procedures for the examination of materials may serve as grounds for the rescission of the above-mentioned decision of a tax authority if those violations have resulted or may result in the adoption of an incorrect decision".

In our view, such an emphasis of the legislator on compliance with the procedural norms is connected with the awareness of the need to do something to strengthen the elements of legitimacy in the actions of officials of a tax authority, and to contribute to forming a constitutional state.

However, there are both positive for a taxpayer judicial acts on this ground, and negative ones in arbitration practice. In our view, a negative outcome for a taxpayer occurred in the cases where its representatives could not prove in court that a violation of the procedure for bringing the taxpayer to tax responsibility involved a substantial violation of the taxpayer's rights, that the observance of this procedure could lead to other tax consequences and other decision of the tax authority.

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