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**DETERMINATION THE GUILT OF A LEGAL ENTITY
AT COMMITTING BY HIM AN ADMINISTRATIVE OFFENCE
IN THE FIELD OF CUSTOMS AFFAIRS**

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Considered problematic issues of the subjective aspect of administrative offenses committed by legal persons in the field of customs. In the article is provided an analysis of scientific views on the determination of guilt of a legal entity in the context of considered legal relations. Here are suggested author's definitions of a legal entity's forms of guilt for administrative violations in the field of customs.

Keywords: administrative offences, administrative offences in the field of customs affairs, guilt of a legal entity, forms of guilt, subjective aspect of an administrative offence.

After 10 years of the Code on Administrative Offences of the Russian Federation scientists with particular interest continue the study of the subjective side of an administrative offense committed by a legal entity [12, 59-67; 10, 48,49; 11, 58,59; 24, 21], paying close attention to the determination of guilt in delicts committed in the area of customs affairs [14].

In the customs legislation the institute of administrative responsibility was first enshrined in the Customs Code of the RF in 1993, article 230 of which defined the concept of violation of customs regulations, which by its nature is a kind of administrative offense. According to this article a violation of customs norms was recognized as a wrongful action or omission of a person, which violated the order established by the Customs Code of the Russian Federation, the Law of the Russian Federation No. 5003-I from May 21, 1993 "On Customs Tariff" [1], other laws of the Russian Federation in the field of customs affairs and international treaties of our country, the control over the execution of which was the responsibility

of the customs bodies of the Russian Federation. It should be noted that in formulating the definition of a customs offense, the legislator did not indicate such an important sign of an offense as guilt. Moreover, in accordance with articles 230, 231, 320 of the Customs Code of the Russian Federation of 1993, at bringing legal persons and individual entrepreneurs to responsibility the guilt was of no importance and not a subject to proof. Only the fact of violation of customs rules by legal entities and individuals engaged in entrepreneurial activity was a subject to proving

In the current scientific literature, there are several approaches to determination of guilt of a legal entity and feasibility of introducing the named institute in the concept of an administrative offense.

According to one of them is suggested not to consider guilt as an indispensable element of an administrative offense committed by a legal person. So, D. N. Bakhrakh said that, if to responsibility was brought an organization, in many cases, the presence or absence of the guilt had no legal value. Moreover, in his view, there are no signs of the subjective aspect in the administrative offense committed by a legal person; there are not four, but three elements [4, 285-292]. In our opinion it is difficult to agree with the reduction in the number of elements of an offense, as it ignores the most important principle of legal responsibility – the principle of responsibility for a guilty deed. In his writings I. A. Galagan uphold the presence of this principle [8, 229].

The second approach is to determine the guilt of a legal entity in terms of objective imputation [19, 13]. Articles 231 and 320 of the Labor Code of the RF of 1993 envisaged, that legal entities are legally responsible for violation of customs rules equally, regardless of the form of ownership and departmental affiliation, and, at this, for making them liable it was needed to prove only the fact of violation of customs regulations, i.e. when there were objective signs of customs offense the guilt of a legal entity was presumed. This approach to determining the guilt of a legal entity is not very different from the previous one, because it also does not take into account the content of the subjective aspect of an offense committed by a legal entity.

The third approach is characterized by the fact that guilt is considered as an indispensable element of offense. While some scholars argue the existence of a particular form of legal entity's guilt [3, 347-349; 7, 46-47], others believe that guilt of a legal entity must be linked to the guilt of its officials [20, 9].

Other scientists suggest to clarify the concept of legal entity's guilt [9], using a special form of legal entity's guilt, which was first formulated by the Russian Constitutional Court in its decision No. 7-P from April 27, 2001 [2], where

was indicated the duty of subjects of customs relations to justify in proper way, that the violation of customs rules was caused by extraordinary, objectively unavoidable circumstances and other unforeseen, insurmountable obstacles that are beyond their control, at their compliance with the degree of care and diligence, what was required of them for the proper execution of customs duties. This definition is almost identical to the norm contained in part 3 of article 401 of the Civil Code of the RF.

It is of interest the statement, that guilt of a legal entity is determined through the collective guilt of workers or guilt of individuals in leadership positions of a legal entity, belonging to the board of directors (supervisory board) or exercising special powers under the job description, and, therefore, responsible for its implementation [22; 5, 68]. Similar conclusion is also made by A. Nikiforov, after an analysis of legislations of U.S.A, Britain, FRG, France and other countries. Any corporation is responsible through its governing body (individual or collective). Performing concrete actions, a physical person does not speak or act instead of its company. It acts as a company, and his mind, guiding his behavior, is a mind of the company. If this is a guilty mind, this guilt is an essence of a company's guilt [15, 124].

It should be noted that in some scientific papers the guilt of a legal entity is considered through its characteristic as a single personalized unity with independent will and incurring self-responsibility. It is noted that an offense is committed, as a rule, by "hands" of one of the members of a collective acting with intent or through negligence. However, the will of each member of the team is not formed by itself; in the interaction of team members in the framework of organizational interrelations it is affected by the collective. If the organizational interrelations between team members adjusted properly, the offense committed only by one of its members is actually excluded [13].

With a positive assessment of the above statement, should be noted limited possibility of its application to the customs legal relations, as the actions can be performed far away from the location of the very legal entity and collective. The nature of administrative offences in the field of customs affairs is such, that is not always an action, which constitutes an offense, has been "authorized" by leadership (such as the movement of goods in addition to customs control), and on the other hand, an employee of a legal entity may not always influence the decision of a leader, for example, at violation requirements of regime of export. Taking into account the above, we can assume that in the process of internal control will be corrected not all unintentional errors, as well as suppressed not all deliberate actions of individuals aimed to committing intentional offences.

Indistinctly formulated by legislator definition of legal entity guilt and the uncertainty of its form are the cause of inconsistent decisions of courts. So, in one case of administrative offence in the field of customs affairs court pointed out that the guilt of a legal entity was proved in the case if the entity could not demonstrate that it had taken all possible measures to comply with customs regulations and norms. Thus, the court laid on the person brought to responsibility the obligation to prove his innocence [18]. In another case, the court stated that the customs authorities had not fully investigated the subjective aspect of the administrative offense committed by a company; to the court was not submitted evidence of an intentional offense, intent to violate laws or regulations or constant negligence [17].

It should be noted that the awareness of the wrongfulness of an action or omission – is a psychological process, which cannot be undergone by a legal entity. Deliberate or careless attitude to a wrongful action may show only individuals. Legal entity – is a team of many individuals, therefore, determination of guilt of a legal entity must consider this feature.

We believe that a legal entity must be found guilty of an administrative offense, if the guilt of specific employees performing actions on behalf of the organization as a whole has been determined. Here, it is necessary to establish a cause and effect relationship between the deeds of an employee and the fact of an offense.

As for customs and legal relations, forms of guilt can be illustrated by the following examples.

Mari Customs recognized LLC Production and Commercial Company “Karina” guilty of an administrative offense under part 1 of article 16.17 of the CAO RF – violation of the term of enrollment currency gain on accounts in an authorized bank (now – part 4 of article 15.25 of the CAO RF). Income deficiency is due to partial damage of the exported goods, which occurred due to adverse weather conditions. This circumstance the firm regarded as force-majeur indicating that there was no guilt in the actions of the organization. During the court proceedings it was found that the goods were transported in an open box car, what did not provide its safety, the examination certificate confirming the fact of damage was signed by a person not entitled to do this, there were no documents of extension by the Bank of Russia the time terms of enrollment currency gain on the firm’s accounts in an authorized bank and evidence of force majeure. Thus, the court concluded that the legal person was guilty of an administrative offense [16].

In the described situation explicit desire of the leadership of LLC Production and Commercial Company “Karina” to violate the requirements of export conditions is not seen, but, realizing, that the steps taken by the LLC to comply with

customs legislation were insufficient, the leaders in their actions showed indifference to the socially dangerous consequences. Here the indifference meant inappropriate transport conditions, careless paperwork for damaged goods, and the fact that the company neither had the permission of the Central Bank of the RF for the change the period of enrollment currency gain, nor even put it in fame.

The structure of this offense is a mixed – formal and material one. On the one hand, have been violated the rules of observance of the customs regime, on the other – the state treasury received less planned currency funds. If the structure is formal, objective aspect is limited only by socially dangerous action or omission. In these cases the intent formally includes the awareness of public danger of action (or inaction) and the desire to commit it [23, 211].

In another case, during the formation of passenger train Barnaul (Russia) - Leninogorsk (Kazakhstan) in the station Barnaul the wagon for heating was loaded by workers of wagon depot with fuel (wood, coal), which was later moved across the customs border of the Russian Federation. In the course of audit, customs service found that the supplies had been moved without being declared in accordance with the law. By decision No. 10605000-2342/2004 railroad was found guilty of an administrative offense under part 1 of article 16.2 of the CAO RF: failure to declare in the prescribed form goods subject to declaration. In this case, workers, who loaded coal, were not officials of the legal entity, however, as pointed out by A. Niki-forov, referring to the speech of Lord Reid on the case of Tesco Supermarkets, Ltd. v. Natrass: “An individual has a mind mind, which can contain actual knowledge, intent or negligence, and he has hands to carry out his intentions. Corporation has nothing of this. It must act through individuals, though not always through one and the same person” [15, 123].

There are actually three parties that constituted the participants of legal relations in this example: a legal entity (brought to responsibility for failure to declare exported goods), a depot worker, who after the load of fuel did not report an official who had the right to declare goods, customs authorities, which as a result of control found a violation of customs rules. And the customs legal relations arose only for two entities: the legal entity and the customs authority. Depot worker had no authority to submit cargo customs declaration, but because the job description he had to report on the actions performed to an authorized declarant. Thus, violation of the internal job descriptions by the worker caused violation of customs regulations by the legal entity, i.e., here the worker acted as a real tortfeasor.

In our view, in bringing a legal person to administrative responsibility for violation of customs regulations, must be determined and considered primarily

actions and guilt of a real tortfeasor (official, worker or employee of a legal entity), who by virtue of its job description or contract must inform officials about committed or being committed actions. However, given the statement of I. A. Galagan that the collective responsibility of legal persons, on the merits, “results in a collective irresponsibility” [8, 229], we believe it appropriate to bring a real tortfeasor to administrative, disciplinary responsibility, and in the case of signing the contract on full financial liability – to liability for damages.

Bearing in mind the researches of various scientific concepts of determination the guilt of a legal entity of committing an administrative offense, which were carried out by N. Bogaeva [6, 30-38], we believe that the guilt of a legal entity for violation of customs regulations should be determined in a special way. The concepts studied by the author: subjective (“psychological”) concept; theory of “collective wili”, the concept of “dominant wili”; behavioral-psychological concept; the concept of “social” guilt, in our opinion, do not fully reflect the guilt of a legal entity for violation of customs rules. The closest in content seems the scheme of bringing to legal responsibility formulated in the Tax Code of the Russian Federation. According to articles 106, 108, 110, 111 of the Tax Code of the RF the guilt of an organization in the commission of a tax offense is determined by the guilt of its officials, or its representatives, actions (inaction) of whom have led to the commission of the tax offense.

We believe that resolving a number of issues related to the bringing of legal entities to administrative responsibility will be promoted by the definition of the concept of legal entity’s guilt that will let not just to consider the subjective aspect of an administrative offense, but also to establish the form of guilt.

In other words, at committing by a legal person an administrative offence in the field of customs affairs the guilt should be considered in the form of intent and negligence. Intent may be presented in two forms: direct and indirect. Such a definition, given that the subjective aspect of administrative offence in the field of customs affairs committed by a legal entity is represented by a particular form of guilt, can be formulated as follows.

Guilt of a legal entity of an administrative offense in the field of customs affairs – is a mental relation of a real tortfeasor to the violation of customs regulations by a legal entity.

An offense shall be deemed committed intentionally, if an actual tortfeasor was aware of the illegality of his actions (or inaction), foresaw its harmful effects and wanted such consequences, knowingly admitted them or treated them indifferently.

A legal person is deemed guilty of committing an administrative offence in the field of customs affairs with direct intent, if an actual tortfeasor was aware of the illegality of his actions (or inaction), foresaw its harmful consequences and wanted such consequences.

A legal person is deemed guilty of committing an administrative offence in the field of customs affairs with indirect intent, if an actual tortfeasor was aware of the illegality of his actions (or inaction), foresaw its harmful consequences and deliberately allowed them or treated them indifferently.

A legal person is deemed guilty of committing an administrative offence in the field of customs affairs by negligence, if an actual tortfeasor foresaw the possibility of harmful consequences of his actions (inaction), but without sufficient reason self-confidently expected prevention of such consequences, or did not foresee such consequences, though it had to and could foresee them.

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