ON THE COLLECTION OF TAX DEBT FROM FINAL BENEFICIARIES IN RUSSIA

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ABSTRACT

Tax policy is now tightened, it increases the risk of using tax schemes based on abuse of law and tax evasion by the capital withdrawal of companies. However, beneficiaries are coming up with new ways of hiding assets. Russian legislation is gradually beginning to emerge in terms of the emergence of legal institutions for the debt collection of taxes of enterprises from final beneficiaries in Russia, by increasing the ability of tax authorities to collect taxes from third parties. There is a clear tendency to expand the list of persons who may be brought to subsidiary liability. Meanwhile, attention should be paid to statutory restrictions that protect the rights of the beneficiary who is not involved in the commission or concealment of tax offenses. Tax authorities and courts combat abusive and illegal tax schemes. For this reason, the issues of collecting debts on taxes from final beneficiaries who evade tax obligations deserve close attention. The problems of applying property liability in Russia to the real beneficiary of the debtor who is guilty of causing damage to creditors are now often discussed. In modern conditions of the formation of court practice in tax disputes, the issue of liability for tax offenses of third parties is becoming increasingly important. This does not prevent this legal institution from developing very dynamically. Most Russian experts see the emergence of property liability for tax offenses of third parties as a long-awaited means of countering the abuse of the right in the field of taxation (the impossibility of leaving beneficiaries from personal responsibility) and the method of punishing unscrupulous taxpayers. The authors talk about the significance of this institution for building a coherent and effective legal system for regulating legal relations in the field of taxes and fees. The purpose of the study is to justify the need to apply with caution property liability to third parties. The research methodology is based on the dialectic method of knowing the institution of collecting tax debts of organizations from final, real beneficiaries as a social and legal phenomenon in development. The article highlights the new mechanisms and instruments for collecting tax debts of organizations from final, real beneficiaries. A new procedure is analyzed, indicating the possibility of collecting arrears not only from dependent organizations, but also from individuals - beneficiaries of the activities of companies evading taxes. The authors investigated and analyzed the new mechanism of influence on unscrupulous persons, aimed at countering the withdrawal of assets to another company in order to avoid paying taxes. The conclusion is substantiated that new trends in the legislation testify to the possibility of bringing beneficiaries to subsidiary liability for losses caused to the company by unscrupulous and unreasonable actions of its persons. On the basis of the study, the authors reviewed the main changes introduced by Federal Law of November 30, 2016 № 401-FZ. The authors came to the conclusion that in the new law, for the first time at the legislative level, a step has been taken to discourage affiliates from transferring assets to another company in order to avoid paying taxes. The exclusion of such negative manifestations will increase the repayment of debts to bona fide creditors. The authors hope that this approach will only improve the position of bona fide taxpayers and improve the quality of tax discipline in the country. The measures of legislative regulation of the institution of property responsibility of the final beneficiaries are proposed and directions for improving modern tax policy in Russia are defined. The authors believe that a deep theoretical study of the issue of the responsibility of an individual on the company's tax liabilities and an active influence on the formation of a

uniform judicial practice is necessary. The authors hope that Federal Law № 401-FZ of November 30, 2016 will be able to increase the debtors' motivation to avoid the evasion of these obligations, since new tools - legislative innovations improve the collection of debts, and at certain points will be generally directed at harmonizing the law.

Keywords: *real beneficiaries, "transfer" of company tax liabilities, tax debt, circumvention of the law, tax evasion*

INTRODUCTION

The tax legislation of Russia has a mechanism for countering the transfer of assets to another company in order to avoid paying taxes. For several years, Russian tax legislation has been steadily moving towards tightening control over the payment of taxes. The current innovations are aimed at combating tax evasion abuses. The outlined trends in the country correlate with the world practice of resolving such cases, presenting claims on the debts of organizations to beneficiaries from their activities. The limits of permissible and possible taxpayer behaviour as a result of ambiguous interpretation of tax legislation remain one of the controversial issues in the relationship between tax authorities and businesses. In the current tax legislation, the problems of protection of a bona fide taxpayer and means of countering the abuse of the right in the field of taxation have not been sufficiently regulated, which still gives rise to litigation. There are certain difficulties in describing models and criteria for good conduct of a taxpayer [1]. The legislation does not establish proper boundaries between tax planning and tax evasion, which often leads to conflicts between tax authorities and taxpayers. It should be noted that the right to tax planning is currently not fixed at the legislative level, tax planning does not have its own criteria and classification. The introduction of such concepts at the legislative level is necessary both for taxpayers and for tax and law enforcement agencies.

THE TAX DEBT COLLECTION FROM AFFILIATED AND INTERDEPENDENT PERSONS

The tax debt collection rule for affiliated organizations was introduced in 2013 [2] (entered into force one month after the official publication of the Federal Law) to combat the common practice of bankruptcy of companies that were subject to major claims based on tax audits. Prior to the introduction of this norm, the business did not stop, but was reincarnated into a new legal entity, where assets, personnel, etc. were transferred. There were no legal means and leverage, it was not possible to do something by the tax authority.

Currently, the state of affairs has changed with the adoption of the Federal Law of 30.11.2016 № 401-ФЗ "On Amendments to Parts One and Two of the Tax Code of the Russian Federation and certain legislative acts of the Russian Federation" [3]. A new mechanism of influence on unscrupulous persons has been introduced - to exact non-payment directly not only from dependent organizations, but also from individuals - beneficiaries of the activities of companies that evade paying taxes. Now the tax debt collection will be addressed to "persons recognized by the court as otherwise dependent on the taxpayer" - thus the amendment to Article 45 of the Tax Code of the Russian Federation (RF) expands the boundaries of "other dependence". It allows you to apply to the courts with claims directly to citizens in whose favour the property or proceeds of the debtor company were withdrawn. The analysis of the changes introduced by Federal Law of November 30, 2016 № 401-FZ, once again set the priorities of the state. As a result of the above, the tax authorities have the right to impose requirements for subsidiary liability (financial liability of the additional debtor for the principal debts) immediately to the owners and other persons of insolvent companies. The approach to

establishing any dependence between a taxpayer, a debtor and a third-party organization was determined by the identification of dependence based on the relations of power and subordination (subsidiaries and affiliates) in the sense provided by Russian civil law. It is possible to suggest an increase in tax disputes in which the amount of tax additional charges will be collected from persons whose interdependence is not based on the rules of civil law on affiliated and subsidiary companies, but on circumstances indicating the existence of facts indicating the transfer of assets and business from the debtor to another legal entity (i.e. active "transfer" of tax liabilities from the taxpayer to its "parent", "subsidiary" and "sister" companies).

Referring to the history of the question that has arisen, it should be noted that until 2006, Russian tax legislation did not have the opportunity to make claims against someone other than the taxpayer. Then, in article 45 of the Tax Code of the RF, a norm appeared allowing to collect arrears of affiliated or parent company if receipt of proceeds on one of them from that organization which did not repay the tax debt was established.

ON SOME ISSUES RELATED TO THE APPLICATION OF THE FEDERAL LAW OF 30.11.2016 № 401-FZ

We believe it is necessary to note that the further implementation of the Federal Law of 30.11.2016 № 401-FZ will lead to the unresolved issues, therefore, it should stop, and highlight the following problems that may arise in law enforcement.

1) How to relate this law to the provisions of the Civil Code of the Russian Federation (GK RF) in part of the provisions of paragraph 3 of clause 1 of article 53 of the Civil Code of the RF, which provides for the possibility to speak on behalf of a legal entity at once several persons (this will need to be indicated in the statute). Clause 1 of Article 53 of the Civil Code of the RF on allows the organization to have several directors acting jointly or independently from each other. In addition, responsibility is established for the latter - at the request of the legal entity, its founders (participants) they will be obliged to pay damages caused to the organization through their fault (clause 8 of Article 1 of the Law [4], Article 53.1 of the Civil Code of the RF). Moreover, a bundle of these persons may also differ: in some cases, the consent of two persons to make some decisions is necessary, and in some cases, each will represent a legal entity within its competence. This is largely borrowed from foreign practice. In summary, it can be concluded that there will be problems at a ratio of provisions of the Federal law of 30.11.2016 № 401-FZ with the property responsibility of managers and founders existing in civil law (the problem of the so-called "double responsibility").

2) How to compare the provisions of the Federal Law of 30.11.2016 № 401-FZ with the existing practice of treating tax authorities with civil lawsuits in criminal proceedings (recognition of the tax authority as a victim and giving the opportunity to file a relevant lawsuit). So as a defendant in a civil suit arising from the commission of a crime under Article 199 of the Criminal Code of the Russian Federation, a natural or legal person may be brought in, who, in accordance with the law (Articles 1064 and 1068 of the Civil Code of the Russian Federation), is liable for harm caused by a crime (Article 54 Code of Criminal Procedure of the Russian Federation, paragraph 24 of the Resolution of the Plenum of the Supreme Court of the RF of December 28, 2006 № 64 "On the practice of the application by courts of criminal legislation on liability for tax crimes"). Analysis of the legislation and established court practice suggests that there will be problems with the existing, current and regulated procedure for recovery of harm, carried out by the tax authority, in a civil lawsuit in a criminal case.

3) When considering a dispute on the legality and reasonableness of bringing individuals to subsidiary liability in a bankruptcy case, it is worthwhile to dwell on the following. Bankruptcy legislation provides additional opportunities for tax authorities and, in the absence of a bankruptcy case, to impose requirements for secondary liability (the financial liability of the additional debtor for the principal debts). It is important and such innovation as the distribution of rights to recover from the subsidiary respondent between creditors. This is a global trend - identifying beneficiaries, imposing responsibility on them for abuse of rights. Currently, the institution of subsidiary responsibility is constantly evolving. Consequently, at present, it is possible to bring to such responsibility not only the directors of organizations, but also any person who is recognized as controlling, that is, having the ability to influence the company's activities.

4) It is important to remember that with such an arrears, it is possible that the head of the organization is brought to criminal responsibility and a conviction against the persons controlling the organization, for which they are obliged, will compensate for the damage caused by their actions to the budget, if it was not possible to recover additional charges including within bankruptcy. The only way to avoid paying and to avoid the consequences is to successfully challenge the decision of the tax authority to check in court, which should also remove the blame from the persons controlling the taxpayer in a criminal case, if such has been filed. As a rule, to get rid of such debts, the procedure of reorganization of the company is carried out. The newly created company is transferred part of the assets and obligations of the reorganized company without terminating the activity of the latter (clause 1 of article 55 of the Law of February 2, 1998 № 14-FZ).

Currently, tax authorities are increasingly trying to hold individuals accountable for the debts of the organization. Such an opportunity arises in case of bankruptcy of a company by collecting from the owner a debt exceeding the property of the organization and its authorized capital. Managers and other controlling persons are increasingly attracted by the tax authorities to subsidiary liability under the Federal Law “On Insolvency (Bankruptcy)” of 26.10.2002, № 127-FZ [5]. Note that, as a general rule, a legal entity is not responsible for the obligations of the founder, and the founder of a legal person is not responsible for the obligations of a legal person (clause 2 of Article 56 of the Civil Code of the RF) [6]. Shareholders bear subsidiary liability for the obligations of the joint stock company (JSC) in the event of its insolvency (bankruptcy). However, in the event that the bankruptcy of a joint-stock company is caused by actions (inaction) of its shareholders, then these shareholders in case of insufficiency of the company's assets may be assigned subsidiary liability for the obligations of the joint-stock company. In this case, a causal relationship should be established between the action (inaction) of persons who are entitled to give binding instructions to the JSC or otherwise have the opportunity to determine its actions, and the insolvency (bankruptcy) of the JSC (paragraph 3 of Article 3 of Law № 208-ФЗ). Similar provisions are contained in paragraph 3 of Article 56 of the Civil Code. The second paragraph of clause 3 of Article 56 of the Civil Code of the Russian Federation refers to persons who may act as subjects of subsidiary responsibility, founders (participants), the owner of the property of a legal entity and other persons who have the right to give binding instructions for this legal entity or otherwise have the ability to determine its actions. In addition, paragraph 4 of Article 10 of the Bankruptcy Law directly refers to the number of subjects of responsibility as the head of the debtor. Therefore, in case of insufficiency of the property of the debtor, the entities defined by law may be assigned subsidiary liability for its obligations.

Moreover, in accordance with clause 5 of the Resolution of the Plenum of the Supreme Court of Arbitration of the Russian Federation № 29 of December 15, 2004 “On Some Questions

of the Practice of Applying the Federal Law“ On Insolvency (Bankruptcy) ”[7], the statement of the debtor’s head is accepted by the arbitration court authorized in accordance with the constituent documents of the debtor to make a decision on the liquidation of the debtor. In order to impose a subsidiary responsibility on the head of an organization, his unlawful behaviour is determined, which is manifested in the fact that, as a result, the head does not perform duties that entail losses for the organization and its creditors. The fault of the head of the organization in case of its insolvency (bankruptcy) is expressed in the non-fulfilment of obligations to take appropriate measures aimed at respecting the rights of third parties, as well as respecting the proper degree of rationality, care and diligence. According to paragraph 2 of Article 401 of the Civil Code of the Russian Federation, the absence of guilt is proved by the person who violated the obligation, that is, it is this person who must prove that it should not and could not foresee the onset of these consequences. Failure to exercise due diligence and prudence means having blame for causing losses to the creditors of a legal entity - a bankrupt (paragraph 2 of clause 1 of Article 401 of the Civil Code of the Russian Federation).By virtue of paragraph 2 of Article 9 of the Bankruptcy Law, the application must be sent to the arbitration court as soon as possible, but no later than one month from the date of the occurrence of the relevant circumstances (Resolution of the FAS of the Urals District of April 29, 2010 №F 09-3031/10-C4). When considering such arbitration cases, the court takes into account the explanations provided in paragraph 2 of the Resolution of the Plenum of the Supreme Court of Arbitration of the Russian Federation № 62 of July 30, 2013 “On some issues of compensation for damages by persons belonging to the bodies of a legal entity” - if the disadvantage of the transaction was later discovered due to violation of the obligations arising from it, the director is responsible for the corresponding losses, if it is proved that the transaction was originally concluded for the purpose of non-performance or improper execution [8]. And with the evidence of the fact that the director or shareholder acted in bad faith and unreasonable (for example, made a free transfer of real estate and all fixed assets of the joint-stock company), the courts come to the conclusion that there are grounds for bringing these persons to subsidiary responsibility (for example, AU North-West District dated July 14, 2016 № A56-4970/2013).

Also, many taxpayers have completely forgotten the existence of article 49 of the Tax Code of the RF unchanged from the moment of adoption of the code: “If the liquidity of the organization being liquidated is not sufficient to fulfil the full obligation to pay taxes and fees, penalties and fines, the remaining debt must be repaid by the participants of the specified organization”. In view of the above, it appears that the organization is at risk if the amount of tax arrears exceeds 300,000 rubles, and the maturity date is more than three months. The organization should take all measures to pay the debt or declare it bankrupt, otherwise the tax authority will do it, but with the requirement to find the manager and / or founders guilty. Thus, in the definition of the Supreme Court of the Russian Federation № 81-KG14-19 dated January 27, 2015, the court held the head and sole owner responsible for non-payment of VAT on a large scale and confirmed the legality of collecting damage from an individual to the state in the amount of the unpaid tax.

LEGAL POSITIONS OF THE CONSTITUTIONAL COURT OF THE RUSSIAN FEDERATION ON THE TAX LIABILITY OF INDIVIDUALS FOR TAX ARREARS OF ORGANIZATIONS

Taking into account the above-described changes in the current tax legislation, the Constitutional Court of the RF expressed a new legal position in the Resolution № 39-P dated December 8, 2017 “On the case of checking the constitutionality of the provisions of Articles 15, 1064 and 1068 of the Civil Code of the Russian Federation, subparagraph 14 of paragraph 1 of Article 31 of the Tax Code of the Russian Federation, Article 199.2 of the Criminal Code of

the Russian Federation and the first part of Article 54 of the Criminal Procedure Code of the Russian Federation in connection with complaints of citizens G.G. Akhmadeeva, S.I. Lysyaka and A.N. Sergeyeva", who considered the possibility of collecting tax debts outside the norms of public law - in civil law. The Constitutional Court of the Russian Federation confirmed the legality of collecting the tax debt of an enterprise from a manager convicted of tax crimes. As a legal justification, the Constitutional Court of the Russian Federation adopted the provisions of Article 1064 "General grounds of liability for causing harm" of the Civil Code of the RF. Later in the definitions of the Constitutional Court of the Russian Federation: № 58-O dated January 25, 2018 № 65-O dated January 25, 2018 № 418-O dated February 27, 2018 № 2624-O dated October 25, 2018 November 29, 2018 № 2940-O, December 20, 2018 № 3247-O, the legal position expressed earlier on the possibility of recovering the harm caused to the budgets of public legal entities, in the amount of taxes and penalties from individuals, was fully supported accused of committing tax crimes. Undoubtedly, such actions arise because of the absence in the law of other mechanisms for bringing third parties to justice for the obligations of the organization. The tax authority immediately commented on the Resolution of the Constitutional Court of the Russian Federation № 39-P dated December 8, 2017 and in the prescribed manner brought it to lower-level tax inspections (letter of the Federal Tax Service of Russia 09.01.2018 № CA-4-18/45@ "On the Direction for Use in the Resolution Of the Constitutional Court of the Russian Federation от 08.12.2017 № 39-P").

CONCLUSION

The conducted research allows coming to the following conclusions. The problem of law enforcement lies in the fact that a public tort is a failure to fulfil the obligation to pay a tax is the basis for civil liability. In any case, there is no doubt that the arrears are always damage caused to the treasury. Is it reasonable and lawful to compensate such damage according to the rules of civil law? We consider it inappropriate in this case to speak about damage in a civil-law sense, as a derogation of the property sphere of a participant in civil turnover, since there is a paragraph 3 of Article 2 of the Civil Code of the Russian Federation. As you can see, the Civil Code of the RF does not regulate the issues of compensation for harm caused to the state by non-payment of taxes (follows from the analysis of the provisions of paragraph 3 of Article 2, Articles 1064, 1068 of the Civil Code of the RF). Under such circumstances, it should be noted that Article 76.1 of the Criminal Code of the Russian Federation speaks of damage to the budget system of the Russian Federation caused as a result of tax evasion. The list of rights of tax authorities to appeal to the court (subparagraph 14 of paragraph 1 of Article 31 of the Tax Code of the RF, paragraph 11 of Article 7 of the Law of the Russian Federation of 21.03.1991 № 943-1 "On tax authorities of the Russian Federation) does not have a general right to file claims for damages caused by failure to fulfil tax obligations, this right arises from the provisions of the Code of Criminal Procedure. Subparagraph 14 of paragraph 1 of Article 31 of the Tax Code of the Russian Federation allows for tax authorities to file claims for compensation by banks for damage to the treasury due to unlawful failure to comply with decisions to suspend operations on taxpayer accounts. In these cases, the damage to the treasury is reimbursed in court on claims of the tax authorities using the rules of civil law. At the same time, in essence, here the legislator directly permits the use of civil law mechanisms for the protection of public property interest. As it is represented, any of the operating or offered norms regulating responsibility of the head except for Subparagraph 2 of Paragraph 2 of Article 45 of the Tax Code of the RF, does not mention receiving by the head revenue, money, other property, that is material benefit as justifications of collecting from the director of the sums equivalent to a tax shortage of the organization. If left unchanged the provisions of Article 45 of the Tax Code of the RF, as amended by Federal Law of November 30, 2016 № 401-FZ, it would be reasonable to secure in the Code of Criminal Procedure of the RF the right of the state represented by the authorized

body to compensate for the damage caused by such a crime, provided that it can be realized only in the form of a claim for collection of tax arrears, the condition of which is to satisfy the guilty person (affiliated) of the proceeds, money, other property as a result of this crime. With this approach, it will be fair to talk about the inadmissibility of re-collecting taxes from the company, collected from the head in connection with criminal prosecution. It seems that in all cases the issue of the tax debt collection from individuals should be considered within tax relations. At the same time, there remains the problem of legal regulation of the implementation of new instruments for the tax debt collection from final beneficiaries. In this regard, the legal position of the Constitutional Court of the RF in the decree № 39-P dated December 8, 2017 becomes relevant. Because of the above, it is obvious to assume that the new instrument (provisions of the Federal Law of 30.11.2016 № 401-FZ) will be applied in exceptional cases, when it will be proved that the revenue or business was actually transferred. Undoubtedly, and justifiably, tax liabilities follow the source of their occurrence. Summing up, we note that there has been an expansion of the mechanisms for collecting tax arrears from individuals - the final beneficiaries. As we see, at the moment there is an opportunity to collect tax arrears of an enterprise from a dependent individual according to the rules of article 45 of the Tax Code of the RF. Let us pay attention to the possibility of collecting the tax arrears of an enterprise from an individual according to the rules of compensation for harm (Chapter 59 of the Civil Code of the RF). The real judicial practice that has taken shape after the entry into force of the amendments to the RF Tax Code testifies to the emerging tendency of criminal prosecution as a tool for collecting tax arrears. Today, the practice of applying this provision has greatly expanded due to the legal positions of the Constitutional Court of the RF. In connection with the above, taxpayers should take more cautious and deliberate actions, which may eventually be regarded by the tax authority and the courts as a “bypass” of the law, since these circumstances indicate the unfair nature of the taxpayer’s actions, and may lead to completely unfavourable consequences for them. We believe that the broadest discussion by the legal community of the provisions of the Federal Law of 30.11.2016 № 401-FZ, a deep scientific and theoretical study of the liability of an individual, interdependent, affiliated to the company's tax liabilities, is required in order to prevent the collection of tax arrears of legal entities from individuals under the guise of compensation for harm to the budget of Russia.

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