

## Contentious issues in the application of the statute of limitations to prosecute for tax offenses

**Abstract:** There meticulously considering the statute of limitations in tax law, raising the problems associated with the interpretation of the Tax Code of the Russian Federation related to the deterioration of the situation of the taxpayer.

**Keywords:** the statute of limitations; interpretation of law; the tax relationship.

### *Some common information about limitation period*

Independently on their branch affiliation a factor of time presents in any legal relationships [6, p. 114-121]. Time deservedly takes an important place among other juridical facts-events. Law-causing and law-repealing feature of time changing of an expiry or beginning of certain moment of time is typical for law in whole. State applies the temporal coordinates in order to organize and to order the public relationships.

Like legal fact a limitation, i.e. expiration of certain time, has especially important significance. When are available other conditions it enable to cancel legal relationship, and in some cases to turn actual state into legal relationship. What is the social ground of limitation, which is able to produce such legal consequences? Despite it duration, time cannot influence in legal relationships.

Being analyzed various points of view on this issue Professor Shershenevich G.F. came to conclusion: “Real ground of limitation is concluded in that a society is needed in stable order and any legal uncertainty of relationships, which is able to violate the rights, exasperates protest against itself. This is a ground to limit an owner under strict fulfillment his property right in trade turnover; the limitation is also based on this. During time are lost evidences, dead witnesses; and a dispute,

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being instituted through many years, enable to break a number of established relationships. And on will of a lawmaker this legal uncertainty is ceased with time” [18, p. 223].

This conclusion for many years anticipated legal positions of European Court of Human Rights and Constitutional Court of Russian Federation in respect of legal certainty like an element of supremacy of law principle. We should note that soviet civil lawyers also wrote about inadmissibility of long-lasting uncertainty in existence of the opportunity to apply the measures of forcible impact to an offender [5, p. 246].

The principle of legal certainty presupposes a stability of legal regulation and existing legal relationships. Legal certainty is necessary that participants of appropriate relationships could in reasonable bounds foresee the consequences of their behaviour and be sure invariability their officially recognized status, gained rights and obligations.

The principle of legal certainty goal is to provide participants of appropriate relationships with opportunity to forecast accurately of their actions’ results including showing them that the rights of these persons will be protected, and the actions of law-enforcer will also be forecasted and predicted upon dispute’s resolution and will not be changed from case to case.

We may presuppose that existence of limitation time called to be guarantee to an offender that on expiration of certain limitation he/she will not be prosecuted. Certainly, this creates legal certainty for him, this very reasonable, because continual expectation of bringing to responsibility does not stimulate him to realize his illegal behaviour, and moreover, it just suppresses an offender. The aim of law is not suppression and but rather to exclude illegal behaviour in future. Sometimes, forgiveness allows realizing a mistake and excluding compulsive repetition of offence. Limitation of time allows an offender not to consider himself like offender and separate him from society [12, p. 59].

There is existed a point of view that public danger of committed offence disappears with expiry of limitation: “Harm consequences made by an offender lose its significance with passing time, it is changed political and economical situation in

society, social and legal assessment of offence made. There happen sufficient changes in personality of guilt, his views and habits, attitude to offence made” [14]. According to V.E. Smolnikov, “Person, who committed crime, presents a social danger not infinitely long time. Social danger of this person is reduced and, finally, lost with passing time. Much danger is presented by a person at moment of commission crime by him; it disappears from passing time in result of positive impact into person with all combination of the conditions... reality” [9, p. 16]. V.D. Filimonov noted in 1957 that when there is no social danger of an offender, punishment’s application “would make in society the same effect like a punishment of innocent” [16, p. 108]. “Falling-off social danger of a person, who committed crime, makes punishment unnecessary as common so special prevention of crimes. There punishment a person, who is not a danger for society, would mean to revenge him” [9, p. 18].

Well, approach of soviet criminalists worked out and expressed in period of totalitarian state confirms that scientific community has always to develop legal science and improve law in order the law will be stayed like a symbol of kindness and justice.

This approach of soviet criminalists was reproduced by Russian scientists-criminalists: “if punishment is applied to culprit on expiry of long time after crime committed, it in considerable extent (if not full) loses its as special so common-preventive significance and might be comprehended like an act of unjustified revenge, as time smoothes over actuality and social significance of crime committed” [15, p. 472].

In Resolution of European Court of Human Rights on case of “Coeme and others v. Belgium”<sup>1</sup> had also emphasized that “limitation might be determined like the right provided by law to a person committing crime, not to be prosecuted or sentenced any more after expiration of certain limitation from a moment of deeds commission”. The court was formulated fundamental legal position in this resolution, according to which “limitations are the general line of legal systems of Treated

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<sup>1</sup> (ECHR 2000-VII - (22.06.00) § 146)

States, have many aims, among which – guaranteeing of legal protection through establishing the limitation for actions and prevention an encroachment to the defence right, which could be compromised if courts make decisions, which evidential basis would be incomplete due to expiry of a period”.

We should note that above stated provision has direct tie with the principles of inevitability of punishment and the presumption of innocence.

Presumption of innocence is not guarantee in public relationships that innocent will not be brought to responsibility and releasing of real criminal from liability. In reality, bringing to responsibility of innocent means actual releasing from responsibility of real guilty person and thereby the principle of punishment inevitability is violated.

This and other facts harm to law and order as bringing of innocent of responsibility and not bringing guilty person to responsibility undermine trust to effective legal system and state.

Since in process of time proving is become problematic including losses of evidences refuting guilt of accused person, accusation might be successful due to evidences did not saved in processing of time, but not because a person is really culpable.

That is in processing of time it is quite possible to bring innocent person only because a defence will not be able to refute accusation only due to the evidences did not saved, but existence of this opportunity violates the presumption of innocence and principle of punishment unavoidability.

Accordingly, in legal state refutation of innocence should be carried out if bounds of limitation.

In decision of US Supreme Court on case of “Adams v. Woods”, 2 Cranch 336, 342 (1805) was indicated: “Federal ground of claim, lodged in any period, will superlatively be contracted our legislation spirit”.

We should note that the existence of limitation is a result of law development, establishing of limitations in public legal relationships; it was a fight with principles

like: “who plucked king’s geese those must take back the feathers through hundred years” [11, p. 141-148].

However, history of public law development went through reduction of once absolute power of state: “If to be limited only with one genetic side of an issue about historical origination of public law then it is undoubtedly presented like a process of deduction by population from total sum of sovereign power of rulers some elements of domination” [4, p. 25].

*Limitation periods of bringing to responsibility for tax offenses. How it has begun*

Notion on limitation period of bringing to responsibility for tax offenses did not exist in the first tax law of Russia – the law of December 27, 1991 no. 2118-1 “On the bases of tax system in Russian Federation”.

Article 13 of this law dedicated to responsibility of taxpayer for violation of tax legislation provided only that “recovery of arrears on taxes and other obligatory payments, and also sums of fine and other sanctions, provided with legislation, is produced from legal entities indisputable order, and from physical persons – in judicial one. Recovery of arrears from physical persons is turned on receiving by them revenue, and in case of absence them – on their property”, and article 24 of this law stipulated the bounds of this recovery with certain period, which had not been called limitation period.

Article 24 of the Law of RF from 27 December 1991 no. 2118-1 “On bases of tax system in Russian Federation” pointed out that “limitation period on claims brought to physical persons no recovery of taxes in budget is three year. Indisputable order of arrears recovery from legal entities might be applied during six years from time of creation of indicated arrears”.

Analysis of this article allows asserting that a lawmaker established for recovery from physical persons claim limitation period applied upon addressing to a court and limitation period upon recovery from legal entities, which should be applied out of applying to a court and actually ceased tax legal relationships due to expiry of this

limitation. Though legal relationships both cases are public and legal, periods were established different as on duration so legal nature of them. It is difficult to be explained it from scientific view, “one needs to state that due to various reasons administrative reform in Russia began without full basing on achievements of juridical science” [7, p. 5].

An attempt to eliminate the gaps in the law was undertaken in cl. 3 of the letter of Supreme Court of Arbitration of Russian Federation from 31.05.1994 no. C1-7/OII-373 “Review of practice of dispute settlement appearing in area of tax relations and touching general matters of tax legislation application”: “The Law of Russian Federation “On bases of tax system in Russian Federation” established period of limitation for recovery arrears on taxes. According to article 24 of the Law, indisputable order of arrears recovering on taxes from legal entities might be applied during six years from time of creation of indicated arrears. Meanwhile, period on indisputable writing off sanctions was not established with tax legislation. In this connection courts of arbitration should proceed from the following. In compliance with article 11 of Arbitration Procedure Code of Russian Federation, in case of absence of legislation regulating disputable relation a court of arbitration applies legislation regulating similar relations. Therefore, established in article 24 of the Law of Russian Federation “On bases of tax system in Russian Federation” period of limitation on writing off in indisputable order of the arrears sum on taxes is applied upon recovering financial sanctions for violation of tax legislation”.<sup>2</sup>

However, this is not one time when Supreme Court of Arbitration of RF tried to overcome a lawmaker’s gaps.

Period of limitation for bringing to responsibility for commission of tax offense as common for all taxpayers was established in Tax Code of RF in 1998.

Article 113 of Tax Code was established general rule that “a person cannot be brought to responsibility for commission of tax offense if from period of the commission or from the next day after tax period completion has been passed three years (period of limitation)”.

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<sup>2</sup> Text of a letter published in Vestnik of Supreme Court of Arbitrary of Russian Federation. 1994. No.8.

In addition, there was established special rule, according to which general rule is not applied in respect of tax offenses stipulated with articles 120 and 122 of the Code, and period of limitation should be considered from the next after completion of appropriate tax period is applied in respect of tax offenses stipulated with articles 120 and 122 of the Code.

Primary edition contained an opportunity to break a period of limitation with commission of new offense, which presently excluded from Tax Code of RF.

As it seen, the primary edition of Tax Code of RF contained a problem of uncertainty in answer into the question when has expired a period of limitation.

Response on this question was given in Decision of the Constitution Court of RF from 14 July 2005 no. 9-П “On case about checking of constitutionality of the provisions of article 113 of Tax Code of Russian Federation in connection with complaint of citizen of G.A. Polyakova and the request of Federal Court of Arbitration of Moscow District” where was expressed position that period begins from moment of tax audit act drawing up.

So, after the Decision of Constitutional Court a lawmaker made alternation in article 11 of the Tax Code of RF, being established the common rule: “Person cannot be brought to responsibility for commission of tax offense if from day of its commission or the next day after completion of tax period and up to time making a decision about brining to responsibility expired three years (limitation period)” (ed. Federal law no. 137-Ф3 dated 27.07.2006).

At the same time, a lawmaker left unchangeable a special rule establishing in cl. 2 and 3 of this part of article 113 of the Tax Code of RF. It was linked neither with time of tax offense commission nor period in during of which the offense was committed; and it was tied to expiration of tax period: “Calculating of period of limitation from a day of tax offense commission is applied in respect of all tax offences except provided in articles 120 and 122 of the present Code. Calculating from the next day after completion appropriate tax period is applied in respect of tax offences stipulated with articles 120 and 122 of the present Code”.

Literal interpretation of this norm means that period for bringing to tax responsibility for tax offence in from of non-payment of profit tax begins to calculate the next day after completion of tax period, i.e. limitation period for bringing to responsibility of tax non-payment for 2012 began to calculate from 1 January 2013 and expires to 1 January 2016.

Such approach has always been followed with judicial practice, e.g. in Decision of Federal Court of Arbitration of Moscow District dated on 25 December 2013 on a case no. A40-163511/12: *“Calculation of limitation time from the next day after completion of appropriate tax period is applied in respect of tax offences stipulated with articles 122 of the Tax Code of RF.*

*According to article 285 of the Tax Code of RF tax period on a profit tax is considered to be a calendar year*

*Thus, established with article 113 of the Tax Code of RF time should be calculated from the next day after completion of tax period, i.e. from 1 January following accounting one. Consequently, for payment of profit tax for 2009 this time begins to calculate from 01.012010”.*

Similar opinion on an issue of limitation period calculation for tax offence in form of reduction of imposing base on profit tax in the same situation was typical, see, in particular, Decision of FAC MO dated on 31.08.2009 no. KA-A40/8492-09, Decision of FAC ZSO from 23.012008 no. F04-308/2008(795-A70-15).

However, in 2011 there was made a Decision of the Presidium of Supreme Court of Arbitration of RF dated on 27.09.2011 no. 4134/11, in which was considered the matter of application of limitation period in connection with tax arrears on VAT. Reason for making the decision of Presidium of Supreme Court of Arbitration of RF was a taxpayer addressing, in which was expressed his dissent with the fact that courts were considered tax auditing protocol compiling as a time of completion of the limitation period, quoting on the Decision of Constitution Court of RF from 14 July 2005 no. 9-P, though according to valid edition of Tax Code of RF time of completion of limitation period was defined with the date of decision taking.

Obviousness of a taxpayer's approach trueness in this matter was not raised a doubt. Even, he did not come to a session of Presidium of Supreme Court of Arbitration of RF, as it seemed for nothing.

Unfortunately, a taxpayer irresponsibly came to the matter and did not take into account that in Decision on transmission of the matter in Presidium of Supreme Court of Arbitration of RF from 17.06.2011 no. BAC-4134/11 on case of no. A33-20240/2009 was indicated: *“Besides, upon consideration of an issue about calculation of the limitations, established with cl. 1 of the article 113 of the Code, board of the judges exposed various arbitrational practice on the issue of time limitation for bringing to tax responsibility on the articles 120 and 122 of the Code. Interpreting above indicated provisions, number of district courts proceed from the fact that the tax period applicably to article 113 of the Code is the tax period, for which a tax offence committed (e.g. non-payment of the taxes for June 2006 – beginning of duration of limitation period of bringing to responsibility – from 01.07.2006). In practice of the courts of arbitration exist also another position, according to which an appropriate tax period is the period during of which is committed an offence (e.g. on declaration for June 2006 is not paid tax on payment time – 20.07.2006, beginning of starting of limitation period bringing to responsibility is 01.08.2006). Taking into consideration different interpretation with courts of arbitration of the provisions of cl. 1 of article 113 of the Code, a board of judges sees presence of the grounds for reconsideration in order of supervision of accepted on a case judicial acts also in indicated part”*.

Thus, taking into consideration that actually question was put wider than an application of the taxpayer, the latter would had to be presence in the session of Presidium of Supreme Court of Arbitration of RF as nobody except him could impact in appearance of interpretation aggravating of the taxpayer rights. When a court makes a decision on complex legal matters, despite presumption “court knows law”, it is sometimes needed in assistance in providing of detailed and competent external conclusion, which is not to be mandatory for court, but gives it more information for making justice judicial decision. Usually, such assistance is named a conclusion of

amicuscuriae, which, unfortunately, is not provided with our procedural law [13, p. 16-19]. In our opinion, if such opportunity is then it could anyway balance a situation, especially when it determinate with judicial activism having a goal to create the norms.

But, in the session of Presidium of Supreme Court of Arbitration of RF took part only a representative of tax body, who was stating the fact that time had to be calculated from the next tax period from 01.08.2006. On opinion of the representative of tax body, courts inferior jurisdiction made inaccuracy indicating that the time should be calculated from 01.07.2006 what had not been yet happened in July – inaccurate indication of tax sum was fulfilled 20.07.2006, therefore the time has to calculate not from 01.07.2006, and from the next tax period, i.e. from 01.08.2006<sup>3</sup>, accordingly act brought 30.07.2009 in frame three years period.

Nobody asked the representative, whether might be brought to responsibility on 21 July 2006? Answer at this question would have shown groundlessness of tax body position, but nobody ask this question and Presidium of Supreme Court of Arbitration of RF agreed with position of the tax body.

Such approach was criticized - so, on 02.12.2011 “RBK daily” daily business newspaper was published article of Yaroslav Nikolayev “Entrepreneurs added a year. Time of limitation on tax offences extended up to four years”. An author wrote that Presidium of Supreme Court of Arbitration of Russian Federation in its decision from 27.09.2011 no. 4134/11 extended up to four years time of limitation of bringing to responsibility for tax offences’ commissions. On 12 December 2011 refutation was given at this article in the website of Supreme Court of Arbitration, which in turn was criticized by specialists in tax law [2].

### *Interpretation of period limitation beginning, second stage*

In 2013 interpretation of article 113 of Tax Code of RF changing beginning of duration of limitation time was legalized with Decision of Plenum of Supreme Court

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<sup>3</sup> To fortunate, a video of the sessions of Presidium of SAC of RF is available at URL: <http://www.youtube.com/watch?v=v-L6pKJJwgU> ( дата обращения 02.02.2016).

of Arbitration of RF. Primary edition of the project of Plenum Decision absolutely did not concern this matter<sup>4</sup>. It appeared only in the project of January 2013<sup>5</sup>.

Cl. 15 of the Decision of Plenum of Supreme Court of Arbitration of RF dated on 30 July 2013 no.57 “On some matters appearing upon application with courts of arbitration a part one of the Tax Code of Russian Federation” was explained that “in force of cl. 1 of article 113 of the Tax Code of RF limitation period of bringing to responsibility for tax offences, stipulated in article 122 of the Code, is calculated from the next day after completion of tax period, during of which was committed an offence indicated. When interpreting this norm, the courts should take into account that offences, responsibility for which established with article 122 of the Tax Code of RF, are due to non-payment or partial non-payment of tax sum in result of reduction of tax base, other wrong calculation of tax or other illegal actions. Since calculation of the tax base and sum of tax is fulfilled by a taxpayer after completion those tax period, on results of which a tax is paid, *limitation period, which determined with article 113 of the Code, is calculated from the next day after completion of tax period, during of which an offence (non-payment or partial non-payment of tax) was committed*”.

Careful familiarization with this “interpretation” allows being doubt that it is just an interpretation, but not changing of existing norm. Actually, special norm containing in paragraph 2 and 3 of part one of article 113 of the Tax Code of RF was annulled by the Supreme Court of Arbitration with such interpretation. It joined beginning of limitation period duration neither to time of tax offence commission nor to a period, during of which was committed the offence. It just provided the limitation period beginning to expiration of tax period.

Pegging of limitation period beginning to time of tax offence commission or tax period, in which was committed tax offence, had been provided only in paragraph 1

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<sup>4</sup> See the project of Decision at // URL: [http://www.arbitr.ru/\\_upimg/A5EFC1C2BF5E6EEB92478BDE3B426B7C\\_1.pdf](http://www.arbitr.ru/_upimg/A5EFC1C2BF5E6EEB92478BDE3B426B7C_1.pdf).

<sup>5</sup> See the project of Decision at // URL: [http://www.arbitr.ru/\\_upimg/1FCA8BB45E3A0302215FC4DFCA9B6705\\_17-18Jan2013.pdf](http://www.arbitr.ru/_upimg/1FCA8BB45E3A0302215FC4DFCA9B6705_17-18Jan2013.pdf).

of part one of article 113 of the Tax Code of RF; application of which a lawmaker excluded for offences provided with articles 120 and 122 of the Tax Code of RF.

Logic of the Supreme Court of Arbitration of RF is simple – limitation period should be calculated after commission of an offence. But, there is nothing seen from the norm that a lawmaker is guided with this logic. In addition, logic of the Supreme Court of Arbitration of RF has more attitudes to private legal offences, where a common rule for beginning of limitation period duration was established a day when a person knew or should be known about violation of his/her right.

In public legal relationships limitation period might be calculated not mandatory from a time of offence commission.

Code of Administrative Offences has the cases of beginning of limitation period duration from a day of entry into force a decision of Commission of Anti-monopoly authority, which was established a fact of violation Russian Federation's legislation (part 6 of article 4.5 of the Code of Administrative Offences) or even from a time receiving of case materials in a body, official, which are authorized make protocols about administrative offences (part 7 of article 4.5 of the Code of Administrative Offences).

If we consider limitation period like the period for public legal prosecution for public legal offence, i.e. the period restricting the state bodies, then a lawmaker may probably in different cases proceed from various approaches.

In addition, the interpretation of the Supreme Court of Arbitration of RF looks like an attempt to correct mistake of a lawmaker (owning to which limitation period was less than three years) than fills the gap. At the same time, the interpretation of the Supreme Court of Arbitration of RF made limitation period for this offence longer than three years from a time of an offence, if not to calculate it from the time of offence.

Before considering of interpretation of the Supreme Court of Arbitration of RF, we try to understand, whether a lawmaker made a mistake.

We should note that content of paragraph 2 and 3 of part one of article 113 of the Tax Code of RF has been remained unchangeable since 1998.

Criticism of a lawmaker's approach, who established beginning of limitation period duration preparatory to an offence could be considered committed, might be discovered in 2001 [17, p. 585], however such was a will of a lawmaker. Naturally, before to criticize one should be understood the grounds of this will.

Today many have forgotten that adoption of the Tax Code has been carried out step by step and in 1998 there was adopted only the first part of the Tax Code of RF, which has replaced since 1999 the law of RF "On bases of tax system in Russian Federation". At the same time, there continued to be valid other tax laws: on profit, VAT and others.

Correspondingly, just these laws determined concrete tax periods. There existed very specific particularities and practices linked with this.

In particular, there very long time the tax authorities successfully collected fines and penalties for untimely non-payment of advance payments on profit tax. Advance payments were paid for the first quarter, half-year etc.

In compliance with interpretation by tax body of cl. 1 and 2 of article 8 of the Law of Russian Federation "On profit tax of enterprises and organizations" and article 55 of the Tax Code of RF, the tax period on result of which is determined tax base for calculation of profit tax, are first quarter, half-year, nine months and a year in whole. According to clause 1 and 2 of the Law of Russian Federation "On profit tax of enterprises and organizations", tax sum is determined by taxpayers in compliance with accounting and reporting independently. Enterprises pay advance payments of profit tax in budget during the quarter, calculate sum of indicated tax based on actual taxable profit with growing total from beginning of year on completion of the first quarter, half-year, nine months and a year.

Correspondingly, tax authorities supposed impossible a situation that a lawmaker imposing in taxpayers concrete duties, in particular a duty to pay advance tax payments, not providing the consequences for their violation.

It seemed a paradox situation – on results of tax period, when tax calculated with growing sum, it was seen that there was happened overpaying of advance payment in connection with receiving of profit less than had planned, but at the same

time tax bodies were demanding to pay fines and penalties for untimely or incomplete production of advance payments.

It seen from here that it is quite possible just presence of such interpretation was a ground to create special rule for beginning of calculation of limitation period in paragraph 2 and 3 of part one of article 113 of the Tax Code of RF. Once we make a reservation that this is not a single reason, which made a lawmaker to create a special norm.

Certainly, today situation with advance payments has changed but the special rule established in paragraph 2 and 3 of part one of article 113 of the Tax Code of RF has not been changed.

Moreover situation with advance payments has changed owing to a lawmaker in connection of adoption Chapter 25 of the Tax Code of RF, but not with interpretations of the Supreme Court of Arbitration.

Especially, that someone may remember the Supreme Court of Arbitration of RF also made a contribution in existence of injustice with advance payments. In particular, cl. 20 of the decision of Plenum of the Supreme Court of Arbitration of Russian Federation from 28.02.2011 no. 5 “On some matters of application of part one of the Tax Code of Russian Federation” indicated that “sum of tax is calculated by a taxpayer on results of each tax (reporting) period on the tax base, i.e. based on real financial results of his/her economic activity for this tax (reporting) period”, and also “when considering the disputes associated with recovering from taxpayer penalties for delay of advance payments, courts have to proceed that penalties stipulated in article 75 of the Tax Code of RF (according to which penalties should be paid by taxpayer only in case of arrears formation, i.e. non-paid tax sum, which established with the law), might be recovered from taxpayer if in force of the law on concrete kind of tax an advance payment is calculated on results of reporting period on the tax base defining in compliance with articles 53 and 54 of the Code”.

But, such interpretation caused dissent as the Supreme Court of Arbitration of RF actually with its interpretation created the norm, which was not in the law, that according to Constitution of Russian Federation everybody is obliged to pay legally

established taxes and fees in Russian Federation (article 57); federal taxes and fees are in run by Russian Federation (article 71, cl. “z”), a system of taxes recovering in federal budget and general principles of taxation and fees in Russian Federation are established by federal law (article 75, part 3); on subjects of running by Russian Federation are adopted federal constitutional laws and federal laws, which have direct effect throughout Russian Federation (article 76, part 1).

Revealing of normative content of fixed in article 57 of the Constitution of Russian Federation principle of legal establishing of mandatory payments, Constitutional Court of Russian Federation repeatedly pointed out that this principle is not limited with requirements to legal form of act, which establishes that or other mandatory payment, and to procedure of its adoption; a content of the act has also to meet certain requirements, therefore cannot be considered legally established mandatory payment not corresponding on core to constitutional principles and main beginnings of legislation about taxes and levies, which reflect them.

Federal taxes and levies should be considered “legally established” if they determined by federal legislative body in proper form, i.e. federal law. At this point tax might be considered legally established only if the law has fixed essential elements of tax liability, i.e. the tax can be established through direct enumeration in the tax law of the essential elements of the tax liability.

Eventually this situation came to transmission of the matter to the Constitutional Court of RF. The Constitutional Court accepted to consideration the request of Federal Court of Arbitration on constitutional recognition of the articles 52-55, 75, 122 of the Tax Code of Russian Federation and also article 8 of the Law of RF “On profit tax of enterprises and organizations”, which provide an opportunity to recover of arrears, penalties and application of tax sanctions for non-payment (partial non-payment) of advance payments of profit tax on the results of reporting period, which does not coincide with tax one.

Despite the Constitutional Court of RF had accepted to consideration this matter, unfortunately hearings of the case did not done, production on the case was terminated. We may suppose that the reason is changes in the Tax Code of RF and

termination of the Law of RF “On profit tax of enterprises and organizations” as there was no published determination of the Constitutional Court on this matter. As result, the matter of limitation period calculation was not assessed from viewpoint of the Constitution by the Constitutional Court of RF and taxpayers had recovered fines and penalties for untimely paying of advance payments.

Nowadays situation with advance payments has changed, on what was paid attention in course of discussion of the Decision’s project of the Plenum of the Supreme Court of Arbitration of Russian Federation “On some issues appearing under application by courts of arbitration a part one of Tax Code of Russian Federation” (further project) at session of the Presidium of the Supreme Court the session did not discussed an issue about what conditions the Tax Code adopted; replica on advance payments concerned to situation in 2013. In our opinion, obvious is necessity to understand a lawmaker’s will based on the conditions, in which the law has accepted (here, might be applied historical and real way of interpretation). Unfortunately, we should note that point of view of the Chairman of the Supreme Court of Arbitration prevailed in the session of Presidium of the Supreme Court of Arbitration of RF. He expressed an opinion that “he would extend limitation period if it depends on him” and it was supported by those who substantiated adoption of this paragraph that it only reproduces legal position of the Presidium of the Supreme Court of Arbitration dated on 27.09.2011 no. 4134/11.

We should not that discussion of paragraph 15 of this project was quite hot and lasted about 23 minutes... Discussion began from speech of representative of the Federal Tax Service, who obviously had differently understood the Decision of Presidium of the Supreme Court of Arbitration of RF dated on 27.09.2011 no. 4134/11 and asked not to change existing practice.

There were few supporters among the speakers, who kept a saving of literal interpretation of paragraph 2 and 3 of part 1 of article 113 of the Tax Code of RF like a special rule established by a lawmaker and correspondingly allowing its change through interpretation. The supporters pointed out that interpretation, which offered in the project, creates an opportunity of absurd situation, which allows bringing to

responsibility only from the next tax period and thereby impedes bringing to responsibility on in-office audits. It means that record of in-office audit might be discovered wrongful profit tax accruals for 2011 on 29 March 2012, but may bring to responsibility only from 01.01.13 as limitation time began lasting from 01.01.2013.

Unfortunately, ground of them was named like craftiness, referring the fact that limitation time cannot last before offence time. Designers of the project pointed that they only literally interpret the law, and indicated that article 58 of the Tax Code of RF protects from fines in advance payments and consequently interpretation offered by the project designers is a literal one.

In our view, for assertion about literality of interpretation one needed to try to understand a lawmaker like he adopted the norm in 1998, but not through prism of the norm appearing in 2007. Classics of the works on laws' interpretation wrote in 20<sup>th</sup> century that "... if new law makes changes in valid law then the parts of it, which might be understood with the same basis by different ways, should be interpreted in sense of the closest to last law, based on provision that alternations or repeal of existing law must be doubtless proved, and if a lawmaker wishes to produce them then he would express clearer" [3, p. 356].

We agreed with accretion of Professor Vinnitsky D.V., who at the session of Presidium of the Supreme Court of Arbitration supported an idea that a lawmaker in paragraph 3 of part 1 of article 113 of the Tax Code of RF "Calculation of limitation time from the next day after completion of appropriate tax period is applied in respect of tax offences provided by articles 120 and 122 of the present Code" under appropriate period was understood just period, for which the taxes should be paid. With considering of historical analysis there could not be other meaning of the term "appropriate tax period".

In our view, if in course of interpretation of paragraph 3 of part 1 of article 113 of the Tax Code of RF the Supreme Court of Arbitration of RF paid attention on the fact that there was mention in article 120 of Tax Code of RF, then term "appropriate period" would be understood in different way.

Obviously that part 1 and 3 of article 120 of the Tax Code of RF says about period, for which taxes should be paid. Article 120 of the Tax Code of RF determines that “under gross violation of rules for accounting for income and expenses and objects of taxation for purposes of the present article is understood absence of initial documents, or absence of invoices, registers of financial and tax accounting, systematical (two and more during of calendar year) untimely or wrong indication in accounts of financial accounting, in registers of tax accounting and economic operations, funds, material values, intangible assets and financial investments”. There is understandable from this norm that it is speaking just about the period, for which taxes should be paid.

Certainly, interpretation of paragraph 3 of part 1 of article 113 of the Tax Code of RF could not be carried out through exception from context of the norm a mention about article 120 of the Tax Code. As according to legal position of the Constitutional Court of RF, which had been expressed in Determination no. 6-O dated on 18.01.2001, the composition of offences stipulated in cl. 1 and 3 of article 120 and cl. 1 of article 122 of the Tax Code of RF have no clear distinction.

So, in force of cl. 1 of article 122 of the Tax Code of RF under non-payment or partial non-payment of the tax in result of reduction of tax base and other wrongful tax calculation or other illegal actions (inactions) is understood, first of all, reduction or concealment of income, concealment of taxation objects, absence of accounting of income, expenses and taxation objects, i.e. violation of the rules of accounting of income, expenses and taxation base, responsibility for which established in cl. 1 and 3 of article 120 of the Tax Code of RF. Along with main qualifying sign of offence is called by both norms a reduction of taxation base, entailing non-payment or partial payment of tax.

Accordingly, when bringing to responsibility of a taxpayer a tax body, on its choice, may apply only one of the two norms based on actual circumstances of concrete case. Taking into account that sanction established in article 120 of the Tax Code of RF is lower than stipulated with article 122 of the Tax Code of RF, and then its application is very occasional.

Appositely, during discussion of the project the developers of “interpretation” asked not to refer to article 120 of the Tax Code of RF as there was no any arbitration practice in this context and consequently it was not mentioned in the text of project. But, during interpretation of the norm system interpretation does not allow removing anything from its content, and is obliged to consider the norm in interrelation to other norms. Approach of the developers deprived them opportunity to understand a lawmaker’s will.

Reason of scientists that a lawmaker, being determined the starting of limitation time lasting had based on “golden mean” and just therefore created special norm, was not supported by the Supreme Court of Arbitration of RF.

It was known ever in the beginning of 20<sup>th</sup> century that ambiguous norm might not be interpreted in harm of those in whose interest it had been adopted as it would have contradicted to its purposes [3, p. 356]. Now, the axiom found fixation in part 7 of article 3 of the Tax Code of RF, according to which “all ineradicable doubts, contradictions and ambiguity of legislation on taxes and levies are interpreted in favour of a taxpayer”. Certainly, this imperative norm links any interpreter of tax legislation.

In one of the rare works dedicated to limitation time in tax law indicated that “acquiring the right in this case is a person, who committed tax offence and obtaining the right non-bringing to tax responsibility” [1, p. 37]. We believe that this is not quite right – limitation period defends *each taxpayer* from accusation in commission of tax offence.

Naturally, the interpretation given by the Supreme Court of Arbitration of RF hardly might be accepted like creating benefit for taxpayers; quite the contrary it should be recognized as seriously harming taxpayers’ rights. In addition, defeat of taxpayers was so obvious that Federal Tax Service needed to provide additional clarifications on matters of applications separate provisions of the Decision of the Plenum of the Supreme Court of Arbitration of Russian Federation from 30.07.2013 no. 57 “On some matters appearing in course of application by courts of arbitration of

first part of the Tax Code of Russian Federation” in connection with numerous inquiries of territorial tax bodies.

The Federal Tax Service of RF “clarified” that legal position stipulated in cl. 15 of the Decision no. 57 applicable also to those taxes, for which tax period is a year.

Actually, the matter was really legitimate, as in those cases when tax periods are short then limitation time in result of interpretation of the Supreme Court of Arbitration of RF became a bit of longer, but when tax periods are annual then limitation time grown considerably.

In the Decision of Presidium of the Supreme Court of Arbitration no. 4134/11 dated on 27.09.2011 considering a matter on VAT tax stipulated that the Supreme Court of Arbitration changed approach according to which, limitation time began to last during twenty days before appearing of duty to pay a tax, into the approach, according to which limitation time gets lasting ten days later the period from which taxpayer might be brought to responsibility; but upon consideration of the disputes on profit tax is much worse.

If liability to pay profit tax for 2013 appears on 28 March 2014, then owing to “interpretation” of the Supreme Court of Arbitration appeared period from 29 March 2014 to 31.12.2014 when a taxpayer might be brought to responsibility, thereby the limitation time will begin lasting only 01.01.2015.

288 days time is rather big period, considering that limitation time on administrative offences on tax matters in Code on Administrative offences is only 2 months. All this show deficiencies of “judicial law”, when court, taking one sample, creates a common abstract rule as it does not an opportunity systematically make alternations in legislation. This rule is absurd and unjust in another situation

We believe that Associate Professor S.V. Ovsyannikov was right, who asserted in a session of the Presidium of the Supreme Court of Arbitration in January 2013 that a lawmaker chose a middle way, when beginning of limitation time linked with completion of tax period, but not with tax period, in which offence was committed.

In our opinion, “interpretation” of the Supreme Court of Arbitration is just an attempt to rig a lawmaker’s will, establishing a special norm of limitation time’s expiration, and is a violation of article 10 of the Constitution of RF.

In compliance with Constitution of RF regulation of tax legal relationships is related to a lawmaker’s competence and in force of article 10 of Constitution none body has right to change this regulation, including Constitutional Court of RF (see 5.2. of the Decision of Constitutional Court of RF from 14 July 2005, no. 9-II “On case on constitutionality checking of the provisions of article 113 of Tax Code of RF in connection with complaint of citizen G.A. Polyakova and with request of Federal court of arbitration of Moscow District”).

We believe that in this case, under pretence of interpretation was created a norm, which had actually changed a special norm.

Presently, this “interpretation” began to be applied with courts and application of this norm might be changed by a lawmaker, the Supreme Court of RF and Constitutional Court where article 113 of the Tax Code (in interpretation of the Supreme Court of Arbitration) might be contested.

Any case, as this Decision placed on 27.08.13 at the Supreme Court of Arbitration website [www.arbitr.ru](http://www.arbitr.ru) with considering of clarifications of the Supreme Court of Arbitration, which in the Plenum from 28.02.2001, no. 5 “On some matters of application of part one of the Tax Code of RF” pointed out: upon solution of matter on moment of coming into effect of concrete act of legislation about taxes should be proceed from the fact that on base of cl. 1 of article 5 of Tax Code this act comes into effect from 1 day of regular tax period on appropriate tax, coming after completion of monthly period from day of official publishing of this act (cl. 3). This case, provisions of the Decision are applicable (if applicable) only to tax legal relationships (in cases, when a year is tax period) appeared after 01.01.2014.

Above stated interpretation of the Supreme Court of Arbitration is not applicable to the relationships, which appeared before 01.01.2014, like aggravating a taxpayer’s position.

As noted in cl. 7 of the Decision of Constitutional Court of RF from 08.10.1997, no. 13-II “On case about constitutionality checking of the Law of S. Petersburg from 14 July 1995 “On rates of land-tax in S. Petersburg in 1995”: Article 57 of Constitution of RF forbids legislative bodies to issue the laws establishing new taxes or aggravating taxpayers’ position, giving them a relation back. Therefore it is not admissible enforcing these laws relation back through direct indication in the law. In equal level it is not admissible enforcing such laws a relation-back in the acts of official or other interpretation or law enforcement practice”.

Later, in Decision of Constitutional Court from 21.01.2010, no. 1-II “On case about constitutionality checking of the provisions of the part 4 of article 170, cl. 1 of article 311 and part 1 of article 312 of the Arbitration Procedure Code of RF in connection with complaints of JSC “Bereg” Production unit, “Karbolit”, “Zavod Mikroprovod” and “Respirator” Scientific enterprise was given clarification of interpretation of the Plenum of the Supreme Court of Arbitration: *“As indicated in decision of Constitutional Court of RF from 01.10.1993, no. 81-p and repeatedly confirmed later with it (determination from 25.01.2007, no. 37-O-O, from 15.04.2008, no. 262-O-O, from 20.11.2008, no. 745-O-O, from 16/07.2009, no. 691-O-O), a lawmaker, based on common principle of law action and realizing its exclusive right on enforcing of the law of relation-back, takes into consideration a specifics of regulating with law of social relationships; enforcing the law of relation-back carries out in interest of individual in relations appearing between him and state in public area (criminal, tax, pension regulation). Correspondingly, based on constitutional principle inadmissibility of enforcing relation-back to the law, which establishes or aggravating of responsibility, and based on it legal positions of the Constitutional Court of RF – might be not had relation-back the Decision of Presidium of the Supreme Court of Arbitration of RF, containing interpretation of the law norm, due to which is aggravated a position of a person brought or bringing to administrative responsibility. In result of such interpretation might not aggravated also position of taxpayers as - in force of articles 54 and 57 of Constitution of RF – inadmissible enforcing of relation-back to the laws aggravating the taxpayers’*

*position, including as indicated in Decision of Constitutional Court of RF from 08.10.1997, no. 13- II, in acts of official or other interpretation or in law enforcement practice. Inadmissibility of enforcing of relation-back to normative regulation through interpretation, aggravating person's position in his relationships with state, provided also with formal determination of legal norm, which presupposes that participants of appropriate legal relationships must have an opportunity in reasonable frames to foresee the consequences of his behaviour and to be sure in non-changeability his official status, and also received rights and obligations”.*

We may also further give grounds for confirmation of obvious judgement, I am afraid that we might be charged in extra citation. The same time, these citations are possible only if somebody has not been condoned with unjust and began to protect his rights and now these provisions are obvious.

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