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What should be legal consequences of lapse time of bringing to responsibility for commission of tax offence

Abstract: Lawmaker continues to adopt the laws and make changes in them, not noticing the fact that he/she has already fallen from communication to population. The law is, certainly, the rules, which should be known to citizens in order to understand the legal consequences of their actions. Unfortunately, the big stream of new laws and alterations in the laws has led to the situation that the citizens are familiarized with the provisions of number of the laws only when an issue on bringing them to responsibility is risen. This, as rule, is clashing with new reality, which was earlier unknown to him. Moreover, this clash is painful.

Keywords: lapse time; tax offence; codification; normative acts; offence; public prosecution.

Despite that the Tax Code of Russian Federation (the RF) is valid for 18 years, but it still contains great number of gaps. Certainly, adoption of the Tax Code was a big step ahead at that time. Commonly known that adoption of the codes with clearly formulated principles and general provision positively impacts in law and order and may have more influence than establishing of strict sanctions [13, p. 7]. As rightly wrote S.S. Alekseev, a maitre of Russian law, being referred to sociologic survey, "perception common principles and provisions in law are mastered by people faster and thorough, than concrete information concerning legislation" [2, p. 278]. No wonder that authors of modern moral codes support an idea of codification [20, p. 29].

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The same time, presence in “continuous codification” might be contradicted the idea of codification. Obvious example may serve permanent changes of the Tax Code of the RF. We may assert that permanent changes have nullified an idea of codification, and one can speak neither any stability nor legal certainty in this sphere. Many practicing lawyers have stopped to buy the Tax Code of the RF.

The single salvation in this sea of changes is electronic informational referral legal systems [4, p. 22]. Only at their assistance there may keep awareness that in course of solution of legal situations one gives assessment basing on valid legislation and with considering of all changes. These electronic legal systems are not public and the most part of population are living and even not knowing a content of the Tax Code of the RF and other codes.

The same time, a lawmaker continues to adopt laws and makes alterations in them, not noticing that it lost communication with population. Certainly, law is the rules, which everybody has to know in order to understand the legal consequences of his/her actions. Unfortunately, increasing volume of new laws and alterations in the laws have resulted to situation that citizens will familiarize with provisions of number of laws only, when it is arisen a question about bringing them to responsibility. This is, as rule, a clash to new reality, which he/she was not known before that. Often the clash is painful. Here, we are not justified them and blame our citizens in legal nihilism – they have ever suffered enough from the fact that they were lost communication to the state and have to study laws on their mistakes.

At this time, even lawyers, who specialize in specific area of the law, cannot explain logics of a lawmaker and reason of such regulation at its obvious injustice.

No wonder, that norms of the Code of Criminal Procedure and Tax Code of the RF are disputed in the Constitutional Court of the RF, where the clash with legal reality is more painful. However, this way does not resolve all problems because there are required a systemic approach to solve that.

Unfortunately, some questions are remained beyond attention of a lawmaker. Moreover, in some branch laws “adjacent legal institutions” are in quite developed condition. Certainly, more often it shows “fight for right”.

Few years ago we involved in fight for lapse time in antimonopoly law [12], which had completed with adopting of the decision no. 11-P of the Constitutional Court of the RF of 24 June 2009 "On case about checking of constitutionality of the provisions par. 2 and 4 of Article 12, Articles 22.1 and 23.1 of the Law of RSFSR "On competition and limitation of monopoly activity in commodity markets" and Articles 23, 37 and 51 of Federal Law "On protection of competition" in respect of complaint of "Gazenergoset" JSC" and "Nizhnekamskneftechim" JSC. Constitutional Court of the RF ruled in this case:

"Recognize not contradicting to the Constitution of Russian Federation the provisions of the par. 2 and 4 of Article 12, Articles 22.1 and 23.1 of the Law of RSFSR "On competition and limitation of monopoly activity in commodity markets" and Articles 23, 37 and 51 of Federal Law "On protection of competition" since on its constitutional legal meaning these statutory provisions are not enjoined transferring to the federal budget a profit received with economic entity due to violation of antimonopoly legislation without establishing its blame and indication of sum, which is obliged to transfer to the budget each of economic entities-participants of the violation. These statutory provisions may be applied, if no others, only during total period of limitation".

We should admit that before we unsuccessfully disputed before the Supreme Arbitration Court an order no. 12 of the Federal antimonopoly service of 02.02.2005 "On approval of the Rules of consideration the cases about violations of antimonopoly legislation" and Rules of consideration the cases about violations of antimonopoly legislation.

Supreme Arbitration Court did not refuse in recognition of these normative acts invalid, it only rather long avoided to examine the cases on merits on motive of non-jurisdiction (determination of the Supreme Arbitration Court of Russian Federation no. 16207/06 of 16.02.2007), and later, when there was proved the jurisdiction of the case the Supreme Arbitration Court of the RF (Decision of Presidium of the Supreme Arbitration Court of Russian Federation no. 3233/07 of 28.10.2008) production on the case was dismissed on the motive the fact that

normative act had been repealed and does not act (Determination of the Supreme Arbitration Court of Russian Federation of 7 April 2009 no. 3233/07) [9; 10, p. 51-86; 11; 15, p. 197-218; 16; 18]. Real reason was the fact that "in actually we are right and arguable normative acts do not correspond to the requirements of laws, but recognition of this fact would be meant that Federal Antimonopoly Service of Russian Federation and its bodies during a number of years had examined the cases on illegal procedure, and it would be also meant that great number of cases considered by courts in wrong way". We think that this reason partly explain why our state is only declared as legal, and it is not such on its gist. Obviously, the standard "Pereat mundus et fiat justicia"[1] for some law enforcers are high enough though only this standard created legal distinctness. Other approach said by us, also creates certainty, supports strength of law enforcement acts, though this is not legal certainty, this is non-legal certainty.

But, let's return to raised problem, we argued in the Constitutional Court of the RF the absence of the norm establishing period of limitation then in the Supreme Arbitration Court we had argued normative acts, establishing procedure of examination of cases about violations of antimonopoly legislation, absence of legal consequences associated with period of limitation. The fact is that a lawmaker always being established a period of limitation like a material norm, at the same time had fixed procedural norms that reflected legal consequences of expiration of the period of limitation.

Since in public legal law a period of limitation is a material legal, which should be applied by official ex-officio then common consequences of expiration of limitation's period is impossibility to institute production on a case, and if case was instituted then it should be dismissed.

Such legal consequences of expiration of a period of limitation have been formulated in par. 3 of part 1 of Article 24 of CCP of RF, Article 15.14 of Federal Law of 29.12.2012, no. 275-FZ "On State Defence Order" , Article 41.1 of Federal

[1] Let justice be done, though the world perish

Law of 26.07.2006 no. 135-FZ “On Protection of Competition”, par. 6 of part 1 of Article 24.5 of the Code of Russian Federation “On Administrative Offences” of 30.12.2001 no. 195-FZ.

Thus, a lawmaker always proceeded from the fact that expiration of limitation’s period was related to circumstances, which exclude production on a case about public legal offence.

Above cited Decision of the Constitutional Court of the RF of 24 June 2009 no. 11- П inter alia there were made clear the reasons of existence of periods of limitation – “*with purpose of establishing of appropriate periods of limitation is a provision of effectiveness of realization of public functions, stability of law and order and rational activity of law enforcer and also ensuring of necessary stability of legal relations and guarantee of constitutional right of person who committed an offence that is caused with appropriate legal consequences, as nobody might be stand by threat of possible encumbrance in uncertain or too long period (Decision of 27 April 2001 no. 7- П and of 14 July 2005 no. 9- П, Determination of 3 November 2006 no. 445-O). Availability of periods, during of which for person in his/her interrelation with state may occur unfavourable consequences, presents to be necessary term of application of these consequences*”.

Requirement of rational organization of activity of law enforcer has to prevent an institution of a case about tax offence and urgent its dismissal, when period of limitation bringing to responsibility for that offence has expired. Expiration of period of limitation is juridical fact, which in itself has to introduce certainty.

Unfortunately, Article 109 of the Tax Code of the RF provides only the fact that expiration of limitation period of bringing to responsibility for commission of tax offence is related only to circumstances, which exclude bringing to responsibility for commission of tax offence, but not to circumstances impeding institution of a case about tax offence and not to circumstances entailing to dismissal of a case about tax offence.

Thus, according to provisions of the Tax Code of the RF, a matter about exemption from burden of accusation in commission of tax offence is carried out

only while making of decision. Before that time a taxpayer knows nothing concerning his/her legal status, i.e. stay in legal uncertainty.

Period of limitation is the period during of which the tax body may prove guilt of a taxpayer, beyond that period presumption of innocence might not be overcome.

Everybody is considered to be innocent in commission of tax offence until the opposite in restricted by law period will be proved in stipulated with tax law order and established by introducing in legal force of appropriate procedural act of a court, which made final decision on a case [1, p. 9].

That interpretation of presumption of innocence coincides with interpretation of the Constitutional Court of the RF: "…in virtue of presumption of innocence (Article 1.5 of the Code on Administrative Offences of Russian Federation) a person in respect of whom a case about administrative offence dismissed due to expiration of period of limitation, considered to be innocent, i.e. state being refused from prosecution of a person for administrative offence, does not impugn his/her status as innocent and moreover recognizes that does not grounds for refutation his/her innocence. Continuing of public prosecution for administrative offence, not having a sufficient social danger in comparison with crime, on expiration of established by law periods of limitation would be unnecessary from point of view of the tasks of legislation about administrative offences, would not justified the efforts on establishing of occurrence and corpus delicti of administrative offense and provide an improvement of efficiency of public prosecution and preventive significance of administrative responsibility. While established temporal bounds for administrative prosecution, state protects also a person, who is suspected in commission of administrative offense, from unlimited on time the threat of public prosecution that is not fitted with respect of dignity of person and right to personal immunity".

Extrapolating position of the Constitutional Court of the RF in the tax legal relations we may assert that continuance of public prosecution for the tax offenses on expiration of established by law the periods of limitation is unnecessary from

point of view the tasks of legislation of the Tax Code of the RF, does not justify efforts on establishing of occurrence and corpus delicti of the tax offenses and does not provide an improvement of efficiency of public prosecution and preventive significance of tax responsibility.

Supreme Court of the RF also made clear that "in the decision about dismissal of production on a case in connection with expiration of periods of limitation might not be contained the conclusions of jurisdictional body about guilt of a person in respect of which was drawn up a report about administrative offense. At presence of these conclusions in complained decision a judge, with considering of provisions of Article 1.5 of the Code on Administrative Offences about presumption of innocence, is obliged to make a decision on changing of the ruling, being excluded from it indication on a guilt of this person (cl. 2 of part 1 of Article 30.7 of the Code on Administrative Offences)". That is jurisdictional activity on prosecution out of bounds of limitation's periods is a waste of state funds, labour time of employees, and if to see at side of accused in this offence – artificial hanging up in state of legal uncertainty, which is not compliance with respect of person's dignity and right to personal immunity. Here, we do not speak about expenses on legal aid, which a person needs to bear in expectation of resolving an issue about bringing to responsibility.

We might be objected and indicated that dismissal in connection with expiration of limitation's period is the dismissal on non- rehabilitating grounds, taking in mid presence of guilt, but dismissed due to expiration of limitation's period. We may object for that with words of Professor T.G. Morschakova – "all these grounds conditionally and incorrectly are called non- rehabilitating in a doctrine of criminal procedure law. In virtue of presumption of innocence, a person in innocent and needs no rehabilitation if his/her guilt is not recognized with state on verdict of a court" [7].

We suppose that dismissal of production on a case in connection with expiration of limitation's period confirms the fact that nobody has right to be in doubt concerning presumption of innocence.

This approach completely corresponds to European legal standards.

"A gist of limitation's period consists on termination of offence that deprives state the powers to prosecute a suspected person on law, to bring him/her to court, to recognize his/her guilt and to punish. Periods of limitation are provided in criminal law in order to impede an institution of criminal prosecution basing of actual circumstances, to establish of which is become difficult in length of time, and also for establishing of deadlines, at exceeding of which appears irrefutable presumption the fact that a right of accused to fair trial will be infringed. Thus, assessment of limitation's periods is a state's right to bring suspected persons to responsibility and to punish for crime committed, and consequently, it concerns not only admissibility, but also merits of a case" .

We believe that above statement of European legal standards of limitation's period and legal consequences its expiration is applicable not only for criminal legal violations, but in general to sphere of bringing to public legal responsibility either administrative and tax or other kinds [8, p. 2-24].

Period of limitation is not a simply a circumstance, which releases from responsibility, but a separate guarantee of rational usage by state its powers on realization of the norms of public law.

Thus, we have mostly the codes and laws, where these approaches at resolution of the matters on bringing to responsibility are completely taken into account, and also we have a gap at regulation of these issues in the Tax Code of the RF.

At his time Professor H. Kelsen in his work "Pure Theory of Law" pointed out that a gap presents to be a difference between positive law and system, which considered being the best, fairer and righter [5]. But, we think that in this case one is talking not about more right legislative regulation, but obligation of a lawmaker to eliminate the gap, which violates constitutional rights of citizens.

This conclusion follows from the fact that how the Constitutional Court of the RF made clear "… from principle of legal equality applicably to realization of constitutional right to judicial protection comes a requirement, in virtue of which

the same on its juridical nature relationships should be regulated the same way; observance of constitutional principle of equality, which guarantees protection from all forms of discrimination at performance of rights and freedoms, means inter alia, prohibition to introduce such restrictions in the rights of persons belonging to the same category, which have no objective and reasonable justification (prohibition of various treatment with persons are being in the same situations); any differentiation, which leads to distinctions in rights of citizens in that or other sphere of legal regulation, has to meet requirements of the Constitution of the RF, in compliance with which these distinctions are admissible, if they objectively justified, substantiated and followed constitutionally significant aims, and for achievement of these goals are used proportionate legal means".

In our view, there is no any justification that a taxpayer has to be in state of legal uncertainty until tax body makes a decision, at that time, when expiration of limitation's period is law-preventing legal fact, which impedes an institution of a case about offence and ground for its dismissal.

We suppose that there are no any problems to introduce in the Tax Code of the RF the provisions about possibility of dismissal of production of a case about tax offence due to expiration of limitation's period, as well as introduction of the norm about that expiration of limitation's period impedes of institution of this case.

Vice versa, non-introduction of these norms is a violation of constitutional rights of taxpayers.

The same time, absence of these norms should not be ground for violation of constitutional rights of taxpayers, who have right to consider that the gaps concerning protection the rights of taxpayer will be overcome through analogy. "It is inadmissible to refuse to taxpayer in performance his/her rights and legal interests under the pretext of incompleteness or uncertainty of legislation about taxes and fees [3]". Just therefore it should be applied an analogy, since "aim of legal analogy is elimination of legal uncertainty. Legal analogy gives an opportunity to apply existed legal constructions in relationships, which have no proper legal regulation" [19, p. 20], and protect constitutional rights and freedoms

of citizens not expecting alterations in law. Since dismissal of production is related to procedural matters then it should be applied procedural analogy. We should note that in one of the decisions the Constitutional Court found that "… gaps that appear in legal regulation due to recognition of non-constitutionality of prohibition to appeal courts decisions on cases about administrative offences until establishing by a lawmaker the appropriate procedures their review cannot be covered in law enforcement practice in base of procedural analogy".

Certainly, refuse to protect in base of gap's ground is illegal and non-constitutional as it contradicts a principle of rule of law. Undoubtedly, presence of this gap may be a subject of consideration of the Constitutional Court of the RF. Though, the Constitutional Court is intended to consider non-constitutionality of the norms, which violate rights and freedoms of citizens and their associations, but the Constitutional Court of the RF rather often is met in process its activity with such defect of legal regulation like legislative gap.

Citizens and their associations may submit complaints to Constitutional Court of the RF on violation constitutional rights and freedoms with absence of that or other legal provision, which might be adopted by Constitutional Court to examination: "in virtue formulated by it legal position of law's gap, if it leads to such its interpretation and application, which violates or may violate specific constitutional rights, might be ground for checking of constitutionality of this law. Being taken a case to production and found presence of gaps in disputed normative regulation, Constitutional Court either recognizes it non-constitutional that caused a violation of constitutional rights and freedoms, other constitutional provisions or reveals its constitutionally legal meaning or expresses its attitude to the gap in other proper legal form.

Normative and methodological criterion of gaps' evaluation in legislation for Constitutional Court is the Constitution of Russian Federation with stipulated in it the principles of legal equality (justice), rule of law, legal state, proportionality, balance of constitutionally protected values, legal certainty, inadmissibility of violent interpretation of law by law enforcer, the inviolability of property, freedom

of agreement, encourage of citizens' confidence to law and state's acts, proportionality of restriction of rights and freedoms, presumption of innocence, inadmissibility of repeated punishment for the same offense, due process of law, complete and effective judicial protection, separation of powers and substantiated by it a system of checks and balances and others".

In cited decision of the Constitutional Court of the RF as an example of consideration of a case about non-constitutionality of gap indicated Decision of 25 March 2008 no. 6- П "On a case about checking of constitutionality of part 3 of Article 21 of the Code of Arbitration Procedure of Russian Federation due to complaints of "Partnership of Builders" CJSC, "Nizhnekamskneftechim" OJSC and "NK-BR Holding" OJSC".

In this Decision the Constitutional Court concluded that being not included the circumstances that indicated in par. 5-7 of part 1 of Article 21 in a list of grounds of a judge's challenge, a federal lawmaker violated a principle of legal equality applicably to realization of right to judicial protection (Article 19, part 1 and 2; Article 46, part 1; Article 123, part 3, of the Constitution of Russian Federation) a requirement, in compliance of which homogeneous on its legal nature, relationships should be regulated the same way. But he admitted an opportunity of formation of a court board, which does not meet a criterion of impartiality, deprivation of process' participants the opportunity to submit rejection of arbitration assessors at presence of such circumstances illegitimately limits constitutional right of citizens to judicial protection whereas distorts an essence of fair trial, and consequently leads to violation of the right to judicial protection that fixed in the Constitution of the RF including with its Articles 46 (part 1), 55 (part 3) and 123 (part 3).

We were very pleasure that our approach was approved and the Constitutional Court recognized part 3 of Article 21 of the Code on Administrative Procedure of Russian Federation inappropriate to the Constitution of Russian Federation, its Articles 46 (part 1), 55 (part 3) and 123 (part 3), in that extent in which providing an opportunity of rejection of arbitration assessors on grounds of judge's rejection

that listed in par. 1-4 of part 1 of Article 21; it in interrelation with par. 2 of part 4 of Article 19 and part 1 of Article 21 of the present Code does not allow rejection of arbitration assessors on other indicated in this Article grounds, and namely: if he in person is directly or indirectly interested in result of case or there are other circumstances, which might be called doubts in his impartiality; if he is or was in official or other dependence on a person that participates in a case or his representative; if he made public statements or gave assessment on merits of examined case [14, p. 163-171].

At the same time, the Constitutional Court of the RF does not always recognize a gap violating constitutional rights and freedoms non-constitutional; sometimes the Constitutional Court of the RF gives constitutional legal interpretation of disputed norm, "supplemented" presence gap determining constitutional legal meaning of this norm, which is obligatory and excludes any other interpretation in law enforcement practice.

There are a lot of samples of consideration in the Constitutional Court of the RF of non-constitutionality gaps. But, in our view, to wait for disputing all gaps in Constitutional Court, which allow violating of constitutional rights and freedoms is unreasonable.

We believe that if taxpayers put questions before law enforcer about elimination of gap and dismissal of case's production on tax offence due to expiration of limitation period and insist on that, this situation sooner or later is changed.

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