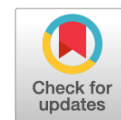


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# Economic Losses of the Russian Budgetary System

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**ABSTRACT:** The article analyzes a new legal trend, the essence of which is to consider property relations as a single complex, whereby the boundaries of certain segments of property and legal regulation complement and replace each other. The analysis of jurisprudence and, above all, case law and justice gives examples of such phenomena.

The article analyzes the rulings of the Constitutional Court of the Russian Federation, which show a connection between tax and civil law. First of all, this resolution of the Russian Constitutional Court of December 08, 2017 No. 39-П, which was to some extent a turning point, because it introduced the possibility of the subsidy of state coercion and confirmed the new content of delict liability, provided for by Article 1064 of the Russian Civil Code. Delict liability began to transform and became not only a means of reparations to the holder of absolute right, but also an expanded reimbursement of “purely economic losses.” The latter are defined as “physical damage not resulting from physical injury to a person or property.” From these positions, the article analyzes the Rulings of the Russian Constitutional Court of 05.03.2019 No. 14-П and from 02.07 2020 No. 32-П.

The two above-mentioned rulings are united by the fact that the possibility of recovering purely economic losses under Article 1064 of the Russian Civil Code in these decisions is assumed, i.e., it indirectly stems from the content of the decision. In the article the author concludes that the widespread use of tort liability situations involving public relations shows that, thanks to the expansion of its content, it tends to go beyond civil law and the article by the institution of inter-industry.

**Keywords:** tort liability; purely economic losses; state legal personality; subsidiarity; arrears; tax and civil law.

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## «Чисто экономические убытки» бюджетной системы РФ

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**Аннотация.** В статье анализируется новая правовая тенденция, суть которой заключается в том, чтобы рассматривать имущественные отношения как единый комплекс, где границы отдельных сегментов имущественно-правового регулирования дополняют и замещают друг друга.

Анализ судебной практики и, в первую очередь, прецедентно-правовых судебных решений дает примеры такого явления.

В статье рассматриваются Постановления Конституционного Суда РФ, демонстрирующие связь налогового и гражданского права. Прежде всего, это Постановление КС РФ от 08.12.2017 № 39-П, которое явилось в определенной мере переломным, так как ввело возможность субсидиарности государственного принуждения и подтвердило уже начавшее к тому времени складываться в цивилистике новое содержание деликтной ответственности, предусмотренное ст. 1064 ГК РФ. Деликтная ответственность начала трансформироваться и стала не только средством возмещения вреда обладателю абсолютного права, но и расширилась до возмещения «чисто экономических убытков». Последние определяются как «физический ущерб, не являющийся следствием физического увечья (повреждения) лица или его имущества». С этих позиций в статье анализируются Постановления КС РФ от 05.03.2019 № 14-П и от 02.07.2020 № 32-П.

Два вышеназванных постановления объединяет то, что вопрос о возможности взыскания чисто экономических убытков по ст. 1064 ГК РФ в этих решениях предполагается, т.е. косвенно вытекает из содержания решения.

В статье автор делает вывод: те случаи, когда деликтную ответственность пытаются применить к ситуациям, вытекающим из публичных отношений, свидетельствуют о том, что благодаря расширению своего содержания она имеет тенденцию выйти за рамки гражданско-правового института и стать институтом межотраслевым.

**Ключевые слова:** деликтная ответственность; чисто экономические убытки; правосубъектность государства; субсидиарность; недоимка; налоговое и гражданское право.

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Today, there is an intricate connection between tax regulations and civil law. Examples are evident in judicial practice, which result from the interpretation of tax regulations. In judicial practice, there has been a tendency to consider property relations as a single complex, where the boundaries of individual property segments and legal regulation merge, complement, and replace each other. The state has focused on individual property segments and legal regulation at the expense of other segments, an example is the strengthening of tax enforcement by civil law.

The source of this trend lies in the understanding of arrears as damage caused to the budget system. For the first time, the definition of such damage appeared in the Ruling of the IC in Civil Cases of the Russian Federation Supreme Court No. 81-KG1419 of January 27, 2015. It was noted that "failure to fulfill the person's obligation to pay legally established taxes and fees entails damage to the Russian Federation in the form of funds not received by the budget system." In 2020, the Constitutional Court of the Russian Federation reiterated this point. The Court stressed that "arrears...cause such harm to the budget system, which consists directly in violating the rules of its functioning and should be compensated by the payment of penalties along with the payment and compulsory collection of the actual arrears (the amount of unpaid tax)." However, on July 2, 2020, the Constitutional Court of the Russian Federation emphasized, in its Resolution No. 32-П that "the loss of the opportunity to forcibly collect arrears...may also indicate that an independent harm has been caused to a public legal entity, which consists in the tax obligation termination due to the loss of the right to collect the tax amount..." Thus, it appears that the arrears of both the unpaid amount of tax and the loss of the state's ability to forcibly collect it are harmful, and any harm must be compensated.

The legal regime for arrears as a public legal category is defined by the Tax Code of the Russian Federation. Accordingly, the compulsory procedure for the recovery of arrears and resulting compensation for damage caused to the budget system is also defined by the Tax Code of the Russian Federation in articles 46 to 48. However, in recent years, the loss by the state of the right to collect arrears in some cases has been considered as a basis for civil liability under Article 1064 of the Civil Code of the Russian Federation. This has resulted in situations where the tax and legal regulations began to develop and become strengthened by the civil-legal "resource."

For the first time, the decision to recover arrears as civil damage at the level of precedent-based legal regulation was adopted by the Constitutional Court of the Russian Federation in Resolution No. 39-П of August, 12 2017. This Resolution was, to a certain extent, a turning point, since; first of all, it introduced the possibility of subsidiarity, i.e., a certain reserve, auxiliary state coercion. More precisely, civil liability under Article 1064 of the Civil Code of the Russian Federation began to be considered as a reserve in case it is impossible

to apply measures of tax and legal coercion in connection with late payment of tax and the arrears' formation. In addition, this Resolution by the Constitutional Court of the Russian Federation confirmed the new content of tort liability provided for in Article 1064 of the Civil Code of the Russian Federation, which had already begun to take shape in civil law. More precisely, an expansive approach to the content of tort liability provided for in Article 1064 of the Civil Code of the Russian Federation has gradually begun to manifest itself in civil law. In the Soviet times, the content of civil tort liability included the concept of damage caused exclusively to property or a person, and the property that was harmed should have been within the victim's possession before the damage was caused [1]. In other words, only the absolute rights of a person were protected by tort liability. Today, the number of civil law disputes is gradually increasing, and the courts are focused on satisfying the victims' claims for compensation for damages that have a so-called economic nature and are not related to physical damage to their property. At the same time, third parties have begun to participate in such cases. In civil law, tort liability is going through a transformation process and has become not only a means of providing compensation for harm to the absolute right owner, but also a means to provide compensation for "purely economic losses," i.e., financial damage that is not the result of physical injury (damage) of a person or his property [2].

Based on the foregoing, the above mentioned Resolution by the Constitutional Court of the Russian Federation at the level of case-law regulation confirmed a new approach to tort liability provided for in Article 1064 of the Civil Code of the Russian Federation, ensuring the expansion of its content. After all, it is obvious that the arrears formed in connection with causing harm to the state due to non-payment of tax does not damage the original property status of the state, i.e., it does not affect its absolute rights. Accordingly, in this Resolution by the Constitutional Court of the Russian Federation, the civil damage caused to the budget system of the Russian Federation is expressed in purely economic losses.

The mentioned Resolution by the Constitutional Court of the Russian Federation contains a number of restrictions on the application of tort liability under Article 1064 of the Civil Code of the Russian Federation. Firstly, with regard to situations arising from tax legal relations, it establishes that such application is possible only in two cases: a) after the termination of the taxpayer organization, which should be recorded in the Unified State Register of Legal Entities, and b) after the court finds that the organization is actually not operating, and it is impossible to recover arrears and penalties from it. Secondly, and this is very important, although it has remained unnoticed in science until now: in the Resolution, the possibility of subsidiary application of civil liability measures' to situations arising from public legal relations is available to a different category of persons than

tax enforcement measures. The possibility of applying to the state, in certain cases, is lost. More precisely, if tax and legal enforcement measures in certain cases cannot compensate for the damage caused by the organization to the budget system due to non-payment of taxes, then such damage in certain cases is compensated by an individual (the head of the organization) by way of tort liability provided for in Article 1064 of the Civil Code of the Russian Federation.

The said Resolution by the Constitutional Court of the Russian Federation, despite the restrictions specified in it on the use of tort liability (Article 1064 of the Civil Code of the Russian Federation), gave the practice a "template" to satisfy claims for compensation of damage caused to the budget system by non-payment of taxes. This is evidenced by the endless lawsuits sent to the courts on this issue through the office of the prosecutor and the tax authorities.

Thus, in 2016, the Federal Tax Service of the Mordovia Republic appealed to the court to recover the losses incurred by the Federal Tax Service from V.A. Nuzhin, the head of the LLC. The Federal Tax Service represented the costs of the bankruptcy case and remuneration to the arbitration manager. The tax authority decided to recover its losses from V.A. Nuzhin due to the fact that the Federal Tax Service had to cover these losses in accordance with the law due to the fact that it initiated the bankruptcy case due to the insufficient bankruptcy estate of the debtor enterprise headed by V.A. Nuzhin. In other words, considering the enterprise's inability to cover its tax arrears and the expenses of the arbitration manager, the Federal Tax Service decided to recover them in a civil procedure from the head of the enterprise, V.A. Nuzhin, in accordance with Article 1064 of the Civil Code of the Russian Federation.

The case was considered by the Constitutional Court of the Russian Federation. Without satisfying the complaint of the tax authority, the Constitutional Court formulated a legal position in the Resolution No. 14-П of March 5, 2019, the court stated that "it is impossible to unequivocally establish that the occurrence of losses at the authorized body is connected exclusively with the illegal behavior of the debtor's head, which was expressed in the failure to file an application for declaring the debtor bankrupt." In fact, the Constitutional Court of the Russian Federation found that the absence of a causal relationship between the actions of the authorized body and the debtor's head, required by the composition of tort liability, suggests the inapplicability of Article 1064 of the Civil Code of the Russian Federation to the situation, i.e., to discuss the compensation for damage caused to the state by the debtor's head.

The court agreed to consider the Tax authority's complaint, but refused to satisfy it. Its justification for the refusal based on the absence of a causal relationship between the debtor's head and the expenses of the tax authority, leads to the logical conclusion that if the causal relationship between these entities had been proved, the court would have satisfied the tax authority's complaint.

Meanwhile, it is important to emphasize here that in this case, what is not considered as harm from the point of view of the regulatory content at the civil law institution of tort liability is considered as harm (loss) caused to the state. After all, it is known that according to Article 15 of the Civil Code of the Russian Federation, losses are understood as "expenses that a person whose right has been violated has made or will have to make to restore the violated right". In this case, the absolute right of the state is not violated. The decision to make or not to make expenses in connection with the bankruptcy procedure are the risks that the tax authority initiating the bankruptcy procedure face, because according to paragraph three of Article 59 of the Federal Law On Insolvency (Bankruptcy), it is responsible for paying off unpaid debts from the debtor's property. In this regard, the tax authority, when filing a complaint with the court, did not try to resolve the issue of compensation for damage, because there was no damage, but there was a risk of damage, i.e., its right to either take the risk or to shift it to another entity- the debtor's representative.

Since the Constitutional Court of the Russian Federation did not discuss the issue of the quality of the harm and its compliance with the regulatory content of the tort liability regulation, it is legitimate to assume that the court, following the trend emerging in practice, considered the tax authority's losses not as losses arising from modern civil legislation, but as purely economic losses that can generally be satisfied.

This situation is to a certain extent similar to the situation that was considered in the Constitutional Court of the Russian Federation on December 8, 2017 No. 39-П. It is similar because it demonstrates a tendency to move away from the established civil tort liability concept and to maintain the concept of collecting "purely economic losses" within the framework of this liability. The tax authority, having suffered losses due to the inability to satisfy the public interest at the expense of the debtor organization in public law, decided to satisfy it at the expense of the debtor organization head in civil law according to Article 1064 of the Civil Code of the Russian Federation.

To some extent, the same logic of reflection gives rise to the Resolution by the Constitutional Court of the Russian Federation No. 32-П of February, 07, 2020. In practice, the situation became widespread when the prosecutor's office began suing individual taxpayers for the recovery of arrears recognized as hopeless. In other words, the formation of arrears, which was recognized as hopeless in public law, according to the prosecutor's office, could be considered as harm caused to the budget system, and in some cases be compensated in civil law.

In the Constitutional Court of the Russian Federation case No. 32-П, the individual entrepreneur I.S. Mashukov unreasonably declared tax deductions for VAT. The tax authority added VAT, penalties, and a fine to him. I.S. Mashukov appealed the tax authority's decision to the court and filed a petition for interim measures. The court

granted his claim, but the higher court refused to recognize the tax authority decision as illegal. Finally, after a long litigation, the tax authority appealed to the court to recover mandatory payments and sanctions from I.S. Mashukov, but the appeal was dismissed due to the expiration of the six-month period for applying to the court on this basis. Thus, the tax authority decided to declare the debt of I.S. Mashukov for taxes, penalties, and fines unrecoverable and wrote them off. In addition, a criminal case was initiated against I.S. Mashukov under Article 198 of the Criminal Code of the Russian Federation, which was subsequently terminated. However, the prosecutor's office appealed to the court with a claim to recover material damage caused to the budget system from the entrepreneur. The court upheld the prosecutor's claims and the claims were satisfied in the amount of VAT arrears.

The Constitutional Court of the Russian Federation concluded that the recovery of the arrears was hopeless due to the inaction of the tax authority, and this was the objective reason for the damage to the budget of a public legal entity. Thus, the complaint of I.S. Mashukov to the Constitutional Court of the Russian Federation was satisfied. However, another important point in the Resolution by the Constitutional Court of the Russian Federation is that the court actually allowed the possibility of collecting debts (arrears) recognized as hopeless from the taxpayer in civil law, if the causal link between the tax payer's actions and the harm caused to the budget was proved. At least, the court did not expressly state that it was impossible to claim material damage in this case. Thus, the court did not actually deny the possibility of collecting damage from the taxpayer that was formed not as a result of damage to the property originally owned by the state, but as a result of public-legal relations due to non-receipt of the expected revenues by the budget system. It follows from the above that this Resolution by the Constitutional Court of the Russian Federation builds on the position developed in the Resolution by the Constitutional Court of the Russian Federation on December 8, 2017, and thus expands the content of tort liability under Article 1064 of the Civil Code of the Russian Federation to include purely economic losses.

From the above, it follows that in modern conditions, tax and legal situations serve as an important factor in the development of the tort liability content provided for in Article 1064 of the Civil Code of the Russian Federation. The widespread occurrence of situations where tort liability is being applied to situations arising from public relations indicates that tort liability, due to the expansion of its content, tends to go beyond the civil law institution, like the institute of unjustified enrichment<sup>1</sup>, to become an inter-sector institute. However, the question of applying tort liability to relations arising from public relations generally is not simple.

<sup>1</sup> See: Resolution by the Constitutional Court of the Russian Federation No. 9-П from March 24, 2017.

The above discussion may elicit reflections the ongoing processes in law, about the blurring of the boundaries between public law and civil law sanctions and about the practical possibility of applying tort liability to situations arising from public relations. The complexity of this issue is connected, surprisingly, with such a fundamental category as legal personality.

The application of civil law enforcement measures by the state to relations arising from public legal relations is quite obviously, the realization of its civil legal personality. However, it should be considered that the state is a special entity that has civil legal personality along with public legal personality, and the latter is common, because due to public legal personality, the state can only, first of all, ensure its public interest. The implementation of public legal personality by the state is a direct way for it to exercise public power. The civil legal personality of the state, on the other hand, is considered a target for it as it applies to special cases that cannot be covered by the state's implementation of the public legal personality<sup>2</sup>. For example, it was noted in science that the state uses its civil legal personality when it is impossible to replenish budget revenues other than at the expense of civil legal payments, rent for leasing state property, sale of state property, etc. [3; 4]. In connection with the above, it should be understood that the state, having a dualistic legal personality, in order to realize its public interests, can realize both its public and private legal personality, but in relation to different cases, situations, and subjects.

The application of civil law enforcement measures by the state (Article 1064 of the Civil Code of the Russian Federation) to relations arising from public relations in connection with the taxpayer's failure to pay taxes and the inability to collect them forcibly is the state's implementation of its civil legal personality. However, a pertinent question at this juncture is whether the civil legal personality of the state can be implemented vicariously when the realization of its public legal personality, and accordingly, the provision of its public interest cannot be made at the expense of this? In other words, in relation to our situation, the question sounds like this: can the state, unable to satisfy its public interest via the public legal personality implementation (collect tax in accordance with the legislation on taxes and fees), realize its civil legal personality to ensure its public interest vicariously, in a civil procedure?

It seems that this is impossible and should not be so, because in this case, the state turns into a monster with two heads, and it is placed in a special legal position in comparison to any other law subject, because unlike any other law subject, it can ensure its interest in any case, by

<sup>2</sup> In the Ruling by the Constitutional Court of the Russian Federation No. 139-О of December 4, 1997, the court emphasized that "the Russian Federation, subjects of the Russian Federation and municipalities participate in civil legal relations as subjects with special legal capacity, which, due to their public legal nature, does not coincide with the legal capacity of other civil law subjects, citizens and legal entities pursuing their private interests".

any method. In other words, the state is in a position where it is “always right.” Moreover, the subsidiary implementation of the state civil legal personality actually exposes the weakness of its public legal personality and its lack of self-sufficiency and the need to strengthen it.

It should be noted that civil liability measures in the above mentioned situations, i.e., in situations arising from public legal relations, can be applied only when the subject of this responsibility differs from the one where public legal coercive measures were originally supposed to be applied, but were not applied due to the impossibility of ensuring public interest. In this case, the civil liability of the state is not applied vicariously with respect to public law enforcement measures, thus, one

type of legal personality of the state is not strengthened at the expense of another one. An example is the Resolution by the Constitutional Court of the Russian Federation of August, 1, 2017, which is plausible because the arrears and penalties not paid to the budget system by an organization in accordance with the procedure established by the Tax Code of the Russian Federation are considered as civil damages only if it is compensated by an individual, i.e., a different subject, but only in specific cases. This is very important, because it is then impossible to discuss the subsidiary use of the state’s civil legal personality. Otherwise, if civil liability measures are applied to the same subject, then the state’s subsidiary legal personality will take place.

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