

IN THE NAME OF THE RUSSIAN FEDERATION

CONSTITUTIONAL COURT  
OF THE RUSSIAN FEDERATION

Judgment  
of 14 July 2005 No. 9-II

in the case concerning the review of the constitutionality of the provisions of Article 113 of the Tax Code of the Russian Federation, in connection with a complaint of G. A. Polyakova and upon a request of the Federal Arbitration Court of the Moscow Circuit.

Moscow, 14 July 2005

The Constitutional Court of the Russian Federation composed of President V. D. Zorkin and Judges N. S. Bondar, G. A. Gadzhiev, Yu. M. Danilov, L. M. Zharkova, G. A. Zhilin, S. M. Kazantsev, M. I. Kleandrov, A. L. Kononov, L. O. Krasavchikova, S. P. Mavrin, N. V. Melnikov, Yu. D. Rudkin, N. V. Seleznev, A. Ya. Sliva, V. G. Strekozov, O. S. Khokhryakova, B. S. Ebzeev, V. G. Yaroslavtsev,

in the attendance of G. A. Polyakova, attorney O. V. Nikulenko as G. A. Polyakova's representative; S. V. Alekseyev, Judge of the Federal Arbitration Court of the Moscow Circuit; Representative of the State Duma Deputy A. P. Moskalets; Representative of the Council of the Federation Ye. V. Vinogradova, PhD in Law,

pursuant to Section 4, Article 125 of the Constitution of the Russian Federation, Subsection 3, Section 1, Sections 3 and 4, Article 3, Section 1, Article 21, Articles 36, 74, 86, 96, 97, 99, 101, 102 and 104 of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation",

in an open hearing, examined the constitutionality of the provisions of Article 113 of the Tax Code of the Russian Federation.

The reason for the consideration of the case is a complaint of G. A. Polyakova about violation of her constitutional rights by Article 113 of the Tax Code of the Russian Federation and a request of the Federal Arbitration Court of the Moscow Circuit for review of the constitutionality of the provisions of the same Article. The ground for the consideration of the case is the discovered uncertainty of whether the provisions establishing the statute of limitations for tax offence as challenged by the applicants are in conformity with the Constitution of the Russian Federation.

Insofar as the complaint and the request concern essentially the same subject matter and by virtue of Article 48 of the Federal Constitutional Law "On the Constitutional Court of the

Russian Federation”, the Constitutional Court of the Russian Federation is permitted to consider all these applications together.

Having heard the report of Judge-Rapporteur M. I. Kleandrov, statements by the parties’ representatives, interventions by M. Yu. Barshchevsky, Permanent Representative of the Government of the Russian Federation to the Constitutional Court of the Russian Federation, I. A. Sugrobov for the Prosecutor General of the Russian Federation, A. A. Ustinov for the Federal Tax Service, attorney A. F. Abushakhmin for YUKOS OJSC; and having considered written submissions and other materials, the Constitutional Court of the Russian Federation,

e s t a b l i s h e d :

1. According to Article 113 of the Tax Code of the Russian Federation (as amended on 9 July 1999), a person shall not be held liable for a tax offence upon the expiration of a three years’ period from the date when the offence was committed or from the date which follows the last day of the taxable period during which the offence was committed (the statute of limitations); the statute of limitations in respect of all tax offences is calculated from the date when the tax offence was committed, except for offences that are specified by Articles 120 and 122 of this Code; the statute of limitations in respect of tax offences specified by Articles 120 and 122 of this Code is calculated from the date following the last day of the relevant taxable period.

1.1. G. A. Polyakova, who challenges the constitutionality of the abovementioned provisions, was held liable in the form of a fine for a committed tax offence specified by Section 2, Article 119 of the Tax Code of the Russian Federation (she submitted her tax return for the year 1999 only on 9 July 2003, while she had to do this not later than on 3 May 2000); this decision was made on 23 July 2002 by the Head of the Inspectorate for the Yuzhny Administrative District of Moscow, Ministry of Taxes and Duties of the Russian Federation. As G. A. Polyakova did not pay the respective fine voluntarily, the tax authority, on 9 July 2002, brought a lawsuit to the Nagatinsky District Court of Moscow seeking recovery of the tax penalty. The Court granted the action and stated that contrary to the defendant’s opinion the tax authority made the decision before the three year statute of limitations established by Article 113 of the Tax Code of the Russian Federation expired. The judgment was upheld on cassation. Further, on 19 August 2003 the same Court found her guilty of a crime prescribed by the Criminal Code of the Russian Federation, namely tax evasion committed on a large scale by an individual who did not submit a tax return (Section 2, Article 198).

As G. A. Polyakova alleges, Article 113 of the Tax Code of the Russian Federation is not in conformity with Article 49 (Section 1) of the Constitution of the Russian Federation. The

applicant believes that it is a prerogative of the court to make the final decision on whether a person is guilty or not guilty of an offence specified by the Tax Code of the Russian Federation, and before the court judgment is delivered (and it shall be delivered within the statute of limitations) a person may not be considered as being held liable for a committed tax offence. However, as long as the cases concerning tax offences and imposing penalties on the taxpayers are decided by tax authorities, the challenged provisions *de facto* allow to hold a person liable for a tax offence after the expiration of the three year period from the date when it was committed (statute of limitations) because the court may deliver a judgment on recovery of the tax penalty beyond this period.

1.2. The constitutionality of the provisions of Article 113 of the Tax Code of the Russian Federation, is also challenged by the Federal Arbitration Court of the Moscow Circuit, which considers the case on recovery, from Neftyanaya Kompaniya “YUKOS” OJSC, of a fine for intentional failure to pay certain taxes, in particular the value added tax. As is stated in the request, the decision to hold the taxpayer liable for intentional failure to pay this tax for the period between January and June 2001 was made by the tax authority on 2 September 2004, i.e. beyond the three year period from the moment when the offence was committed.

Having reached the conclusion that the provisions of Article 113 of the Tax Code of the Russian Federation contradict the Constitution of the Russian Federation, its Articles 19 (Section 1) and 57, the Federal Arbitration Court of the Moscow Circuit stayed the proceedings and filed a request for review of their constitutionality to the Constitutional Court of the Russian Federation.

In the applicant’s opinion, as long as these provisions do not provide for the statute of limitations to be interrupted if a taxpayer commits another tax offence within this period, they encourage failure to perform his constitutional duty to pay legally established taxes. Consequently, they do not comply with the purpose of the statutes of limitations in respect of tax offences and make it impossible to apply state coercive measures aimed at ensuring that this constitutional duty is performed equally by all taxpayers.

1.3. The Constitutional Court of the Russian Federation has already considered the issue on whether the constitutional rights of the taxpayers are affected by the provision of Article 113 of the Tax Code of the Russian Federation which establishes a statute of limitations for committed tax offences. In its Decision No. 36-O of 18 January 2005, by which it rejected a complaint of Neftyanaya Kompaniya “YUKOS” OJSC, the Constitutional Court of the Russian Federation reached the conclusion that this provision, as applied in the specific case, did not violate the applicant’s rights.

Neftyanaya Kompaniya “YUKOS” OJSC had alleged that the provision of Article 113 of the Tax Code of the Russian Federation, as interpreted in the law-enforcement practice, is unconstitutional and tried to prove this opinion by reference to only one judgment of an arbitration court delivered in its case. However, the applicant’s point was not to challenge but to confirm the constitutionality of this provision, and in fact his purpose was to express disagreement with the judgment of the arbitration court. The review of legality and reasonableness of the law-enforcement decisions in the applicant’s case, *inter alia* the issue of whether the legally established statute of limitations for imposing tax liability was exceeded, falls within the scope of competence of arbitration courts since it is related to determining and considering facts of a specific case.

Accordingly, the Constitutional Court of the Russian Federation rejected the complaint as it did not meet the admissibility criteria established by the Federal Constitutional Law “On the Constitutional Court of the Russian Federation”.

1.4. As follows from Section 4, Article 125 of the Constitution of the Russian Federation, Section 3, Article 74, Articles 97 and 102 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation”, the Constitutional Court of the Russian Federation, upon individuals’ complaints about violation of their constitutional rights and freedoms by law which was applied or is to be applied in a specific case and upon court requests, delivers judgments only in respect of the subject matter indicated in the complaint and only in respect of that part of the act the constitutionality of which is challenged. Therefore, the subject matter for consideration in the present case is the provisions of Article 113 of the Tax Code of the Russian Federation, pursuant to which a person shall not be held liable for a committed tax offence upon expiration of three years from the date when the offence was committed or from the date following the last day of the taxable period during which the offence was committed (statute of limitations).

The Constitutional Court of the Russian Federation does not review the legality and reasonableness of the decisions made in the specific cases in respect of which G. A. Polyakova and the Federal Arbitration Court of the Moscow Circuit challenge the constitutionality of the provisions of Article 113 of the Tax Code of the Russian Federation, because pursuant to Sections 3 and 4, Article 3 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation” it decides only on matters of law and refrains from determining and considering facts in any case where this falls within the scope of competence of other courts or any other public authorities.

2. According to Article 57 of the Constitution of the Russian Federation, everyone shall be obliged to pay legally established taxes and duties.

The constitutional duty to pay legally established taxes and duties, within the meaning of this Article, has public law, not private law (civil law) nature. The respective relations imply subordination and obedience of one party to the other, which has the power. The taxpayer is obliged to pay tax amounts accurately and in full, and the tax authority, acting on behalf of the State, has the power to ensure that this duty is performed by the taxpayer. The taxpayer has no right to dispose, at his own will, of a part of his property which must be transferred to the treasury as a certain amount of money; the respective public authorities are vested with the power to unilaterally collect the payable tax amounts using state coercive measures. Otherwise, the constitutionally protected public interest enshrined in Article 57 of the Constitution of the Russian Federation and the respective rights and lawful interests of the taxpayers, public law entities and the State as a whole would be violated.

To ensure that the taxpayers perform their constitutional duty to pay taxes and to compensate damages caused to the treasury by failure to perform this duty, the federal legislator, pursuant to Articles 57, 71 (“c”, “g”, “h”, “n”), 72 (Section 1 (“b”, “i”)), 75 (Section 3) and 76 (Sections 1 and 2) of the Constitution of the Russian Federation establishes a system of taxes collected to the budget and general principles of taxation; it also determines state coercive measures which may be either restorative, i.e. measures ensuring that the constitutional duty is performed by the taxpayer (discharge of arrears and recovery of damages caused by inaccurate and incomplete payment of taxes – the penalty interest), or punitive, i.e. imposing certain additional charges payable as sanctions on the offenders.

The abovementioned provisions of the Constitution of the Russian Federation correspond to the provision of the European Convention of Human Rights stipulating that the State has the right to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties (Article 1 of Protocol No. 1).

While establishing a legal mechanism for the performance of the constitutional duty to pay taxes, the federal legislator has discretionary powers to determine both forms of tax control and respective control procedures, tax offences, their categories and liability for their commission, including grounds and conditions for imposing liability, in particular statutes of limitations, their duration and the possibility to terminate or suspend them, etc.

Collection of taxes as compulsory individually non-repayable fiscal payments necessary to cover the public expenses is an interference by the State in the right of ownership, proprietary rights, the freedom of entrepreneurial activity and, therefore, in the domain of fundamental rights and freedoms. Consequently, tax relations shall be regulated in a manner that guarantees equal performance of the taxpayers’ duties and does not create conditions for violation of their

constitutional rights and the rights and lawful interests of others. The legislator imposing liability for committed tax offences shall rely on the constitutional principles of fairness, legal equality, proportionality, coherence of the liability imposed and constitutionally significant aims (Article 19, Section 1; Article 55, Sections 2 and 3 of the Constitution of the Russian Federation).

Therefore, in the legal regulation it is necessary to maintain a balance between public and private interests as the constitutionally protected values.

3. As a legal mechanism of ensuring performance of the duty established by Article 57 of the Constitution of the Russian Federation, guaranteeing full and accurate collection of taxes and duties, compensating damages of the treasury caused by failure to perform this duty, the Tax Code of the Russian Federation establishes a system of tax control measures and liability for committed tax offences (the notion of “tax offence”, elements of tax offences, tax sanctions, proceedings taken in respect of tax offence cases etc. in Section 2, Article 100, Article 101, Articles 106–142) so that the sovereign right of the State to receive the respective amounts (arrears, penalty interest, and fines) from the taxpayer is guaranteed.

However, in order to achieve stability of the legal order, legal certainty, stability of the existing system of legal relations, while legally protecting the possibility for the collection and preservation of evidence, the legislator introduced statutes of limitations applicable to tax liability for a committed tax offence.

The tax liability statute of limitations is an institution which is known to all legal systems of the member-states of the European Convention on Human Rights. The European Court on Human Rights considers it a right guaranteed by law to a person who committed a tax offence not to be prosecuted beyond a specific period from the moment when the offence was committed, so as to achieve legal certainty and finality and prevent infringements of the defendants’ rights which might be impaired if courts were required to decide on the basis of evidence which might have become incomplete because of the passage of time (Judgment of 22 June 2000 *Coeme and Others v. Belgium*).

3.1. Pursuant to Article 114 of the Tax Code of the Russian Federation, the measure of responsibility for a committed tax offence is a tax penalty (Section 1), which is established and applied in the form of monetary charges, i.e. a fine (Section 2). For offences specified by Article 119, Section 3 of Article 120, Articles 122 and 123 of the Tax Code of the Russian Federation, i.e. offences which directly resulted in arrears on taxes and duties for the State or which create a direct threat of such result, the tax penalty is determined as a percentage of the amount of the tax not paid (or payable). As follows from Article 114 of the Tax Code of the Russian Federation, tax penalties are recovered for every offence separately and they are applied

not to the officials or other persons responsible for the taxpayers' due performance of tax duties, but to the participants in tax relations themselves, i.e. taxpayers, payers of duties, and withholding agents (Sections 5 and 6).

Consequently, the liability for tax offences specified by the Tax Code of the Russian Federation has proprietary nature and is aimed at compensating damages caused to the treasury by the tax offence. That is why application of punitive measures for tax offences is based on determining the amount of fiscal damages caused to the State in a strict procedural form (Section 4, Article 101 of the Tax Code of the Russian Federation).

According to the legal opinions expressed by the Constitutional Court of the Russian Federation in its Judgments No. 20-II of 17 December 1996, No. 8-II of 11 March 1998, No. 11-II of 15 July 1999, No. 7-II of 27 April 2001, and in Decisions No. 244-O of 14 December 2000 and No. 130-O of 5 July 2001, the amounts of penalties determined by the Tax Code of the Russian Federation and recovered for violation of the requirements of the tax legislation go beyond the scope of the tax debt as such. Consequently, they are distinct from arrears and tax penalty interest and, basically, constitute a type of public law liability of proprietary nature. The power of the tax authority acting in an authoritative and binding manner to impose liability for committed tax offences implies application of a special kind of public law measures of responsibility aimed at ensuring the State's fiscal interests and imposed for the committed offences specified by the norms of the tax legislation.

3.2. The public law nature of tax offences and the negative consequences to be endured due to their commitment imply that such cases require identification of tax offences and collection of evidence. Such functions are part of pretrial proceedings and, within the meaning of Articles 10, 118, 123, 126 and 127 of the Constitution of the Russian Federation, may not be exercised by a court. That is why the legislator, taking into consideration the public law nature and specificity of tax offences and tax liability reflected in respective relations, has the right to vest the tax authorities with certain administrative jurisdiction in the sphere of tax liability. At the same time the legislator has to ensure compliance with the requirements of Article 46 (Sections 1 and 2) of the Constitution of the Russian Federation, which guarantees judicial protection of everyone's rights and freedoms and the right to appeal decisions and actions of state bodies and officials in court.

Article 6 (right to a fair trial) of the European Convention on Human Rights, as interpreted by the European Court of Human Rights, does not exclude the possibility of prior intervention of administrative bodies performing their jurisdictional functions, which is justified by "demands of flexibility and efficiency, which are fully compatible with the protection of human rights, and the legal tradition of many member states of the Council of Europe may be

invoked in support of such a system” (Judgment of 23 June 1981 in *Le Compte, Van Leuven and De Meyere v. Belgium*); however, the court must be able to supervise actions of administrative bodies in matters of prosecution and penalties (Judgment of 23 September 1998 in *Malige v. France* and of 23 October 1995 in *Gradinger v. Austria*); moreover, access to court may not be considered violated for the sole reason that a person is a party to an agreement reached in the course of procedures which are auxiliary to the trial (Judgment of 27 February 1980 in *Deweert v. Belgium*).

According to the Tax Code of the Russian Federation, if a taxpayer refuses to pay the tax penalty voluntarily, the tax authority shall lodge a lawsuit aimed at recovering the tax penalty to the court (Sections 1 and 2, Article 104, Section 7, Article 114); moreover, acts of tax authorities, actions or inaction of their officials may be challenged in court by lodging a lawsuit (Article 138).

Consequently, in case of a dispute between a taxpayer and a tax authority, the final decision shall be taken by a court, which, considering the case on the merits in a legally established procedure, decides *inter alia* on whether a person is guilty of the tax offence and on the recovery of the tax penalty (a fine). A person shall be considered not guilty of the tax offence until his guilt is proven according to the rules prescribed by federal law and confirmed by a sentence of a court, which entered into legal force; a person who is held liable shall not be obliged to prove his innocence of the committed offence; the burden of proof of the circumstances demonstrating commission of an offence and the guilt of the person is on the tax authorities (Section 6 of Article 108 of the Tax Code of the Russian Federation).

These tax offence proceedings do not exclude the taxpayer’s voluntary consent to pay a tax fine, if the taxpayer waives the guarantees of judicial review of his case on the merits. Therefore these proceedings may not be considered as violating constitutional rights and freedoms, and in particular the right to judicial protection.

3.3. The facts of the case constituting grounds for punitive measures in the form of monetary payment (a fine), are ascertained by tax authorities in the process of tax control; one of the forms of such control is office and field tax audits (Articles 82, 87–89 of the Tax Code of the Russian Federation).

Pursuant to Section 1, Article 87 of the Tax Code of the Russian Federation, the tax audit (both office and field) may cover only a three year period of activities of the taxpayer, the payer of a duty or the withholding agent, prior to the year of the tax audit. This provision is coherent with Subsection 8, Section 1, Article 23 of the Tax Code of the Russian Federation requiring the taxpayer to keep his accounting books and records and other documents that are necessary for

calculating and paying taxes and documents that confirm the income received (for organizations – also the expenses incurred) and the taxes paid (withheld) for four years.

Upon the expiry of a lengthy period of time it will be impossible to ascertain the fact of non-payment of a tax and other circumstances of the tax offence; while the penalty which is calculated as a percentage of the value of tax arrears may reach considerable amounts. For this reason the legislator prescribed the maximum tax audit period for safekeeping of reporting documents. This period is primarily designed to ensure implementation of the constitutional prohibition of arbitrary restriction on the taxpayer's proprietary rights (Article 35; Section 3, Article 55; Article 57 of the Constitution of the Russian Federation). In addition, the guilt of a person who committed an offence cannot be proven within proceedings initiated in the absence of evidence.

Therefore, the statute of limitations for purposes of imposing liability for the committed tax offences is established by the legislator to guarantee the constitutional rights of the taxpayers and at the same time to ensure the stability of the legal order and efficient organization of the law-enforcement authorities' activity. In this context, a three year period established by Article 113 of the Tax Code of the Russian Federation is coherent with the period during which the reporting documents shall be kept and audited. These periods are an additional guarantee precluding unlawful restrictions of the right of property when commission of a tax offence is significantly distant in time from the moment of its discovery.

The tree year statute of limitations established by Article 113 of the Tax Code of the Russian Federation is universal, i.e. it is equal for all types of tax offences foreseen by Chapter 16 of the Tax Code of the Russian Federation. However, the legislator relying on the general principles of legal responsibility and in particular on the principle of fairness and proportionality (Articles 19 and 57; Section 3, Article 55 of the Constitution of the Russian Federation), may establish differentiated statutes of limitations depending on the type of a tax offence, its character, and the degree of public harm.

4. Providing for the duty to pay legally established taxes, the Constitution of the Russian Federation does not directly establish procedural forms of legal responsibility for committed tax offences, an order or specific procedures of imposing tax liability. Regulation of these issues falls within the competence of the legislator.

Pursuant to Articles 1, 17 (Sections 1 and 3), 18, 45, 46, 49, 55 (Section 3) and 57 of the Constitution of the Russian Federation and the principles of legal responsibility universally recognized in rule of law states and pursuant to the European Convention on Human Rights (its Article 7 and Article 1 of Protocol No. 1), legal responsibility is only possible for an offence that was committed, which requires legally established procedures under which the tax offence is

detected, the existence of elements of this delict is proven, in particular the guilt of the person, and the final law-enforcement decision indicating a specific type and measure of punishment is issued.

Therefore, the process of holding a person liable includes a number of consecutive stages which follow one another in the process of emergence, alteration and termination of the relevant relations. The parties to these relations are, on one side, the State represented by the bodies of state power vested with the power to detect and prove offences, impose tax penalties and enforce their recovery, and, on the other side, a person (individual or legal person) who committed a tax offence and has to endure negative consequences in the form of tax liability.

4.1. As follows from Articles 31, 82–101 of the Tax Code of the Russian Federation, tax offences are detected and revealed in the process of tax control and are recorded on the stage of tax audit results reporting.

The procedures used in field tax audits include inspection, request of documents, seizure of documents and objects, expert assessments, participation of attesting witnesses, interrogation of witnesses. In accordance with Article 100 of the Tax Code of the Russian Federation, the tax audit shall result in a report. This report contains documented facts of tax offences discovered during the audit and the related circumstances of the offence committed by the taxpayer, conclusions on whether the taxpayer's actions have elements of a tax offence with references to the Articles of the Tax Code of the Russian Federation which impose liability for these tax offence. The tax audit report is served on the audited person who has the right to appeal against the results in full or in part.

Within the meaning of this Article, a field tax audit report is a final act of the tax control procedure, but at the same time, since it establishes the fact of an offence and its elements, specifies the norm of tax legislation prohibiting a specific type of tax offence and penalty, it is also a law-enforcement act which in fact institutes legal proceedings on the committed tax offence, i.e. it is a starting point of the process of holding a person liable for a committed tax offence.

Pursuant to Article 101 of the Tax Code of the Russian Federation, upon consideration of the audit results the head (deputy head) of the tax authority makes a decision either (a) to hold the taxpayer liable, or (b) not to hold the taxpayer liable, or (c) to exercise further measures of tax control in order to clarify the circumstances related to the discovered offence. The decision imposing tax liability shall reflect the circumstances of the offence committed by the taxpayer as they were established during the tax audit; documents and other evidence which prove the abovementioned circumstances; arguments given by the taxpayer in his defence and the results of the review of these arguments; and it shall indicate the decision to hold the taxpayer liable for

a particular tax offence with reference to the Articles of the Tax Code of the Russian Federation which establish these offences, and the liability measures to be applied (Sections 2 and 3).

Within the meaning of Article 113 taken together with Articles 88, 89, 100 and 101 of the Tax Code of the Russian Federation, if there is no need to prepare a tax audit report in order to formalize the results of the tax audit during which a tax offence was discovered, the process of holding a person liable for a committed tax offence starts with the decision adopted on the tax audit materials by the head (deputy head) of the tax authority. In this case the duration of the statute of limitations for holding a person liable is terminated (i.e. the statute of limitations runs out) from the moment the respective decision to hold the taxpayer liable was made by the head (deputy head) of the tax authority.

If a taxpayer refuses to pay the penalty voluntarily or exceeds the deadline for payment, a lawsuit aimed at recovering the tax penalty, according to Article 115 of the Tax Code of the Russian Federation, may be brought by the tax authorities within six months from the moment the tax offence was discovered and the report was prepared (Section 1). If the tax offence is discovered and reported in the field tax audit report, the six month period of limitation for the recovery of the tax penalty, as follows from Articles 100, 101, 113 and 115 of the Tax Code of the Russian Federation, is calculated with regard to this report, i.e. starts from the moment it was prepared and not from the moment the decision of the head of the tax authority was adopted. In cases where the tax audit report is not required the six months period for bringing a lawsuit aimed at recovering the tax penalty is calculated with regard to the decision of the head of the tax authority adopted on the basis of the audit materials.

Consequently, within the meaning of Article 13 and Article 115, Section 1 of the Tax Code of the Russian Federation taken together with its Articles 100, 101 and 104, the period during which a tax authority is entitled to bring a lawsuit to the court is established in Article 115, and Article 113 is not applicable. The statute of limitations for applying to court with an aim to recover a tax penalty is a separate period which is not absorbed by the tax liability statute of limitations, and it does not imply that the whole process of holding a person liable (all the stages, including delivery of the court judgment ordering recovery of a tax penalty) shall be finished within the period prescribed by the statute of limitations in Article 113. The period tax penalty recovery shall be calculated from the moment the tax liability statute of limitations terminates. In its turn, termination of the tax liability statute of limitations does not depend on a judicial decision, but on the fact of signing the tax audit report or, when the filing of the audit report is not required, the decision of the head of the tax authority.

The tax liability statute of limitations, established in Article 113 of the Tax Code of the Russian Federation, is aimed at eliminating unreasonably long-lasting uncertainty concerning the

taxpayer's legal status (including his proprietary rights) due to the committed offence; it protects the person from penalties for an offence which was discovered after the expiration of the period when he was obliged to keep the documents related to the calculation and payment of taxes. That is why the tax authority has no right to hold a taxpayer liable for the committed tax offence after the expiration of the statute of limitations. However, the provisions of Article 113 of the Tax Code of the Russian Federation do not prevent a tax authority from holding a taxpayer liable when the fact of a tax offence was discovered in compliance with the requirements of the Tax Code of the Russian Federation for the maximum period covered by the tax audit and for the period during which the taxpayer has to keep his report documentation (Subsection 8, Section 1, Article 23 and Section 1, Article 87).

Any other interpretation of Article 113 of the Tax Code of the Russian Federation would lead to lack of coordination between the abovementioned periods, would allow to apply the tax liability statute of limitations against its intended purpose within the tax law, would undermine the balance of public and private interests and thus would contradict the Constitution of the Russian Federation, its Article 57 taken together with Articles 1, 15 (Section 4), 17 (Sections 1 and 3), 18, 45, 49 and 55 (Section 3).

4.2. Therefore, the provisions of Article 113 of the Tax Code of the Russian Federation are in conformity with the Constitution of the Russian Federation. Within their constitutional meaning in the system of legal regulation in force, they imply that the statute of limitations for holding a person liable for the committed tax offence stops running from the moment a tax audit report is prepared (provided that it reflects documented facts of the tax offences, contains references to Articles of the Tax Code of the Russian Federation prescribing liability for these offences) and where the report is not required from the moment the decision is adopted by the head (deputy head) of the tax authority imposing the tax penalty on the tax payer.

5. Pursuant to Articles 57, 71 ("c", "h"), 75 (Section 3) and 76 (Section 1) of the Constitution of the Russian Federation, the power to regulate the consequences of exceeding the statute of limitations, to establish the possibility of its interruption, suspension or restoration in respect of the committed tax offences, is vested with the federal legislator.

5.1. It follows from Article 113 of the Tax Code of the Russian Federation that the legislator chose a three year statute of limitations for imposing tax liability as a universal period applicable to all tax offences specified by Chapter 16 of the Code; and this period may not be interrupted, i.e. it is possible to stop its calculation and start it over.

The absence of this possibility is not in itself a violation of the Constitution of the Russian Federation, as the balance of private and public interests in determining the

consequences of exceeding the statute of limitations for tax offences may be achieved by other means within the legal system of the Russian Federation, *inter alia* by suspending this period.

5.2. The legislator exercising the respective regulation, however, shall rely on the general principles of legal responsibility and specific principles of tax liability (fairness, proportionality, and inevitability). In any event, such regulation shall meet the requirements of reasonableness and formal certainty, clarity, and lucidity of legal norms, predetermined by the mentioned principles in order to preclude ambiguous interpretation and arbitrary application. These principles, while ensuring equal legal guarantees to all taxpayers, however permit to consider [?] legally significant differences in implementing the taxpayers' duties under Article 57 of the Constitution of the Russian Federation for the purposes of regulating the consequences of exceeding the statute of limitations.

Pursuant to Article 10 of the Constitution of the Russian Federation, the Constitutional Court of the Russian Federation may not substitute the legislator, who is vested with the power to amend the tax legislation concerning the statutes of limitations in force. However, the Constitutional Court of the Russian Federation, under Article 125 of the Constitution of the Russian Federation and Articles 3, 36 and 74 of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation", in reviewing the constitutionality of Article 113 of the Tax Code of the Russian Federation may reveal its constitutional meaning, including aspects concerning the consequences of exceeding the statute of limitations.

Article 113 of the Tax Code in its normative unity with Section 4, Article 109, prescribes that termination of the statute of limitations for imposing a liability for a committed tax offence is a circumstance which precludes holding a person liable for a committed tax offence. These provisions within the system of the tax legislation in force are binding both for tax authorities and taxpayers (in particular concerning the performance of duties by taxpayers, tax control procedure, mechanism of compensation for damages caused by a taxpayer's inaccurate payment of taxes, tax liability).

It is necessary to consider that the system of taxation is based on information about the taxpayer's income, which is primarily provided by the taxpayer himself. Unlawful actions of the taxpayer, e.g. refusal to provide the requested documents or failure to produce them by a certain date, may obstruct the normal course of a tax audit and thus make it impossible to hold a person liable due to the expiration of the statute of limitations.

However, the principles of fairness and legal equality and the inseparably linked principle of proportionality (proportionate equality) predetermine equal guarantees for all taxpayers regarding the statutes of limitations, but require a differentiated approach to the taxpayers who

attempt to use the statutes of limitations contrary to their purpose by obstructing tax control and tax audits and thus impairing other taxpayers' rights and lawful public interests.

When the taxpayer obstructs tax control and tax audits the expiration of a three year statute of limitations might be the only reason why tax penalties could not be imposed on the taxpayer, while the system of legal regulation in force does not permit to interrupt or suspend statutes of limitations. There would be a possibility to abuse the right not to be held liable outside the statute of limitations established by Article 113 of the Tax Code of the Russian Federation. This possibility is contrary to the principles of legal responsibility which have a general regulative impact and predetermine the actual meaning and purpose of statutes of limitations for tax offences. Thus, a taxpayer who did not produce the requested documents in due time and who obstructed the tax audit causing expiry of the statute of limitations and precluding imposition of tax penalties (in particular, for offences specified by Articles 119, 120 and 122 of the Tax Code of the Russian Federation) would gain an unlawful advantage over a taxpayer who committed the same offences but did not obstruct tax audits and was held liable within the statute of limitations.

Within the context of legal responsibility for failure to perform the constitutional duty to pay legally established taxes and duties in forms characterized as tax offences by the Tax Code of the Russian Federation, the abovementioned interpretation of the said Tax Code provisions would grossly violate (in contradiction to Articles 6 (Section 2), 19 (Section 1), 55 (Section 3) and 57 of the Constitution of the Russian Federation) the principles of everyone's equality before the law and the court and equality of the duties of Russian Federation citizens, and the related taxation principles of legal equality of taxpayers, universality and proportionality of taxation, and imposition of an equal tax burden. Other principles of tax liability, e.g. fairness, proportionality and inevitability, would be distorted, which is not permissible in a rule of law state. Moreover, the constitutional principle prohibiting the exercise of the rights and freedoms of man and citizen where it violates the rights and freedoms of others (Article 17, Section 3 of the Constitution of the Russian Federation) would be violated as well. Ultimately, it would violate the fundamentals of the constitutional order of the Russian Federation prescribing the supreme legal force and direct application of the Constitution of the Russian Federation within the legal system of the Russian Federation.

Accordingly, the challenged provisions of Article 113 of the Tax Code of the Russian Federation may not be interpreted as implying that the statute of limitations established in it equally applies both to taxpayers who comply with their duties within the process of tax control and to taxpayers who obstruct this control. The court applying these rules in proceedings concerning a tax offence shall consider the principles of autonomy of the judiciary and of fair,

independent, objective and impartial administration of justice (Articles 10 and 120 of the Constitution of the Russian Federation). Therefore, it shall not be restricted to recognizing the fact that the statute of limitations for holding a taxpayer liable is exceeded, but may give due regard to other circumstances, in particular to verify, under a motion by a tax authority, whether any unlawful actions of the taxpayer impeded the regular measures of control and extended its duration.

As follows from Article 123 (Section 3) of the Constitution of the Russian Federation, according to which judicial proceedings presume adversariness and equality of the parties, provisions of Section 6, Article 108 of the Tax Code of the Russian Federation providing its detailed regulation, Section 1, Article 65 of the Arbitration Procedure Code of the Russian Federation and Section 1, Article 56 of the Civil Procedure Code of the Russian Federation, the burden of proof rests with the tax authority. In an adversarial trial, it has to prove the circumstances it refers to as the basis of its claims and objections. The court, in its turn, pursuant to Article 71 of the Arbitration Procedure Code of the Russian Federation and Article 67 of the Civil Procedure Code of the Russian Federation, ascertains the evidence relying on its inner conviction based on comprehensive, full, objective and direct examination of the evidence attached to the case, evaluates the relevance, admissibility and validity of each piece of evidence, as well as sufficiency and interrelation of all the evidence as a whole; each piece of evidence is evaluated by the court along with other pieces of evidence; and no evidence has a predetermined value for the court.

Therefore, the provisions of Article 113 of the Tax Code of the Russian Federation within their constitutional meaning in the system of legal regulation in force do not prevent the court from recognizing the reasons for which a tax authority exceeded the statute of limitations as justifiable, provided that the taxpayer obstructs tax control and tax auditing. Therefore under these circumstances a taxpayer may be held liable and tax penalties may be recovered for the offences discovered within the periods of the taxpayer's activities that were the subject of the tax audit upon analysis of the relevant documents.

Concluding from the above and pursuant to Article 6, Sections 1 and 2, Article 71, Articles 72, 74, 75, 79, 100 and 104 of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation", the Constitutional Court of the Russian Federation

h e l d :

1. To recognize the provisions of Article 113 of the Tax Code of the Russian Federation as conforming to the Constitution of the Russian Federation. In their constitutional meaning within the system of legal regulation in force these provisions may not be considered as a ground

for interrupting the statute of limitations and consequently the statute of limitations for holding a person liable for a committed tax offence stops running from the moment a tax audit report is prepared. This report shall list all documented tax offences discovered in the course of the audit and contain references to Articles of the Tax Code of the Russian Federation imposing liability for these offences. If such a report is not required then the statute of limitations stops running from the moment the head (deputy head) of the tax authority issues a decision to hold the taxpayer liable.

The federal legislator relying on the requirements of the Constitution of the Russian Federation and taking into consideration the legal opinion expressed in the present Judgment is entitled to accordingly amend the regulation of expiry of the statute of limitations for imposing liability for committed tax offences.

Until such amendments are introduced, if the taxpayer obstructs tax control and tax audits a court may consider reasons for which the tax authority exceeded the statute of limitations justifiable and recover tax penalties for the offences that were discovered on the basis of the analysis of the relevant documents and within periods of taxpayer's activities which were the subject of the tax audit.

2. The constitutional meaning of Article 113 of the Tax Code of the Russian Federation revealed in the present Judgment is generally binding and precludes any other interpretation in the law-enforcement practice.

3. This Judgment shall be final and shall not be subject to any appeal, it shall come into force immediately upon pronouncement, shall be directly applicable and shall not require confirmation by other authorities or state officials.

4. Pursuant to Article 78 of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation", this Judgment shall be published in the Collection of Laws of the Russian Federation and *Rossiyskaya Gazeta*. The Judgment shall also be published in the Bulletin of the Constitutional Court of the Russian Federation.

Constitutional Court  
of the Russian Federation

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