

IN THE NAME OF THE RUSSIAN FEDERATION
The Constitutional Court of the Russian Federation

Judgment

of 31st March, 2015 No. 6-II/2015

on the case concerning the review of constitutionality of Item 1 of Section 4 of Article 2 of the Federal Constitutional Law “On the Supreme Court of the Russian Federation” and Paragraph 3 of Sub-Item 1 of Item 1 of Article 342 of the Tax Code of the Russian Federation in connection with the complaint of the Open Joint Stock Company “Gazprom Oil”

The Constitutional Court of the Russian Federation composed of the President V.D.Zor’kin, Judges K.V.Aranovsky, A.I.Boitsov, N.S.Bondar’, G.A.Gadzhiev, Yu.M.Danilov, L.M.Zharkova, G.A.Zhilin, S.M.Kazantsev, M.I.Kleandrov, S.D.Knyazev, A.N.Kokotov, L.O.Krasavchikova, S.P.Mavrin, N.V.Mel’nikov, Yu.D.Rudkin, N.V.Seleznev, O.S.Khokhryakova, V.G.Yaroslavtsev,

with participation of representatives of the Open Joint Stock Company “Gazprom Oil” lawyers V.M.Zaripov and I.V.Khamenushko, Plenipotentiary Representative of the State Duma to the Constitutional Court of the Russian Federation D.F.Vyatkin, representative of the Council of Federation PhD A.S.Solomatkin, Plenipotentiary Representative of the President of the Russian Federation to the Constitutional Court of the Russian Federation M.V.Krotov,

guided by Article 125 (Section 4) of the Constitution of the Russian Federation, Item 3 of Section 1, Sections 3 and 4 of Article 3, Section 1 of Article 21, Articles 36, 74, 86, 96, 97 and 99 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation”,

in an open session considered the case on the review of constitutionality of Item 1 of Section 4 of Article 2 of the Federal Constitutional Law “On the Supreme Court of the Russian Federation” and Paragraph 3 of Sub-Item 1 of Item 1 of Article 342 of the Tax Code of the Russian Federation.

The reason for the consideration of the case was the complaint of the Open Joint Stock Company “Gazprom Oil”. The ground for the consideration of the case

was the discovered uncertainty of whether the legislative provisions contested by the petitioner are in conformity with the Constitution of the Russian Federation.

Having heard the report of Judge-Rapporteur M.I.Kleandrov, statements of representative of parties, interventions by representatives invited to the hearing: judges of the Supreme Court of the Russian Federation L.A.Kalinina and A.G.Pershutov from the Supreme Court of the Russian Federation, G.R.Golovanova from the Ministry of Finance of the Russian Federation, O.V.Ovtchar from the Federal Tax Service of the Russian Federation, M.A.Mel'nikova from the Ministry of Justice of the Russian Federation, T.A.Vasilyeva from the Prosecutor General of the Russian Federation, having examined submitted documents and other materials, the Constitutional Court of the Russian Federation

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

1. The petitioner in the present case Open Joint Stock Company "Gazprom Oil" contests constitutionality of the following legislative provisions:

Item 1 of Section 4 of Article 2 of the Federal Constitutional Law of 5th February, 2014 No. 3-ФКЗ "On the Supreme Court of the Russian Federation", which ascribes to the powers of the Supreme Court of the Russian Federation as a court of first instance consideration of administrative cases on questioning of normative legal acts of the President of the Russian Federation, Government of the Russian Federation, federal bodies of executive power, Office of the Prosecutor General of the Russian Federation, Investigatory Committee of the Russian Federation, Judicial Department at the Supreme Court of the Russian Federation, Central Bank of the Russian Federation, Central Electoral Commission of the Russian Federation, state extra-budget funds, including Pension Fund of the Russian Federation, Fund of Social Insurance of the Russian Federation, Federal Fund of Mandatory Medical Insurance of the Russian Federation, as well as state corporations;

Paragraph 3 of Sub-Item 1 of Item 1 of Article 342 of the Tax Code of the Russian Federation, according to which if by the time of payment of the tax on extraction of minerals on the outcome of the first tax period of periodical calendar year tax-payer has no approved norms of losses of minerals for periodical calendar year until their approval norms approved earlier in the established order are applied.

1.1. The Supreme Court of the Russian Federation by Ruling of 17th December, 2013 refused to accept application of the Open Joint Stock Company “Gazprom Oil” on recognition as invalid of the provision of the letter of the Federal Tax Service of 21st August, 2013 No. AC-4-3/15165 “On Tax on Extraction of Minerals” on the procedure of determination of the tax rate on the tax on extraction of minerals with regard to recalculation of sums of this tax by the tax-payer with consideration of approved norms of losses of minerals for periodical calendar year, having pointed out that the contested letter of the Federal Tax Service, contrary to petitioner’s assertion, does not meet the requirements brought forward to normative legal acts. The Supreme Court of the Russian Federation noted that consideration of cases on questioning of acts of the Federal Tax Service falls within the jurisdiction of an arbitration court.

The Higher Arbitration Court of the Russian Federation, where the Open Joint Stock Company “Gazprom Oil” addressed with similar application, by Ruling of 10th April, 2014 discontinued proceeding on the case on the ground that the letter of the Federal Tax Service of 21st August, 2013 does not establish legal norms (rules of behavior) obligatory for an uncertain circle of persons and does not meet the criteria allowing to recognize it as a normative legal act, neither in form nor in content, subject which issued it and source of publication.

1.2. According to Articles 96 and 97 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation”, rendering concrete Article 125 (Section 4) of the Constitution of the Russian Federation, association of citizens has the right to petition the Constitutional Court of the Russian Federation with a complaint against violation of constitutional rights and freedoms by a law and such complaint is recognized as admissible if the contested legislative provisions were

applied in petitioner's case, the consideration of which has been completed in court and if they affect constitutional rights and freedoms; non-observance of these conditions, by virtue of Articles 43 and 68 of the said Federal Constitutional Law is a ground for the decision on dismissal of the complaint or on discontinuance of proceedings on the case.

Open Joint Stock Company "Gazprom Oil" perceives violation by Item 1 of Section 4 of Article 2 of the Federal Constitutional Law "On the Supreme Court of the Russian Federation" of the Constitution of the Russian Federation, its Articles 8, 34, 35, 46 and 57 in the assumption that this legislative provision, which, in essence, reproduces Item 2 of Section 1 of Article 27 of the Civil Procedure Code of the Russian Federation, applied in its case in the wording having operated prior to the adoption of the said Federal Constitutional Law, restricts the right to questioning in court of acts of the Federal Tax Service, which establish for taxpayers duties not envisaged by the Tax Code of the Russian Federation, namely Sub-Item 1 of Item 1 of its Article 342, i.e. substantially are normative legal acts.

The Federal Law of 12th March, 2014 No. 29-Ф3 "On Amendments to Individual Legislative Acts of the Russian Federation in Connection with Adoption of the Law of the Russian Federation on Amendment to the Constitution of the Russian Federation "On the Supreme Court of the Russian Federation and Prosecutor's Office of the Russian Federation", having expounded in the new wording Article 27 of the Civil Procedure Code of the Russian Federation, according to which jurisdiction of cases to the Supreme Court of the Russian Federation is determined by the Federal Constitutional Law "On the Supreme Court of the Russian Federation", entered into force on 6th August, 2014. From the same day the Federal Law of 28th June, 2014 No. 186-Ф3 "On Amendments to the Arbitration Procedure Code of the Russian Federation" recognized as having lost force Section 2 of Article 34 of the Arbitration Procedure Code of the Russian Federation, according to which the Higher Arbitration Court of the Russian Federation considered as a court of first instance cases on questioning of normative

legal acts of federal bodies of executive power, if such acts affected rights or lawful interests of an applicant in the field of entrepreneurial and other economic activity.

Thereby at present power to consider administrative cases on questioning of normative legal acts of federal bodies of executive power as a court of first instance is entrusted to the Supreme Court of the Russian Federation as the higher judicial body on civil cases, cases on settling economic disputes, criminal, administrative and other cases in jurisdiction of courts formed in accordance with the Federal Constitutional Law of 31st December, 1996 No. 1-Φ3 “On Judicial System of the Russian Federation” and federal laws. Proceeding from this, the complaint of the Open Joint Stock Company “Gazprom Oil” with regard to questioning of Item 1 of Section 4 of Article 2 of the Federal Constitutional Law “On the Supreme Court of the Russian Federation”, in spite of absence of reference to it in court decisions, passed in respect of the petitioner during operation of respective norms of the Arbitration Procedure Code of the Russian Federation and the Civil Procedure Code of the Russian Federation, having lost force as from 6th August, 2014, is admissible.

As to Paragraph 3 of Sub-Item 1 of Item 1 of Article 342 of the Tax Code of the Russian Federation, it follows from the submitted materials that the Open Joint Stock Company “Gazprom Oil” appealed to the Supreme Court of the Russian Federation and the Higher Arbitration Court of the Russian Federation in the procedure envisaged for questioning of normative legal acts outside a specific case, in which on the basis of the said legislative provision in a certain jurisdictional procedure the question broaching its constitutional rights and freedoms would be resolved, actual facts would be established and (or) studied, which can testify to non-fulfilment by it of prescriptions expounded in the letter of the Federal Tax Service of 21st August, 2013 which, in the petitioner’s opinion, contradict the law. Judicial decisions on cases of subsidiary organizations of the Open Joint Stock Company “Gazprom Oil”, in which the provision of the Tax Code of the Russian Federation contested by it was applied with consideration of the said letter of the Federal Tax Service, within the framework of the present case cannot be accepted as documents confirming (as it is required by Article 96 of the Federal

Constitutional Law “On the Constitutional Court of the Russian Federation”) application of this provision in a specific case of the petitioner. Accordingly, proceeding on the present case with regard to review of constitutionality of Paragraph 3 of Sub-Item 1 of Item 1 of Article 342 of the Tax Code of the Russian Federation is subject to discontinuance by virtue of Item 2 of Article 43 and Article 68 of the said Federal Constitutional Law.

1.3. As follows from Articles 36, 74, 96 and 97 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation”, the Constitutional Court of the Russian Federation adopts judgment solely on the subject stated in the petition and only with regard to the part of an act which was applied in the petitioner’s case and constitutionality of which is called in question, appraising both the literal meaning of legislative provisions under consideration and the meaning attributed to them by an official and other interpretations or the prevailing law-applying practices, as well as proceeding from their place in the system of legal norms, not being bound when passing the decision by grounds and arguments stated in the petition.

Thus, Item 1 of Section 4 of Article 2 of the Federal Constitutional Law “On the Supreme Court of the Russian Federation” is a subject-matter of consideration by the Constitutional Court of the Russian Federation in the present case to the extent to which on its basis in the operating system of legal regulation the question is resolved on the possibility of court examination of acts of the Federal Tax Service as a federal body of executive power, containing explanations on issues connected with application of norms of tax legislation by tax bodies.

2. The Constitution of the Russian Federation guarantees everyone protection in court of his rights and freedoms (Article 46, Section 1); decisions and actions (or inaction) of bodies of state power, bodies of local self-government, public associations and officials may be appealed against in court (Article 46, Section 2). The right to court protection, which belongs to basic human rights and freedoms, is recognized and guaranteed in the Russian Federation according to the universally recognized principles and norms of international law and the Constitution of the

Russian Federation and might not be restricted (Article 17, Sections 1 and 2; Article 56, Section 3, of the Constitution of the Russian Federation), contemplates existence of legal guarantees which allow to realize it in full amount and ensure effective restoration in rights by means of justice, meeting general legal requirements of fairness and equality.

The value of the right to court protection as the most important constitutional guarantee of all other human and civil rights and freedoms is predetermined – by virtue of Articles 4 (Section 2), 15 (Sections 1 and 2), 18, 118 (Section 2), 120 (Section 1) 125, 126 and 128 (Section 3) of the Constitution of the Russian Federation – by particular role of the judicial power and its prerogatives in administration of justice, including by way of control over ensuring supremacy and direct effect of the Constitution of the Russian Federation and federal laws on the entire territory of Russia.

It follows from Article 46 of the Constitution of the Russian Federation in the interconnection with its Articles 19 (Section 1), 47 (Section 1) and 123 (Section 3), setting the principle of equality of all persons before the law and the court, the right of everyone to have his case heard in the court and by the judge within whose competence the case is placed by law and the principle of conducting judicial proceedings on the basis of controversy and equality of the parties, that the right to court protection is not only the right to appeal to court, but also the possibility to receive real judicial protection in the form of restoration of violated rights and freedoms in accordance with legislatively fixed criteria, which in a normative form (in the form of a general rule) predetermine in which court and in what procedure a specific case is subject to consideration, which allows the court (judge), parties, other participants of the proceedings as well as other interested persons to avoid legal uncertainty in this issue.

One of the important factors, determining the effectiveness of restoration of violated rights, is timely protection of rights of persons participating in the case. This means that institutional and procedural conditions of exercise of procedural rights set by the legislator must meet the requirements of procedural effectiveness,

economy in the use of means of court protection and thereby ensure fairness of court decision, without which the balance of public-law and private-law interests is unattainable.

The adduced legal positions were expressed in a number of decisions of the Constitutional Court of the Russian Federation, including the judgments of 16th March, 1998 No. 9-II, of 17th November, 2005 No. 11-II, of 26th December, 2005 No. 14-II, of 20th February, 2006 No. 1-II, of 25th March, 2008 No. 6-II, of 19th July, 2011 No. 17-II and of 1st March, 2012 No. 5-II. The European Court of Human Rights adheres to similar approach in its practice, supposing that Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, recognizing everyone's right to a fair court hearing, in the interconnection with its Article 13, guaranteeing everyone effective remedy of legal protection, including in connection with supposed violation of this right, implies that the state must provide internal remedy of legal protection that would allow to consider substantiated complaint against this supposed violation in substance (Judgment of 25th February, 2010 on the case "Kaziulin vs. Russia"). The Committee of Ministers of the Council of Europe also draws attention to the need to ensure prompt and effective means of legal protection to petitioners, allowing them to petition competent national body of power and receive reimbursement on the state level (Item 13 of the Addendum to Recommendation of 12th May, 2004 Rec (2004) 6 "On Increase of Effectiveness of Internal Means of Legal Protection").

3. As follows from Articles 1 (Section 1), 6 (Section 2), 17 (Section 3) and 19 (Sections 1 and 2) of the Constitution of the Russian Federation and legal positions of the Constitutional Court of the Russian Federation based on them, the principle of legal equality contemplates formal certainty, exactness, clarity, unambiguity of legal norms and their accordancy in the system of operating legal regulation, so far as legal equality can be ensured only under the condition of uniform understanding and interpretation of a legal norm; legislative provisions, which by their content and (or) form do not meet the indicated criteria, engender contradictory law-applying practice, create the possibility of their poly-semantic interpretation and arbitrary

application and thereby lead to violation of guarantees of state, including judicial, protection of rights, freedoms and lawful interests of citizens, fixed by Articles 45 and 46 (Sections 1 and 2) of the Constitution of the Russian Federation (judgments of 20th April, 2009 No. 7-II, of 6th December, 2011 No. 27-II, of 29th June, 2012 No. 16-II, of 14th May, 2013 No. 9-II and others).

At the same time the requirement of certainty of legal regulation, obliging the legislator to formulate legal prescriptions with a sufficient degree of exactness, allowing a citizen (association of citizens) to conform his behavior with them, both prohibited and permitted, does not exclude use of estimative or generally accepted notions, whose meaning must be available for perception and elucidation by subjects of respective legal relations either directly from the content of a concrete normative provision or a system of provisions being in obvious interconnection, or by way of revelation of a more complex interconnection of legal prescriptions, in particular with the help of explanations about their application given by courts (judgments of the Constitutional Court of the Russian Federation of 11th November, 2003 No. 16-II, of 14th April, 2008 No. 7-II, of 5th March, 2013 No. 5-II, of 23rd March, 2013 No. 11-II; Ruling of the Constitutional Court of the Russian Federation of 16th July, 2013 No. 1173-O and others).

Interpretation of legislative provisions takes place not only when public authoritative decision in respect of a concrete person is adopted; it can be carried out by way of explanation of normative content of one or another legislative provision with regard to all legal relations arising on its basis, which requires adoption of respective act by an authorized body in order to bring it to the notice of all subjects of legal relations to whom the explained provision of law extends.

In the tax sphere adoption of such acts is predetermined by the provisions of tax legislation in their system interconnection: according to the Tax Code of the Russian Federation higher-ranking tax bodies have the right to abrogate and change the decisions of lower-ranking tax bodies in case of non-conformity of these decisions to the legislation on taxes and duties (Item 3 of Article 31); to the number of duties of tax bodies appertains informing of tax-payers about the legislation on

taxes and duties (Sub-Item 4 of Item 1 of Article 32); the Ministry of Finance of the Russian Federation gives written explanations on the issues of application of the legislation on taxes and duties, which tax bodies are obliged to be guided by (Sub-Item 5 of Item 1 of Article 32 and Item 1 of Article 34²). As follows from the Statute on Federal Tax Service, approved by the Resolution of the Government of the Russian Federation of 30th September, 2004 No. 506 (Items 1 and 2, Sub-Items 5.6 and 6.3), apart from informing tax-payers on the legislation on taxes and duties the Federal Tax Service, which is under the authority of the Ministry of Finance of the Russian Federation and which is entrusted with powers of control and supervision over execution of tax legislation, has the right to give tax-payers written explanations on issues ascribed to the field of its activity.

Determining consequences of application by tax-payer of written explanations, Sub-Item 3 of Item 1 of Article 111 of the Tax Code of the Russian Federation recognizes as circumstance excluding person's guilt in committing tax offence execution by him of explanations about the order of calculation, payment of a tax (duty) or on other issues of application of the legislation on taxes and duties, given to him or to indefinite circle of persons by a financial, tax or other authorized body of state power (authorized official of this body) within the bounds of its competence (these facts are established in the presence of a respective document of this body, on meaning and content appertaining to tax periods, in which tax offence was committed, irrespective of the date of issue of such document), and (or) execution by a tax-payer of motivated opinion of a tax body, sent to him in the course of conducting tax monitoring; the provision of this sub-item is not applied, if the said written explanations, motivated opinion of a tax body are based on incomplete or unreliable information submitted by the tax-payer.

Within the meaning of the adduced normative provisions, right of the Federal Tax Service to adopt acts of informational-explanatory character in order to ensure uniform application of tax legislation by tax bodies on the entire territory of the Russian Federation is not excluded. Such acts are addressed directly to tax bodies and officials, applying respective legislative provisions. Mandatory character of

explanations contained in them for tax-payers is not normatively fixed. At the same time – since by virtue of the principle of departmental subordination territorial tax bodies are obliged in the legal relations with tax-payers to be guided by explanations of norms of the tax legislation, coming from the Federal Tax Service – such acts indirectly, through law-applying activity of the officials of tax bodies, acquire, in essence, mandatory character also for indefinite circle of tax-payers (which is confirmed, in particular, by the letter of the Federal Tax Service of 21st August, 2013, which was questioned by the Open Joint Stock Company “Gazprom Oil” in the Supreme Court of the Russian Federation and the Higher Arbitration Court of the Russian Federation).

4. According to the Constitution of the Russian Federation, judicial authority is exercised by means of constitutional, civil, administrative and criminal proceedings (Article 118, Section 2); judges are independent and are subordinate only to the Constitution of the Russian Federation and federal law (Article 120, Section 1); should a court establish when considering a case that a legal act of a state or other body conflicts with law, it shall take a decision in accordance with the law (Article 120, Section 2).

Proceeding from this, the right to question in the court procedure normative legal acts of federal bodies of executive power, contradicting federal law and affecting rights and freedoms of citizens, is established in the operating procedural legislation and the legislation on the judicial system. Consideration of administrative cases on questioning of normative legal acts of federal bodies of executive power, envisaged by Item 1 of Section 4 of Article 2 of the Federal Constitutional Law “On the Supreme Court of the Russian Federation”, within the meaning of Articles 46 (Sections 1 and 2), 118 (Section 2), 120 (Section 2), 126 and 128 (Section 3) of the Constitution of the Russian Federation, is an independent means of court protection of rights and freedoms regulated by federal law and must be exercised in the procedure of administrative judicial proceedings.

4.1 The Constitution of the Russian Federation, fixing binding character of legal norms contained in laws and legal acts of bodies of executive power based on

them, does not define the notion of a legal norm and normative legal act. In the formed legal doctrine and juridical practice that has formed on its basis, among other things reflected in individual legal acts (in particular, in the Resolution of the State Duma of 11th November, 1996 No. 781-II ГД “On Petition to the Constitutional Court of the Russian Federation” and Explanations on Application of Rules of Preparation of Normative Legal Acts of Federal Bodies of Executive Power and Their State Registration, approved by the Order of the Ministry of Justice of the Russian Federation of 4th May, 2007 No. 88), normative legal act is understood as a written official document, adopted (issued) in a certain form by a law-making body within the framework of its competence and aimed at establishment, modification or abrogation of legal norms, and a legal norm is understood as a binding state prescription of permanent or temporary nature, designed for multiple application.

Doctrinal understanding of a normative legal act on the whole conforms both to legal position of the Constitutional Court of the Russian Federation, expressed on the basis of Articles 15 (Sections 1 and 3), 90, 105-108 and 125 (Section 2) of the Constitution of the Russian Federation, by virtue of which normative legal act is an act of general effect, designed for multiple application, which contains concretizing normative prescriptions, general rules and is an official state prescription obligatory for execution (Judgment of 17th November, 1997 No. 17-II) and conclusions of other higher judicial bodies.

The Supreme Court of the Russian Federation ascribes to essential signs of a normative legal act its publication in an established order by an authorized body of state power, body of local self-government or official, presence of legal norms (rules of behavior) in it, obligatory for an indefinite circle of persons, designed for multiple application, aimed at regulation of public relations or modification or discontinuance of existing legal relations. Bearing in mind these signs, enumerated in Item 9 of the Resolution of the Plenum of the Supreme Court of the Russian Federation of 29th November, 2007 No. 48 “On Practice of Consideration by Courts of Cases on Questioning of Normative Legal Acts in Full or in Part”, a court when

considering a case in essence is required, as indicated in Item 17 of the said Resolution, to clear up the procedure of adoption of the normative legal act, in particular, powers of a body (official) to issue normative legal acts and their bounds; the form (kind) in which a body (official) has the right to adopt normative legal acts; the envisaged rules of bringing normative legal acts into effect, including rules of their publication; should the court establish that when issuing the questioned normative legal act requirements of the legislation were violated at least on one of the grounds entailing recognition of the act as inactive, it is entitled to adopt a decision on satisfaction of the application without examination of other circumstances of the case, including contents of the questioned act.

In accordance with the Resolution of the Plenum of the Higher Arbitration Court of the Russian Federation of 30th July, 2013 No. 58 “On Some Issues Arising in Court Practice when Arbitration Courts Consider Cases on Questioning of Normative Legal Acts”, if a questioned act contains provisions of normative character, violation of requirements to the form of a normative legal act, procedure of its adoption and (or) bringing into effect are not grounds for discontinuance of proceedings on the case, since such act can be applied by interested persons, as a result of which rights and lawful interests of the applicant and other persons may be violated; acts having not undergone state registration (if such registration is obligatory) and (or) not published in the envisaged order, entail no legal consequences as not having legal force and cannot regulate respective legal relations irrespective of revelation of the indicated violations in the judicial procedure; having established such violations, arbitration court adopts decision on recognition of the questioned act as inactive in full (including when appealing against its individual provisions in arbitration court) as not having legal force from the moment of its adoption; the conclusion about it should be contained in the resolution part of the court act (Item 6.2).

Thus, legality of normative legal acts of federal bodies of executive power contemplates not only presence in them of a certain normative content (general rule) not contradicting the law, but also observance of an appropriate lawful form,

the procedure of adoption and promulgation. In the operating system of legal regulation judicial review of such normative act includes establishment of its conformity to a federal law as to the content of normative provisions, form of the act as well as the subject having issued it, procedure of adoption, publication and bringing into force.

4.2. Turning to the question of the possibility to verify in court procedure acts of a federal body of executive power, in which written explanations on issues of application of tax legislation are given, the Constitutional Court of the Russian Federation, proceeding from the provisions of Article 46 of the Constitution of the Russian Federation on the right to protection in court, pointed out that Articles 29, 150 and 198 of the Arbitration Procedure Code of the Russian Federation, considered in the interconnection with Article 137 of the Tax Code of the Russian Federation, do not hinder questioning in court procedure of acts of respective federal body of executive power, if by their content they engender the right of tax bodies to bring forward demands to tax-payers; when considering such cases courts are not entitled to confine themselves to formal establishment of what character the act has and whom it is addressed to, but must clear up whether it affects the rights of tax-payers, whether it conforms to acts of the legislation on taxes and duties, and in any specific case must really ensure effective restoration of violated rights; other would mean renouncement of court protection (rulings of 5th November, 2002 No. 319-O, of 20th October, 2005 No. 442-O and of 3rd April, 2007 No. 363-O-O).

Within the meaning of Articles 15 (Sections 1 – 3), 46 (Sections 1 and 2) and 118 (Section 2) of the Constitution of the Russian Federation, which the adduced legal position of the Constitutional Court of the Russian Federation conforms to, and bearing in mind that the federal legislation envisages the possibility of consideration of administrative cases on questioning of normative legal acts of federal bodies of executive power outside a specific case, in the basis of admissibility of a checkup of an act of the Federal Tax Service as a federal body of executive power in this procedure must be first of all presence of normative qualities of this act (whether it renders general regulating influence on public

relations, contains prescriptions on rights and freedoms of a personally indefinite circle of persons – participants of respective legal relations, is designed for multiple application).

If the questioned act of the Federal Tax Service has qualities, allowing to apply it as a binding prescription of general character, its clothing in the form of explanation in itself cannot serve as sufficient ground for recognition of inadmissibility of verification of its conformity to federal law. Meanwhile, absence in the legislation in force of a clear-cut definition of grounds and conditions of questioning by interested persons in court of acts of federal bodies of executive power, possessing normative qualities and explaining the provisions of federal laws, entailed contradictory practice when resolving the question about the significance of formal side of characteristics of such act (the order of issue, publication, registration by the Ministry of Justice of the Russian Federation, etc.). Judicial decisions taken on the case of the Open Joint Stock Company “Gazprom Oil” by the Supreme Court of the Russian Federation and the Higher Arbitration Court of the Russian Federation, materials submitted to the Constitutional Court of the Russian Federation by the Supreme Court of the Russian Federation, as well as the Resolution of the Plenum of the Supreme Court of the Russian Federation of 29th November, 2007 No. 48, Item 9 of which directly ascribes to substantial signs of a normative act its publication in an established order, in particular, testify to it.

As a result, the possibility to question acts of the Federal Tax Service explaining prescriptions of tax legislation in the procedure envisaged for questioning of normative legal acts, not being supported by direct normative instructions, has in many respects situational character. Meanwhile, such explanation, coming out as normative interpretation, binding for tax bodies and their officials, and rendering concrete tax norms can diverge from their real meaning and thereby, in essence, actually establish for tax-payers prescriptions of general character, rules addressed to an indefinite circle of persons, designed for multiple application and, consequently, rendering regulating influence on tax relations. And renunciation of court review of explanations having normative

qualities, but in their form not being normative legal acts, in essence, prolongs their operation in the law-applying tax practice as an official normative interpretation of respective legislative provisions, which can contradict their real meaning and extends to an indefinite circle of persons.

Consideration of cases on questioning of such acts according to rules established for cases on questioning of non-normative legal acts and decisions of individual-disposing character (Chapter 24 of the Arbitration Procedure Code of the Russian Federation and Chapter 25 of the Civil Procedure Code of the Russian Federation) would neither resolve this problem. According to the Resolution of the Plenum of the Supreme Court of the Russian Federation of 10th February, 2009 No. 2 “On Practice of Consideration by Courts of Cases on Questioning of Decisions, Actions (Inaction) of Bodies of State Power, Bodies of Local Self-Government, Officials, State and Municipal Servants”, to these decisions appertain acts of bodies of state power, bodies of local self-government, their officials, state, municipal servants and persons equated with them, adopted individually or collegially, containing authoritative prescription engendering legal consequences for concrete citizens and organizations (Item 1). Therefore, in the said Resolution the point is of non-normative acts, which are understood as individual acts, whereas an act containing explanation of normative legal acts, being aimed at law-applying practice as a whole, and not at specific legal relation, is characterized by a repeated, regular, and not individual-disposing influence on public relations.

Taking into account that such explanations are widespread in the practice of tax bodies, their review only in the procedure envisaged by the legislation in force for questioning of non-normative acts (i.e. decisions entailing legal consequences only for concrete citizens and organizations) in such circumstances cannot be recognized as sufficient for ensuring full and effective judicial protection of rights and freedoms as a necessary element of the constitutional-law regime, based on the principles of the rule of law and law-governed state.

Institution of proceedings on the case on questioning of normative legal act, as follows from the Civil Procedure Code of the Russian Federation, is put in

dependence of whether the questioned act can be regarded as violating rights and freedoms of an applicant (Section 1 of Article 3 and Section 1 of Article 251). If the applicant questions a normative legal act which does not affect his rights, freedoms or lawful interests, the court refuses to admit application for consideration (Item 1 of Section 1 of Article 134 of the Civil Procedure Code of the Russian Federation, Paragraph 3 of Item 11 of the Resolution of the Plenum of the Supreme Court of the Russian Federation of 29th November, 2007 No. 48). At the same time, unlike questioning of decisions of individual-disposing character, the fact of a person's being within legal relations regulated by a normative legal act in itself testifies to the possibility to consider respective case and thereby the possibility to protect violated rights within the questioning of a legal act containing rules of behavior, obligatory for an indefinite circle of persons and designed for multiple application, not waiting for adoption of law-applying decisions on its basis, negative for this person.

Meanwhile, at present neither grounds and conditions nor procedural order of questioning by interested persons of acts of federal bodies of executive power, which are acts of explanation of some or other legislative provisions and having normative qualities, as necessary elements of legal regulation of respective mechanism of court protection are clear-cut established, which hinders effective court questioning of such acts and deteriorates the state of persons, *de facto* falling under their operation in connection with inappropriate law-making activity of the state (or the legal regulation is such that it requires clarification by explanatory acts, or an act formally explaining the legislation has been adopted without observance of requirements, ensuring its legality and availability, including registration by the Ministry of Justice of the Russian Federation, official publication and so on). It is impossible to recognize reduction of the level of guarantees of court protection of rights of these persons as compared with persons questioning acts having official, formalized normative status as fair and proportionate in the context of the requirements of Article 55 (Section 3) of the Constitution of the Russian Federation. This lacuna in the legal regulation thereby acquires constitutional

significance, which obliges the Constitutional Court of the Russian Federation to adopt decision proceeding from the idea that absence of the necessary legislative mechanism may not suspend realization of rights and lawful interests of citizens, following from the Constitution of the Russian Federation.

4.3. Thus, the Constitutional Court of the Russian Federation deems it necessary to recognize the provision of Item 1 of Section 4 of Article 2 of the Federal Constitutional Law “On the Supreme Court of the Russian Federation” as not conforming to the Constitution of the Russian Federation, its Articles 15 (Sections 1 and 2), 46 (Sections 1 and 2) and 55 (Section 3) to the extent to which in the system of operating legal regulation this provision within the meaning attributed to it by judicial interpretation, in the indissoluble connection with norms of procedural legislation engenders legal uncertainty in the issue of grounds and conditions of court questioning of acts of the Federal Tax Service as a federal body of executive power, having normative qualities and containing explanations of the tax legislation which, being in essence official interpretation of its provisions, can contradict their real meaning, thereby admitting the possibility of refusing court protection to tax-payers only on the ground of non-conformity of such acts to formal requirements, brought forward to normative legal acts of federal bodies of executive power as to the form, subject and order of adoption, registration and publication, which leads to violation of constitutional guarantees of the right to court protection.

The recognition of Item 1 of Section 4 of Article 2 of the Federal Constitutional Law “On the Supreme Court of the Russian Federation” as non-conforming to the Constitution of the Russian Federation does not mean investment of interested persons with unconditional right to question in the Supreme Court of the Russian Federation outside a specific case of any act containing explanations of the tax legislation, coming from the Federal Tax Service, as having normative qualities: to become a subject-matter of questioning, such act by means of factual explanations contained in it must establish (modify, abrogate) rules, binding for an indefinite circle of persons, designed for multiple application and thereby rendering

general regulatory influence on tax relations. In the events when explanations contained in the act of the Federal Tax Service do not go beyond the bounds of adequate interpretation of the provisions of tax legislation and do not entail modification of legal regulation of respective tax relations, interested persons may be refused the judicial review of such act in the procedure envisaged for questioning of normative legal acts.

4.4. In order to ensure the balance of constitutionally significant values and in the interests of subjects of the law, the Constitutional Court of the Russian Federation, guided by Item 12 of Section 1 of Article 75 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation”, deems it possible to determine the following order of execution of the present Judgment.

Proceeding from the requirements of the Constitution of the Russian Federation and legal positions of the Constitutional Court of the Russian Federation based on them and expressed in the present Judgment, the federal legislator, in order to eliminate respective lacuna in legal regulation, is required to make amendments to the legislation in force, defining the peculiarities of consideration of cases on questioning of acts of federal bodies of executive power, including acts of the Federal Tax Service, containing explanations of tax legislation, which formally are not normative legal acts, but in fact have normative qualities. Yet it does not follow from the Constitution of the Russian Federation that jurisdiction of such cases cannot in principle be established in another way than for legal acts of federal bodies of executive power, which side by side with normative qualities have necessary formal attributes of a normative legal act.

Until appropriate amendments following from the present Judgment are made to the operating legal regulation, consideration of cases on questioning of acts of the Federal Tax Service, containing explanations of tax legislation, which formally are not normative legal acts, but in fact have normative qualities, must be exercised in the procedure envisaged by procedural legislation for questioning of normative legal acts.

Proceeding from the above and guided by Articles 68, 71, 72, 74, 75, 78, 79, 80, 87 and 100 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 provision of Item 1 of Section 4 of Article 2 of the Federal Constitutional Law “On the Supreme Court of the Russian Federation” as not conforming to the Constitution of the Russian Federation, its Articles 15 (Sections 1 and 2), 46 (Sections 1 and 2) and 55 (Section 3), to the extent to which this provision within the meaning attributed to it by judicial interpretation in the system of operating legal regulation does not admit resolution by court of administrative cases on questioning of acts of the Federal Tax Service, which do not conform to formal requirements, brought forward to normative legal acts of federal bodies of executive power on the form, subject and order of adoption, registration and publication, but at the same time contain explanation (normative interpretation) of tax legislative provisions binding for all tax bodies, which can contradict its real meaning and thereby violate the rights of tax-payers.

2. The federal legislator is required, proceeding from the requirements of the Constitution of the Russian Federation and legal positions of the Constitutional Court of the Russian Federation based on them and expressed in the present Judgment, to make amendments to the legislation in force, aimed at establishment of peculiarities of judicial consideration of cases on questioning of acts of federal bodies of executive power, including acts of the Federal Tax Service, which formally are not normative legal acts, but in fact have normative qualities.

Until appropriate amendments following from the present Judgment are made to the operating legal regulation, consideration of cases on questioning of such acts of the Federal Tax Service must be exercised in the procedure envisaged by procedural legislation for questioning of normative legal acts.

3. To discontinue proceeding on the present case in the part concerning the review of constitutionality of Paragraph 3 of Sub-Item 1 of Item 1 of Article 342 of the Tax Code of the Russian Federation.

4. Judicial acts on the case of the Open Joint Stock Company “Gazprom Oil” are subject to reconsideration in the order determined by the Constitutional Court of the Russian Federation for execution of the present Judgment, provided there are no other obstacles to it.

5. The present 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 and officials.

6. The present Judgment is subject to immediate publication in Rossiyskaya Gazeta, the Collection of Laws of the Russian Federation and the official Internet-portal of legal information (www.pravo.gov.ru). The Judgment shall also be published in the Bulletin of the Constitutional Court of the Russian Federation.

The Constitutional Court
of the Russian Federation

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