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НЕФОРМАЛЬНЫЕ ЛИЧНЫЕ ОТНОШЕНИЯ КАК ОСНОВАНИЕ ПРИЗНАНИЯ ЛИЦА КОНТРОЛИРУЮЩИМ ОРГАНИЗАЦИЮ

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Аннотация

Неформальные личные отношения, характеризующиеся нормативной неурегулированностью, являются весьма неоднозначной оценочной категорией, которая, тем не менее, используется в практике установления статуса контролирующего должника лица и бенефициарного владельца. Отсутствие в действующем отечественном законодательстве каких-либо норм, которые бы конкретизировали сущность данной категории, создает условия для необоснованно широкого толкования отдельных положений закона о признании лица контролирующим организацию-должника. Акты Верховного Суда РФ и Федеральной налоговой службы России в части оценки неформальных связей однозначного ответа на многие спорные вопросы не дают; более того, в них очевидны определённые противоречия: налоговый орган, как правило, более широкого рассматривает неформальные личные отношения, как и их признаки. С учётом данной проблемы в статье предлагается дополнение Федерального закона «О несостоятельности (банкротстве)» положениями, конкретизирующими перечень признаков, отражающих наличие неформальных личных отношений, которые должны или могут учитываться при решении вопроса о признании лица контролирующим организацию-должника. Также предлагается дополнить данный Федеральный закон ограничениями, не позволяющими субъектам правоприменительной деятельности чрезмерно широко трактовать неформальные отношения в указанном контексте.

Ключевые слова: банкротство, бенефициар, контролирующее должника лицо, неформальные личные отношения, ответственность контролирующего должника лица

Original article

INFORMAL PERSONAL RELATIONSHIPS AS A BASIS FOR RECOGNIZING A PERSON AS CONTROLLING AN ORGANIZATION

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Abstract

Informal personal relationships, characterized by regulatory unsettledness, are a very ambiguous evaluation category, which, nevertheless, is used in the practice of establishing the status of a controlling debtor and beneficial owner. The absence of any norms in the current domestic legislation that would specify the essence of this category creates conditions for an unreasonably broad interpretation of certain provisions of the law on recognizing a person as controlling a debtor organization. The acts of the Supreme Court of the Russian Federation and the Federal Tax Service of Russia regarding the assessment of informal relationships do not provide an unambiguous answer to many controversial issues; moreover, certain contradictions are obvious in them: the tax authority, as a rule, considers informal personal relationships more broadly, as well as their signs. Taking into account this problem, the article proposes to supplement the Federal Law "On Insolvency (Bankruptcy)" with provisions specifying the list of signs reflecting the existence of informal personal relationships that should or can be taken into account when deciding whether to recognize a person as controlling a debtor organization. It is also proposed to supplement this Federal Law with restrictions that prevent law enforcement entities from overly broadly interpreting informal relations in this context.

Keywords: bankruptcy, beneficiary, controlling debtor, informal personal relationships, responsibility of controlling debtor

Introduction

For many years of Russia's post-Soviet history, there has been a rather serious problem within the framework of the law of legal entities, which is expressed in a significant limitation of the ability to identify beneficiaries of companies in cases of obvious violations of the law, especially in situations of bankruptcy or deliberate understatement of the tax base. Since 2014, this problem has been solved quite consistently. Thus, in 2014, the Civil Code of the Russian Federation [1] was supplemented by Article 53.1, which mentions "a person who has the actual ability to determine the actions of a legal entity", and further amendments were made to Federal Law No. 127-FZ of 26.10.2002 (as amended on 23.05.2025) " On Insolvency (Bankruptcy)"[2] (hereinafter referred to as Law No. 127-FZ), which introduced such a category as "controlling person of the debtor" (hereinafter referred to as KDL). In this regard, the relevant signs were also identified, on the basis of which it became possible to identify the relevant persons for prosecution. However, some problems have not been fully resolved, and one of them concerns the justification of belonging of the subject of legal relations to the category of KDL based on the presence of informal personal ties with the organization, its nominee managers, founders.

The main part

The essence of informal personal relationships is not disclosed in the current legislation, and this legal gap definitely complicates the consideration of the chosen issue. However, in the scientific literature, there are quite clear ideas about what informal personal relationships are.

These include exactly the category of interpersonal relationships that does not depend directly on the established rules and norms. And if we talk specifically about legal entities, then informal personal relationships in the context of their activities can include any communications that do not have legal regulation in the relevant official documents, arise arbitrarily, often spontaneously, and do not have a certain deadline [10, p.131].

Of course, the concept under consideration can be interpreted in other aspects, but here it is important to indicate their essence. As for individual nuances, they should be considered in relation to the chosen topic on the example of specific, legally significant documents, since we are talking about legally significant facts and circumstances of the organization's activities. But in the end, the assessment of personal informal relations boils down to finding an answer to the question of whether it is possible to determine the actions of the debtor without being in formal relations with him.

Here it is appropriate to pay attention to Law No. 127-FZ, Article 61.10 of which clarifies the concept of CDL and in Part 5 allows recognizing such status for subjects "on other grounds". This rule, in its literal meaning, gives the arbitration court and, obviously, other bodies authorized to solve law enforcement tasks, sufficiently wide opportunities for discretion and interpretation of certain circumstances as other grounds. And here, of course, not the last place is occupied by personal informal relationships.

The absence of a normative definition of the concept under consideration forces us to refer to the acts of the highest court, which is the Supreme Court of the Russian Federation (hereinafter-the Supreme Court of the Russian Federation). Resolution of the Plenum of the Supreme Court of the Russian Federation No. 53 of 21.12.2017 "On certain issues related to bringing persons controlling the debtor to responsibility in bankruptcy" [3] provides some explanations regarding the legal relations under consideration. In particular, the Supreme Court stressed the possibility of exercising actual control over the organization, regardless of the presence or absence of formal and legal signs of affiliation. And this possibility can be indicated by:

- kinship or property with persons who are part of the debtor's body;
- direct or indirect equity participation;
- direct or indirect participation in management, etc.

That is, the range of signs that somehow indicate or may indicate the presence of informal connections is actually not limited not only by the law, but also by the court.

Nevertheless, the Supreme Court of the Russian Federation stressed in this Resolution that "The Court determines the degree of involvement of a person brought to subsidiary liability in the debtor's management process, checking how significant his influence was on making significant business decisions regarding the debtor's activities."

That is, the very fact of the existence of certain relationships, including those of an informal nature, cannot be qualified unambiguously as a sign that allows the subject to be recognized as a CDL. It seems that this is one of the few restrictions that the relevant citizen can use in his favor when challenging the informal grounds for recognizing the status of a CDL.

Moreover, some formal ties with the organization, in particular, the transfer of authority to perform certain actions on behalf of the debtor, are not sufficient grounds for recognizing a person as a KDL, which is also indicated in the Resolution of the Plenum of the Armed Forces of the Russian Federation under consideration.

This position can generally be considered as generally accepted and is not disputed by either the scientific community or the legislator. We stand in solidarity with her. However, a completely different opinion regarding the possibility of recognizing a subject as a CDL due to the presence of informal relations is expressed in the Letter of the Federal Tax Service of Russia. According to the position of the specified agency, any informal personal relationships can be considered and considered as grounds for recognizing a person as a CDL, including:

- cohabitation (including a state in a so-called civil marriage);
- long-term joint service activities (including military service, civil service);
- co-education (classmates, classmates) , etc. [7].

It is noteworthy that in this letter the emphasis was placed on the possibility of establishing the relevant circumstances by operational search measures.

It is interesting that in the letter under consideration, the Federal Tax Service of Russia also mentions such a concept as" civil marriage", although de jure it is not considered as the basis for the emergence of any legally significant relations. And in this sense, there are very significant contradictions.

It is also necessary to pay attention to the fact that, for example, joint service activities can be, in essence, completely different, including not assuming the existence of any objective connections. For example, two citizens serving in the same division may not actually interact with each other, depending on the specifics of the service. Moreover, the duration of joint service may be completely different and in no way contribute to the establishment of a certain close contact that would allow us to conduct joint activities, but, based on the signs highlighted in the letter of the Federal Tax Service of Russia, this does not play a significant role. The very fact of even an indirect relationship can be interpreted as a sign of the existence of informal personal relationships inherent in the CDL.

It is noteworthy that neither in official published documents of the Federal Tax Service of Russia, nor in sources of legislation, nor in subordinate regulatory legal acts does it say in which cases such relationships can or should be regarded as not indicating the ability of a person to determine the actions of the debtor. That is, it can be hypothetically assumed that in any situation, the presence of such informal relationships can be regarded as a basis or reason for recognizing the subject as controlling.

In the literature, it is usually recognized that the Supreme Court of the Russian Federation, having outlined its position on the informal personal relations of KDL, set a higher standard of proof [9, p.153]. This circumstance can only be assessed positively. However, taking into account the position of the Federal Tax Service of Russia, the question of assessing informal relations in the context of identifying CDL remains open.

In the context of the above, it is appropriate to refer to the Definition of the Supreme Court of the Russian Federation No. 305-ES18-17629(2) of 28.03.2019, in which it was noted that given the objective complexity of obtaining direct evidence of informal affiliation by creditors that they do not have, courts are required to take into account the totality of indirect evidence that is consistent with each other. If the interested parties have made sufficiently serious arguments and provided substantial indirect evidence, which together allow us to recognize as convincing their arguments about the emergence of a group of persons, by virtue of Article 65 of the Arbitration Procedure Code of the Russian Federation, the burden of proof to the contrary passes to the creditor who filed the claim, referring to the independent nature of its relations with the debtor [4].

It is necessary to recognize that informal relations are possible both de jure and de facto within the framework of legally regulated contractual legal relations. In any case, this follows from separate judicial acts. Thus, the Thirteenth Arbitration Court of Appeal recognized that insufficiently detailed regulation of obligations is accompanied by the establishment of an informal order of relations between its parties [5]. This definitely makes it harder to understand the essence of informal personal relationships.

However. the study of some sources of judicial practice in the consideration of cases and many signs that reflect the presence of informal relationships, allows us to identify. Moreover, it is often about indirect evidence. For example, the Moscow Arbitration Court, when considering one of the cases, drew attention to a fairly wide range of indirect, but interrelated signs indicating the affiliation of two organizations. In particular, it was noted that the type of activity, contact information, and banks where accounts were opened coincided; there was a lack of property in both organizations. Another circumstance was also quite remarkable: when one of the organizations in respect of which the case was being considered ceased its activity, the second activity began; moreover, the circle of counterparties of both organizations was the same. Based on this, the court concluded that in fact there was continuous servicing of the same counterparties [6].

Conclusion

It is obvious that informal personal relationships can be established on an unlimited number of grounds, including indirect grounds. Unfortunately, neither the legislator nor the Supreme Court of the Russian Federation has fully disclosed the essence of such relations, nor their features, nor the requirements for establishing (proving) their existence. Therefore, these issues should be subject to more detailed regulation.

There is a need to supplement Article 61.10 of Law No. 127-FZ with a list of specific features that can or should be considered as evidence of a personal informal relationship between a potential CDL and the debtor organization. In addition, it is advisable to exclude the possibility of excessively subjective and broad interpretation of the norms of this article. To do this, it is also necessary to make a reservation in this article that the facts of joint service, training, and employment in the same organization that took place earlier cannot be considered as indisputable signs of the existence of informal relations precisely in the context of recognizing a CDL subject.

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