

Operative part of the judicial act · A40-142261-2012 · 27.03.2014

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Ninth Commercial Court of Appeal

Operative part of the judicial act

UNOFFICIAL COMPLETE TRANSLATION. The Russian original is the legally controlling text. This translation was prepared for documentary access and should not be relied upon as a certified translation.

Monetary amounts are shown first in Russian roubles, followed by an approximate USD equivalent calculated at the official Bank of Russia historical rate for the date of the act.

Official Bank of Russia rate used: 1 USD = 35.449400 RUB; effective date 27.03.2014.

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DIRECTIVE No. 09AP-6050/2014-AC

d. Moscow Case No. A40-142261/12 March 27, 2014

Resolution announced on 24 March 2014 Resolution made in full on 27 March 2014

The Ninth Arbitration Court of Appeal shall consist of: Presiding Judge Zh.V. Potashova, judges: Lepikhina D.E., Yakovleva L.G., while maintaining the protocol by the secretary of the court session Egunov O.S., having considered in open court the appeal of Pharmstandard OJSC against the decision of the Arbitration Court of the city. Moscow of 29.01.2014 in case No. A40-142261/2012, Judge Blinnikova I.A. (120-1410) at the request of Pharmstandard OJSC (141700, Moscow region, Dolgoprudny, Likhachevsky Promenade, etc.) 5 B) to FAS Russia (123995, Moscow, str. Garden Kudrinskaya, d. 11) on the recognition of the illegal decision of 25.09.2012 in case No. 1 14.32/306-12 with the participation of: from the applicant: Arkhangelskaya M.A. by power of attorney No. 2346 of 31.12.2013; from the defendant: Kozlov E.V. by power of attorney NoIA/32350/13 of 20.08.2013; Zaitseva N.N. by power of attorney NoIA/23365/13 of 17.06.2013;

ISSUED:

Pharmstandard OJSC (hereinafter referred to as the applicant, the Company) appealed to the Arbitration Court of the city. Moscow with a statement on the recognition of the illegal decision of the Federal Antimonopoly service of Russia (hereinafter - the defendant) of 25.09.2012 in case No. 1 14.32/306-12 on bringing to administrative responsibility, provided for in part 1 of article. 14.32 Administrative Code of the Russian Federation with the appointment of a fine in the amount of RUB 201 381 295 (approximately USD 5,680,809.69) 10 kopecks. The decision of the Arbitration Court of Moscow of 19.03.2013, left unchanged by the resolution of the Ninth Arbitration Court of Appeal of 12.07.2013, satisfied the stated requirements. The court found illegal the decision of the FAS of Russia of 25.09.2013 in case No. 1 14.32/306-12 on bringing the company to administrative responsibility under part 1 of article 14.32 of the administrative code of the Russian Federation. The decision of the Federal Arbitration Court of the Moscow District of 05.11.2013 Decision of the Moscow Arbitration Court of March 19, 2013, the decision of the Ninth

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The arbitration court of appeal of July 12, 2013 in case No. A40-142261/12-120-1410 was canceled and the case was sent for a new consideration to the Arbitration Court of Moscow. In the new consideration by the decision of the Arbitration Court d. Moscow of 29.01.2014 refused to satisfy the requirements of Pharmstandard OJSC on the recognition of the illegal resolution of the Federal Antimonopoly Service of Russia of 25.09.2012 in case No. 1 14.32/306-12 on bringing to administrative responsibility in part. 1 st. 14.32 RF Administrative Code. Disagreeing with the decision, the Company filed an appeal, in which it asks him to cancel and adopt a new judicial act on the satisfaction of the stated requirements in the case. Refers to the incomplete clarification by the court of first instance of the circumstances relevant to the case, the inconsistency of the court's conclusions set out in the decision with the circumstances of the case, the incorrect application of the rules of substantive and procedural law. At the hearing, the applicant's representative supported the arguments of the appeal, asked to cancel the decision of the court of first instance, since he considered it illegal and unreasonable on the grounds set out in the appeal, and to adopt a new judicial act on the satisfaction of the claims in the case. The representative of the defendant supported the decision of the court of first instance, disagreed with the arguments of the appeal, considers the complaint unreasonable, asked the decision of the court of first instance to leave unchanged, and to refuse to satisfy the appeal, submitted in accordance with Article 81 of the CPC of the Russian Federation written explanations, which were attached by the court to the case materials. The Ninth Arbitration Court of Appeal, having checked the legality and validity of the decision in accordance with Articles 266 and 268 of the CPC of the Russian Federation, having heard the representatives of the applicant and the defendant, taking into account the evidence examined in the case and the arguments of the appeal, believes that the judicial act should be left unchanged, based on the following. In accordance with the 1 st. 14.32 Administrative Code of the Russian Federation, the conclusion of an inadmissible agreement by an economic entity in accordance with the antimonopoly legislation of the Russian Federation, as well as participation in it or implementation by an economic entity of actions inadmissible in accordance with the antimonopoly legislation of the Russian Federation, entails the imposition of an administrative fine on legal entities - from one hundredth to fifteen hundredths of the size the amount of the offender's proceeds from the sale of goods (work, services), on the market of which an administrative offense has been committed, or from one tenth to one second of the initial cost of the subject of the auction, but not less than one hundred thousand rubles, and in the event that the amount of the offender's proceeds from the sale of goods (work, services), on the market of which an administrative offense has been committed exceeds 75 percent of the total amount of the offender's proceeds from the sale of all goods (works, services) or an administrative offense committed on the market of goods (works, services), the sale of which is carried out at prices (tariffs) regulated in accordance with the legislation of the Russian Federation - in the amount of three thousandths to three hundredths of the offender's proceeds from the sale of goods (work) services, on the market of which an administrative offence has been committed, but not less than one hundred thousand rubles. The case file shows that the implementation of the agreement between ROSTA and Pharmstandard, aimed at maintaining prices at the auction, was completed on 18.08.2010 by transferring the last payment of funds by the state customer as part of the fulfillment of obligations under the state contract dated 13.01.2010 No K-25-Ts/2-5, concluded with Pharmstandard OJSC following the results of bidding on lot No. 16 of Auction No. 312. Thus, the objective side of the imputed offense provided for in part 1 of article. 14.32 Administrative Code, are actions, the Company expressed in conclusion and participation in the period from 25.12.2009 to 13.01.2010 in an anti-competitive agreement with CJSC "ROSTA" in the territory of the city. Moscow, violating paragraph 2 of part 1 of article 11 of the Federal law of 26.07.2006 No. 135-FZ "On protection of competition".

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The decision of the Commission of the Antimonopoly body of 25.05.2012 in case No AC/16586, established the fact of violation of Pharmstandard OJSC and ROSTA P2 part 1 of the article. 11 of the Law on Protection of Competition by Conclusion and Implementation of Agreement, which resulted in the maintenance of the auction price No. 091127/001550/312 lot 16. By the decision of the Arbitration Court d. Moscow of 19.11.2012 in case No. A40-94475/2012, left unchanged by the Resolution of the Ninth Arbitration Court of Appeal of 31.01.2013, the decision of the antimonopoly body on No. ATS/16586 of 25.05.2012 was recognized as not in compliance with the law. By the decision of the Federal Arbitration

Court of the Moscow District of 22.04.2013, the decision of the court of first instance and the decision of the court of appeal were canceled, the requirements of Pharmstandard and ROSTA were denied. By virtue of Part 2 of Article 69 of the CPC of the Russian Federation, these circumstances have a prejudicial significance in relation to this case and are not proved again during the consideration of the arbitration court of this case. Thus, the fact of the applicant's commission of the administrative offence imputed to him by the defendant was proved and confirmed by the case materials. According to paragraph 2 of article 2.1 of the administrative code of the Russian Federation, a legal entity is found guilty of an administrative offence if it is established that he had the opportunity to comply with the rules and rules for violation of which is provided for administrative liability, but this person has not taken all measures depending on him to comply with them. In this case, the Company has not taken all measures depending on it to comply with the rules and norms for the violation of which is provided for administrative liability. At the same time, the case does not exist and the applicant has not provided evidence that he has no opportunity to comply with the violated rules and norms. Thus, the conclusion of the court of first instance on the presence in the actions of the Company of the event and the composition of the administrative offence provided for in part 1 of article 14.32 of the administrative code of the Russian Federation, should be recognized as legitimate. As for the procedure for bringing the applicant to administrative responsibility, the violations of the procedure that may be the basis for the cancellation of the contested decision in accordance with paragraph 10 of the Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation of 02.06.2004 No. 10, the appeal court has not established. As correctly established by the court of first instance, the disputed decision, the protocol on administrative offence was issued by authorized officials of the antimonopoly authority in the presence of evidence of proper notice to the Company about the time and place of consideration of the materials of the administrative case. Compliance with the procedure for attracting is reflected in detail in the decision of the court of first instance, the conclusions of which are recognized as relevant to the materials of the case and the norms of law. Regarding the Company's request to exclude from the evidence a copy of the list No. 950 of mail delivered to the Main Post Office (date of dispatch - 06.09.2012) submitted by the defendant (volume 3, lb. 20-21), it was rejected by the court of appeal, and a protocol decision was made. The objective document existed in the materials of the defendant and the arbitration case. This evidence was presented during the consideration of the appeal of the FAS of Russia, attached to the case materials and the decision of the Court of Appeal of 12.07.2013 on these materials was the subject of research by the Federal Arbitration Court of the Moscow District. Under the order number 8 in this list is indicated postal item with the following details: Ex. No PS/28572, No PS/28571, postal address and addressee name: 141701, Likhachevsky passage, d. 5 "B," d. Dolgoprudny, Moscow region, Pharmstandard OJSC (Moscow region), postal identifier: 12399553105825.

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In view of the above, there is sufficient evidence in the materials of the administrative case, indicating that the legal representative of Pharmstandard OJSC was duly notified of the date, time and place of consideration of the case on administrative offence No. 1 14.32/306-12, appointed on 25.09.2012 at 14.45. In accordance with Part 1 of Article 1.6 of the Administrative Code of the Russian Federation, the main conditions for ensuring the rule of law in the consideration of cases of administrative offenses and the application of administrative penalties are associated with strict observance of the grounds and procedure for bringing to administrative responsibility, which are established by law. By force. 3 st. 4.1 The Administrative Code of the Russian Federation, when imposing an administrative penalty on a legal entity, takes into account the nature of the administrative offense committed by it, the property and financial position of the legal entity, the circumstances mitigating administrative liability, and the circumstances aggravating administrative liability. In accordance with Part 2 of Article 1.7 of the Administrative Code of the Russian Federation, the law that mitigates or cancels administrative liability for an administrative offense or otherwise improves the position of the person who committed an administrative offense has retroactive force, that is, applies to the person. who committed an administrative offence before the entry into force of such law and in respect of which the decision on the imposition of an administrative penalty has not been executed. A law that establishes or aggravates administrative liability for an administrative offence or otherwise worsens the position of a person shall not have retroactive force. According to Part 3. st. 1.7 The administrative code of the Russian Federation

proceedings in the case of an administrative offence are carried out on the basis of the law in force during the proceedings in the case. In the present case, as is seen from the case file when considering the case of an administrative offence against the Company, it is established that the Company has extracted income in the amount of more than five million rubles as a result of an administrative offence, which in accordance with paragraph 2 para. 3 Notes to article 14.32 of the administrative code are determined by a circumstance aggravating administrative liability. The Judicial Board also considers the conclusions of the court of first instance that in accordance with Part 2 of Article legitimate. 1.7 The Administrative Code of the Russian Federation cannot accept this circumstance as aggravating administrative liability and be taken into account when imposing an administrative penalty. Due to the fact that the amount of administrative fine calculated in accordance with the notes to articles 14.31 and 14.32 of the administrative code (ed.). Federal law of 06.12.2011 No. 404-FZ improves the position of the person brought to administrative responsibility, then an administrative fine calculated according to the specified notes of the articles of the Administrative Code is subject to application. Federal Law of 06.12.2011 No. 404-FZ. From the materials of the case, it is seen that the initial (maximum) price of the bidding contract for lot No. 16 Auction No. 312 is RUB 671 270 983 (approximately USD 18,936,032.29) 68 kopecks. The arguments of the appeal on the illegality of the calculation of the fine imposed on the Company are based on the applicant's misinterpretation of the norms of law and cannot be recognized as justified, since the FAS of Russia, when imposing an administrative penalty, took into account the provisions of Article 1.7 of the Administrative Code of the Russian Federation, improving the situation of the person being brought to administrative responsibility and correctly applied the wording of Article 14.32, which is subject to application. Calculation of the fine, calculated on the basis of the provisions of the Administrative Code operating during the proceedings in the case, that is, the Administrative Code. Federal Law of 06.12.2011 No. 404-FZ, lawfully determined by the antimonopoly body in the amount of RUB 201 381

295,10 (approximately USD 5,680,809.69) In accordance with Part 3 of Art. 211 of the APC of the Russian Federation in case, when considering an application to challenge the decision of an administrative body to bring to administrative responsibility, the arbitration court determines that the decision of the administrative body on the

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bringing to administrative responsibility is legal and justified, the court decides to refuse to satisfy the applicant's claim. In these circumstances, the Court of Appeal considers that the court of first instance has fully and comprehensively examined the circumstances of the case and correctly applied the rules of substantive and procedural law. There is no basis for satisfying the appeal, since the arguments contained therein do not affect the legality and validity of the decision of the court of first instance. Violations of the rules of procedural law established by Part 4 of Article 270 of the CPC of the Russian Federation and entailing unconditional cancellation of the judicial act, the court of appeal has not established. Based on the above, guided by the article. 266, 268, 269, 271 of the Arbitration Procedure Code of the Russian Federation, DECIDED:

The decision of the Moscow Arbitration Court of 29.01.2014 in case No. A40-142261/2012 to leave unchanged, the appeal - without satisfaction. The decision shall enter into force from the date of its adoption and may be appealed within two months from the date of the decision in full to the Federal Arbitration Court of the Moscow District.

The presiding judge shall: JV. Potashova

Judges: D.E. Lepikhin

L.G. yakovleva

The telephone number of the court's information service is 8 (495) 987-28-00.