The Moscow Times
30 YEARS
INDEPENDENT NEWS FROM RUSSIA

Should Tenants Pay for Disposal of Office Waste?

By Inga Shakhnazarova

April 11, 2011

Inga Shakhnazarova
Associate
Salans

Russian law requires organizations to pay certain charges to cover their adverse environmental impact. The Constitutional Court has analyzed the legal nature of the environmental impact charges and has concluded that the payments are mandatory public law payments for measures taken by the state to protect the environment and mitigate the effects of economic activity, and therefore such payments are of a compensatory nature rather than a tax (Ruling No. 284-O of Dec. 10, 2002).

One form of adverse environmental impact for which a charge is assessed is the disposal of production and consumption waste. This environmental charge is to be paid quarterly by the 20th day of each month after the end of a quarter (Federal Service for Environmental, Technological and Atomic Inspection Decree No. 557 of June 8, 2006). The amount of environmental charge to pay is determined on the basis of Government Resolution No. 632 of Aug. 28, 1992 and No. 344 of June 12, 2003.

Organizations and supervisory authorities have been locked in dispute for some time over whether non-industrial organizations that lease office space in business centers and only produce office and personal waste should pay this environmental charge.

Federal Law No. 89-FZ on production and consumption waste of June 24, 1998 (the "Waste Law") defines the terms "production and consumption waste" and "waste disposal." "Production and consumption waste" means the remains of raw materials, materials, semi-finished materials, other items and products generated in the process of production or consumption, and goods or products that have lost their consumer properties. "Waste disposal" means storage or burial. In turn, "storage" means keeping the waste at facilities designed to hold waste pending burial, while "burial" means isolation of waste that is not suitable for further use in special disposal facilities to prevent harmful substances

contaminating the environment. Waste disposal facilities are specially equipped facilities for disposal of waste, such as dumps, slag heaps, etc., whose construction requires a permit and which must be entered in the state register of waste disposal facilities.

Therefore, in the sense of the Waste Law, waste disposal is a specialized activity, and the environmental charge for waste disposal should be paid by specialized organizations engaged in that activity. This approach was supported by the Supreme Arbitration Court in Ruling No. 14561/08 of March 17, 2009. Ruling No. 14561/08 has led arbitration courts almost uniformly to declare unlawful the administrative prosecution of non-waste disposal organizations for non-payment of the environmental charge for waste disposal.

However, the Supreme Court has taken a contrary view of who disposes of waste, and therefore of who must pay the environmental charge. In Ruling No. 78-Vpr10-33 of Nov. 30, 2010, the Supreme Court followed Federal Service for Environmental, Technological and Atomic Inspection Letter No. 14-07/6011 of Oct. 28, 2008, according to which the waste disposer is either the owner of the waste (for example, an office tenant) or the person carrying out storage or burial on the basis of an agreement on final disposal concluded with the owner of the waste. Notably, the term "agreement on final disposal" is not found in the statutes, although the Federal Service for Environmental, Technological and Atomic Inspection defined it in its letter as "an agreement under which the counterparty undertakes to perform all obligations with respect to waste disposal, calculation and payment of charges."

Therefore, on the one hand, the Waste Law clearly indicates that waste disposal is a specialized activity, and thus the environmental charge should be paid by waste disposal organizations, which is the approach supported by the Supreme Arbitration Court. On the other hand, following the logic of the Federal Service for Environmental, Technological and Atomic Inspection and the Supreme Court, in the absence of any agreement on final disposal, the person responsible for disposing of the waste is the owner of the waste, who is therefore obligated to calculate and pay the corresponding environmental charge. Since office tenants do not, as a rule, enter into agreements on final disposal, it follows from the reasoning of the Federal Service for Environmental, Technological and Atomic Inspection and the Supreme Court that supervisory authorities may demand that office tenants, as owners of their own waste, calculate and pay the environmental charge. In order to materially reduce this risk and be able to defend their position in court, office tenants would be prudent to ensure that their lease agreements provide for the landlord to assume title to waste generated during the tenant's activities, and for the landlord to calculate and pay the environmental charge with respect to such waste. Note, however, that under the Waste Law a tenant may pass title to hazardous waste (Hazard Class I-IV) to a landlord only if the landlord holds a license to collect, use, decontaminate, transport and dispose of Hazard Class I-IV waste.

Of course, this legal regime may yet change, given that in October 2010 the administration of environmental charges was transferred from the Federal Service for Environmental, Technological and Atomic Inspection to the Federal Inspection Service for Natural Resources Use. However, although the Federal Inspection Service for Natural Resources Use has yet to publish any clarifications such as Federal Service for Environmental, Technological and Atomic Inspection Letter No. 14-07/6011 of Oct. 28, 2008, there is no reason to believe that the Federal Inspection Service for Natural Resources Use will take an approach that

materially differs from the one followed by the Federal Service for Environmental, Technological and Atomic Inspection.