



Determining the elements of crime of illegal receipt of credit by fraud

Determinación de los elementos del delito de recepción ilegal de crédito por fraude

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ABSTRACT:

The purpose of the article is to study top-priority directions of preliminary inspection by the bodies of preliminary investigation for determining the elements of crime of illegal receipt of credit by fraud. The authors determine specific circumstances during preliminary verification of information regarding these crimes and offer a methodology of their determination with procedural means. The offered recommendations are aimed at optimization of activities of preliminary investigation bodies during initiation of proceedings and investigation of this type of crimes.

Keywords: economic activities, credit, banks, credit organizations, fraud, procedural actions, document audit, revision, reclamation and seizure of document and items.

RESUMEN:

El propósito del artículo es estudiar las direcciones de alta prioridad de la inspección preliminar por parte de los organismos de investigación preliminar para determinar los elementos del delito de recepción ilegal de crédito por fraude. Los autores determinan las circunstancias específicas durante la verificación preliminar de la información relacionada con estos delitos y ofrecen una metodología de su determinación con medios procesales. Las recomendaciones ofrecidas están dirigidas a la optimización de las actividades de los organismos de investigación preliminar durante el inicio de los procedimientos y la investigación de este tipo de delitos.

Palabras clave: actividades económicas, crédito, bancos, organizaciones de crédito, fraude, acciones procesales, auditoría de documentos, revisión, reclamación y confiscación de documentos y artículos.

1. Introduction

Among economic crimes, the large share account for the crimes envisaged by Article 159(1) of the Criminal Code of the Russian Federation – credit fraud. In 2016, the number of initiated criminal cases due to illegal receipt of credit with signs of fraud in the sphere of crediting exceeded the indicators of 2015 by 69.5 % with illegal issue of money assets for RUB 1,010.7 thousand. In 2017, the number of committed crimes of this type increased by

14 %. It is very difficult to unravel such crimes, as they are very latent (Shalyapina, 2015; Aslanyan, 2016).

2. Methodology

The methodology of studying the methods and means of determining the aspects of crimes of illegal receipt of credit by fraud is studying the practice of investigation of these crimes and theoretical developments of criminalists. Specific methodologies of investigation of any type or groups of crimes are based on determining and studying the circle of circumstances that are subject to establishment based on the construction of specific components of crime. Article 73 of the Code of Criminal Procedure of the RF gives the circumstances that are to be proved for each criminal case. Their analysis shows that they are of criminal and legal (e.g., form of guilt), criminally-remedial (requirement to determine these circumstances), criminological (circumstances that stimulate execution of crime), and criminalistic character. R.S. Belkin noted that "if Article 73 of the Code of Criminal Procedure of the RF has no data of criminal & legal, procedural, and criminological character, only one criminalistic element will remain – method of execution, method of hiding the crime, and traces" (Belkin, 2001).

The method of preparation and execution of crimes in the sphere of crediting could be determined as "totality of illegal and interconnected actions (or absence of actions) of borrower, consisting in fraud and abuse of creditor's trust by putting false and incorrect data into documents that are provided by borrower for the purpose of obtaining a credit (state purpose, commercial, consumer, mortgage, etc.), including with its usage not for direct purpose or willful evasion from payment of credit" (Meretukov, 2014) (Meretukov, 2016).

It is known that the volume of elements of criminalistics characteristic that are to be determined for the case is wider than the volume of circumstances envisaged by Article 73 of the Code of Criminal Procedure of the RF. A.G. Filippov noted that "circumstances subject to determination is not a simple mechanical combination of the object of proving and dispositions of the corresponding articles of the criminal code, i.e., there are facts and circumstances that are of large criminalistic importance but not belonging to the subject of proving for the case" (Filippov, 2013).

Based on study on criminalistic characteristic of crimes, we think that the circumstances that are to be determined for crimes of fraud in the sphere of crediting should include the following elements: methods of preparation, which created traces of criminal activities; characteristics of personalities of criminal and victim; characteristic of qualities and attributes of object of criminal activities and consequences of the crime as the most informative in the aspect of receipt of significant information.

3. Results

The main types of credits are bank, commercial, mortgage, consumer, commodity, and state purpose. Analysis of judicial and investigatory practice shows that determination, unraveling, and investigation of illegal receipt of credit with signs of fraud are complicated by absence of primary information due to closed nature of activities of banks and other credit establishments in terms of public control – which is peculiar for entrepreneurial activities (commercial and other secret); reluctance of credit establishments to report crimes (falsification, incorrect information in documents at the time or after receipt of the credit) by the borrower or willful evasion from payment of credit – especially when employees participate in these crimes. The process of execution of crime in the sphere of credit and bank activities is often accompanied by commercial bribes, illegal entrepreneurship, excess or abuse of office, etc.

Let us dwell on characteristics of certain types of credit. State purpose credit is issued by banks or other credit establishments by means of the state from the federal budget or the budget of a subject of the federation, which is distributed by the decree of the State Duma of the RF and approved by the decree of the Government or legislative body of the subject of the federation and approved by the head of the subject or order of the government of the subject of the federation.

Bank credit is issued from own assets of a bank or credit establishment. Commercial credit envisages legal relations that are related to buy-sell of goods, execution of various works, and provision of services, provision of advance, respite, or payment in installments. The creditor could be individuals or legal entities.

Commodity credit could be issued in the form of goods and precious or golden items with different qualities. Certain entrepreneurs use trusting relations with bank employees and receive credits on subsidized terms.

In the course of determination of signs of crime of illegal receipt of credit, there appears a need for inspection of documents of the legal and credit case of the borrower with participation of specialist. Also, the methods of unraveling of crimes include documentary inspections; revisions and audits; inventory of borrower's activities. It is necessary to study financial documents, tax declarations, acts of inspections of tax bodies, reports for the pension fund, etc. Also, past criminal cases or materials on refusal for initiation of criminal case, materials of departmental inspections, and financial and other documents of credit spending are studied.

Diversity of document turnover in organizations with various forms of property and types of economic and production activities leads to peculiarities of determination of traces of the studied crime. However, there are circumstances that should be established for all crimes of this category: was there active fraud by willful provision of incorrect data on the purpose of the credit by the borrower; is passive fraud possible – which consists in hiding the legally significant circumstances (content of documents, qualities of items, valuables, etc.), and abuse of trust (special trusting relations between employees of credit establishment and borrower) or provision of incorrect data during preparation of falsified documents on economic and financial state for the purpose of improving the indicators of the company's balance sheet; provision of low-quality and falsified property as a bond and documents that contain false or incorrect information that confirms availability of property; provision of credit application with incorrect information; preparation of substantiation on planned income with the usage of false or incorrect information and presenting them to the credit establishment.

The methods of collection of evidential information of illegal credit with signs of fraud, envisaged by Article 159(1) of the Criminal Code of the RF, are documentary inspections and revisions of financial and economic activities of the credit establishment and specific organizations or individual entrepreneurs who received credits.

For the purpose of determining the inappropriate spending of state credit, it is necessary to study the following documents: budget of profit and loss (determining the illegal movement of assets that were allocated from the federal budget for the articles of economic classification); documents that confirm the fact of using budget means and regarding the correspondence to the conditions of their receipt that are determined in normative & legal documents, agreements, etc.

If it is necessary to obtain additional information based on Part 4 Article 21 and Part 1 Article 44 of the Code of Criminal Procedure of the RF, it is possible to claim the materials of the credit case of the borrower from the bank for studying the following issues: is he a legal entity and what is the form of property; official title of organization or individual to whom the credit was issued; legality of state registration; list of founders of the borrower; volume of statutory capital and founders' shares; legal address, bank accounts; data on company's managers; responsibilities of officials who are authorized to conclude credit agreements; results of performed revision and audit inspections; state of balance sheet; data of incoming and outgoing documents – in particular, for incoming credit resources and outgoing economic and production operations; terms and volume of credit and its purpose.

Credit case may also include the documents containing important evidential information: application for opening a credit line, notification from tax body on opening of bank account; letter to the bank or credit organization with application for opening an account; credit agreements; business plan of borrowing organization; documents on debit debt; documents with distorted data on borrower's sales of products; documents that characterize financial and economic state of guarantor, its statute, etc.

As a rule, investigatory bodies also claim from the state registration chamber the legal case of the borrower; the data regarding the license for the specific type of entrepreneurial activities are required; from tax bodies, information on borrower's payment of taxes and his accounts in credit organizations are claimed; from the Federal anti-monopoly body – information on various deals with other organizations and companies; from the Federal service for currency and export control – the data on currency and foreign economic operations, provision of the right for export of strategically important goods, and the order of their quotas and licensing; from the bodies of the Federal Treasury of the RF – the data on financial state of the organization that received credit assets from the republican budget and federal non-budget funds; from the Customs Committee – the data on cargo movement through the customs border.

Also, information carriers – flash drives, CD, and photo and video materials - could be claimed.

4. Discussion

A large drawback of the law is absence of clear regulation of the mechanism and order of reclamation and seizure of documents and items in the course of verification of a signal regarding at the stage of initiation of a criminal case. A range of questions arises: what document is to be used for registration of reclamation – query, letter, or decree; what is the form of transfer of the claimed documents and items – direct, via mail, with mandatory protocol? The expression “seize them (documents and items) in the order envisaged by this Code” (Part 1 Article 144 of the Code of Criminal Procedure of the RF) does not clarify the legislator's intent. According to the information letter of the Prosecutor General Office of the RF dated August 20, 2014 No. 3 6-11-2014 “Regarding inadmissibility of seizure of documents and items outside of investigatory activities, envisaged before the initiation of criminal case”, seizure of documents and items could be performed only as a part of crime scene investigation. However, it seems that the order of seizure should be established in the Code of Criminal Procedure of the RF, and it would be logical to perform seizure before initiation of criminal case. These problems should be solved at the legislative level, and the corresponding article should be included into the Code of Criminal Procedure of the RF.

Participants of criminal procedure relations do not receive the status of victim, suspect, accused, representative, etc. at this stage, but, as was stated by S.A. Sheifer, “they should not be bereft of the possibility to protect their legal interests, presenting (with explanations and reports) the corresponding items and documents” (Sheifer, 1997).

Proofs are presented by passing the documents or items related to the case to the investigator (Part 2 and 3 Article 86 of the Code of Criminal Procedure of the RF). There's no constraint in this case, as the action is based on voluntariness. R.Y. Mamedov views presentation as the “method of collection of proofs, at which voluntary presentation of the object leads to its receipt by the proper subject for the purpose of its introduction into the criminal case and usage in the process of proving” (Mamedov, 2017).

Presenting proofs differs from other means of collection of proofs not only due to voluntariness but also due to the fact that investigator must accept the presented documents or items, study them, and make a decision regarding their relation to the inspected event, and then decide whether or not to include them into the materials of inspection.

According to the materials of the archive criminal cases, viewed by the course of the first instance, the initiator of presentation of documents as proofs on illegal receipt of credit with signs of fraud is credit organizations – 55.4%, bodies of financial control – 16.4%, prosecutors for materials of prosecutor inspections – 6.8%, and operative services of investigative bodies – 21.4 % (Meretukov, 2014). Materials with signs of crime, presented by the above bodies, were a reason and basis for initiation of a criminal case.

The Code of Criminal Procedure of the RF does not regulate the procedural order of presenting the materials at the stage of initiation of a criminal case. In our opinion, such order should be clearly stated in a separate norm, which will envisage not only specific

procedural actions of investigative bodies, but also the form and contents of procedural documents that are compiled in this case.

The documents of preliminary inspection belong to other documents as one of the types of proofs. Apart from documents, material evidence could be presented. The presented materials are acknowledged as other documents and as physical evidence – depending on their qualities (Orlov, 2000, Belousov, 2001, Smirnov and Kalinovsky, 2004, Kapranov, 2005). If evidential information is obtained from the contents of the documents, it's other documents, and if it is obtained from external form – it is physical evidence.

Explanations in the course of preliminary inspection of materials for the signs of fraud in the sphere of crediting could be taken from ordinary employees and officials of credit organizations and borrowing organizations. These are usually credit inspectors, members of credit committee, bond service, security service, accounting department employees, etc. Besides, explanations could be taken from the employees of the Federal Treasury, local administration, or administration of the subject of the RF on the consequences of issue of state credit, organizations and companies with which the borrower concluded deals with the assets of the credit, insurance companies, customs bodies, guarantors, and other creditors in case of provision of additional credits.

A very important aspect for receipt of evidential information belongs to inspection of documents, which is conducted in the credit establishment and with the borrower. During the inspection, the investigator decides which documents are to be seized.

5. Conclusions

Based on the above, it is recommended to conduct – during verification of the signal on issue of credit with signs of fraud – the following actions that are envisaged by Part 1 Article 144 of the Code of Criminal Procedure of the RF:

Inspection of documents (it should be one of the first actions), in the course of which their relation to the inspected event has to be determined and the issue of their seizure has to be decided.

Require the conduct of revision or documentary inspection with attraction of specialists in credit organization that issued the credit and with the borrower. The questions on the following aspects should be asked: observation of the rules of credit issue, availability of all necessary documents, presence of distorted data on the borrower's financial state in the documents, purpose of the credit, movement of credit sums after its receipt by the borrower, economic and other operations on which the credit was spent, the responsible persons who signed the agreement, persons who signed the documents for the credit.

Claim (or seize) the founding documents of the borrower.

Require explanations from employees and officials of the credit organization and borrower who participated in issue of the credit, as well as from the federal authorities, local administration, and controlling bodies, which, according to their responsibilities, participated in receipt of the credit by the borrower or have information on its further usage.

Only after determining all procedurally and criminally significant circumstances of receipt of the credit, it is possible to decide on initiation of a criminal case.

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