

THE REVIEW OF REGULATORY DOCUMENTS ON TAXATION ISSUES IN NOVEMBER–DECEMBER 2015

L.Anisimova

In the period under review, a large number of regulatory documents was approved. A part of those documents is aimed at highlighting in the Tax Code of the Russian Federation tax issues resulting from adoption of the legislation regulating new types of financial instruments and business deals, while other documents are of a technical nature and regulate, for example, taxation issues due to crisis phenomena in the economy.

The analysis of regulatory documents published in the period under review permitted to identify the issue which was not regulated by the legislation until recently, that is, the limits of a tax burden on commodity producers and, consequently, determination of admissible schemes of taxation. The above issue became particularly topical amid the crisis in the manufacturing industries.

1. Entrepreneurial activities are individuals' profit-making activities, including those through participation in the capital of separate legal entities. If burdening becomes prohibitive, activities end up. A newly created value is the only source which permits to meet mandatory payments as it is distributed without resulting in limitations on individuals as regards their property both in a situation when markets rise and fall. If in determination of mandatory payments they are not limited by the source of payment (the size of the newly created value), direct seizure of individuals' property may become feasible. Such a seizure cannot be regarded as a tax. Though the Constitutional Court of the Russian Federation failed to provide comprehensive explanations regarding the issue of limitation of sources of income, it referred to the fact that "by implication of ... constitutional provisions, taxes are established by the legislator ... as components of the system whose functioning parameters and conditions as applied to each taxpayer are largely determined by common factors specific to taxpayers' business activities ... Taxes and duties should be economically justified and not be arbitrary"¹.

On the basis of Letter No. 03-06-06-01/64851 of 9 November 2015 of the Ministry of Finance of the Russian Federation, one can, for example, analyze the differences between the positions of the Supreme Court of the Russian Federation and the Supreme Arbitration Court of the Russian Federation as regards the issue of attributing mandatory payments' sums set arbitrary by way of multiplying absolute values by a tax rate to costs. For example, such taxes include the severance tax and transport tax.

The Supreme Arbitration Court of the Russian Federation proceeds from the public law implication of the tax and believes that taxes cannot be accrued on the sums of taxes already paid. In other words, VAT and excises must not be accrued on the sum of the severance tax, included in costs related to production of minerals: "... funds which are subject to payment to the budget

¹ Decision No.1484-O-O of 1 December 2009 of the Constitution Court of the Russian Federation

for fulfilment of public-law obligations are not to be accounted for in the tax base”¹. It is a controversial position as it rules out rental payments which are a specific form of seizure of additional income not related to entrepreneurial activities and a sort of a special seizure, that is, costs in terms of the price pattern. At the same time, inclusion of taxes (and other mandatory payments, except for rental ones) in manufacturers’ costs increase automatically (which is unjustified in economic terms) tax liabilities in respect of other taxes – VAT and excises – which are eventually levied on ultimate consumers, that is, individuals.

Russian legislators are not so far aware of the fact that all the mandatory payments attributed to costs – no matter whether such payments are a paid road fare, sales tax and severance tax – are entrepreneurs’ expenditures related to their business activities and increase a tax burden on ordinary people. All taxes and mandatory payments which the legislator is seeking to impose on manufacturers not only increase the cost of production of goods (jobs and services), thus reducing their competitive edge on the global market, but simultaneously increase further a tax burden on ultimate consumers, that is, individuals as the cost of production and the sales tax base are involuntarily increased.

Efforts to “disintegrate” the revenues of manufacturers and a “public-law obligation” to meet mandatory payments means that individuals participating in business activities may be deprived of their property just on the basis of the fact they engage in such activities which situation is in conflict with Article 35 of the Constitution of the Russian Federation².

In above-mentioned Decision No. 1484-O-O of 1 December 2009 of the Constitution Court of the Russian Federation, the procedure for formation of the price (an estimated value) on minerals to be produced is explained. According to the stance of the Constitution Court of the Russian Federation, the estimated value is formed with taking into account all the costs, including those related to subsoil use, while the severance tax is an economically essential cost like other expenditures which include other taxes”, that is, in opinion of the RF Constitution Court VAT and excises can be accrued on it.

The problem related to the severance tax, as well as the transport tax consists in the fact that the size of those taxes is set arbitrary and does not depend on the size of sources of their payment³ and that means that taxes may exceed the limits of the newly created value and result in a direct seizure in favor of the budget of a portion of property⁴ amassed by the entity. Such things happen, for example, when market prices on hydrocarbons fall. As a result, an entity may become bankrupt simply by virtue of inflexibility of the fiscal policy, that is, due to a fault of legislators. So, tax and mandatory payments attributed to manufacturers’ costs (except for rental payments) do not correspond to the market and their adverse effect on development of the

1 Decision No. 11715/09 of 8 December 2009 of the Presidium of the Supreme Arbitration Court of the Russian Federation

2 Article 35 of the Constitution of the Russian Federation: “3. No one can be deprived of his/her property unless there is a court ruling. Compulsory alienation of property for state purposes can be carried out on condition of provision of a preliminary compensation of an equal value”

3 Unlike the VAT, profit tax and individual income tax which are set as a share of the newly created value (the newly created value includes remuneration and profit): the VAT, profit tax and individual income tax bases are profit and remuneration.

4 Property of entities through a system of participation in capital forms individuals’ capital.

economy is determined by the extent of such payments in manufacturers' costs.

In order to avoid a mandatory seizure of property owned by mining entities in a crisis situation, in our view it is advisable to speed up a transfer of the primary sector industries to the added income tax (AIT) having envisaged both advanced payment of AIT from the very start of the project and offset of advance payment sums against liabilities of the project's subsequent operation periods.

2. Efforts of the Ministry of Finance of the Russian Federation aimed at reviewing application of non-tax payments in the Russian Federation should be supported. Taking into account the guidelines of the Accounts Chamber of the Russian Federation provided in Letter No. 01-3599/16-10 of 6 November 2015 as regards elimination of individual violations and faults in forecasting of the 2016 federal budget revenues, the Ministry of Finance of the Russian Federation published Letter No. 02-08-10/71273 of 7 December 2015 with a request to report in accordance with the adopted form non-tax revenues of budgets of different levels. What is meant here is an effort both to form a detailed list and review the existing regulatory statutory acts, municipal statutory acts and contracts under which payments which are sources of budgets non-tax revenues are made. According to the explanations of the Accounts Chamber of the Russian Federation, the statutes regarding the above non-tax payments should envisage the procedure for calculation of such payments, their time-limits and (or) terms of payment. Tables filled in as per form published on the official Web-site of the Ministry of Finance of the Russian Federation with the type of payment and details of the approving document specified are to be submitted to the Ministry of Finance of the Russian Federation within the shortest time period. It is believed that upon the results of the review, measures will be taken to reduce substantially the number of non-tax payments. Undoubtedly, such work is critically important.

Work related to liquidation of tax evasion schemes is carried on.

3. By Decision No. 306-KG15-7673 of 27 November 2015 of the Supreme Court of the Russian Federation, use by entity-taxpayers having the status of a limited liability company (OOO) of tax privileges granted to an individual entrepreneur-taxpayer applying the regime of payment of tax on imputed income is recognized as invalid.

Limited liability companies created a scheme based on formal conclusion of trust agreements with an individual entrepreneur-payer of the single tax on imputed income. Under the above agreements, a limited liability company and entrepreneur could on behalf of each other carry out activities related to execution of purchase and sale deals with buyers of goods. It is to be noted that sales premises and cash registers rented by entrepreneurs were not separated from the lessor's sales premises. The proceeds received from sale of goods of the company and the entrepreneur were accounted for within the frameworks of cash registers' unified software. That situation permitted the lessor to minimize its liabilities as regards the profit tax and VAT as within the frameworks of the single tax on imputed income (STII) the tax unit is a physical indicator (the occupied sq. meters of floorspace), while the tax proper is paid as a fixed payment and no ledgers of revenues and expenditures to be kept by an individual entrepreneur-taxpayer were provided for by that

tax requirements. In other words, funds at the cashier's desk from activities of the individual entrepreneur applying the STII were not shown in his/ her reporting and could be withdrawn by the limited liability company.

Efficiency of some anti-tax evasion measures which have been recently developed is doubtful.

4. By Letter No. 03-03-10/69206 of 27 November 2015 of the Ministry of Finance of the Russian Federation (notification by Letter No. BS-4-11/21269@ of 4 December 2015 of the Federal Tax Service of the Russian Federation), the obligation imposed on Russian tax agents to carry out deductions from income – which a Russian individual has the actual right to – paid to foreign beneficiaries is explained. The problem consists in the fact that if the assumption that the beneficiary is a Russian resident is wrong, contractual obligations with all the consequences involved will happen to be violated due to operations of the “tax agent”. If in future it turns out that the tax agent has failed to identify a Russian resident-beneficiary, such a tax agent will be recognized as violator of the Russian tax legislation. It is believed that legal operations related to identification of actual beneficiaries under contracts of Russian residents with foreign counterparties should be carried out by tax authorities on the basis of relevant official queries to other countries' tax authorities, rather than by taxpayers and tax agents.

5. By Order No. MMV-7-14/501@ of 9 November 2015 of the Federal Tax Service of the Russian Federation, forms have been established in accordance with which foreign financial market entities have to inform Russian tax authorities of account/deposit details, that is, accounts/ deposits opened with them by Russian individuals and legal entities which are directly or indirectly controlled by nationals of the Russian Federation.

It was already stated that provisions of Article 2 (7) of Federal Law No.173-FZ¹ of 28 June 2014 may happen to be ineffective in practice as the norms set within the frameworks of the internal legislation of the Russian Federation do not regulate obligations of foreign taxpayers. It is obvious that Russian banks and Russian financial market entities do not have legitimate grounds to apply to foreign tax authorities with an official request to provide information on tax residency of shareholders of a foreign taxpayer or holder of an account with a foreign bank (such requests are acceptable only from tax authorities, while the prospect of receiving the answer depends on the internal legislation of the country which tax authorities the request was sent to and inter-government agreements on the exchange of information).

There is another conflict between the legislation regulating tax relations and that establishing an administrative responsibility of individuals and tax residents of the Russian Federation in respect of activities carried out by non-Russian nationals and non-Russian tax residents in the territory of foreign states. Responsibility of Russian nationals and Russian tax residents is established for a failure to report their speculations as regards residency of shareholders of foreign entities and holders of accounts opened with foreign financial institutions. The norms in question mandatory limit the rights of Russian

¹ Federal Law No. 173-ФЗ of 28 June 2014 on The Specifics of Financial Operations with Foreign Nationals and Legal Entities, Amendment of the Administrative Offences Code of the Russian Federation and Recognition of Individual Provisions of Statutory Acts of the Russian Federation as Void.

banks and Russian financial market institutions to attract foreign customers and impose on them functions which are to be fulfilled by tax authorities.

In the period under review, a large number of tax laws was approved. A part of those laws is aimed at highlighting in the Tax Code of the Russian Federation tax issues resulting from adoption of the legislation regulating new types of financial instruments and business deals, while other laws are of a technical nature and regulate, for example, taxation issues due to crisis phenomena in the economy.

6. Due to amendments – providing for operations to be carried out with underlying securities and derivatives assets – introduced by Federal Law No. 210-FZ of 29 June 2015 to Federal Law No.7-FZ of 7 February 2011 on Clearing and Clearing Activities, amendments aimed at specifying taxation in carrying out of operations within the frameworks of a property pool and in connection with a new financial instrument – a clearing certificate – were introduced to the Tax Code of the Russian Federation by Federal Law No.326-FZ of 28 November 2015.

A Clearing Certificate of Participation (CCP), a non-issue documentary bearer security with mandatory centralized safe-keeping is issued by a clearing institution which has formed a property pool.

In accordance with Article 24.1 (4) of Federal Law No.7-FZ of 7 February 2011 on Clearing and Clearing Activities, “a transfer of property to the property pool does not entail a transfer of the title to that property to the clearing entity”. The taxation system is consequently based on the above principle: operations related to assignment of property to the property pool of the clearing company and return therefrom, as well as operations on issuing and redemption of clearing certificates whose circulation is regulated by the securities laws are exempted from VAT. The specifics of attributing by clearing entities of VAT to costs in carrying out by them functions of a central counterparty and (or) commodity supplies operator, as well as in fulfilment and (or) ensuring of fulfillment of obligations accepted for clearing were established. In determination of a profit tax base, revenues in terms of CCP issued by a clearing entity to the holder and property received as a result of redemption thereof, as well as expenditures in terms of the property contributed to the property pool and expenditures in terms of CCP presented for redemption are not taken into account. In case of improper fulfilment (non-fulfilment) of the second part of REPO if the subject of a REPO agreement is CCP, the costs related to the first part of REPO are accepted as equal to the par value of CCP. A similar scheme is applied in determination of costs within the frameworks of calculation of the individual income tax base.

By the law in question, exempted from profit tax are:

- revenues of an entity carrying out in compliance with the federal law functions related to mandatory insurance of individuals' deposits with banks of the Russian Federation in taking of measures to maintain stability of the banking sector;
- revenues in terms of penalties paid by banks due to violation by them of measures to maintain stability of the banking sector;
- income in terms of dividends received by the entity on banks' preferred shares acquired by way of payment of those shares by fed-

eral loan bonds provided as a property contribution of the Russian Federation to the property of the entity;

- income in terms of dividends received by an entity on banks' common shares acquired by way of a swap of the entity's claims under subordinated loan agreements for banks' common shares or conversion of banks' subordinated bonds into banks' common shares;
- coupon yield on federal loan bonds transferred by the entity to banks under subordinated loan agreements and included in the entity's revenues.

The law in question determined the list of persons recognized as tax agents in payment of income in terms of dividends on shares issued by a Russian entity in cases where such an entity is an issuer of such securities and in cases where it is not.

7. Article 214.9 specifying determination of the tax base, accounting of losses and calculation and payment of taxes on operations accounted for in an individual investment account was included by Federal Law No. 327-FZ of 28 November 2015 in Chapter 23 of the Tax Code of the Russian Federation.

Calculation and payment of the tax on a tax base which took place in the individual investment account is carried out by a tax agent carrying out operations with the individual investment account of the taxpayer.

The law in question specifies wording of the provision which determines who and in which cases is recognized as a tax agent in respect of income received from the individual's different financial market operations (Article 226.1 (2), (1) of the Tax Code of the Russian Federation).

Payment of tax liabilities which arose not because of operations with the individual investment account is inadmissible at the expense of funds in the above account.

It is established that payment of the individual income tax out of the individual's income, including income under civil-law agreements concluded with the individual by a separate division of the entity is carried out at the place of location of that separate division.

8. By Federal Law No.325-FZ of 28 November 2015, amendments were introduced to Part 1 and Article 342.4 and Article 342.5 of Part 2 of the Tax Code of the Russian Federation. The amendments are aimed at protection of interests of entities producing hydrocarbons and consolidated groups of taxpayers (CGP). The minimum period for which CGP is established is increased from 2 years to 5 years. Inclusion of new participants in CGP is limited by the same period. On the one side, the consolidated tax base of the existing participants to CGP is stabilized, while on the other side the interests of the budget are protected from undervaluation of the revenue base of the budget in case of formation of a large number of new CGP or joining of new participants to the existing CGP amid the crisis.

By the law in question, amendments were introduced into the severance tax procedure. Calculation of the base value of the standard fuel was specified. On the one side, the ratio was raised from 0.15 to 0.20 against the price of combustion natural gas. On the other side, a decreasing coefficient characterizing the exports' earning capacity and being equal to 0.7317 was introduced (for the OAO Gasprom that decreasing coefficient will be effective only from 1 January 2017).

As can be seen, amendments to the severance tax are the result of involuntary compromise: for compensation of losses from reduction of the exports' earning capacity the base calculated in rubles is increased.

It is to be noted that in the period under review a large number of individual statutory acts on various concrete issues of taxation was approved. Probably, legislators did not unite those issues into a single document in order to prevent a situation where a delay in discussion of one issue may result in a delay in consideration and approval of other issues. Such "point" amendments to the Tax Code of the Russian Federation may be evidence of the fact that some deputies are seeking to upgrade their personal performance by way of increasing both the number of legislative initiatives and approved draft laws before the elections:

9. By Federal Law No.317-FZ of 23 November 2015, standard tax deduction for disabled child till he/she is 18 years old, full-time students, post-graduate students, attending physicians, interns and students before they become 24 years old and having the 1st or the 2nd disability group is increased to Rb 12,000 for parents and adoptive persons and up to Rb 6,000 for guardians, custodians and adoptive parents of such children.

By the same law, personal exemption is increased to Rb 350,000 after which level (the accrued total from the beginning of the year) standard tax deductions cease to be provided.

10. By Federal Law No.318-FZ of 23 November 2015, exempted from VAT are vision correction lens and rims, including sun-protective ones.

11. By Federal Law No.319-FZ of 23 November 2015, the wording of Article 337 and Article 342 of the Tax Code of the Russian Federation was updated as regards specification of the "type of a mineral" definition in extraction of precious metals. It is established that that type of minerals includes among other things base gold (a gold alloy with chemical elements and placer and native gold) complying with the national standard (technical conditions) and (or) standard (technical specifications) of the taxpayer-entity. Also, the definition of normative losses in mining was determined.

12. By Federal Law No.329-FZ of 23 November 2015, exempted from the individual income tax payment was income in terms of amounts of judicial expenses¹ compensated to the taxpayer on the basis of a court ruling; the time-limits of payment by individuals of property taxes (land tax, transport tax and individual property tax) were shifted for two months and other adjustments were introduced.

13. By Federal Law No.321-FZ of 23 November 2015, an option to reduce a profit tax rate for Special Economic Zone participants in the Magadan Region was envisaged.

14. By Federal Law No.321-FZ of 23 November 2015, terminological inconsistencies between the Tax Code of the Russian Federation and the patent legislation were eliminated.

¹ Compensation of judicial expenses is indemnification to a taxpayer of his/her own funds spent in the course of legal proceedings.

15. By Federal Law No.328-FZ of 28 November 2015, the procedure was updated for accounting for for taxation purposes the profit resulting from the exchange rate difference on operations with precious metals and claims denominated in precious metals that are carried out in accordance with regulatory acts of the Central Bank of Russia.

16. By Federal Law No.333-FZ of 28 November 2015 and Federal Law No.334-FZ, 90% of the after-tax profit of the Central Bank of Russia received in 2015 is envisaged to be paid to the federal budget.

17. By Federal Law No.323-FZ of 23 November 2015, for the purpose of payment of excises the procedure was established for issuing of the Certificate of Registration of an entity carrying out operations with medium distillates at its own facilities in terms of sea vessels, mixed river-sea going ships, fixed-site and flexibly fixed drill-rigs (platforms), as well as underwater structures (including wells); the taxation procedure and rates of excises on medium distillates were determined and the procedure for application of tax deductions and other was envisaged.

From among other documents in the field of taxation, it is important to single out the following.

18. In the previous review, Letter No.12-4-5/2568 of 02 November 2015 of the Central Bank of Russia as regards application of provisions of Federal Law No.173-FZ of 28 June 2014 on the Specifics of Carrying Out by Russian Financial Market Entities of Financial Operations with Foreign Nationals and Legal Entities was discussed.

By Resolution No.1267 of 26 November 2015 of the Government of the Russian Federation, that work was carried on. The procedure was determined for provision of the information on OFR to authorized authorities (the Central Bank of Russia, the Federal Tax Service and the Rosfinmonitoring) as regards registration of OFR with foreign tax authorities for the information to be transferred on deals and accounts of nonresidents, identification of foreign taxpayer-customers and other.

19. For solution of the issue – set by the Government of the Russian Federation – of upgrading the efficiency of utilization of land by way of engagement of non-utilized land into the economic turnover, generalization of judicial practice on disputes related to withdrawal of land plots from entities and individuals is highly important. It is worth paying attention to explanations of the Supreme Court of the Russian Federation as regards determination of the repurchasing price of a land plot when the owner of that land plot has the title to indemnification against losses due to withdrawal of property (The Judicial Practice Review approved by the Presidium of the Supreme Court of the Russian Federation on 10 December 2015).

20. Also, work was carried out on generalization of the judicial practice of the Supreme Court of the Russian Federation (approved by the Presidium of the Supreme Court of the Russian Federation on 25 November 2015) as regards contract disputes, corporate and debt relationship, civil cases and other. The results are prepared in the form of Judicial Practice Review No.3 (2015) of the Supreme Court of the Russian Federation.

21. In accordance with explanations No.ED-4-2/20421 of 23 November 2015 of the Federal Tax Service of the Russian Federation, documents requested by the tax authorities during the audit are to be provided signed and sealed. If documents are sent to the tax authorities as scan-copies, an electronic signature will be sufficient enough. Certification of scan-copies by signature and seals is not required. There is an exhaustive list of documents (invoices, consignment notes and other) envisaged by Table 4.9 to Letter No. MMB-7-6/465@ of 29 June 2012 of the Ministry of Finance of the Russian Federation and the Federal Tax Service of the Russian Federation which documents an entity may send as a scan-copy at the request of tax authorities.

22. By Letter No.03-07-11/64840 of 11 November 2015 of the Ministry of Finance of the Russian Federation, the procedure for calculation and payment of VAT on goods (jobs and services) was explained. VAT is accrued on the contract sum of sale of goods (jobs and services) at prices applied to deals by non-related parties. So, VAT is accrued on the total sum of rental payments even if the lessor included in rentals the expenses related to payment of the land tax. The VAT is accrued on the cost of goods (jobs and services) in general and the contract price is not broken down into component parts.

23. By Letter No.GD-4-14/18418@ of 21 October 2015 of the Federal Tax Service of Russia, the issue regarding the procedure for receipt of the information certifying the fact that a person is not an individual entrepreneur was explained. The data from the Unified State Register of Individual Entrepreneurs (hereinafter the USRIE) on the specific individual entrepreneur is provided on a hard copy and in an electronic format for a fee and free of charge, respectively.

The data regarding the fact that the person is not an individual entrepreneur is a statement certifying a lack of information on the individual in the USRIE in response to a request.

24. By Letter No.ED-4-2/20741 of 27 November 2015 of the Federal Tax Service of Russia, it was explained that as amendments to the notion of “the gambling business” were introduced by Federal Law No.198-FZ of 23 July 2013 and the above notion included services related to organization and (or) conclusion of agreements on a gambling gain with participants to risk-based gambling games, in rendering of services the sponsors of such games are obligated to carry out cash payments with utilization of cash-register equipment.

25. By Letter No. SD-4-3/20437@ of 24 November 2015 of the Ministry of Finance of the Russian Federation, controlling ratios between indicators of tax return forms and accounting statements as regards the severance tax were published.

Some documents require further elaboration, as decisions envisaged by them may be used for a tax-free withdrawal of funds out of the Russian Federation.

26. By Resolution No. 1307 of 2 December 2015 of the Government of the Russian Federation, amendments were introduced into Resolution No.803

of 01 November 2008 of the Government of the Russian Federation which approved the Rules of Provision of State Guarantees of the Russian Federation in Foreign Currency to Support Exports of Industrial Produce (goods, jobs and services).

Expediency to grant the Vneshekonombank and AO Roseximbank (a subsidiary of the Vneshekonombank) functions in respect of state guarantees provided for by Cl.2a and Cl.2b of the Rules is doubtful. In accordance with the above clauses, state guarantees of the Russian Federation are granted to secure obligations of “importers as regards payments for industrial produce (goods, jobs and services) supplied under export contracts concluded by importers with Russian exporters; importers as regards loans (to the extent of return of the sum of the loan (redemption of the principal) and (or) payment of interests for utilization of the loan) taken by importers in foreign currency for the purpose of payment for the industrial produce (goods, jobs and services) under export contracts concluded by importers with Russian exporters”.

It is not clear what importers are meant here. If it is foreign entities making purchases from Russian exporters that are meant as importers, state guarantees of the Russian Federation are provided to foreign third parties for payment of the produce (goods, jobs and services) of Russian exporters. If for some reasons foreign importers failed to pay for Russian export supplies, that would be done by the Vneshekonombank and (or) AO Roseximbank (apparently at the expense of funds from the state budget). And if the foreign importer fails to return those funds for some reasons, another Vneshekonombank’s subsidiary dealing with insurance of export supplies (at the expense of federal budget funds, too) will “come to rescue”. Eventually, export produce will be paid for minimum twice: at the moment of production and when it is supplied for export. It seems it would be cheaper to give such produce (goods, jobs and services) to a foreign importer free of charge. ●