

Court practice on tax disputes

edition №31



1. The Company against the State Revenue Office of Esil district of Astana State Revenue Department

Instance: The Supreme Court

Hearing Date: May 2016

Subject of the dispute: VAT refund

Test period: 2007 - 2008

The amount of additional charges: ~ KZT 7 bln

Facts:

The tax authorities performed a tax audit of the transportation Company on confirmation of VAT claimed for refund from the state budget.

Based on the tax audit act, VAT was refused for refund due to the following reasons:

- 1) lack of marks of the customs authorities on the additional copies of waybills (the “waybills”);
- 2) the Customs Control Committee provided the information on a smaller number of carriages used for international services as compared to the Company's data;
- 3) expiry of the statute of limitation at the time of audit completion.

The Company provided the following counterarguments:

- 1) the tax legislation does not require availability of marks on the waybills;
- 2) the law does not require confirmation of international carriage turnovers by the customs authorities;
- 3) VAT refund application was filed within the statute of limitation.

The position of the court:

The court supported the position of the Company stating that:

- 1) for the purpose of Article 244 of the Tax Code, the waybills confirm the fact of international carriage, regardless of availability of marks of the customs authorities;
- 2) the Tax Code does not contain any provisions , based on which insufficient data provided by the customs authorities on number of carriages may serve as a basis for non-confirmation of VAT refund;
- 3) international carriage is confirmed by the waybills, which were fully provided by the Company during the tax audit;
- 4) the Company submitted the application on VAT refund within the statute of limitation, which is confirmed by the acceptance of VAT refund claim for consideration and launch of the tax audit by the tax authorities.

The position of PwC:

- 1) According to Article 244.2 of the Tax Code, carriage shall be considered as international if this carriage is supported by standard international carriage documents as set out in paragraph 3 of corresponding Article. Under this paragraph, the carriage of goods in international and interstate rail is supported by waybill of a single sample which includes, *inter alia*, additional copies of waybill as per Article 7.1 of the Agreement on International Transportation of Goods by Rail (the “Agreement”).
- 2) The Agreement does not contain any instructions on marks of the customs authorities to be put on the waybills. In our view, the tax authorities incorrectly applied references to the rules on preparation, formation and use of documents for control of delivery of goods. Thus, these rules do not regulate preparation of the waybills, but rather contain requirements for preparation of freight bills, which, under the Agreement, should be treated as different documents.
- 3) Article 224 of the Tax Code and Article 25 of the Law on introduction of the Tax Code do not contain any requirements for confirmation of international transportation by the customs authorities. International transportation is confirmed by a waybill of single sample / additional copies of waybills.

2. The Company against the State Revenue Office of Mugalzhar District of the State Revenue Department of Aktobe region

Instance: The Supreme Court

Hearing Date: April 2016

Subject of the dispute: royalty, Mineral Extraction Tax ("MET")

Test period: 2007 - 2010

Type of checks: comprehensive tax audit

The amount of additional charges: ~ KZT 354 mln

Data:

The tax authorities assessed additional MET, royalty and late payment interest to the Company engaged into the extraction of gold ore. The reason was the non-payment by the Company of MET and royalties on copper extracted together with gold and silver.

The tax authorities believe that the copper contained in the extracted gold-containing ore is associated mineral and, therefore, should be regarded as a taxable object for royalty and MET purposes.

The Company considers that the extraction of copper from ore concentrate, which is used for processing is unprofitable. Therefore, copper should not be regarded as a commercial production.

The Company pays royalties only with respect to minerals covered under the subsoil use contract (only gold and silver). At that, there are no other minerals stipulated by the contract. The contract envisages royalty rates for extraction of gold and silver and, therefore, the Company has no obligations to pay royalties and MET for copper.

Lower courts supported the position of the Company stating that the copper produced together with gold and silver is not subject to taxation, because it is not extracted from the ore technologically.

The position of the court:

The Supreme Court canceled the lower courts' decisions.

The Supreme Court stated that under the Tax Code, royalties are paid separately for each type of mineral produced in Kazakhstan. At that, MET is paid for the physical volume of mineral resources contained in mineral raw materials (taxable amount of redeemed reserves).

The Supreme Court stated that the state commission on mineral resources under the Ministry of Geology approved reserves of gold deposits of the Company, including copper reserves.

Letter of the Committee of Geology and Subsoil Use of the Ministry of Industry and New Technologies confirmed that the extracted copper is not "associated component", but rather a mineral.

The position of PwC:

Since under the tax legislation royalty / MET are paid by subsurface users separately for each type of mineral produced in Kazakhstan, we recommend paying attention to explanatory letters of the authorized

bodies, norms of sectoral legislation (the Law of Subsoil and Subsoil Use, etc.), types of minerals approved by the Protocols of the State Commission on mineral resources, as well as associated minerals being extracted.

Artem Petrukhin, Partner
petrukhin.artem@kz.pwc.com

Mikhail Kovalenko, Manager
mikhail.kovalenko@kz.pwc.com

Askar Makhmetov, Senior Consultant
askar.makhmetov@kz.pwc.com

34 Al-Farabi Ave.
Building A, 4th floor
Almaty, Kazakhstan, A25D5F6
Tel.: +7 (727) 330 32 00
Fax: +7 (727) 244 68 68
www.pwc.kz

Dana Tokmurzina, Director
dana.tokmurzina@kz.pwc.com

Bayan Utegenova, Manager
bayan.utegenova@kz.pwc.com

15/1 Kabanbay batyr Ave.
Business Centre "Q2", 4th floor
Astana, Kazakhstan, Z05M6H9
Tel.: +7 (7172) 55 07 07
Fax: +7 (7172) 55 07 08
www.pwc.kz