

Some Topical Legal Issues of the Taxation in the Field of Subsoil in the Republic of Kazakhstan

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Abstract: This article examines the legal issues of the tax treatment provided by the state to the subsoil users within last 20 years.

Key words: Taxation in subsoil use area • Tax regime • Preferences • Retroactive tax law and tax law

INTRODUCTION

In current conditions of economic development in Kazakhstan, certain legal issues arise between state and subjects realizing investment activities in the field of taxation for subsoil use. In this regard, there is a necessity for resolution of those legal issues in the field of taxation for subsoil use.

Reviewing the history of considered subject, it is possible to claim, that while signing subsoil use contracts in the course of formation of independent Kazakhstan, foreign investors actively started to develop major oil fields, hoping for the state guarantees in regards of stability of the tax legislation. Besides, foreign investors were not aware of possible legal issues in this field of subsoil use. However, practice revealed some problematic issues foreign investors had faced in the calculation and payment of the excess profits tax. The problem is that the tax authorities of the Republic of Kazakhstan started to make an additional tax charges on excess profits in the course of tax audits. Obviously questions regarding such additional tax charges have aroused.

As we know, generally subsoil use contracts for the largest oil fields of Kazakhstan were concluded at the beginning of the 90's. In that period in the Republic of Kazakhstan there was a single law on taxes and certain number of subordinate regulatory legal acts, while legal provisions for the subsoil use contracts relating to the tax matters had general and referential character.

Many legal norms regulating legal relations in this field have not been provided not by subsoil use contracts nor by the current tax legislation. And therefore, as a result lots of contradictory legal issues have occurred. Thus such legal issues have been resolved on the basis of precedents, although we are well aware that the case-law principles do not apply in Kazakhstan. But in practice it turned out that foreign investors were forced to solve these legal issues by appealing in the courts of Kazakhstan against those illegal actions from tax authorities. Certainly, it is possible to give some arguments in justification of this case. It's a known fact, that after obtaining independence by the country, there was a rupture of economic relations between the former USSR republics, as well as labor outflow to those republics and many other factors that have negatively affected full and adequate solution in regards to those legal issues. By their appeals to the RK courts, foreign investors have started the development process in regards of solutions to those problematic issues. We will analyze in a historical context, how issues concerning calculation of excess profit tax have been resolved by the judicial authorities.

Initially, calculations of excess profit tax were regulated based on the law on taxes, before the acceptance of the tax code in 2002.

Excess profit tax was set out for the first time in the law on taxes in early 1995 [1]. According to this law, the excess profits tax payers are all subsoil users: firstly,

engaged in the extraction of mineral resources, secondly, the processing of technogeneous structures, thirdly, receiving additional income from activities production in relatively better natural conditions or implement its crude production in relatively better market conditions. The law "On taxes and other obligatory payments to the budget" contained only general provisions on the form of tax payments and definition of excess profits tax payers. Only subsequently this tax law has been amended so that the rate of excess profit tax has been determined. For a long time there was no regulatory legal act that could regulate issues concerning calculation and payment of excess profit tax. The reason is that at the stage of exploration and development of oil field, such issues has not been addressed as operational issues were more vital.

Only, on December 29, 1997 the Tax Committee of the Ministry of Finance of the Republic issued an order on approving Instructions N41 "On taxation of subsoil users" [2], which have determined the method of calculation of the excess profits tax. It was necessary due to the fact that based on the forecasts from specialists, mining companies started to receive excess profit. At this time, the requirements on tax reporting for excess profit tax were approved. Those requirements were negotiated with the taxpayers, who received advice on the calculation and payment of excess profit tax. After that tax authorities started tax inspections concerning correctness, accuracy and validity of calculations and payments of excess profit tax. The results of such inspection showed that taxpayers incorrectly calculated excess profit tax.

Based on the results of such tax inspections, question regarding contradictory interpretation of tax legislation norms has occurred. The results of complex inspections made for excess profit tax during the period of 2000-2004, were significantly different compared to the results of similar inspections made in 2005.

Also it was identified that formulas of calculation for excess profit tax defined in annual (since 2000) rules of the tax reporting approved by tax authorities contradict with the formulas applied in the above mentioned inspections. Tax officials used a new method of calculation for the excess profit tax in regards of subsoil use contracts. In accordance with norms of current tax legislation of that time and provisions of oil contracts, the established practices of calculation for excess profit tax were made according to the following scheme:

Income after CIT payment (corporate income tax payment) - tax on dividends - excess profit tax, paid for previous year = net income x excess profit tax rate = the amount of excess profit tax.

This formula has been defined in the instructions N41 "On taxation of subsoil users" and also in the rules of declarations on excess profit tax.

In the middle of 2005, tax authorities of the Republic of Kazakhstan have accepted the departmental act, which considers another order of calculation for the excess profit tax. That order is based on the determination of net income. This act has been developed based on the para 30 of the Article 5 of the Tax Law, which set out that net income is taxable income, net of income tax payable on this income. In this regards excess profits tax must be calculated as follows:

Income after CIT payment = net income x excess profit tax rate = the amount of a excess profit tax.

Tax authorities believe that in case of calculation of net income subsoil users unreasonably deducted the amount of the tax paid on dividends and the amount of excess profit tax, paid for previous year. They motivated it with the reference to the para 30 of article #5 of the Tax Law, which defined net income as the income minus only corporate income tax. It must be taken into consideration that in subsoil use contracts, the method of calculation is defined in regards of the excess profits tax.

Nevertheless tax authorities, while developing and putting into practice the new methodology to calculate the excess profits tax, forgot to consider significantly changing economic balance of interests of subsoil users and the state. Tax authorities, at all, forgot, norms of article 94 of the law on taxes where are explained requirements for payment of taxes and other mandatory payments (a tax mode), set for subsoil users, are defined in contracts on subsoil use between the subsoil user and the competent authority authorized by the government of the republic. According to Art. 94-3 of the law on taxes the tax mode set by the contract on subsurface use, concluded in accordance with the established procedure and passed mandatory tax expertise, works steadily before the termination of period of validity of the contract.

Also it is necessary to mark that provisions of the contract on subsurface use of rather tax mode have a priority before norms of the law on taxes and the subsoil user is obliged to pay taxes and other mandatory payments to the budget according to the tax mode set by the contract on subsurface use. But, despite it judicial authorities always on the side of tax authorities. And in this regard it is possible to tell that tax disputes arise most often on such questions as stability of a tax mode.

In addition, there are a number of issues that also need to be resolved – distribution of a retroactive effect of the tax law in case of change and addition acceptance in operating tax the legislation where it is provided certain tax preferences and privileges, monitoring applications on transfer pricing, problems of calculation of a tax on excess profit in connection with acceptance of tax laws. In 2006 it is accepted the normative resolution of the Supreme Court of the Republic of Kazakhstan on some questions of the taxation of subsoil users which have been clearly and unequivocally stated questions provided by the state guarantees the stability of the tax regime of the calculation of the tax on excess profits. There was an attempt to resolve controversial legal questions in this area is required to decide tough legal conflicts in the applicable tax laws. In this resolutions judicial authorities confirmed, validity of implementation by tax authorities of monitoring in case of use of the transfer prices regardless of provisions of contracts on subsurface use about stability of a tax mode. As well as, letters of organs of tax service of explanatory character concerning origin, execution and extinctions of tax obligations don't belong to regulations and courts when reviewing tax disputes have no right to apply them. Such clarification and comments are subject to an assessment court taking into account their compliance to norms of the tax legislation [3].

In normative resolutions, it is specified, on affairs with involvement of the taxpayers realizing the activities based on contracts on subsurface use, concluded in the period of action of the law on taxes and set stability of a tax mode, applicable substantive tax laws in effect on the date of entry into force of such contracts. In this regard, there were legal situations when provisions of the contract on subsurface use contradict provisions of the tax legislation existing for date of its coming into effect very often began to arise.

In this regard there is certain and requiring the permission a question: by what norms shall be guided judicial authorities in case of permission of tax dispute if provisions of the contract on subsurface use concerning a tax mode enters in a contradiction to norms of the tax

legislation existing for date of its coming into effect?. In specified resolutions it is provided that norms of the tax legislation are subject to application. Though in the current tax law, contracts on subsurface use until their inference shall pass mandatory tax expertize. In this contract a mandatory order it is specified questions of a tax mode. And in this regard it is supposed that for the errors of the state allowed in case of carrying out tax expertize of contracts on subsurface use responsibility it is laid to the subsoil user. After analyzing on these issues, we come to a definite conclusion about the need to undertake a thorough scientific analysis, taking into account the Tax Code in the period since 2000 -2009 years and other subordinate legislation in this field.

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