

New in tax court practice of the Supreme arbitrazh court and Constitutional court of the Russian Federation

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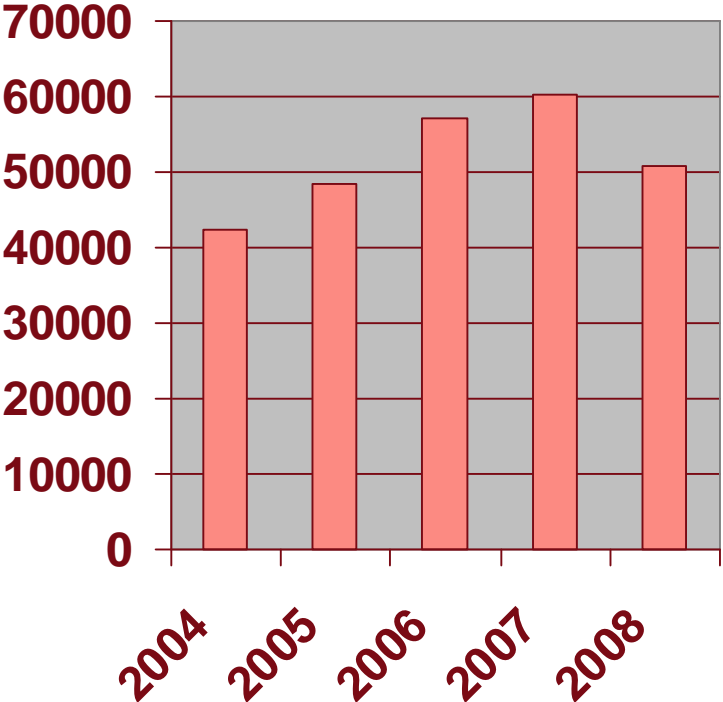
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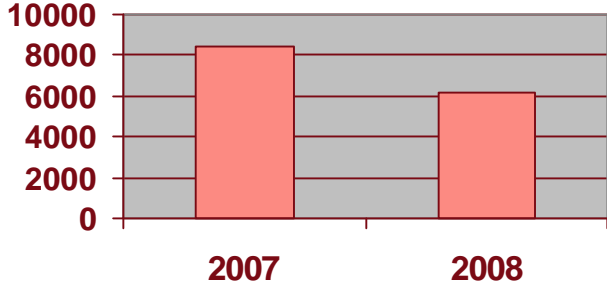
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Disputes' quantity



Quantity of disputes on a declaring tax bodies acts as lawful of tax bodies (according to Supreme arbitrazh court of Russian Federation)



Quantity of disputes related to application of the tax laws considered by Moscow arbitrazh court



Quantity of disputes related to application of the tax laws considered by Federal arbitrazh court of Moscow district

The reasons of decrease in quantity of disputes

Changes in the VAT legislation

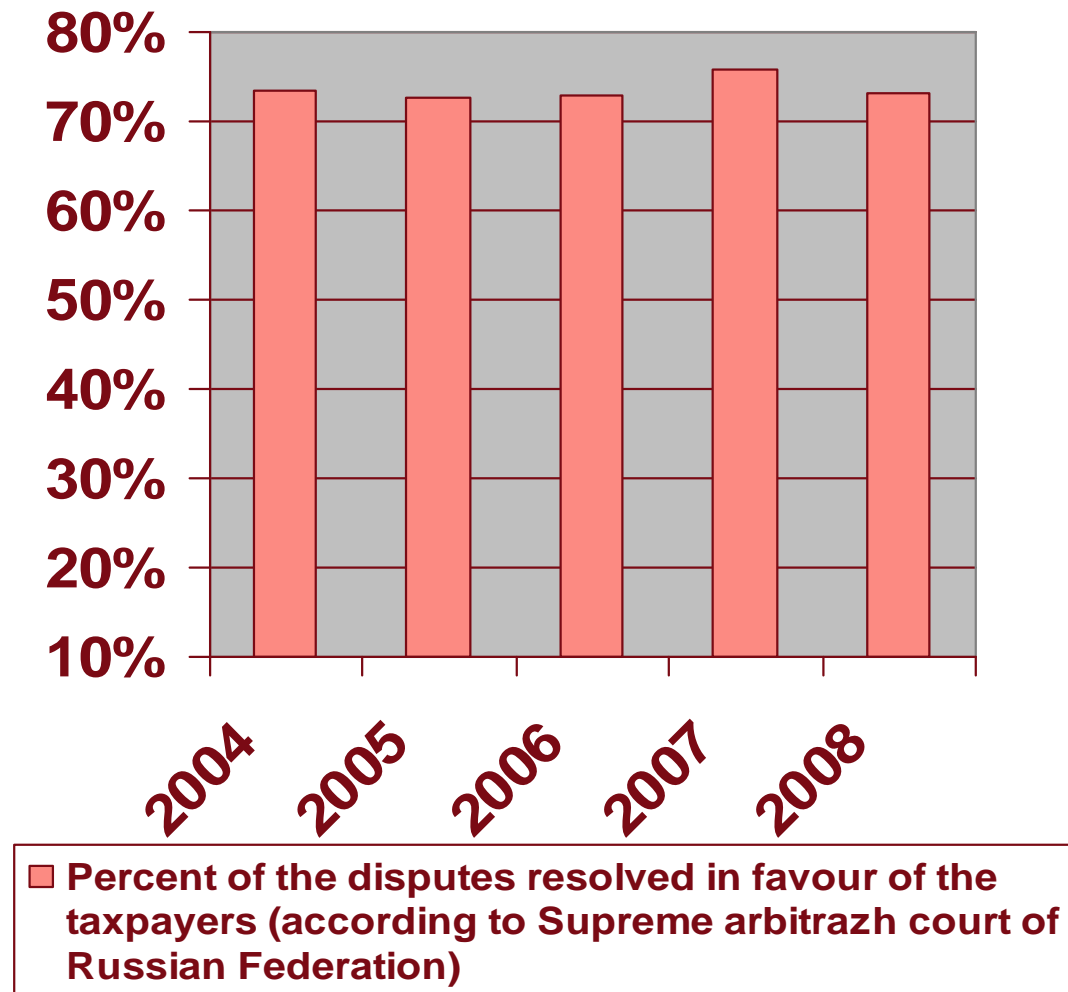
- Reducing the quantity of tax returns from 24 to 4

Changes in the legislation on tax administering:

- Reducing the authorities of tax bodies during the tax audits
- Direction to pre-judicial disputes resolution
- Changes in tax authorities position

THE MOST COMPLICATED DISPUTES ARE IN COURTS

Taxpayers' wins (in percentage)



Tendencies

Transition from the form to an essence

Main issues

- Economic justification
- VAT refund
- Counterparties that do not fulfil their tax obligations

The increasing attention of courts to evidences

Increasing role of pre-judicial stage

Transparence of the arbitrazh courts' activity

Conclusions

- Court practice develops in a proper way. In long-term perspective everything should be stabilized;
- However currently it is a beginning, therefore there are problems

Tax control

Background

- Individual entrepreneur claimed professional tax deductions;
- Tax authorities requested supporting documents during the desk audit of PIT return;
- Individual entrepreneur asked for tax authorities' explanations regarding the demand's lawfulness;
- The answer was that professional tax deductions can be claimed basing on the basic source documents only;
- Individual entrepreneur contested the demand's legality to court.

Tax body's position

- The demand is legitimate and shall be fulfilled

Supreme arbitrazh court's position

- Russian Tax code abridged tax authorities' rights in requesting documents during the tax audits starting the 1st of January 2007 (art. 88 of Russian Federation Tax code – hereinafter RTC)
- The right for professional tax deductions is not the tax benefit. Chapter 23 of the RTC does not also abuse the taxpayers to submit requested documents
- The tax office did not provide the evidence of mistakes of contradictions in the field tax return



According to the revised version off art. 88 of RTC there are no grounds fir requesting the explanations and basic source documents

Source: Resolution of the Presidium of the Supreme arbitrazh court of the Russian Federation (hereinafter – SAC RF) № 7307/08 dated 11.11.2008

Tax control

Background

- Superior tax agency assessed additional tax, interests and fine following the results of the tax audit
- All named taxes were assessed in all episodes during the first tax audit. But the court claimed the decision taken upon to results of the first tax audit illegal at all points

Tax body's position

- Tax RTC permits charging additional taxes by the superior tax body during the repetitive tax audit even if the first tax audit's results on the same issues were declared as unlawful

The Constitutional court's position

- Superior tax agency is allowed carrying out repetitive tax audit even if there are any court rulings upon results of the first tax audit
- Nevertheless superior tax body is prohibited to issue an act changing taxpayer's rights and responsibilities defined by the court decision in force that was issued of the same taxpayer and lower tax body, on the basis of research and estimation of the same actual circumstances which were a subject of proceeding

Source: Resolution of the Constitutional court of the Russian Federation № 5-P dated 17.03.09

Tax control

Background

- Taxpayer is obliged to represent tax return in electronic form;
- Electronic copy of tax return was provided later than the set term
- Hardcopy of the tax return was provided on time.

Tax body's position

- Bringing to responsibility according to Article 119 of the RTC

SAC's position

- Breaking the order and form of the tax returns submission does lead to the offence stipulated by Art. 119 of the RTC
- It is not allowed to expand application of the tax responsibility's provision, including on reasons of logic and expediency of such expansion



No grounds for bringing to the responsibility

Source: Resolution of the presidium of the SAC RF № 11482/08 dated 03.02.2008, № 11500/08 dated 17.02.09

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Tax control

Background

- The company that is the tax agent has accidentally paid PIT to the wrong local budget

Tax body's position

- The tax agent did not fulfil its obligation as excessive tax payment of the tax to one local budget cannot compensate for loss of another local budget
- Three court instances have supported tax body's position

SAC's position

- Company has withheld and transferred PIT
- The RTC does not provide the responsibility for breaking of the order of transferring the withheld PIT



No grounds for bringing to the responsibility

Source: Resolution of the presidium of the SAC RF № 14519/08 dated 29.01.2009 (is not published yet)

Tax control

Background

- The company has addressed to the tax body with inquiry on issuing the certificate of absence of debts on tax payments
- Issued certificate reflects the debts under the tax body decision being challenging in the court

Tax body's position

- The fact of contesting the tax body's decision is does not exclude existence of the challenged tax arrears

SAC's position

- Contesting the tax body's decision in itself cannot testify the falsity the data contained in the latter
- The data on tax appears contained in the tax body's decision shall be deemed as correct up to the recognition of this decision as unlawful under the set procedure

Source: Resolution of the presidium of the SAC RF № 10405/07 dated 08.04.2008

Relations with contractors

Background

- individual entrepreneur purchased goods, claimed VAT to offset. Costs are considered for deduction PIT and UST purposes.
- Upon results of the tax audit has been found that the contractor is not registered In United state register of legal entities and Tax authorities

Tax body's position

The documents field in confirmation of expenses and VAT deduction are not authentic

!REALITY of the transaction is not contested

- Expenses are not confirmed documentary
- VAT deduction is claimed on the basis of VAT-invoices contradicting Art. 169 of the RTC

SAC' position

- Requirements of the Federal law "On statutory accounting" concern not only full indication of all data but also authenticity of said data
- According to the Russian Federation Civil code entities that did not past state registration as legal entities do not acquire legal capacity of legal entity
- Actions of such entities are not recognized as deals



If the counterparty is not registered with the United state register of legal entities, there are no grounds to accept the expenses and VAT deduction

Source: Resolution of the presidium of the SAC RF № 7588/08 dated 18.11.2008. Similar conclusion: Ruling of the SAC RF on refusal in transfer of dispute to the Presidium of the Supreme arbitrazh court № 4048/08 dated 14.04.2008

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Relations with contractors

Background

- The company acquired oil not from the extracting companies, but through the trading companies (“traders”)
- VAT sums paid are claimed for deduction

Tax body’s position

- The company had an opportunity to acquire oil without mediators but performed economically unreasonable deals by increased price
- Traders in fact did not participate in the oil transactions
- VAT - Invoices contradict Art. 169 of the RTC

! The fact of oil delivery is not contested



VAT deduction is rejected.
Additional VAT, interest and fines
are charged.

SAC’s position

- Increasing of the Company’s tax deductions on the account of participation in trader deals does not mean itself receipt of unjustified tax benefit
- Each deal participant is responsible for his tax obligations. Tax body and courts do not content the fact of tax payments by traders
- RTC does not contain provisions allowing to estimate the VAT payments from the point of their economical reasonability, rationality and efficiency
- Another approach would mean violation of VAT assessing order set by RTC on the ground of non-reasonability of relations between companies which is not allowed in public legal relationship



Taxpayer position is supported

Source: Resolution of the presidium of the SAC RF № 6273/08, 6272/08 dated 28.10.2008

Profits tax

Background

- The taxpayer indicated expenses incurred in particular tax periods as losses of the previous years
- The reason was late submission of supporting documents by the counter-parties
- Taxpayer: there is no obligation to submit adjusted calculations as it did not lead to reduction of taxes

Tax body's position

The taxpayer's position of taxpayer has lead to reduction of tax base of the audited period



Arrears, interest and fine are charged

SAC's position

- Case's documents evidence lack of losses at the tax periods where the expenses were incurred
- According to Art. 272; 54 of RTC due to the common rule expenses must be accounted within the period they related to. So if mistakes are found, re-accounting is executed within the period mistakes were occurred.
- Art. 265. 2.1. of RTC should be applied within the current period only if the period of argued expenses appearance is unknown
- In any other events the taxpayer should to correct the data of the previous tax periods

Source: Resolution of the presidium of the SAC RF № 4894/08 dated 09.09.2008

Profits tax

Background

- The company which has the own legal department engaged other companies for rendering legal services
- Expenses accounted for the profits tax purposes

Tax body's position

- Expenses are unreasonable as the company there has similar specialists
- Expenses do not correspond with the cost of advocates' services in the region (Ural district)
- Evidence of reasonability of legal representation expenses must be presented by such a party



The whole amount of the expenses is excluded from the tax base

SAC's position

- Expenses caused by the necessity of company's activity suppose their economic justification
- The right of checking economic reasonability of the taxpayer's decisions is not granted to tax bodies
- There are no grounds to recognise expenses as not justified by the taxpayer has its own specialists
- Foundations for checking market prices according to the art. 40 of RTC are not found out



Excluding of expenses is unlawful

- * Moreover art. 40 of Tax code of Russian Federation does not provide for cancelling whole amount of expenses from tax base

Source: Resolution of the presidium of the SAC RF № 14616/07 dated 18.03.2008

Profits tax

Background

- The taxpayer concluded several loan agreements with foreign legal entities (participation share is more than 90%)
- For the purposes of thin capitalization rules the taxpayer demarked loan obligations according to each agreement
- All interest were deducted for the Profits tax purposes

Tax body's position

The amount exceeding the maximum interests on controlled debts accounted by joint amount of debts should be excluded from the expenses

SAC's position

Existence of the taxpayer's debts before the foreign company more than three times exceeding a difference between the sum of actives and amount of loan obligations, should be established irrespective of such obligations are issued by one or several loan contracts

Source: Resolution of the presidium of the SAC RF № 15318/07 dated 01.04.2008

Uniform social tax

Background

- The company was reorganized in the form of transformation
- UST was accounted by regressive tax rates

Tax body's position

- There is no right of regressive tax rate application as due to transformation of the company the new legal entity appeared



Reduction of UST is found

SAC's position

- The key issue for the determining of UST tax base is labour relationships between the taxpayer and employees
- According to Russian Labour code labour relationships continue with the agreement of the employee
- Payments and rewards are essential conditions of the labour contract



Payments executed on the basis of the labour contracts with employees concluded before reorganization (in any form) must be taken into consideration while defining the UST tax base

Source: Resolution of the presidium of the SAC RF № 13584/07 dated 01.04.2008

Uniform social tax

Background

- The company concluded outsourcing contracts with related parties (more over than 10)
- Every contractor implemented simplified tax system and did not pay VAT
- Actual circumstances are the following
 - ✓ United founder
 - ✓ United address
 - ✓ Establishment upon of opening of new shops of a network
 - ✓ Lack of property and other business activities, etc.

Tax body's position

- Outsourcing contracts are formal
- The only purpose of their conclusion is tax benefit from reduction of expenses for UST payments

Source: Resolution of the presidium of the SAC RF № 12418/08

SAC's position

- The tax body's position is supported
- Dispute is sent for new consideration

Court expenses compensation

Background

- The company carried out expenses for the court representative in the amount of 40 000 dollars in the dispute with tax bodies

Tax body's position

- Court expenses should be compensated but in small part of it. Everything else is unreasonable
- Two court instances supported the tax body's position
- Cassation instance upheld the requirements of the Company in the full amount (North-west district)

SAC's position

- In the ruling to transfer of the case to the Presidium three judges pointed out that cassation court's resolution is illegal and due to cancel
- Although by the results of case's consideration the resolution of the Federal arbitrazh court of north-western district is left in force. Expenses are compensated in the full amount
- Text of the resolution is not published yet

Source: Resolution of the presidium of the SAC RF № 6284/07 dated 16.02.2009 (is not published yet)

Court expenses compensation

Background

- The tax body appealed to the court with the claim on collecting of arrear and interest from the taxpayer. The tax body's claims were upheld
- The tax body appealed to the court for collecting of court's expenses from the taxpayer

Courts' position

- Tax body's requirements were rejected as the tax body appealed to the court in fulfilment of its functions, expenses for which are compensated from by federal budget
- Chapter 17 of RTC also does not contain the possibility for executing the court expenses from the taxpayers

SAC's position

- SAC adopted a resolution on costs court's collecting from the taxpayer in favour of tax body
- Text of the resolution is not published yet

Source: Resolution of the presidium of the SAC RF № 14278/08 dated 11.01.2009 (is not published yet)

Thank you for your attention!

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