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SEPARATE PROBLEMS OF LAW ENFORCEMENT PRACTICE OF TAX AUTHORITIES, ARISING IN THE COURSE OF MONITORING OVER THE CALCULATION AND PAYMENT OF VAT

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The article gives an overview of specific problems of law enforcement practice of tax authorities arising from the conduct of control over the calculation and payment of VAT. The author attempts to identify the causes of conflict between taxpayers, payers of VAT and tax authorities and makes his own conclusions.

Keywords: monitoring, tax, VAT, conflict, tax authority, taxpayer, tax audit.

Law-enforcement practice of tax authorities in the field of monitoring over compliance with the legislation on taxes and fees in calculation and payment of VAT is the most extensive and is characterized by a high degree of conflictness and refutability. This is largely due to the complexity and contradiction of legislation on the issues of calculation, collection and payment of VAT and often requires a separate explanation by tax authorities' professionals and an interpretation by the courts of higher instances.

Monitoring of compliance by taxpayers, payers of fees, tax agents the legislation on taxes and fees in part of the calculation and payment of VAT is exercised by means of carrying out of cameral and field tax audits. Cameral tax audit is conducted on the basis of tax declarations (calculations) and documents submitted by a taxpayer, payer of fees, tax agent in accordance with paragraph 1 of article 88 of the Tax Code of the RF (hereinafter TC RF) [2]. Cameral tax inspection is carried out

by the authorized officials of a tax authority in accordance with their official duties without any special decision of the head of the tax authority. The duration of the audit is three months from the date of submission of a taxpayer's tax return (VAT calculation) in a tax authority (article 88, paragraph 2 of the TC RF). The start date of cameral tax audit is specified in an audit certificate. In carrying out of a cameral tax audit of VAT calculation, significance is represented by:

- previously submitted tax returns (calculations);
- revised tax declarations(calculations);
- documents previously received (compiled) in the course of field and cameral tax audits, other measures of tax control;
- applications and messages received from the taxpayer and third parties;
- materials submitted from law-enforcement and other bodies, from extra budgetary funds, including in accordance with departmental agreements with the FTS of Russia, regional departmental agreements, etc.;
- other documents and data received by a tax authority on legal grounds.

Cameral tax audits are carried out in the following order:

1) Entering of submitted by a taxpayer tax returns (calculations) data into an automated information system of tax authorities (hereinafter referred to as AIS "Tax"). Taxpayers can submit information both on paper and in electronic form through telecommunication channels. This stage includes an automated arithmetic control in respect of all submitted calculations and formation of errors protocols. Protocols are stored in a database and used in the work by the division for cameral audits.

2) Automated cameral monitoring carried out by the division for cameral audits in respect of all submitted tax returns (calculations).

3) Registering the results of tax audit in accordance with article 100 of TC RF.

In the event of violations of the legislation on taxes and fees in the area of VAT calculation a protocol shall be drawn up, in accordance with chapter 21 of TC RF governing the calculation and payment of VAT.

The Division for cameral audits, in respect of all submitted tax returns (VAT calculations) carries out a verification of:

1) Comparability of indicators of tax return (VAT calculation) with the indicators of tax return (calculation) of the previous reporting (fiscal) period;

2) Associativity of the indicators of an audited tax return (calculation) with the indicators of tax declarations (calculations) in respect of other types of taxes and accounting;

3) Reliability of tax return (calculation) indicators on the basis of analysis of all information available in the tax authority, etc.

4) Correctness of information in the budget settlements card of a taxpayer.

5) Correctness of calculation of a tax base.

6) Soundness of application of tax benefits, tax rates, etc.

In addition the employees of the Division for cameral audits carry out analysis between the differences protocol based on the results of arithmetic control and the protocol of verification on supervisory ratios generated when input of tax declarations data (calculations) in the AIS "Tax". And then they form and summarize protocols of comparison of tax declarations indicators (calculations) and accounting reporting and other data contained in the information resources of the tax authority, as well as the information of external sources.

If possible, employees carry out a comparison of tax returns indicators (VAT calculations) and the accounting reporting with the indicators for similar taxpayers and with industry average indicators of the calculation and payment of VAT (for the previous periods).

If the tax control over the calculation and payment of VAT is carried out in the manner of a field tax audit, a tax authority has the right to inspect the territories, premises of a person, in respect of which the tax audit. In order to clarify the circumstances of importance for the completeness of audit (paragraph 1 article 92 of the TC RF), the documents submitted by a taxpayer for a cameral tax audit (Declaration of the value added tax (paragraphs 8 and 81 of article 88 of the TC RF)) and other are analyzed.

When conducting tax control over the calculation and payment of VAT numerous problems take place. Let's consider some of them:

Problem 1. Responsibility of a taxpayer and its officials in connection with the restriction of access of a tax authority on the taxpayer's territory isn't normatively enshrined. Such a right is given to tax authorities by virtue of article 31 (subparagraph 6) of the TC RF. In accordance with the procedure provided for in article 92 of the TC RF, tax authorities have the right to inspect any production, storage, commercial and other premises and territories used by a taxpayer for the extraction of income or related to the maintains of taxable objects regardless of their location, to conduct an inventory of property owned by the taxpayer. Such access is carried out strictly on a voluntary basis with the consent of a taxpayer.

Problem 2. The law restricts the right of tax authority during a tax audit to request from the taxpayer additional documents, except: ones confirming the right to tax benefits, the documents to be attached to a tax declaration (calculation),

documents proving the legitimacy of use of tax deductions (article 172 of the TC RF) [3]. For obtaining additional information the tax authorities have to make appropriate inquiries to the executive authorities, local self-government bodies, banks, NGOs, etc. This can lead to a reduction in the time required for an audit. Meanwhile, there is a need for request additional documents from the taxpayer in case of identifying discrepancies between a document previously received by the tax authority and the actual data, identified in the course of tax audit, as well as in other cases.

In this regard, there is a proposal on the need to amend the existing legislation on taxes and fees. Article 31 of the TC RF shall be complemented by the provisions of the following content: in case of identification of contradictions or inconsistencies between the information contained in a taxpayer's tax return for value added tax, or in case of identification of inconsistencies of transactions' information contained in the tax return with the information on these transactions contained in the tax return for value added tax submitted in the tax authority by another taxpayer (a person who, in accordance with chapter 21 of the Code, is responsible for submission of tax return), or in the record book of received and issued invoiced submitted to the tax authority by a person, in case if such contradictions or inconsistencies show underestimating the amount of VAT payable to the budget, or about inflating the amount of VAT claimed for compensation, the tax authority has the right to claim from the taxpayer additional documents certifying the correctness of the calculations.

It should be noted that the failure of a taxpayer to submit documents requested during tax audit or failure to provide them on time is recognized as a tax offense and shall entail responsibility stipulated in paragraph 1 article 126 of the TC RF. In addition to the mentioned, failure to submit to a tax authority documents and (or) other information necessary for the implementation of tax control, as well as the presentation of such information incomplete or distorted forms an administrative offence and entails administrative responsibility of officials (part 1 article 15.6 of the Code on Administrative Offences).

In case of taxpayer's refusal or failure to provide additionally requested by tax authority documents for tax control within the time limits set out in the request, an official of the tax authority performing the tax audit has the right to execute seizure of necessary documents in accordance with article 94 of the TC RF.

Problem 3. There are problems of determination of the range of taxpayers and classification of certain categories of persons to tax payers. The range of taxpayers of value added tax is legislatively enshrined in article 143 of the TC RF.

These include: organizations; individual entrepreneurs; persons recognized as tax payers of value added tax in connection with the movement of goods across the customs border of the Customs Union, in accordance with the customs legislation of the Customs Union and the Russian Federation legislation on Customs Affairs. The notion of "organization" is legally enshrined in paragraph 2 article 11 of the TC RF, and covers both Russian and foreign organizations. Russian organizations are legal persons formed in accordance with the national legislation. The content of the notion of organization is disclosed in the Civil Code of the Russian Federation. Foreign organizations are foreign legal entities, companies and other corporate formations that have civil legal capacity, established in accordance with the legislation of foreign countries ... (paragraph 2 article 11 of the TC RF).

Foreign organization implementing activity in the Russian Federation (extracts profit) should embark on tax accounting [4] at the location of its permanent offices in the Russian Federation. Thus, a foreign organization, that extracts profit through its representative office in the territory of the Russian Federation, is a taxpayer of VAT at the place of registration of its representative office. Russian scientists in their researches repeatedly indicated that the rules on the taxation of foreign organizations through a permanent representative office in the Russian Federation initially differed by significant collisions [9, 20-27]. In subparagraph 4 paragraph 1 article 148 of t the TC RF the legislator introduces a definition of "place of business". The territory of the Russian Federation is recognized as this place, in the event of actual presence of buyers of works (services) on the territory of the Russian Federation on the basis of state registration of the organization, and in its absence – on the basis of the place specified in the constituent documents of the organization, the place of management of the organization, the place of its permanent executive body, the place of its permanent representative office (if works (services) are provided through that permanent office), the place of residence of an individual.

Paragraph 2.1 of the Order of the RF Ministry of Taxation N BG-3-23/150 from March 28, 2003 clarifies that presence of a permanent representative office of a foreign organization in the Russian Federation shall be determined on the basis of the provisions of the legislation on taxes and fees. If a foreign organization is a person with permanent residence in the State, in relations with which the Russian Federation (USSR) has a valid agreement for the avoidance of double taxation, in determining the presence of a permanent representative office the provisions of a corresponding international treaty are of priority [7].

Representative office of a foreign organization, which is registered in the tax authorities of the Russian Federation, shall draw up invoices when transactions that are recognized subject to taxation in accordance with chapter 21 of the TC RF [5].

Thus, the basic criterion, necessary and sufficient for collection of VAT from a foreign organization is presence (absence) of its permanent representative office in the Russian Federation.

The notion of permanent representative office of a foreign organization in the Russian Federation as defined in paragraph 2 article 306 of the TC RF. At that, we should draw attention to the fact that it is provided for the purposes of chapter 25 of the TC RF "Organization Profits Tax". This circumstance is directly specified in this norm. A permanent representative office of a foreign organization in the Russian Federation shall be understood to mean a branch, representation, division, bureau, office, agency or any other economically autonomous subdivision or other place of business of that organization (hereinafter referred to as "division") through which the organization regularly carries out entrepreneurial activity in the territory of the Russian Federation which is connected with:

- the use of subsurface resources and (or) the use of other natural resources;
- the performance of work envisaged by contracts involving construction, installation, erection, assembly, adjustment, servicing and operation of equipment, including gaming machines;
- the sale of goods from warehouses located in the territory of the Russian Federation which are owned or rented by that organization;
- the performance of other work, rendering of services.

A permanent representative office of a foreign organization is considered to be established from the beginning of the regular implementation of business activity through its office. At that, an activity on establishment of a division by itself does not create a permanent representative office. A permanent establishment ceases to exist after the cessation of business activity carried out through a division of a foreign organization (paragraph 3 article 306 of the TC RF) [9, 20-27].

Thus, emergence of a permanent representative office of a foreign organization is based on three prerequisites:

1) establishment of a permanent representative office exclusively for carrying out business activity;

2) place of business must be located in the territory of the Russian Federation;

3) the activity should not be of a temporary nature.

However, with the emergence of e-commerce the concept of "permanent representative office" in general has lost its relevance, writes, for example, N. M. Vasil'eva. Since it has become possible to carry out economic activity abroad without registration at the place of profit extraction. The most typical example is e-commerce, when the place of permanent representative office is the location of the server, which processes a web-site – e-commerce tool [8]. The web-site may be registered in any country and even under an assumed brand. As an example can serve the travel company Dream-Line, which is active in the dissemination of tourist products on the whole territory of the Russian Federation. Dream-Line is registered in Hamburg (Germany) and does not have permanent representation in Russia. At that, after the formation of contracts for the purchase of a tourist product customers are offered to transfer money directly into Germany on private accounts.

Respectively there is a problem of VAT tax collection from foreign organizations that have not registered their permanent representative office in the territory of the Russian Federation, but carry out activities on extracting income, and bringing them to a tax responsibility in the event of violation of the legislation on taxes and fees.

4) There are problems of collection of VAT from an individual entrepreneur. Individual entrepreneurs according to the general rules are VAT payers. Individual entrepreneurs, according to the norms of the Civil Code of the RF (hereinafter – CC RF, are physical persons carrying out activities without formation of a legal entity [1]. Such a right is guaranteed to all citizens of the Russian Federation in accordance with the rules of article 23 of the CC RF. A person engaged in entrepreneurial activity, if it is not registered as an individual entrepreneur, is not entitled to claim that it is not an individual entrepreneur (part 4 article 23 of the CC RF). So, a citizen, who rents out its real estate (flat, summer cottage) or provides rental services, is required to pay VAT. At the same time, it may not invoke the fact that it is not an individual entrepreneur, only because is not registered in a tax authority as such. This position is directly explained in the letters of the RF Ministry of Taxation N 03-1-08 / 1191/15 @ from 13.05.2004 and N 03-1-08 / 1920/16-CH127 from 23.06.2003. At the same time, in carrying out activities outside the framework of entrepreneurial activity by a natural person having the status of an individual entrepreneur, this implementation is not subject to VAT [10].

So, the FAC of the Ural district ruled that the status of an individual entrepreneur cannot change the provided by civil legislation status of immovable property belonging to it as to a natural person, even if the property is rented out by the owner as an individual entrepreneur [6]. The Court decision is based on the fact

that an individual entrepreneur uses its property not only for business but also as a personal property for personal use, so its property cannot be demarcated.

It should be noted that special tax regimes may provide for exemption from the obligation of an individual entrepreneur to pay VAT. The obligation to issue invoices is not applied to the taxpayers applying the simplified taxation system.

Individual entrepreneurs applying the patent system of taxation also are not recognized as payers of VAT, with the exception of payable VAT in carrying out entrepreneurial activities in respect of which the patent system of taxation is not applied. This circumstance forms the conflict of legal relations between tax authorities and individual entrepreneurs, and it was the basis for its resolution in the Constitutional Court of the Russian Federation.

Problem 5. The Tax Code does not provide for the obligation of a taxpayer to submit a revised tax return in connection with the violations identified by a tax authority in the course of tax audit. Therefore, when a taxpayer (tax agent) recalculates amounts of tax and submits declarations (calculation) for the subsequent tax period the results of tax audits carried out by the tax authority in that tax period, in respect of which the taxpayer (tax agent) implements recalculation of amounts of tax, shall not be taken into account. Results of tax audits are recorded only in a decision about bringing (denial of bringing) to responsibility for committing a tax offense.

The proposal of necessary corrections in the documents of accounting and tax account in the operative part of a decision on prosecution for committing a tax offence only means the right, but not the taxpayer's obligation to submit revised tax returns. Paragraph 1 article 81 of the TC RF provides for the right of a taxpayer, in case of identification the fact of failure to reflect or incomplete reflection of information, as well as errors, which lead to the underestimation of the amount of tax payable, to make necessary changes in the tax return and to submit to the tax authority the revised tax return. A taxpayer is entitled to make such changes in case of discovery by itself of inaccurate information, as well as errors not-leading to underestimation of the amount of tax payable.

Tax returns do not refer to documents of tax accounting, but are taxpayer's statements about the objects of taxation, income received and expenses incurred, sources of income, the tax base, tax exemptions, the calculated amount of tax and (or) other data which serve as a basis for the calculation and payment of particular taxes (paragraph 1 article 80 of the TC RF). Failure of a taxpayer to make changes to tax returns (calculations) leads to further distort of reporting. Consequently, paragraph 1 article 81 of the TC RF should be added by a paragraph read as follows:

"In case of violations of the legislation on taxes and fees identified in a tax control, revised tax return may be submitted prior to the adoption of decisions on tax audit of primary (previous) tax return for the same tax (accounting) period".

The right of a taxpayer to submit a revised tax return should be accompanied by the power of a tax body to check it. Checking of a revised tax return is carried out individually, on the basis of changes made to it. Revised tax return can be checked by a tax authority within the framework of a cameral tax audit, and/or within the framework of a field tax audit (if the revised declaration (calculation of VAT) were presented during the field tax audit).

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