

July 2013

Changes in Tax Laws

Buyer bonus in the price of products for the VAT purposes

The changes in the Second Part of the Tax Code and Article 4 of the Federal Law on Amendment of Certain Legislative Acts of the Russian Federation in Connection with the Perfection of the Principles of Price Determination for Taxation Purposes came into force on July 1, 2013.

The said changes concern the manner of determination of a tax base in the sale of goods (work, services), *inter alia*, where bonuses (incentive payments) are granted for performance of certain contractual conditions (the so-called retro discounts).

According to the amended Article 154(2.1) of the Tax Code, under the general rule, the granting of a buyer

bonus for performance of certain contractual conditions does not reduce the cost of shipped goods (performed work, rendered services) for the VAT calculation purposes (either for the seller or for the buyer). But for one exception: if the reduction of the product price by the bonus amount is ***expressly set forth in the contract***.

Single corrective invoice – how to draw it up

The amended Article 169(5.2) of the Tax Code came into force on July 1, 2013

At present, a taxpayer may draw up a single corrective invoice (*schet-factura*) to reflect a change in the cost of shipped goods (performed work, rendered services) or transferred property rights, as compared to the previous two and more invoices issued to one customer.

The invoice should contain, *inter alia*:

- the numbers and the dates of all previously issued invoices for which the single corrective invoices is drawn up;

- the quantity of goods, work, services under all invoices of the customer before and after the specification of the quantity;
- the cost of all goods, work, services under all invoices of the customer without and with the VAT, before and after the changes made;
- the difference between the figures of the invoices.

Requisition of taxpayer's documents between tax audits

Starting from July 30, 2013, by virtue of the amended Article 93.1(2) of the Tax Code, tax authorities have the right to require from tax payers both information about a transaction and relevant documents between tax audits.

Previously, under Article 93.1(2) of the Tax Code, tax authorities had the right to require information about a specific transaction from one of its parties or from other persons between tax audits, if the tax authority had a reasonable

necessity to obtain such information. In practice, tax authorities required from taxpayers not only information but specific documents as well, and such requisitions of tax authorities were denied by arbitration courts.

Addresses for mailing communications to taxpayers from tax authorities

The new rule establishes addresses for communicating official documents of tax authorities where the documents are sent by post.

Previously, there arose disputes because the Tax Code did not specify addresses for sending official documents of tax authorities, except for the act of tax audit which should be sent to the place of location of the organization (its separate subdivision) or the home address of the individual (Article 100(5), Article 105.17(12) of the Tax Code).

The question what addresses tax authorities should use for sending notifications to tax payers is of great legal importance. For example, by virtue of Article 101(2) and Article 101(14) of the Tax Code, the absence of evidence that the taxpayer was notified of the time and place of consideration of a tax audit materials serves as a separate ground for revocation of the tax authority's decision.

Court practice is rich with the cases of reversal of tax authorities' decisions made after tax audits, if the tax authority failed to send a notification to the tax payer's addresses (legal and actual) known to the tax authority. The same question arises in

the event of sending of a tax payment claim under Article 69(6) of the Tax Code. The amended Article 31(5) of the Tax Code specifies the following addresses:

- the location of a Russian organization (its branch, representative office) recorded in the Consolidated State Register of Legal Entities (i.e., the legal address);
- the place where a foreign organization carries out its activity in Russia, as recorded in the Consolidated State Register of Legal Entities;
- the home address (place of stay) of an entrepreneur, notary public engaged in a private practice, attorney who set up attorney's offices, individual not engaged in any business.

If any of the said persons provides the tax authority with another address for sending official documents, the documents will have to be sent to that address. The form of the application providing an address for mailing official documents will be approved by the Federal Tax Service in due time.

Changes in Article 45(2) (2) of the Tax Code came into force on July 30, 2013

Previously, the said rule permitted recovery of a subsidiary's debt from the parent company and vice versa. Recovery of debt was claimed in court in the event that:

- the debt was overdue for over three months;
- proceeds from the sale of goods (work, services) of the subsidiary (parent company) went to the bank accounts of the parent company (subsidiary).

The amended Article 45(2)(2) of the Tax Code introduces new grounds for the recovery of debt. For example, the debt of the subsidiary is recovered from the parent company if after the debtor learned or should have learned about the forthcoming field tax audit or the beginning of a desk tax audit its money or other assets were transferred to the parent company and as the result of such transfer the debt could not be recovered from the debtor. Similar grounds are established for the recovery of the parent company's debt from its subsidiary. In that case subject to recovery is only the debt revealed during a tax audit.

The said rule is applied to organizations which the court finds affiliated in any way with the debtor.

The amended Article 45(2) (2) also specifies the manner of the recovery of debt:

- In the event that the debtor's proceeds from the sale of goods (work, services) go to the bank accounts of several organizations or if its money or other assets were transferred to several companies, the debt is to be recovered from all the organizations in proportion to the share of the proceeds they received, share of the transferred money, or value of other assets;
- in such case, the value of the assets is determined as their depreciated cost reflected in the debtor's accounts as of the time the debtor learned or should have learned about the forthcoming field tax audit or the beginning of a desk tax audit;
- the debt is also recovered where proceeds from the sale of goods (work, services) are remitted (money and other assets are transferred) by the subsidiary to the parent company (and vice versa) through interconnected operations. In the determination of such proceeds, the fact that the parties to such operations are not subsidiaries is of no importance;
- the debts of subsidiaries are subject to recovery in the amount of proceeds received, or money or other assets transferred.

Legalization by apostille

Decision of the Moscow Arbitration Court in Case No. A40-34310/2013

A tax authority refused a Russian organization acting as a tax agent the right to apply the provisions of the Russia-Ireland Double Taxation Treaty and not to withhold the tax from income paid to its Irish counterpart. As the result of such decision, a penalty and a fine were imposed on the tax agent. The decision reasoned that the signature of the Irish tax official on the confirmation of the permanent residence of the Irish counterpart had been certified by a notary public and the affixed apostille certified the signature of the notary public and not that of the tax official. In the opinion of the Russian tax authority, such manner of legalization by apostille contravenes the Hague Convention of 1961 (the "Convention"), and the apostille should be affixed directly to the signature of the tax official.

The Moscow Arbitration Court found the tax authority's decision invalid, having agreed with the tax payer's argument

that the Convention did not contain any provision that would prohibit national authorities empowered to affix an apostille from requiring that the person's signature under the document be first certified by a notary public and then certify the notary's signature by an apostille. Such certification should be recognized as complying with the Convention, if the said manner of certification is stipulated by the national laws of the country in which the document was issued. Such legal approach may undoubtedly be extended not only to the certification of permanent residence issued by tax authorities but to any other documents as well.

Besides, in the case in question the court confirmed that the absence in the tax audit report of key reasons underlying the Russian tax authority's decision to hold the taxpayer liable for violation of tax laws serves as a separate ground for finding the decision invalid.

Invalidation of a transaction – consequences for the land tax payment

Resolution of the SAC Presidium No. BAC-12992/12 in Case No. A56-39448/2011

In March 2013, the Supreme Arbitration Court (the "SAC") by Resolution of the SAC Presidium No. BAC-12992/12 gave the final answer to the question how the invalidity of a transaction affected the calculation of the land tax. Thereafter, lower court instances changed their

approach in the consideration of land tax disputes to the unfavorable one for persons to whom the consequences of invalidation of transactions were applied. According to the approach formulated in the Resolution, a taxpayer whose title to land is terminated due to the invalidation

of the transaction must pay the land tax for the entire period during which the title remained registered, regardless of the fact that the transaction is invalid as of the time of its making. Thus, with respect to tax relationships the SAC does not take the formal approach, i.e. an

invalid transaction does not entail legal consequences except for those which are connected with its invalidity, but directs courts' attention to the economic contents of the title and to legal consequences connected with it.

The VAT on gifts to employees

Ruling of the SAC, dated April 11, 2013, No. BAC-1001/13, in Case No. A40-29743/2012-140-143

The SAC judicial panel transferred to the Presidium the case concerning the imposition of the VAT on gifts to employees.

The courts of lower instances found justified the tax authority's decision to impose additionally the VAT on the cost of New Year gifts purchased by the Company for the children of its employees. According to the courts, the tax authority rightfully qualified the handing out of New Year gifts as the operation evidencing a free-of-charge transfer of ownership to the gifts, therefore such gifts are recognized as sale of goods and are subject to the VAT in accordance with Article 146(1)(1) of the Tax Code.

The Company's arguments that the tax authority should have determined the actual amount of the VAT by reducing the

additional VAT amount by the established deductions were rejected by the lower courts because the right to deductions is exercised by taxpayers by way of a declaration.

Notably, the judicial panel's ruling on transfer of the case did not put to doubt the propriety of imposition of the VAT on the expenses in question. However, the judges referred to the obligation of the tax authority to calculate the VAT deductions itself in the case in question, because the declaration of deductions by the Company in the circumstances of the tax dispute would mean that the Company concurred with the tax authority's approach.

The final opinion of the SAC on the two interconnected issues will be clear from the concluding judicial act in the case.

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