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Legislative and court practice news for companies in the automotive industry

May 2013

Content

Dear friends,

We are pleased to present you with the latest issue of our Automotive Bulletin, which contains legislative news for the first half of 2014.

This document covers a lot of judicial decisions on topics such as transfer pricing, notification on controlled transactions, assessment of VAT on supplier bonuses, and trademark use.

It also contains news on changes with respect to tax on movable and immovable property, and provides explanations about the car disposal tariff.

We hope this issue will prove useful.

Kind regards,

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Tax news

Disposal tariff

The RF Ministry of Finance and the RF Ministry of Industry and Trade have issued letters with respect to the profit tax treatment of disposal tariffs, and have issued their requirements regarding the form and format of disposal tariff calculation.
RF Ministry of Finance Letter No. 003-03-10/10650 of 12 March 2014 http://www.nalog.ru/rn77/taxation/util_sbor/4587238/
RF Ministry of Industry and Trade Letter No. 20-984 of 10 April 2014 http://www.nalog.ru/rn77/taxation/util_sbor/4620828/
RF Ministry of Industry and Trade Letter No. 20-828 of 27 March 2014 http://www.nalog.ru/rn77/taxation/util_sbor/4600886/

Property tax

List of "luxury" passenger cars published

On 28 February 2014 the RF Ministry of Industry and Trade published a list of passenger cars with a value of more than 3 million RUB which are subject to the "luxury" car tax (Federal Law No. 214-FZ of 23 July 2013). RF Ministry of Industry and Trade website *(http://www.minpromtorg.gov.ru/docs/list/index.php?id_18=1925)*

STS 2015

A new Federal Law introduces amendments to Part II of the RF Tax Code, according to which, starting in 2015, entities applying the simplified taxation system (STS) will be treated as property tax payers with respect to property for which the tax base is determined as its cadastral value.
Federal Law No. 52-FZ of 2 April 2014

Procedure for determining the actual use of buildings and non-residential premises

The Moscow Government has approved the Procedure for determining the actual use of buildings and non-residential premises for tax purposes.
Moscow Government Resolution No. 257-PP of 14 May 2014 "On the procedure for determining the actual use of buildings and non-residential premises for tax purposes" http://www.garant.ru/hotlaw/moscow/543366/#ixzz32MJTM8N6

Establishment of priority development territories

There are plans to establish priority development territories in the Far East. According to a draft Federal Law, a special legal regime will apply to the territories, which may include:

- a special regime for land use
- beneficial rental rates
- tax benefits and beneficial conditions for insurance contributions
- special tax treatment for residents, including guarantees against unfavourable changes to the Russian tax legislation
- beneficial terms for connecting to the infrastructure
- use of the "free customs zone" customs regime, etc.

Draft Federal Law "On territories of priority social and economic development and other measures of state support to regions of the Far East"

Judicial practice

Free-of-charge trademark use

Positive decision

The tax authority concluded that the value of the right to use a trademark received free-of-charge had been improperly excluded from non-sales income by the distributor of Iveco cars ("the Company").

The tax authority referred to the following:

- the non-exclusive right was transferred on the basis and under the terms of the technical cooperation and licensing agreement (TCLA) and the licensing agreement between the distributor and the rights holder
- the licensing agreement with the rights holder was not registered with the Russian Patent Agency
- the Company had letters from the rights holder which confirmed the right to use the trademark without charge.
- The cassation court recognised that the nature of relations between the companies was compensable:
- in accordance with the licensing agreement, the compensation of the rights holder for the provision of the rights to use the trademark was included in the fees agreed by the parties to the TCLA
- in accordance with the trademark licensing agreement, the terms of payment for trademark use are defined in the TCLA

Also, the application of the income approach by the expert was recognised as not complying with Art. 40 of the RF Tax Code.

At the same time, we note that judicial practice on this issue is contradictory, and the issue is currently the subject of a number of tax disputes.

Federal Arbitration Court of the Urals District Resolution of case No. A76-4926-2013 of 14 February 2014

Transfer pricing

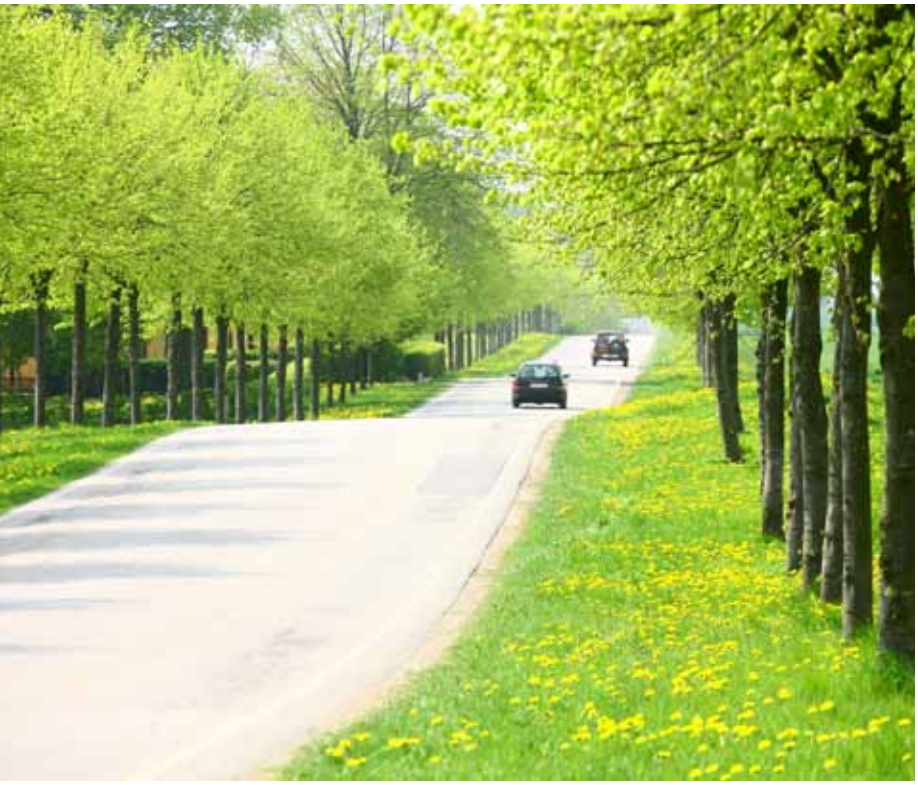
Negative decision

Mazda Motor Rus ("the Company"), a major car distributor, has lost its lawsuit. Let us remind you that the tax authority previously concluded that the main reason for losses suffered on the wholesale distribution of cars in 2009 was that cars had been purchased from the seller at overstated prices.

When making its decision, the court relied on the conclusion of an independent expert analysis, which covered the following:

- it is impossible to determine the actual existence and extent of influence of the relationship between the parties on the car market
- the operating profit margin does not depend on a company's market share, calculated on the basis of the number of cars sold
- the separation of companies that sell cars of different price classes is conventional in nature and does not have any material effect on the profitability indicator
- differences in the commercial and economic risks undertaken by the companies are insignificant, as they have the same effect on all companies in the industry
- differences in the activities of companies (sale of spare parts, accessories, power machines, motorcycles, warranties and maintenance services, loans, insurance and domestically-produced cars) do not have a material effect on the profitability indicator
- profit from sales does not depend on a company's market share (by the number of cars sold)
- the crisis of 2009 affected most companies (not only the Company) and negatively affected the operating profit margin.

The court considered a statement about the independence of the Company's decisions, in particular on the payment and granting of bonuses to dealers, to be erroneous.
Ninth Arbitration Court of Appeal Resolution of case No. A40-4381/13 of 4 April 2014



In another tax dispute, the tax authority claimed (supported by decisions of the first instance and appeal courts) that the Company improperly understated the corporate profit tax base for 2008 and 2009 with respect to a foreign trade transaction involving the sale of natural gas to a related party at below-market prices.

Although this case relates to the Oil & Gas industry, we would like to point out several important facts:

- when carrying out tax control, the tax authority sent a request for information about the German company to the Federal Central Tax Authority of Germany; information was provided on the volume of natural gas sold, selling price and delivery points
- To determine the market price of gas sold by the Company to related parties, the tax authority used official information in the form of an expert opinion. On this basis, a downward deviation of more than 20% from market prices was determined.

Ninth Arbitration Court of Appeal Resolution of case No. A40-90092/12 of 18 December 2013

Notification on controlled transactions

The Presidium of the Russian SAC considered claims by OJSC Avtoframos, CJSC Volvo Vostok and LLC Oriflame Cosmetics ("the Claimants") to recognise the Federal Tax Service Order "On the notification on controlled transactions" ("the Order") as partially non-compliant with the RF Tax Code and to invalidate said Order to the extent that it prescribed the completion of the following fields: 121–124 (grounds for treating a transaction as controlled) and 131–135 (grounds for treating a transaction between Russian related parties as controlled) of section 1A; 040, 043, 045 (transaction object codes), 070 (code of the country of origin), 080 (place of origin), 090 (place of the transaction), 100 (code of delivery terms), 110 (OKEI code), 120 (quantity), 130 (price), 140 (total price), 150 (date of the transaction) of section 1B; 020, 030, 060, 070, 080, 090 of section 2; 020, 030 of subsection I of section 3; and the entirety of subsection II of section 3.

The claimants stated that the Order infringed upon their rights to conduct business activity by imposing additional responsibilities not stipulated by the RF Tax Code. The RF Tax Code does not require taxpayers to disclose in notifications any information on controlled transactions other than that specified in clause 3 of Article 105.16.

In response to the claim, the FTS stated that the form, procedure of completion and procedure of electronic submission of the notification on controlled transactions were approved by the FTS with the agreement of the RF Ministry of Finance, in accordance with clause 2 of Article 105.16 of the RF Tax Code, and that the Order was registered with the RF Ministry of Justice; hence, it had passed legal expert examination. The tax authority believes that sections of the Order contain information stipulated by clause 3 of Article 105.16 of the RF Tax Code.

The Presidium of the Russian SAC, through its Resolution of 25 February 2014, sent the case for reconsideration to the Russian SAC.

Resolution of case No. 10012/13 on the full cancellation of a legal act and on sending the case for reconsideration to the Russian SAC of 25 February 2014

VAT on bonuses received

Negative decision

Major car dealers lost lawsuits with the tax authorities on the assessment of VAT on bonuses received from suppliers up to 1 July 2013, i.e. before the enactment of amendments to Article 154 of the RF Tax Code[1].

In its decision to reject the dealers' claims, the court noted:

- The payment of bonuses by supplier companies on the basis of performance of obligations under bonus programmes is a measure incentivising a dealer to sell as many products supplied as possible; i.e. to purchase more products from the suppliers
- If bonuses for performing a sales plan are directly linked to the supply of products, it should be recognised that they, like other discounts (bonuses), also represent a form of trade discount that affect the value added tax base.

Fifteenth Arbitration Court of Appeal Resolution of case No. A53-16510/2013 of 30 April 2014
Order of refusal to submit the case to the Presidium of the Russian SAC No. VAC-4321/14 of 23 April 2014

Positive decision

The automotive dealers were able to sustain their position on accounting for bonuses received from suppliers in court.

The courts ruled that there were no changes to the price of supplied cars on the basis of an agreement between the parties; respective primary documents were not prepared (no changes were made to goods delivery notes containing information on the price of goods); and no adjusting invoices were issued to suppliers as the price of goods did not change. The tax authorities did not present any evidence that the suppliers had taken the bonuses paid into account when determining the VAT base.

The bonuses received by taxpayers could not be qualified as a trade discount that changes the price of goods supplied to the company.
Federal Arbitration Court of the Urals District Resolution of case No. A71-2375/2013 of 27 January 2014; Fourteenth Arbitration Court of Appeal Resolution of case No. A05-4257/2013 of 6 February 2014

[1] Federal Law No. 39-FZ of 5 May 2013

Contacts

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