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On some issues raised by the arbitration courts during the resolution of VAT-related cases

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On 24 June 2014 RF Supreme Arbitration Court (RF SAC) Plenum Decision No. 33 of 30 May 2014 "On some issues raised by the arbitration courts during the resolution of VAT-related cases" was officially published.

The document contains the official position of the RF SAC, to which lower courts and the RF SAC itself are obligated to adhere when resolving VAT-related disputes.

Key issues

1. Tax consequences of property withdrawal for reasons beyond the reasonable control of the taxpayer

The withdrawal of property for reasons beyond the reasonable control of the taxpayer is not accounted for during the formation of VAT-able assets. However, the taxpayer is required to prove that the property was withdrawn for the stated reason, and was not transferred to a third party.

When resolving disputes on the validity of justification for withdrawal, the courts must take into account the type of business carried out by the taxpayer and the conditions of the taxpayer's economic management. The courts must also consider whether the volume and regularity of property withdrawal corresponds with the level expected for that type of business and other circumstances.

If it cannot be proven during legal proceedings that property was withdrawn for reasons beyond the reasonable control of the taxpayer, the courts are recommended to proceed on the basis that the taxpayer is obligated to calculate tax in accordance with the rules established for free-of-charge supply.

Thus, if property is lost, e.g. due to theft or fire, the taxpayer is obligated to prove that said property was withdrawn for that reason and not transferred to a third party, or will be obligated to calculate VAT on that property.

2. Free-of-charge supply

The transfer of goods/work/services from a taxpayer to its counterparty in addition to the main body of goods (souvenirs, gifts or bonuses) without extra charge is taxable in accordance with subitem 1, item 1, Article 146 of the RF Tax Code as the free-of-charge supply of goods/work/services, unless the taxpayer is able to prove that the price paid for the main body of the goods (and VAT calculated on that transaction) includes the value of the additionally-transferred goods/work/services.

Goods/work/services supplied for promotional purposes are taxable in accordance with subitem 25, item 3, Article 149 of the RF Tax Code, provided the cost of acquisition/production of one unit of said goods/work/services exceeds 100 RUB.

The distribution of promotional materals within a promotional campaign on the market of the produced and/or sold goods/work/services with the goal of increasing sales cannot be considered as a VAT-

able transaction in and of itself, provided these promotional materials are not similar in nature to the product/work/services, i.e. property destined for supply in and of itself.

The free-of-charge provision of guarantees and compensation by a taxpayer to its employees in accordance with the labour legislation (e.g. due to harmful work conditions) is not subject to VAT.

3. VAT calculation

If an agreement does not directly state that the price of the transaction thereunder does not include VAT, and provided such cannot be assumed on the basis of the circumstances under which the agreement was concluded or other conditions of the agreement, courts should move forward on the basis that the amount of VAT displayed to the buyer by the seller is deducted from the price stated in the agreement, and is calculated at a rate of 18/118 (10/110) of the price of the transaction.

4. Application of 0% VAT rate with respect to goods transported overseas

A VAT rate of 0% applies to overseas shipping services, as well as to freight forwarding services under a freight forwarding agreement, in accordance with subitem 2.1, item 2, Article 164 of the RF Tax Code.

The fact that multiple entities are involved in rendering these services (e.g. in cases where the contractor has multiple entities or engages the services of third-party subcontractors) does not exclude the application of the 0% VAT rate by all parties involved in rendering the services.

Consequently, the 0% VAT rate may also be applied by carriers rendering overseas shipping services at various stages of transport, and by third parties engaged by the forwarding agent to render specific freight forwarding services.

These provisions apply to freight forwarding services rendered with respect to the overseas shipping of goods, regardless of whether the shipping is organised by the forwarding agent, the client or a third party. .

5. Application of 10% VAT rate with respect to the supply of goods on the territory of the Russian Federation or import into the Russian Federation

Item 2, Article 164 of the RF Tax Code provides for the application of a reduced VAT rate of 10% with respect to the supply of food products and other goods, and empowers the Government of the Russian Federation to stipulate the codes of these goods in accordance with the All-Russian Product Classifier and the Unified Nomenclature of Goods of Foreign Economic Activity. When exercising this authority, the Government of the Russian Federation may not introduce additional restrictions to the application of the reduced VAT rate.

The 10% VAT rate applies with respect to certain categories of goods regardless of whether the goods were supplied in the Russian Federation or imported onto the territory of the Russian Federation, provided the goods in question are classified under a code stipulated by the Government of the Russian Federation with reference to either the All-Russian Product Classifier or the Unified Nomenclature of Goods of Foreign Economic Activity.

6. Refund of overpaid VAT

If, when applying for a VAT refund, the taxpayer indicates that a transaction was not subject to VAT or should have been taxed at a reduced VAT rate, the courts are obligated to analyse whether the amount of VAT paid to the budget corresponds to the amount of VAT charged to the buyer.

The refund of VAT in such cases may not result in unjustified profit to the taxpayer; therefore, refund is possible only if the taxpayer can provide proof that overpaid VAT was refunded to the buyer.

7. VAT recovery with respect to capital repair of fixed assets

A taxpayer-investor may claim VAT for recovery regardless of the procedure by which payments were made and of who charged VAT (the contractor or the real estate developer/technical client).

In conjunction with the investor, the real estate developer/technical client is considered an intermediary, provided the real estate developer does not simultaneously carry out the functions of a contractor.

8. VAT recovery with respect to advance payments in kind

In resolving disputes linked to VAT recovery by a taxpayer who paid in advance for future supplies of goods/work/services/property rights, the courts must consider the fact that Chapter 21 of the RF Tax Code does not limit the possibility of VAT recovery to cases where payment is made in cash. The taxpayer, therefore, cannot be deprived of the right to apply VAT recovery to payment in kind for goods/work/services/property rights.

In addition, the taxpayer may not be deprived of the right to apply VAT recovery in cases when VAT was calculated and paid to the budget upon receipt of advance payments, introduction of amendments to an agreement, or termination of agreement, when the amount of VAT was refunded to the counterparty in kind.

9. Application of VAT recovery by lessor and lessee

If a lessee makes rent payments in the form of capital investment into the leasehold property as agreed by the parties VAT charged to the lessee in relation to goods/work/services/property rights acquired by the lessee in connection with these capital contributions may be claimed for recovery by the lessee in the same manner as VAT charged by the lessor in relation to rent payments.

If the lessee makes capital investment into the leasehold property in addition to rent payments, the lessee is entitled to recover VAT in accordance with the standard procedure for the buyer of goods/work/services to meet the requirements of its economic activities.

If the lessor provides compensation to the lessee for capital investment, said investment will be considered to have been transferred to the lessor, and any VAT recovered by the lessee will be charged to the lessor. The lessor may subsequently apply for recovery of this VAT, or may deduct it as expenses for property tax purposes.

10. VAT recovery period and deadline for submitting VAT returns

A positive difference between excess tax recoveries and the amount of tax calculated on VAT-able transactions is refundable to the taxpayer from the budget, provided the taxpayer submits a tax return before the end of the set three-year period.

The taxpayer may reflect tax recovery in the tax return for any relevant three-year tax period.

The taxpayer must comply with the requirement to file a tax return within a three-year period, including in cases where tax recovery is reflected in an amended tax return.

The taxpayer may exercise the right to tax recovery within the set three-year period, regardless of whether the application of tax recovery results in a positive or negative difference.

Contacts

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