



GES Legislative News

Personal income tax on housing payments to employees

On 21 October 2015, the Presidium of the Russian Supreme Court published a review of judicial practice related to the application of Art.23 of the Russian Tax Code "Personal income tax" (hereinafter – **the Review**). The Review contains a number of clarifications on how to apply provisions of the Russian Tax Code related to personal income tax (hereinafter **PIT**) to income in kind received by individuals, such as rental payments provided by an employer to its employees.

The position on whether to apply PIT to housing payments provided by employers to their employees has always been rather controversial.

Law enforcement practice

The position of the Ministry of Finance on this subject is definite. The authority has concluded that housing paid by employers for their employees, (including foreign citizens in the status of highly qualified specialists) constitutes income in kind and is therefore subject to PIT [1].

However, the judicial practice is not similarly consistent. Many Arbitrazh Courts apply for another position stating that such payments can be exempt from PIT [2].

The courts that have confirmed the right to exempt the payments in kind from PIT supported their decisions with the following argument: the Russian Tax Code (hereinafter, the Tax Code) stipulates that income in the form of legally established compensation payments related to the provision of free accommodation and utility payments to employees is initially not subject to PIT [3]. In the reviewed cases, the employers were obliged to provide their employees with

accommodation according to provisions in the Russian Labor Code. Consequently, these payments were of a compensatory nature (as they represented the reimbursement of the employees' costs directly related to the fulfillment of their job obligations that required them to move to a new location).

The position of the Russian Supreme Court

In the published Review, the Russian Supreme Code concluded that that housing (rental) payments are not acknowledged as incentives and do not constitute income for PIT purposes if their transfer primarily stems from the interests of the transferring (paying) party and not from the satisfaction of individuals' personal needs. For example, this is the case when apartment rental agreements are concluded at the employer's initiative as the result of opening of a branch office in another city and there is a need to engage employees from other locations because of their specific experience and qualifications. In addition, the apartments provided to the employees were not categorized as elite, and if not for the needs of the business, the employees would not have voluntarily changed their place of residence.

Despite the published Review, we believe that the decision to exempt housing payments to employees from PIT should be made with caution.

Given the current practice, we believe that the tax authorities are likely to disagree with the position of the employer to exempt such income from PIT due to the lack of direct provisions in the Tax Code, i.e. they will not accept the position based purely on the court practice. Only direct legislation can eliminate all the risks and disputes on this matter.

[1] e.g. the letters of the Ministry of Finances No 03-08-05/41253 of 17 July 2015, No 03-04-05/21026 of 5 May 2014 and No 03-06/1/40369 of 30 September 2013.

[2] e.g. the Ruling of the Federal Commercial Court of West-Siberian District of 11 September 2013 on case No A19-2330/2013 and the Ruling of the Federal Commercial Court of Moscow of 21 March 2011 on case No A40-36395/10-107-192

[3] Item 3. Article 217 of the Russian Tax Code

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