



LT in Focus

Overview of court practice September 2015

Commercial court practice

Contents

- Thin capitalization rules applied to past losses
- Application of reduced MET when restructuring ownership
- Non-reinstatement of input VAT for the amount of sales-based remunerations
- Deducting compensation payments when terminating labor agreements
- Deducting secondment expenses
- Inclusion of VAT on a gratuitous sale into profit tax expenses
- Re-qualification of loans from affiliated parties into contributions to the charter capital
- Inability to file claims on tax non-payment when purchasing goods from shell companies at market prices

Thin capitalization rules applied to past losses

Ruling of the Commercial Court of the Ural District on Case No. A60-54425/2014 of 7 September 2015

Any Motors LLC

Ruling in favor of the tax authorities

As a result of the field inspection of Any Motors LLC for the years 2011-2012, the tax authorities challenged the past losses recorded within the audit period due to the unauthorized deduction of interest on controlled indebtedness (loans from Russian entities affiliated with a foreign founder) in previous periods (2008-2010).

The taxpayer attempted to challenge the findings claiming that the years 2008-2010 were beyond the audit scope and the tax authorities had not challenged the application of thin capitalization rules in previous periods during earlier tax audits.

Courts of all three instances supported the tax authorities and ruled that the past loss carried forward was a part of the tax base of the following tax periods, and the tax authorities' auditing of the past losses was therefore lawful.

[LEARN MORE ►](#)

Source: E-justice: catalogue of commercial court cases

Application of reduced MET when restructuring ownership

Ruling of the Commercial Court of Moscow on Case No. A40-10501/15 of 3 September 2015

Purgas CJSC

Ruling in favor of the tax authorities

As a result of the desk audit of the MET return submitted by Purgas CJSC, the tax authorities charged an additional tax, fines, and penalties.

The tax authorities ruled that in violation of sub-item 11, item 2, Art. 342 of the Russian Tax Code, the company unlawfully applied the reduced factor of 0.673 to the standard MET rate since the indirect share of the unified gas supply system owner (Gazprom OJSC) in the charter capital of Purgas CJSC within the disputed periods of 2014 exceeded 50 percent.

In the first-instance, the court ruled in favor of the tax authorities.

During the judicial proceedings, the interest share of Gazprom OJSC in Purgas CJSC was determined, and the court ruled that the indirect share of Gazprom OJSC in Purgas CJSC at the date of the tax audit constituted 50.063 percent and was therefore recognized as lawful charging of additional MET.

When determining the indirect share of Gazprom OJSC in Purgas CJSC, the court did not only include direct and indirect shares in the charter capital, but also shares placed in a trust and the national pension fund.

Moreover, the 2012 restructuring (introduction into Gazprom Resource Purgaz LLC the structure to which 51 percent of Purgaz CJSC shares were transferred) had no reasonable economic purposes and aimed solely at deriving unjustified tax benefits (the factor of 0.673 to the standard MET rate was introduced precisely in 2012). In particular, the court noted that Gazprom Resource Purgaz LLC carried out no business activities, possessed no assets or employees, and was registered at the address of the previous owner of Purgaz CJSC, Gazprom Dobyvcha Noyabrsk LLC. Moreover, during the tax audit, the management failed to present any credible financial justification for the reorganization.

The total amount of tax adjustments exceeded RUB 280 million.

[LEARN MORE ►](#)

Source: E-justice: catalogue of commercial court cases

Non-reinstatement of input VAT for the amount of sales-based remunerations

Ruling of the Commercial Court of the Northern Caucasus District on Case No. A32-19682/2014 of 15 September 2015

Agriplant CJSC

Ruling in favor of the taxpayer

As a result of the field inspection of Agriplant CJSC, the tax authorities concluded that the company violated Art. 170 of the Russian Tax Code and failed to restore VAT by the amount of remunerations paid for meeting sales targets in 2011-2012.

The tax authorities ruled that the remunerations obtained by the company under the supply of goods agreements were discounts and reduced the cost of the goods purchased, which is why the earlier claimed VAT credit had to be adjusted to the remuneration received.

Courts of three instances supported the taxpayer given the following circumstances:

- The supply of goods agreements envisioned no price adjustment or adjustment of the contractual price for the company;
- The supplier had not supplied any adjusted invoices since the cost of goods did not change;
- Remuneration calculation acts signed by the parties contained no clauses on adjusting the price of the earlier supplied goods;
- Payment and supply of goods obligations had been fulfilled prior to agreeing the remuneration calculation and payment.

[LEARN MORE ▶](#)

Source: E-justice: catalogue of commercial court cases

Deducting compensation payments when terminating labor agreements

Resolution of the 9th Commercial Court of Appeal on Case No. A40-81209/15 dated 18 September 2013

British American Tobacco SPB CJSC

Ruling in favor of the tax authorities

As a result of the field inspection of British American Tobacco SPB CJSC, the tax authorities challenged the deduction of compensation payments resulting from the termination of labor contracts by agreement of the parties in 2010-2011.

The tax authorities ruled that the labor contracts between the company and the employees having received the severance payments contained no clauses on potential severance payments and no relevant contracts amending labor contracts had been concluded afterwards.

The court of first instance and the commercial court supported the tax authorities, recognizing the deduction of the taxable profits by the severance payments for labor contract termination by agreement of the parties as unlawful.

The courts ruled that contracts to terminate labor relations had been concluded shortly before the employees' dismissal, severance payments were paid out to each employee on the date of the relevant discharge order, and the severance payment of each employee was calculated with no relation to their job obligations and functions. Moreover, the courts dismissed the company's claim that the disputable remunerations were related to labor relations under which employees were obliged to preserve confidentiality after the termination of the labor relations.

[LEARN MORE ▶](#)

Source: E-justice: catalogue of commercial court cases

Deducting secondment expenses

Ruling of the Commercial Court of Moscow on Case No. A40-147132/14 of 30 July 2015

Hoist and Loading Machines Jungheinrich LLC

Ruling in favor of the tax authorities

As a result of the field inspection of Hoist and Loading Machines Jungheinrich LLC, the tax authorities challenged the deduction of secondment expenses under agreements with foreign companies affiliated with the company.

The tax authorities concluded that foreign citizens actually worked in Russia under labor agreements concluded with the company and under secondment agreements. Thus, the company paid twice for the foreign employees: by paying their salary under the labor agreements and by paying fees to affiliated companies under secondment agreements.

Courts of three instances supported the tax authorities stating that the company had no economically viable reasons to increase its employee costs for the employees already hired under labor agreements by transferring remuneration to the foreign parent company for the same employees.

[LEARN MORE ▶](#)

Source: E-justice: catalogue of commercial court cases

Inclusion of VAT on a gratuitous sale into profit tax expenses

Resolution of the 9th Commercial Court of Appeal on Case No. A40-10526/15 dated 7 September 2013

KuibyshevAzot OJSC

Ruling in favor of the taxpayer

As a result of the desk inspection of the corporate tax return submitted by KuibyshevAzot OJSC, the tax authorities challenged the deduction of VAT on the assets transferred gratuitously for temporary use from profit tax base.

The tax authorities concluded that the VAT accrued and paid by the company from its proprietary resources is an expense related to the gratuitous transfer of property and cannot be acknowledged as an expense for profit tax purposes.

The courts of the first and appellate instances ruled in favor of the taxpayer stating that the VAT calculated under the current Russian legislation not claimed from buyers and paid to the state budget from proprietary resources can be included in other costs when calculating the profit tax base according to sub-item 1, item 1, Art. 264 of the Russian Tax Code.

[LEARN MORE ▶](#)

Source: E-justice: catalogue of commercial court cases

Re-qualification of loans from affiliated parties into contributions to the charter capital

Ruling of the Commercial Court of Moscow on Case No. A40-115140/2014 of 15 June 2015

Centurion Alliance CJSC

Ruling in favor of the tax authorities

Centurion Alliance CJSC raised funds from foreign companies to build a shopping mall. Loan interest was deducted for taxation purposes, which was challenged by the tax authorities.

Courts of three instances concluded that the company had obtained unjustified tax benefits since the loan transactions were not accounted for in accordance with their real economic purpose.

The courts agreed with the tax authorities that lending companies were affiliated with the borrower (actually managed by the same individuals). Given this, the courts ruled that the owners invested the monetary funds into business operations via "foreign technical companies" by using loan agreements to acquire tax benefits by reclassifying shareholders' contributions to the charter capital into lending transactions.

The company artificially created creditor indebtedness to the "initial creditors" to be later re-classified.

[LEARN MORE >](#)

Source: E-justice: catalogue of commercial court cases

Inability to file claims on tax non-payment when purchasing goods from shell companies at market prices

Ruling of the Russian Supreme Court on Case No. A40-92342/2014 of 23 September 2015

Ergofor Group of Companies LLC

Partial satisfaction of the taxpayer's claims

As a result of the field inspection of Ergofor Group of Companies LLC, the tax authorities challenged the taxpayer's expenses since the goods had been purchased from shell companies.

The court of first instance ruled in favor of the taxpayer, the commercial court supported the tax authorities while the court of cassation supported the court of first instance in terms of recognizing the additional corporate profit tax charge as unlawful.

The court of cassation supported the taxpayer stating that given the following: the actual supply of the goods and the comparison of the prices at which the taxpayer purchased goods from the disputed supplier, and the suppliers not challenged by the tax authorities, as well as the market prices, it can be concluded that the goods under the disputable transactions were not overpriced. This implied that the taxpayer had not derived any unjustified tax benefits.

The Russian Supreme Court acknowledged the cassation court's ruling as lawful and declared the company's petition to the Chamber for Commercial Disputes of the Supreme Court inadmissible.

[LEARN MORE >](#)

Source: E-justice: catalogue of commercial court cases

Contacts

Should you have any queries on this subject please feel free to contact our Tax&Legal specialists:

Raisa Alexakhina

Partner

+7 (495) 787 06 00, ext. 2950

ralexakhina@deloitte.ru

Pavel Kovalev

Senior Manager

+7 (495) 787 06 00, ext. 2445

pkovalev@deloitte.ru

Alexei Sergeev

Senior Manager

+7 (495) 787 06 00, ext. 3402

asergeev@deloitte.ru

Learn more about Deloitte TaxSmart App



deloitte.ru

About Deloitte

Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee ("DTTL"), its network of member firms, and their related entities. DTTL and each of its member firms are legally separate and independent entities. DTTL (also referred to as "Deloitte Global") does not provide services to clients. Please see www.deloitte.com/about for a more detailed description of DTTL and its member firms. Please see www.deloitte.ru/en/about for a detailed description of the legal structure of Deloitte CIS.

Deloitte provides audit, tax, consulting, and financial advisory services to public and private clients spanning multiple industries. With a globally connected network of member firms in more than 150 countries and territories, Deloitte brings world-class capabilities and high-quality service to clients, delivering the insights they need to address their most complex business challenges. Deloitte's more than 210,000 professionals are committed to becoming the standard of excellence.

This communication contains general information only, and none of Deloitte Touche Tohmatsu Limited, its member firms, or their related entities (collectively, the "Deloitte Network") is, by means of this communication, rendering professional advice or services. No entity in the Deloitte network shall be responsible for any loss whatsoever sustained by any person who relies on this communication.