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LT in Focus

Tax and Custom Disputes and Litigation Review: Autumn/2020

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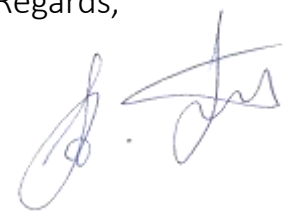
Dear friends

We are happy to offer this latest overview of court practices around Kazakhstan court tax and custom disputes. In it we have considered the most interesting and significant cases that may have the potential to impact any aspect of your business.

Should you be interested, we would be happy to have a more detailed discussion on any of the cases considered in this LT in Focus, or any question you may have on the latest tax court practices, including investment disputes.

Regards,



Dispute Resolution Group

Tax Disputes

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Nur-Sultan city Court Resolution dated 17 October 2019

Additional accrual of anti-dumping duties

"CNPC International (Buzachi) BV" Corporation ("**Taxpayer**", "**Company**") applied to the court to cancel the notification No. 125/1 dated 8 May 2019 on the results of consideration of a complaint against a notification of the audit results of the Mangistau Region State Revenue Department ("**Department**") in parts of additional accrual of anti-dumping duty in the total amount of 238 567 821 tenge.

According to the Taxpayer's opinion, the actions of the Department violate the principles of customs regulation and do not comply with the Basic Rules of Interpretation of the Commodity Nomenclature of Foreign Economic Activity (CN FEA), and the decision of the Department on qualification of goods may be canceled based on the results of a court appeal against the notification of the audit results.

In addition, the Taxpayer believes that additional accrual of the anti-dumping duty contradicts the stability of the subsoil use contract and the international agreement with the European Union.

Thus, the Taxpayer applied to the court to cancel the results of the audit in terms of additional charging of the anti-dumping duty.

Case history

Period	Instance	Decision
October 2019	Court of first instance	Taxpayer claims are rejected

Position of the court of first instance:

The court recognised the notifications issued by the Department as lawful and justified on the following grounds:

- According to the case file, the Company imported seamless tubing from China. During customs clearance, the Company declared the CN FEA EAEU code 7306290000 - other casing and tubing pipes made of ferrous metals used in drilling oil or gas wells. However, according to the decision of the Department of 15 August 2018, the classification of goods was changed to the CN FEA EAEU code 7304291009 - other casing, tubing and drilling pipes made of ferrous metals (except for cast iron) used in drilling oil or gas wells, external with a diameter not exceeding 168.3 mm. The Company did not appeal against the decisions of the Department for the qualification of goods in court, thus according to the requirements of customs legislation, they are obligatory;
- The arguments of the Taxpayer that the additional accrual of the anti-dumping duty contradicts the stability of the contract for the production of hydrocarbon raw materials was rejected by the court on the grounds that the contract concluded between the Company and the competent authority contains other provisions on the stability of the legislation, different from the provisions provided for by the legislation on foreign investments; the contract provides consequences of the stability of legislation only in the event of a change in legislation, regulations adopted by the Republic of Kazakhstan, not at the conclusion of an international agreement;
- The court declared untenable the Company's arguments regarding the application of the Agreement "On partnership and cooperation between the Republic of Kazakhstan, on the one hand, and the European Communities and their Member States, on the other hand" dated 23 January 1995, ratified by the Law of the Republic of Kazakhstan dated 26 May 1997, since the provisions of this Agreement cannot be applied to goods imported by the Company from the China.
- In such circumstances, the court decided to leave the stated claims of the Taxpayer without satisfaction.

More details

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Nur-Sultan city Court Resolution dated 8 August 2018

Determining the place of rendering services by non-residents

Closed Joint Stock Company "Karachaganak Petroleum Operating BV" ("**Taxpayer**", "**Company**") filed a claim to the court to recognize as illegal and cancel notification No. 272/1 dated 24 April 2018 on the results of consideration of a taxpayer's complaint against the notification on the results of a tax audit of the West Kazakhstan region State Revenue Department(" **Department** ") in the part of calculating value added tax for a non-resident in the amount of 53 785 113 tenge and a penalty in the amount of 26 247 434 tenge.

According to the case file, the dispute arose in relation to the place of provision of services by non-residents to the Company.

Case history

Period	Instance	Decision
August 2018	Court of first instance	Taxpayer claim rejected

Position of the court of first instance:

The court recognized Department's statement that non-residents rendered services to the Taxpayer in the territory of the Republic of Kazakhstan on the basis of the following:

- According to the case file, FSU Law LTD Company provided legal services (settlement of production sharing issues at the Karachaganak field) to the Taxpayer under an agreement dated 28 September 2009. In order to fulfill their obligations under the Agreement, FSU Law LTD employees came and stayed in Kazakhstan, which is confirmed by air tickets, invoices for accommodation at the Radisson SAS Astana hotel, for meals at the Nur Astana restaurant. The court took into account not the number of days of stay of FSU Law LTD employees in Kazakhstan, but the fulfillment of its obligations by FSU Law LTD as a whole in Kazakhstan when determining the volume of services rendered;
- The services of the Peloton E.U.B.V .. HIS Global LTD Company for the provision of technical software services were provided at the place of software use. According to the explanations of the Company's representatives, the servers are located in the office and at the field, that is, in Kazakhstan. Initially, during the tax audit, the Company submitted acts of work performed indicating the place of rendering services in Aksai, Republic of Kazakhstan. Thus, the body of evidence refutes the Company's arguments that the services were provided outside the territory of the Republic of Kazakhstan;
- In such circumstances, the court decided to leave the stated claims of the Taxpayer without satisfaction.

More details

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Nur-Sultan city Court Resolution dated 31 October 2018

Determining the customs value of goods

Closed Joint Stock Company "Karachaganak Petroleum Operating BV" ("**Taxpayer**", "**Company**") filed a claim to the court to recognize as illegal and cancel the notification on the audit results of the West Kazakhstan region State Revenue Department ("**Department**") No. 52 dated 28 June 2018 in the amount of 439 673 630 tenge.

According to the case file, based on the results of an unscheduled on-site customs check, the Department issued a notification to the Taxpayer for the period from 20 April 2016 to 31 December 2017 on payment of customs duties for customs clearance in the amount of 423 804 686 tenge, penalty in the amount of 15 868 944 tenge, 439 673 630 tenge in total.

The Taxpayer does not agree with the conclusions of the customs inspection and appealed to the court to cancel the notification on the payment of customs duties.

Case history

Period	Instance	Decision
October 2018	Court of first instance	Taxpayer claim rejected

Position of the court of first instance:

According to the court's opinion, the Taxpayer's application is not subject to satisfaction on the basis of the following:

- It was reliably established that on 21 August 2002 the Company entered into contracts for the transportation of oil with CJSC KTK-K and CJSC KTK-R, which stipulate conditions for the use of a quality bank. For each delivery, the Company receives invoices for the quality bank and, accordingly, depending on the positive or negative result for the quality bank, reduces or increases the customs value of the goods when declaring it. The court agrees with the findings of the Department that the customs value is not subject to adjustment depending on the product quality bank. The court did not take into account the arguments of the Company about the provisions of the final production sharing agreement taking into account the bank of product quality, since these provisions are applied in taxation. In the case of determining the customs value, it is necessary to be guided by the requirements of the legislation on customs, effective during the period of submission of the declaration, according to which the customs value is determined based on the price of the goods indicated in the invoice. Thus, the notification regarding the accrual of customs duties in connection with the use of a quality bank is legitimate;
- According to the case file, the Company delivered crude oil for export under contracts concluded with Vitol Central Asia SA, KazMunayGas Trading AG and other buyers on FOB (Free On Board) terms in accordance with Incoterms 2000. The Company believes that that all transportation costs are included in the transaction price, which is determined based on the quotation for oil from an official source and should not be reflected in the customs value of the goods. However, the cost of transporting oil through the main oil pipeline was not presented by the Company when the export customs procedure was declared, and accordingly, these costs were not included in the customs value. Therefore, the notice in this part is also made lawfully;
- In such circumstances, the court concludes that the notification was made in accordance with the requirements of customs legislation, there is no legal basis for satisfying the Company's application.

More details

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Nur-Sultan city Court Resolution dated 31 March 2018

Exclusion from the differential of transaction costs

The company "Maersk Oil Kazakhstan GmbH" ("**Taxpayer**", "**Company**") filed a claim with the court to recognize as illegal and cancel notification No. 972 dated 30 October 2016 on the results of the audit of the Mangistau Region State Revenue Department ("**Department**") regarding the accrual of corporate income tax from legal entities organizations in the oil sector in the amount of 704 674 852 tenge and penalties in the amount of 181 685 976.37 tenge.

In the opinion of the Company, the Department unreasonably made adjustments to the proceeds from transactions, in particular, for bank charges, operator's remuneration, forwarding costs, discounts for CFR sales, discounts for non-tanker consignment / transshipment costs, demurrage, freight costs, insurance, trader's margin and inspection.

Case history

Period	Instance	Decision
March 2018	Court of first instance	The Department's claims were partially satisfied

Position of the court of first instance:

The Court considers that the Taxpayer's application is subject to satisfaction in part on the basis of the following:

- According to the requirements of the legislation, the differential includes expenses justified and confirmed by documents and (or) sources of information necessary for the delivery of goods to the relevant market; conditions affecting the deviation of the transaction price from the market price. The conditions affecting the value of the deviation of the transaction price from the market price include: payment terms used in transactions of this type, as well as other conditions that may affect prices. From clauses 6.2, 6.6 of the contract for the sale of oil - FOB Incoterms 2000 (Aktau) D-CO-269, concluded between the Taxpayer and the Unioil AG Company dated 5 May 2003 follows that the payment of the amount for the delivered monthly volume must be covered by an irrevocable standby letter of credit issued by a first-class international bank acceptable to the seller. The terms of payment in the presence of a bank letter of credit are also stipulated by contracts No. D-CON-0510 dated 1 July 2010 with the company "Vitol Central Asia BV"; No. D-CON-0598 dated 21 February 2011. with the Vitol Central Asia SA Company. Since the conditions affecting the deviation of the transaction price from the market price include conditions that may affect prices, bank charges relate to such conditions, these costs are confirmed by letters from banks, letters of credit, transcripts with a mark and signature of the buyer indicating the month of delivery, numbers and dates of the contract, volumes in tonnes and barrels, the bank's interest rate and the amount of bank charges per barrel, the court considers that the exclusion of banking costs from the differential is unlawful;
- According to the materials of the case, from contracts No. COS-VSA090301 dated 30 December 2008 and dated 2 March 2009. Caspian Oil Services Pte, Ltd undertakes to provide services to Vitol SA within 1 year, starting from January 1 and March 2, respectively, 2009 in the port of Neka, Iran services at a rate of USD 0.10 per barrel. From the explanations of the Company's representative it follows that within the framework of these agency agreements, the operator provided services for filling the tanker. Thus, the operator's remuneration for filling a non-tanker consignment of oil does not apply to expenses justified and necessary for the delivery of the goods, in this regard, the Department rightfully excluded these expenses from the differential;
- In support of expenses for forwarding services, the Company provided invoices for payment to OMS Agency LLP. Since the goods were delivered on FOB Aktau terms, all costs for the provision of services for organizing and controlling the loading and shipment of oil in ports should be covered by the seller, therefore, these costs are unreasonable and are not included in the differential;

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- According to the Company's representative explanation, the discount on the sale of CFR was formed upon resale by Caspian Oil Development B.V. oil to a third party - the Vitol SA Company. The differential includes expenses justified and confirmed by documents and (or) sources of information necessary for the delivery of goods (works, services) to the relevant market. In support of these costs, an oil purchase and sale contract with a third party was provided. Since these costs were incurred by the buyer when reselling the goods, the court considers that the Department's actions to exclude this discount from the differential are justified;
- The Company did not submit documents confirming the demurrage of the vessel and payment (port documents), the court considers that the Department reasonably excluded demurrage costs from the differential;
- Freight costs are confirmed by invoices for payment, source of information Platt's Crude Oil Marketwire and Crude Oil Market Wire of The McGraw-Hill Companies (Platts), UK, is an officially recognized source of information in accordance with the Decree of the Government of the Republic of Kazakhstan dated 12.03.2009. No. 292 "On Approval of the List of Officially Recognized Sources of Information on Market Prices", the court considers that the tax authority's reduction in the amount of these expenses is not justified.
- In such circumstances, the court satisfied the Company's stated claims partially.

More details

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