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LT in Focus

Tax, Labour and Custom Disputes and Litigation Review: Summer/2020

July 2020

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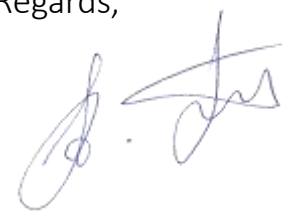
Dear friends

We are happy to offer this latest overview of court practices around Kazakhstan court tax 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

Tax audit appeals 1/5

East-Kazakhstan Oblast Specialised Inter-District Economic Court Ruling dated 29 May 2019

Reduced tax rates for dividend payments

Company A ("**Taxpayer**") took the East-Kazakhstan Oblast State Revenue Department ("**Department**") to court to have Notification of Audit Results No. 78 dated 1 April 2019 regarding an additional accrual of corporate income tax ("**CIT**") on the Taxpayer of KZT 17 100 027 and late payment interest of KZT 3 598 550 and Notification No. 79 dated 1 April 2019 regarding the accrual of CIT of KZT 31 421 250 and late payment interest of KZT 7 379 959 recognised as illegal and cancelled.

The Taxpayer's payment of dividends to the shareholders : Shareholder 1 with a 15% share and Shareholder 2 with an 85% share, applying a reduced rate of 5% served as the basis for the above additional CIT accrual.

The Taxpayer believes that tax law governing the payment of dividend income to non-residents was not violated, and CIT withheld at the source of payment from non-resident income was not underestimated.

The Department, in turn, believes that the Taxpayer paid dividends in violation of the Tax Code because:

- Shareholder 1 has owned shares for less than three years, and the second shareholder, Shareholder 2 is registered in the US State of Delaware, which is recognised as a US territory with preferential taxation in accordance with Kazakhstan Minister of Finance Order No. 595 dated 29 December 2014. Thus, it believes the income received by these non-residents is taxable;
- The international treaty between Kazakhstan and the USA reducing the rate does not apply, since the Taxpayer paid dividends from its net income and did not tax the non-residents' income.

Case history

Period	Instance	Decision
May 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 subpoint 9) of point 1 of article 182 of the version of the Tax Code valid during the audit period, dividend income received from a resident legal entity is recognised as non-resident income from sources in Kazakhstan. Article 193 of the Tax Code stipulates the types of non-taxable income, with the exception of dividends, payable to entities registered in low-tax countries as approved by the authorised body;
- When paying dividends to non-residents, tax agents are may apply a tax exemption or reduced tax rate stipulated by an international treaty, provided that the non-resident in question is the final (actual) recipient of income and is a resident of the country with which the international treaty has been concluded;

Tax audit appeals 1/5

- Since Shareholder 1 has owned shares for less than three years, and Shareholder 2 is registered in a US state recognised as having preferential tax rates, the income received by these non-residents is taxable according to Kazakhstan law;
- Moreover, the Double Tax Treaty between Kazakhstan and the USA dated 24 October 1993 requires tax to be withheld on dividends (income) payable to non-residents;
- It was found that dividends were paid from the Taxpayer's net income, while CIT was calculated by applying a rate of 5%;
- In these circumstances, the court decided to reject the Taxpayer's claims.

More details

Tax audit appeals 2/5

Supreme Court Resolution dated 18 November 2019

Classification of fixed assets

The Company A ("**Taxpayer**") took the Kyzylorda Region State Revenue Department ("**Department**") to court to have Notification of Audit Results No. 428 dated 24 June 2016 regarding an additional accrual of corporate income tax ("**CIT**") on the Taxpayer of KZT 59 888 403 and late payment interest of KZT 31 045 329, value added tax ("**VAT"**) on goods, work and services produced or provided in Kazakhstan of KZT 98 211 385 and late payment interest of KZT 747,632, property tax of KZT 428 086 374 and late payment interest of KZT 127 439 065, recognised as illegal and cancelled.

The Taxpayer appealed the Notification of Audit Results with the State Revenue Committee ("**Committee**"), as a result of which CIT was reduced by KZT 38 565 368 and VAT by KZT 24 242 513. The Committee upheld the remaining tax audit results.

According to the case file, the dispute arose regarding the classification of 26 fixed assets - autonomous block-modular boiler houses whose components the Taxpayer included in the 2nd tax group.

The Taxpayer's claim was rejected by a court of first instance ruling, which was upheld by a court of appeal resolution.

The taxpayer went to the Supreme Court with a request to have the judicial acts of lower instances reviewed.

Case history

Period	Instance	Decision
October 2018	Court of first instance	Taxpayer claim rejected
June 2019	Court of appeal	Court of first instance ruling upheld
November 2019	Supreme Court	Court of appeal resolution and court of first instance ruling are upheld

Supreme Court position:

The Supreme Court believes there are no grounds for reviewing judicial acts that have entered into legal force in accordance with the cassation procedure for the following reasons:

- According to a response from the Statistics Committee, each separate construction with all devices that make up a whole is an object acting as a construction. Also, for the purposes of fixed asset statistical records, it is incorrect to consider power equipment as independent equipment if it is part of another object;

Tax audit appeals 2/5

- Thus, the Taxpayer used Classifier group code 142.0000 to classify fixed assets in other machinery and equipment. The Taxpayer included autonomous block-modular boiler house buildings in the “Construction” group. In addition, for depreciation purposes, the Taxpayer accounted for boiler houses and boiler house internal equipment in group two “Machinery and Equipment” (maximum depreciation rate of 25%), and the boiler house building as a structure in group one “Buildings and Structures "(maximum depreciation rate of 10%);
- The autonomous block-modular boiler houses should be accounted for as part of a single object in fixed asset group one; and as such, the Department accrued CIT and property tax correctly.
- For this reason, the Taxpayer’s appeal was rejected.

More details

Tax audit appeals 3/5

Supreme Court Resolution dated 9 December 2019

Recognition of royalties

The Company A ("**Taxpayer**") took the Almaty State Revenue Department ("**Department**") to court to have Notification No. 168 dated 5 June 2018 regarding an additional accrual of corporate income tax ("**CIT**") of KZT 59,264,490 recognised as invalid and cancelled.

According to the case file, the Department issued a payment notice to the Taxpayer for the period from 1 January 2013 until 31 December 2017 for CIT at the source of payment of KZT 59 264 490 and value added tax ("**VAT**") on goods, work and services produced or provided in Kazakhstan of KZT 35 774 510 in line with the results of a comprehensive tax audit.

The taxpayer does not agree with the tax audit act conclusions regarding CIT at the source of payment on royalties from a transaction with Company B.

The Almaty Specialised Inter-District Economic Court rejected the Taxpayer's claim in a ruling dated 9 January 2019. The Almaty City Court upheld the court of first instance ruling.

The Taxpayer went to the Supreme Court to have the above judicial acts annulled and a new decision issued upholding the claim.

Case history

Period	Instance	Decision
January 2019	Court of first instance	Taxpayer claim rejected
May 2019	Court of appeal	Court of first instance ruling upheld
December 2019	Supreme Court	The court of appeal resolution and court of first instance ruling are upheld

Supreme Court position:

According to the Supreme Court, the judicial acts of the lower courts are lawful and justified because:

- It had been duly established that the Taxpayer made payments Company B on the basis of exclusive distribution agreement No. LVM / LVK - 2012 - 009 dated 30 August 2012 ("**Agreement**"), whereby the Company B owns the trademark and trade name worldwide;
- The taxpayer did not provide the "Construction Guide and Store Guide" following the Department's request, which led to the latter's conclusion of a lack of documentation confirming that the Company B had performed work in Kazakhstan;

Tax audit appeals 3/5

- The Department correctly applied royalties in relation to Taxpayer payments to the Company B, since payments under the Agreement without work being performed correspond to the definition of “royalties” as stipulated by an international agreement between Kazakhstan and France dated 3 February 1998;
- The Taxpayer did not provide certificates of residence, which would serve as the basis for applying the 20% rate on the income of the above non-residents;
- Based on the above, the lower courts have correctly rejected the Taxpayer’s request to cancel notification of tax audit results regarding CIT accruals.

More details

Tax audit appeals 4/5

Supreme Court Resolution dated 12 May 2020

Recognition of a transaction as invalid

The Akmola Oblast State Revenue Department ("**Department**") went to court to have transactions between Company A("**Taxpayer**") and Company B recognised as invalid.

The Department believes that the transactions were concluded without any intent to bring about any legal consequences and to evade tax.

Case history

Period	Instance	Decision
February 2019	Court of first instance	Department claim is upheld
June 2019	Court of appeal	Court of first instance ruling upheld
May 2020	Supreme Court	Lower court judicial acts cancelled and a new resolution passed

Supreme Court position:

The Supreme Court considers that judicial acts from lower courts should be overturned because:

- Findings that contracts, invoices and waybills are not evidence of financial and business transactions are not based on law. The imaginary nature of the transactions was given by the Department as the reason for taking court action. According to point 1 of article 160 of the Civil Code, a sham transaction does not impose any obligations on the parties to fulfil contractual terms and the parties are aware that contractual obligations do not need to be fulfilled. Thus, the disputed transactions do not meet the above sham transaction criteria;
- The transactions are not sham, because the transaction terms were duly executed by the parties, which is confirmed by the existence of goods delivered to the Taxpayer's warehouses, acts of reconciliation of settlements, invoices, waybills and other primary accounting documents;
- The Department's conclusions that the Taxpayer's counterparty did not have the necessary resources, such as staff, transport or facilities to store the goods sold were not confirmed, since court economic review No. 4601 from 4 June 2018 confirmed settlements between Company B and Company C to acquire inventory items that were subsequently delivered to the Taxpayer;
- In these circumstances, the Supreme Court overturned the resolutions of the first and appeal instances and passed a new resolution rejecting the Department's claim.

More details

Tax audit appeals 5/5

Supreme Court Resolution dated 19 May 2020

Civil case jurisdiction to Nur-Sultan

The Company A("**Taxpayer**") took the Almaty City State Revenue Department ("**Department**") to court to have Notification of Audit Results No. 435 dated 9 December 2019 recognised as unlawful and cancelled.

On 17 March 2020, the Nur-Sultan City Court returned the Taxpayer's claim claiming it was not within its jurisdiction.

Case history

Period	Instance	Decision
March 2020	Court of first instance	Claim returned to the Taxpayer
May 2020	Court of appeal	Claim submitted to the court of first instance for consideration

Court of appeal position:

The court of appeal believes that the Taxpayer's claim should be considered by the Nur-Sultan City Court because:

- The court of first instance returned the claim on the basis that the Taxpayer did not provide documentation confirming the implementation of investment activities in Kazakhstan. The conclusions of the court of first instance on the jurisdiction of the dispute, without providing and familiarising itself with documents confirming investment activity, are premature;
- In addition, the failure to submit documentation with a claim is not a reason for the court to return it to the jurisdiction of a specific court;
- For this reason, the Taxpayer's appeal was upheld and the claim filed with the court of first instance.

More details

Employment disputes

Employment disputes 1/4

Supreme Court Resolution dated 18 December 2019

Compensation following the termination of an employment contract

The Citizen A("**Employee**") took Company A ("**Company**" or "**Employer**") to court to have Order No. 967 dated 24 August 2018 recognised as unlawful and recover compensation following his dismissal of nine times his official monthly salary of KZT 9 900 000 and bonus payments of KZT 440 550.

In a ruling from 18 February 2018, the Ekibastuz City Court partially upheld the claim and compensation of KZT 9 900 000 was exacted from the Company in favour of the Employee.

The Pavlodar Oblast Court judicial board for civil cases issued a ruling on 15 May 2019 to cancel the court of first instance ruling and issued a new ruling rejecting the claim.

The Employee went to the Supreme Court to have the court of appeal resolution reviewed.

Case History

Period	Instance	Decision
February 2019	Court of first instance	Employee claim partially upheld
May 2019	Appeal court	Court of first instance ruling rejected; new ruling passed rejecting the Employee's claim
December 2019	Supreme Court	Court of appeal resolution upheld

Supreme Court position:

The Supreme Court believes that the court of appeal ruling is lawful and justified because:

- It was established that the Company hired the Employee as the head of its Technological Transport Department on the basis of Order No. 1173 dated 19 November 2016 and employment agreement No. 9-2/271. The Employee and Company signed an employment contract addendum changing his official salary and compensation due by the Employer upon the Employee's dismissal at his own initiative;
- According to Employer Order No. 1172 dated 10 September 2018, the Employee took the initiative to terminate his employment contract;
- According to article 131 of the Labour Code, if an employee is dismissed at the employer's initiative, the latter is obliged to pay compensation of one month's average salary. Given the fact that employment relations were terminated at the Employee's initiative, the court of appeal correctly concluded that there were no obstacles to the continuation of the employment relationship;
- Moreover, the termination of the Employee's employment contract with the Company was not a coercive measure and cannot be treated as the Employee's loss of work through the fault of the Employer;
- Under these circumstances, the court of appeal came to a legitimate conclusion that there were no grounds for compensation;
- Thus, the Employee's appeal to review the court of appeal resolution should be rejected.

More details

Employment disputes 2/4

Ruling of the Nur-Sultan City Court Judicial Board for Civil Cases dated 21 January 2020

Termination of employment due to disciplinary issues

The Citizen A **("Employee")** took Company A **("Company" or "Employer")** to court to:

1) invalidate and cancel disciplinary orders;
2) ensure her reinstatement;
3) collection any salary due during her enforced absence.

The Employee believes that she was unlawfully reprimanded for a failure to meet retail business targets for May 2018 and June 2018, and that her employment contract was also unlawfully terminated.

Case History

Period	Instance	Decision
November 2019	Court of first instance	Employee claim rejected
January 2020	Court of appeal	Court of first instance ruling upheld

Court of appeal position:

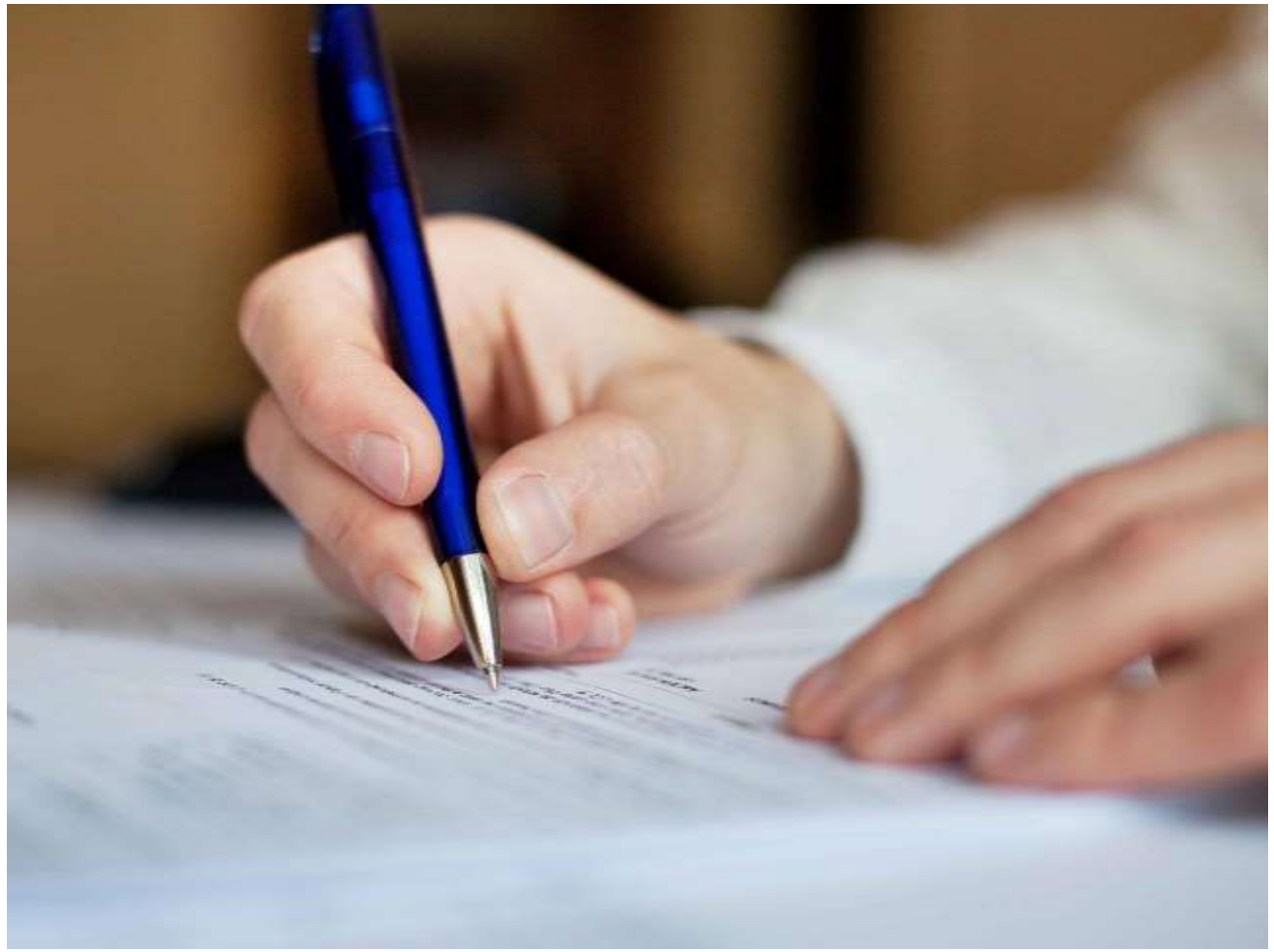
The court of appeal believes the Employee's appeal should not be upheld because:

- According to subpoint 76) of point 1 of article 1 of the Labour Code, a disciplinary act is an employee's violation of employment discipline, as well as the improper performance of employment duties;
- The court of first instance established that the Employee had incorrectly performed her job description duties. The court of first instance findings that the Employer had complied with employment legislation requirements regarding the application of the disciplinary sanction provided for in articles 65 and 66 of the Labour Code are based on the case file;
- A repeat of the disciplinary offence was established because the Employee failed to meet direct functional duties, as a result of which sales plans for May and June 2018 were not met, which means the similar disciplinary offences meet repetition criteria;
- It was established that the Employee was aware of the existence of a sales plan, since as the deputy head of the Bank branch she had been entrusted with its structural divisions to implement the sales plan and manage the process of issuing credit lines. Therefore, arguments around the poor behaviour of managers, under these circumstances are not relevant;
- The Bank's conciliation commission made its decision on 26 July 2018 and passed it to the Employee's representative the same day, and in accordance with subpoint 1) of point 1 of article 160 of the Labour Code, the two-month period for filing a lawsuit for Employee reinstatement expired on 26 September 2018;
- The Employee filed a claim to the Almaty Bostandyk District Court in April 2019, and due to the Employee's failure to appear in court on 24 May 2019, the claims were left without consideration. Thus, the Employee missed the court deadline without a justifiable reason.

Employment disputes 2/4

- The Employee's arguments that the representative's actions were criminal and the appeal to the criminal prosecution authorities in the same period as the lawsuit was filed in the present case do not prove that the employee missed the statute of limitations for a justifiable reason.
- Thus the appeal does not contain arguments that could serve as the basis for cancelling or amending the court ruling, and for that reason it should be dismissed.

More details



Employment disputes 3/4

Ruling of the Nur-Sultan City Court Judicial Board for Civil Cases dated 11 February 2020

Full employee material liability

The Company A ("**Employer**") took Citizen A ("**Employee**") to court to recover material damage of KZT 2 594 186.30.

The reason for this was that an agreement had been concluded with the Employee on full individual liability dated 30 October 2018. On 28 March 2019, it was revealed that the delivery of a boiler had not taken place, and which had been under the Employee's control.

The Yesil District Court in Nur-Sultan upheld the Fund's claim on 28 November 2019, stating that material damage and legal expenses had been recovered in favour of the Fund.

Case history

Period	Instance	Decision
November 2019	Court of first instance	Fund claims upheld
February 2020	Appeal court	Court of first instance ruling cancelled and a new ruling passed

Court of appeal position:

The court of appeal believes that the court of first instance ruling should be overturned because:

- Even though the Fund was informed on the missing boiler on 28 March 2019, the Fund did not record the property's transfer together with the Employee either his dismissal or during the dismissal process;
- The missing boiler was purchased and installed on 30 June 2009 and listed on the Ministry of Health balance sheet, then transferred to Nazarbayev University, and subsequently transferred to the Company B. Its useful life, according to technical documentation, was 78 months (6.5 years), which expired in 2016. On 2 October 2017, a defect report was drafted recommending the boiler be replaced;
- On 17 October 2017, the boiler was dismantled, and the corresponding act was drawn up. Thus, by the time the Employee accepted a boiler in his report (30 October 2018), it had already been dismantled due to its unsuitability for further use as intended;
- The Employer did not provide the Employee with a specific fenced area with restricted access for unauthorised persons to store the Employee's inventory, and for this reason the Employer did not meet the obligation to ensure proper storage conditions for property transferred to the employee;
- Based on the above, the court of first instance ruling was cancelled and a new ruling passed to reject the Fund's claim to recover material damage.

More details

Employment disputes 4/4

Supreme Court Resolution dated 22 June 2020

Termination of an employment contract due to authorities' refusal to issue a work permit

The Citizen A("**Employee**") appealed to the Company A ("**Employer**" or "**Representative Office**"), the German Trade and Industry Association, to have an order dated 7 March 2019 terminating employment contract No. 44 dated 20 March 2017 recognised as unlawful, and recover compensation for her entire period of enforced absence from work of 27 350 Euros. The Representative Office also went to court to have addendum No. 4 dated 20 August 2018 to employment contract No. 44 dated 20 March 2017 recognised as invalid.

On 11 November 2019, the Almaty Bostandyk District Court rejected the parties' claims.

The Almaty City Court Judicial Board for Civil Cases upheld the court ruling on 18 February 2020, .

The Employee went to the Supreme Court to have the judicial acts of the lower courts reviewed.

Case History

Period	Instance	Decision
November 2019	Court of first instance	Parties' claims rejected
February 2020	Court of appeal	Court of first instance ruling upheld
June 2020	Supreme Court	Court of appeal resolution upheld

Supreme Court position:

The Supreme Court believes that the court of previous instances dud not significantly violate material and procedural law when issuing their rulings because:

- According to the case file, the Employee entered into employment contract No. 44 with the Representative Office from 20 March 2017 until 8 March 2019, under the proviso that the Representative Office received a work permit for the Employee;
- It was established that the permit issued for the Employee was valid from 9 March 2018 until 8 March 2019. Once it the permit expired, on 13 March 2019 the Representative Office applied to the local executive body to issue a new one, which was rejected by the Almaty City Social Welfare Department on 20 March 2019, due to the Employee not meeting all education requirements for the position;
- Due to the local executive body's refusal to issue a work permit, the Representative Office was forced to terminate the employment contract on the grounds stipulated in subpoint 3) of article 60 of the Labour Code;
- Under these circumstances, the Employee's request to review the judicial acts of the courts of previous instance will be rejected.

More details

Custom disputes

Custom disputes 1/2

Court of first instance ruling

Cancellation of the Notification of Audit Results regarding an accrual of custom fees and anti-dumping duties

*The Company A("**Company**") took the Mangistau Oblast State Revenue Department ("**Department**") to court to have Notification No. 126 dated 10 February 2018 regarding an additional accrual of custom fees of KZT 91 523 035 and anti-dumping duties of KZT 223 212 524 cancelled.*

1. Customs value

Company position: Between 2013 and 2017, the Company exported crude oil under eight supply contracts, which included oil export transportation costs in the transaction price;

The Company's obligation to supply oil **FOB Novorossiysk, Ust-Luga** or **Batumi** is stipulated by supply contracts. The price was determined according to URALS and BRENT oil quotes from the "Platts Crude Oil Marketwire" magazine and International Chamber of Commerce Rules and the Methodology for collecting statistics on international trade in goods, "FOB" is defined as a condition for the delivery of goods, whereby the price of goods includes the cost of shipping and loading the goods on transportation.

The company states that all seller expenses are included in the transaction price, which was determined by oil quotes from an official source and should not be reflected in the customs value of the goods.

Department position: According to article 98 of the Customs Code, transportation costs are included in the transaction price for customs value purposes. The company did not include these costs in the customs value.

The contract does not provide for the inclusion of transportation costs in the transaction price, while transportation and other costs to the loading port should be included in the customs value of goods according to FOB delivery terms.

Court of first instance position: According to article 122 of the Customs Law dated 20 July 1995 and similar provisions specified in article 98 of the Customs Code dated 30 June 2010, the customs value of goods exported from the Customs Union is based on an invoice and actual costs not specified in it. The value of goods is determined based on the transaction price. Thus, customs value is determined by the transaction price paid when selling goods for export.

The price of the goods under the Company's FOB Baltic, Black or Caspian Sea contract is determined in US Dollars per barrel net and calculated using the arithmetical mean value of average Urals RCMB quotes (Recombined) published in Platts Crude Oil Market on the bill of lading date, less an agreed discount. The calculation method is similar in other contracts;

The court appointed a forensic review of financial and accounting documents that concluded that oil transportation costs are included in the oil sale price. The amount by which the declared customs value of the oil sold exceeded the cost of the oil and its transportation through the Customs Union was established. The reviewer gave an example of a delivery where the difference between the selling price and actual costs was deducted.

Letters from the official sources Platts dated 26 July 2017 and Argus dated 9 July 2018 confirm the inclusion in the quote of any seller expenses to the delivery point, including pipeline transportation costs to the terminal.

Thus, the court, taking as its basis, the expert's opinion, letters from official sources and contractual terms confirming the Company's arguments, considers that the costs should not be re-included.

Custom disputes 1/2

2. Classification of goods and application of anti-dumping duties

Company position: The company produces oil based on a contract from 1997 that applies provisions of the Customs Law dated 20 July 1995.

The Company referred to the requirement to apply the Partnership and Cooperation Agreement between Kazakhstan and European Community Member States, ratified on 1 July 1999 to anti-dumping duties, meaning the decision of the Board of the Eurasian Economic Commission cannot be applied until 24 September 2018.

A customs review was not carried out to determine foreign economic activity commodity nomenclature codes.

Department position: The company incorrectly classified the goods as pipes with a seam, because it imported seamless pipes, which are covered by anti-dumping duties.

To clear the pipes through customs, the Company needs to pay anti-dumping duties 31% of the customs value. The contracts referred to by the Company only apply if the goods come from the countries of the parties.

An expert in the classification and origin of goods explained that according to the technical description, manufacturing method and manufacturer's passport, the Company had not classified the goods (pipes) correctly.

Court of first instance position: The company did not appeal the decisions on the classification of goods, meaning the court considering the case is not entitled to evaluate these decisions.

The court established that anti-dumping duties had been introduced after Kazakhstan had entered the Customs Union under the "Agreement to apply special protective, antidumping and countervailing measures in relation to third countries", ratified on 21 March 2009, and further applied after it joined the EAEU in 2014.

The contract with the Company is long-term and exempts the Company from paying import customs duties. At the moment the contract was concluded, Kazakhstan law did not stipulates measures such as anti-dumping duties.

The court took into account that according to article 6 of the 1994 Foreign Investment Law, "in the event of a deterioration of the situation of a foreign investor resulting from legislative changes and/or the entry into force and/or changes in international agreement terms, foreign investors will be entitled to apply legislation in force at the moment an investment is made for 10 years, and for investments made under long-term contracts (over 10 years) with the state authorised bodies it, it remains in force until the contract expires, unless otherwise specified by the contract.

The court concluded that anti-dumping duties applied by the Department of 31% based on a decision of the Board of the Eurasian Economic Commission from 18 August 2015 "to apply anti-dumping measures" does not apply due to the stability clauses applicable to the company's contract concluded in 1997.

The court upheld the Company's claims in full.

Custom disputes 1/2

Court of appeal position:

1. Customs value of exported oil

Article 122 of the Law does not determine any specific features for determining customs value to export exchange goods, therefore, the specifics of forming the market value (selling price) of exchange goods does not have legal significance. The key point is to determine the following circumstance, namely whether delivery costs are included in an invoice or not.

At the same time, the Department did not provide estimates for the delivery of goods to a port or other place of export from Kazakhstan, and therefore, the conclusions of the court of first instance to cancel the notification regarding an additional accrual of customs fees of KZT 91 523 035 are legitimate.

2. Anti-dumping duties

The Department's position on the requirement to pay anti-dumping duties is legitimate because:

1) at the moment the Contract was concluded, Kazakhstan customs law did not contain rules governing the collection of anti-dumping duties, which means that the Kazakhstan Customs Code applies;

2) the Contract between the parties contained stability clauses with respect to the cancellation and amendment of only Kazakhstan law.

Case history

Period	Instance	Decision
May 2019	Court of first instance	In favour of the Company, notification cancelled.
September 2019	Court of appeal	New resolution passed; court of first instance ruling cancelled; notification of the accrual of anti-dumping duties recognised as legal.

More details

Custom disputes 2/2

Court of first instance ruling

Recognition of the section of Notification of Audit Results regarding the accrual of additional transportation costs in customs value, and the unjustified declaration of the customs value of exported oil in connection with the use of the Quality Bank as unlawful and cancelled

*The Company A ("**Company**") took the West-Kazakhstan Oblast State Revenue Department ("**Department**") to court to have the section Notification No. 52 dated 28 June 2018 regarding the accrual of custom fees and late payment interest of KZT 439 673 630 recognised as unlawful and cancelled. The additional accrual with respect to the non-inclusion of transportation costs is KZT 423 804 686, and the unjustified declaration of the customs value of exported oil in connection with the use of the **Quality Bank** is KZT 2 291 830.*

1. Non-inclusion of transportation costs

Company position: The Company delivers crude oil through the Atyrau-Samara pipeline systems and the Caspian Pipeline Consortium ("CPC") **FOB - Novorossiysk, Ust-Luga**.

According to Incoterms-2000, the Company bears the costs associated with goods until they pass the ship's rail. For this reason, oil transportation costs are considered included in the price of the goods.

The contractual oil supply price covers transportation costs. All seller costs when oil is sold FOB are considered as included in the market price reflected in an invoice, as the oil price is formed at the port of sale. This was confirmed by S&P Global Platts, which states that all seller costs, including transportation costs, are included in quotes.

Department position: FOB delivery terms testify to the distribution of costs and determine the moment title transfers, but do not indicate that transportation costs are included in the transaction price. For this reason, the costs associated with transporting oil through the pipeline system to the shipment port should be included in the customs value.

Court of first instance position: According to article 98 of the Kazakhstan Customs Code, the customs value of goods exported from the Customs Union is based on the transaction price actually paid or payable for an export sale. To determine customs value, the transaction price includes transportation costs and other loading costs, unless they are included in the transaction price.

The price of goods under FOB contracts is determined per barrel net and calculated using a formula that does not provide for the seller's transportation costs.

The crude oil price is formed based on crude oil quotes published by news agencies, and are used to determine the market value of oil (formed by supply and demand) and cannot take into account seller or buyer shipping costs. For this reason, the link to the response of the information source is not valid.

The company did not present costs to transport oil by main pipeline when applying to export the oil, which is they are not included in the customs value.

The court rejected the Company's claim to cancel the Notification of Audit Results regarding the inclusion of transportation costs.

Custom disputes 2/2

2.Quality Bank

Company position: The Company exports crude oil through the CPC pipeline system. The product at the CPC main pipeline outlet cannot be pure Karachaganak oil, as oil from various CPC shippers mixes. Article 1 of the Trunk Pipeline Law provides a mechanism for applying a Quality Bank when concluding contracts with CPC. For this reason, the Company receives and pays for the Quality Bank on the basis of settlements provided by an independent financial institution. Bank statements confirm payment and compensation received by the Quality Bank.

Since supplies to the CPC pipeline began in 2004, the Company has included both positive and negative Quality Bank amounts in gross revenue, taxable turnover and customs value. The Company uses section 9.4 of the final Production Sharing Agreement (FPSA) to determine the price of oil and gas raw materials, therefore it correctly included Quality Bank costs in the customs value.

Department position: When declaring oil transported through the CPC pipeline for customs purposes, the Company incorrectly declared its customs value less Quality Bank costs, which is a violation of article 98 of the Kazakhstan Customs Code.

Court of first instance position: The CPC pipeline allows several shippers to transport oil, therefore, outlet oil is a mixture called “CPC mixture”. This is not disputed by the Company.

Contractually, crude oil should match the standard of CPC mixture oil shipped to the marine terminal at the moment of delivery.

The contractual buyer of goods purchases and pays the exchange cost for CPC mixture for a specific period of time. At the same time, Quality Bank compensation payments or retention do not affect the transaction price. Quality Bank costs are not billed to the buyer.

The court did not accept the Company's arguments about FOSA (Final Production Sharing Agreement) provision that take into account the Quality Bank, since they apply to taxation.

The Quality Bank is not included in the expenses stipulated by point 3 of article 98 of the Kazakhstan Customs Code to be excluded when determining customs value, if they were previously included in the transaction price, respectively, and cannot be taken into account.

The Court considers that Notification regarding the accrual of customs duties in connection with the use of the Quality Bank is lawful; a ruling was passed in favour of the Department.

Custom disputes 2/2

Court of appeal position: The provisions of material law determine the range of circumstances to be proved, specifically: transportation costs to the place of export of goods from Kazakhstan are of legal importance.

Article 122 of the Law does not determine any specific features for determining customs value to export exchange goods, therefore, the specifics of forming the market value (selling price) of exchange goods does not have legal significance. The key point is to determine the following circumstance, namely whether delivery costs are included in an invoice or not.

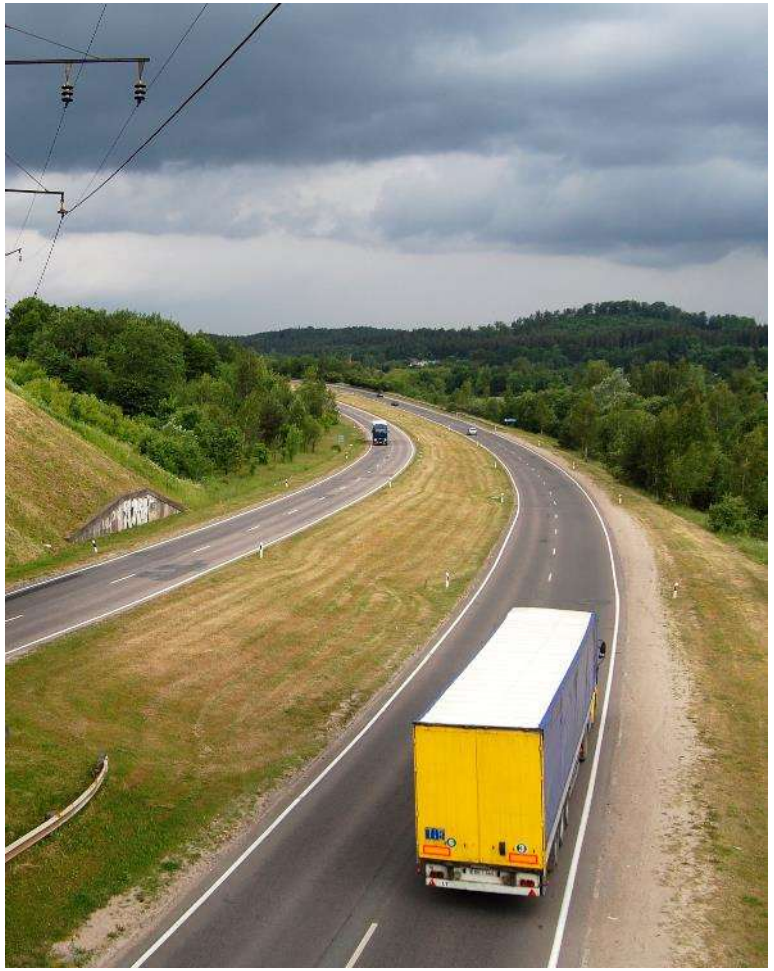
The Department did not provide calculations for the delivery of goods to a port or other place of export from Kazakhstan, which is why the conclusions of the court of first instance on the legality of the relevant part of the notification should be cancelled and a new ruling adopted recognising the notification as illegal and cancelled with respect to the additional accrual of customs duties of KZT 421 512 856.

The court upheld the Company's request to cancel the notification of audit results regarding the inclusion of transportation costs and refused the additional Quality Bank accrual.

Case history

Period	Instance	Decision
October 2018	Court of first instance	Company claims rejected
March 2019	Court of appeal	Court of first instance ruling regarding the accrual of custom fees and late interest payment on transportation costs cancelled.
September 2019	Supreme Court	Court of appeal resolution upheld.

More details



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