

State Administration revisits legislation: are gross-up clauses in danger?

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The State Tax Administration of Ukraine (STAU) has made public Letter No.14086/5/22-5016, questioning payment of “additional amounts compensating a non-resident for the Ukrainian withholding tax.” Though the STAU is referring to a particular case when interest is paid on a cross-border loan, this approach may apply on a far wider scale.

Indeed, the CPT Law prohibits reservations in cross-border agreements that oblige the Ukrainian entity to pay the withholding tax. This provision, however, is remarkably vague and leaves ample room for interpretation.

There are fears that this position may trigger disputes about the deductibility of gross-up payments and about the validity of underlying clauses, and that it could technically impede the payments in question.

Nevertheless, legal ambiguity may be exploited to defend the legitimacy of gross-up clauses. If the wording of a contract is accurate, and if the withholding tax is properly built into the price, there will be stronger arguments in favor of the taxpayer.

Tax rulings: A long way to go

On 27 January 2010, the government issued Resolution No. 86, complicating the procedure for obtaining tax clarifications.

The tax and other fiscal authorities will provide only general tax/other fiscal clarifications and approve them with formal orders. The authorities must bring earlier clarifications in compliance with the Resolution within three months.

The new changes represent an arbitrary interpretation of legislative provisions (Law No. 2181) that govern clarifications.

The Resolution could limit the taxpayer’s right to seek a tax ruling and complicate any situation that may have resulted from previous tax clarifications. It also creates problems with taxpayer liability. To recap, under Law No. 2181 a taxpayer who has acted based on a tax clarification cannot be brought to responsibility (this provision has traditionally been construed as granting exemption from fines).