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Tax & Legal News

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NBU comments on application of some provisions of Law No.1533-VI

The National Bank of Ukraine (NBU) has released several clarifications about applying some provisions of the Law No.1533-VI "On Amendments to Some Laws of Ukraine with the Purpose of Overcoming the Negative Consequences of the Financial Crisis" (please see the Newsletter of 2 December 2009).

Terms of settlements under foreign economic contracts

In the Letter No.28-311/4492-22644 dated 7 December 2009, the NBU notes that the reduction of settlement terms from 180 to 90 calendar days that the Law No.1533-VI introduced applies solely to import and export transactions carried out after the Law took force, i.e. after 24 November 2009.

If execution of a customs cargo declaration or other documents under export transactions or payments under import transactions took place before the Law took force, the term of settlements is 180 days.

Order of making foreign investments

In the letter No.13-215/7968-22877 dated 10 December 2009, the NBU issues a reminder that foreign investors are allowed to make investments in Ukraine in monetary form exclusively, through investment accounts they have opened at authorized banks. Transferring funds from investment accounts for making foreign investments in Ukraine can be done in Hryvnia only.

The NBU clarifies that foreign investments and income that a foreign investor in Ukraine receives may temporarily (before relevant NBU regulatory legal acts take force) be returned without the use of an investment account as required by regulatory acts, in particular chapter 3 of the Regulation No.280 dated 10 August 2005. However, it is unclear whether the current order of payment of dividends and other income and of return of foreign investments to investors will be retained in the future (in particular, it is unclear whether Ukrainian companies will be entitled to use their own currency for these purposes).

As for the requirement to register foreign investments in currency value form, the NBU will realize this procedure only after approval of a regulatory legal act that establishes the order and grounds of registration. Information about adopting this regulatory legal act will follow. Hence, the issue of state registration of foreign investments in currency value form remains unregulated indefinitely.

The Ministry of Justice of Ukraine was unable to clarify application of some provisions of the Law No.1533-VI

Recently the Ministry of Justice of Ukraine considered the issue of application of para 10 of chapter II of Law No. 1533 which prohibits early fulfilling obligations by residents to non-resident lenders under credit and loan agreements.

According to the Ministry of Justice, the Law is not clear regarding cases which qualify for early fulfilling of such obligations. Besides the above, the issue of retroactive effect of such provisions is still open.

Hence, the Ministry of Justice believes that the said provisions require official interpretation by the Constitutional Court of Ukraine.

The draft Law recalls 180-day rule for settlement under foreign economic contacts

23 December 2009 the draft Law No.5378 "On Amendments to Some Legislative Acts of Ukraine (Regarding Overcoming Negative Consequences of the Financial Crisis)" passed the first reading in Verkhovna Rada.

The draft Law provides for amendments to a number of legislative acts of Ukraine, including the Law of Ukraine "On the Order of Settlements in Foreign Currency" to increase the term of currency proceeds return from 90 days to 180 days.

STAU declares that filing corporate profit tax reporting for 11 months is not required in 2009

In the Letter No.26806/7/15-0217 dated 2 December 2009, the STAU notes that Ukrainian tax and budget law do not provide for filing a return for 11 months. The tax authorities will accept the corporate profit tax reporting that taxpayers file for a mentioned period. However, it will be classified as "For information purposes" and will not be entered into corporate profit tax payers' personal accounts.

New STAU clarification regarding VAT treatment of services provision to non-residents or receipt of services from non-residents

On 4 December 2009 the STAU released the Letter No.27085/7/16-1517, in which it clarified rules for VAT treatment of services provision under agreements with non-residents.

Determination of tax object and base

The STAU again concludes that the place of actual supply is a condition for determining the tax object and base for VAT purposes with respect to services provision to non-residents or receipt of services from non-residents (excluding provision of services specified in subparagraphs "B", "r" - "e" of paragraph 6.5 of Article 6 of the Law of Ukraine "On Value-Added Tax"). As follows from the Letter, the tax authorities consider the "place of actual supply" to be exactly the place of actual provision of services.

The STAU notes that services rendered outside the customs territory of Ukraine as confirmed by primary documents are not subject to VAT. The tax authorities opine that such services may include accommodations in a hotel in the territory of a foreign country, provision of office premises located in the territory of another country, repair of equipment at the place where the customer's productive capacities are located (in the territory of a foreign country) and other similar services.

To substantiate its position, the STAU again refers to provisions of subparagraph "r" of paragraph 10.1 of Article 10 of the Law of Ukraine "On Value-Added Tax." That part of the law says that upon a non-resident's provision of services, the entity responsible for accruing, withholding and paying taxes is the non-resident's permanent establishment. In the absence of the latter, the entity responsible for accruing, withholding and paying taxes is the entity receiving these services if the place of service provision is located on Ukrainian customs territory.

Hence, the STAU insists on its approach, under which one should use the "place of services provision" criteria to determine the applicable VAT treatment. However, neither the law nor the STAU's clarifications establish the principles necessary for identifying the place of service provision. It is unclear what should be treated as a key factor: the place where the service is rendered under the agreement, or the place where this service is consumed. Nor does the law establish requirements for the primary documents that should confirm provision of services outside the customs territory of Ukraine (in particular, that satisfy the need to prove the physical presence of the customer/contractor at the place of actual service provision outside Ukraine).

Furthermore, this approach is inconsistent with general rules for determining the place of services supply established by subparagraph "a" of paragraph 6.5 of Article 6 of the Law of Ukraine "On Value-Added Tax."

The STAU advanced a similar position in its Letter No.10887/6/16-1515-26 dated 23 October 2009.

Taxation of data processing services

The STAU issued a detailed interpretation of data processing services for the purposes of subparagraph "д" of paragraph 6.5 of Article 6 of the Law of Ukraine "On Value-Added Tax."

When treating such services as those that fall into the category in question, one should take into account that data processing services and provision of information, including the use of computer systems, fall into the services specified in section 72.30.2 of the State Classifier of Goods and Services, approved by the Order of the State Committee for Standardization No.822 dated 30 December 1997.

The Law of Ukraine "On Protection of Information in Telecommunication Systems" No. 80/94-BP dated 5 July 1994 defines processing information in the system as the performance of one or several operations, in particular: collection, introduction, writing down, transformation, reading, storage, elimination, registration, acceptance, receipt and transmission with the help of technical means and software.

Dictionaries also define "data processing." Data processing means a sequence of operations performed with data, for example combination, verification, arithmetical operations, etc. (<http://www.oceaninfo.ru/sprav/termin3a.htm>). The term also comprehends storage, search, sorting and reformatting of text and tabular data in computer systems (<http://www.litera.com.ua/slovaro.htm>).

VAT treatment of software development services

The STAU notes that the place of supply of software development services should be determined under general rules. We would like to restate that according to subparagraph "д" of paragraph 6.5 of Article 6 of the Law of Ukraine "On Value-Added Tax," the place of transfer or provision of copyright, patents, licenses and allied rights, including trademarks, is the place of registration of the buyer or its permanent establishment. If there is no such place of registration, the place of service supply is the place of permanent address or residence if the buyers of services are located outside the customs territory of Ukraine.

In view of the above, the STAU clarifies that software development services and the transfer of exclusive or non-exclusive right to use such software have different natures. These services could be rendered both simultaneously or not, but should be formalized through different types of agreements.

Therefore, provision of software development services is not considered as transfer or provision of copyright. The place of supply of such services, therefore, is the customs territory of Ukraine (regardless of whether these services are rendered to a resident or to a non-resident). Accordingly, provision of the mentioned services is subject to 20% VAT under general rules.

Also, the STAU issues a reminder that according to subparagraph 2.3.3 of paragraph 2.3 of Article 2 of the Law of Ukraine "On Value-Added Tax" the entity supplying goods (services) on the customs territory of Ukraine through a global or local computer network is subject to mandatory registration regardless of whether it reached the maximum level of taxable transactions. A non-resident may carry out such activity only through its permanent establishment registered in Ukraine.

STAU approves criteria for selecting economic entities that run the risk of performing unreal (fictitious) transactions in rendering services to third parties with the purpose of unjustifiably declaring VAT credit

On 12 November 2009 the STAU issued Order №631 "On dealing with economic entities that run the risk of performing unreal (fictitious) transactions" (hereinafter the Order). According to the Order, the STAU has approved criteria for selecting economic entities that run a risk of performing unreal (fictitious) transactions.

Evaluation of economic entities will be performed according to the following criteria:

1. Status of the taxpayer;
2. Type of activity according to the Classifier of Types of Economic Activities;
3. Sharp changes in sales volumes according to VAT return data (one-time increases in sales volumes);
4. The volume of sharp changes in VAT returns exceeds 20%;
5. The organization employs less than five individuals;
6. The same person occupies the director and chief accountant positions;
7. Sales volumes are less than the average monthly amount of supply according to Appendix 5 to the VAT return;
8. Charter capital does not exceed UAH 50,000;
9. Depreciation charges are less than UAH 50,000;
10. The legal address of the taxpayer is the registration address of more than 10 taxpayers.

According to the Order, the STAU should prepare a list of risky economic entities by 20 November 2009. As of yet, however, a list has not been made public.

It is now difficult to determine what the consequences of the adoption of this Order will be, as it does not provide for particular mechanisms for revealing risky economic entities.

Taking into account that the Order provides for amendments to the Methodological Recommendations on Review of VAT Reporting, the Order will influence VAT payers only after the relevant amendments are introduced.

We would also like to note that the Order has not been registered in the Ministry of Justice of Ukraine, so its validity may be questioned.

The STAU position regarding declaring VAT credit for loss-making transactions

The STAU believes that the right to VAT credit does not depend on the financial result for the reporting period (Letter № 11499/6/16-1515-12 dated 9 November 2009). At the same time, the wording used in the Letter complicates understanding of the STAU position. Specifically, it is unclear whether such approach applies to instances when supply of goods is performed at prices that are lower than their cost (i.e. whether the right to VAT credit depends on the financial result of particular transaction), and whether the losses arising are to be covered from other sources (e.g. shareholder contributions).

It is worth noting that available court practice proves that the tax authorities tend to contest the right to VAT credit depending on the result of transaction. In practice the authorities often dispute the right of taxpayers to VAT credit for goods (services) that were sold at prices that are lower than their purchase prices. In the majority of cases courts support the authorities' position, referring to the fact that the purchase of goods (services) for loss-making transactions cannot be considered as their use in the taxpayer's business activity.

Ratification of the Double Tax Treaty between Ukraine and Libya

On 9 December 2009 the Law of Ukraine "On Ratification of the Double Tax Treaty between Ukraine and the Great Socialist People's Libyan Arab Jamahiriya" took force.

The Law was signed by the President on 18 November 2009.

STAU prepares draft laws that provide a range of significant changes to key laws on taxation

CPT and VAT administration

The STAU has developed the draft Law "On Amendments to Some Legislative Acts of Ukraine," which provides a range of changes to the order of CPT and VAT administration, such as:

- For CPT purposes, it sets a single tax period - a calendar year;
- Taxpayers will pay monthly CPT determined as 1/12 of the amount of accrued CPT for the previous calendar year and adjusted by the inflation index for the previous calendar year;
- CPT is due by the 20th day of each calendar month. Taxpayers should submit the annual CPT return for the annual reporting period;
- It increases depreciation rates for fixed assets, including fixed assets purchased before 1 January 2004;
- Salary expenses can be deducted if the obligatory Personal Income Tax is paid to the budget;
- VAT refund will be performed only for export transactions. Should VAT credit exceed VAT liabilities for the reporting period as a result of supply of goods (services) within the customs territory of Ukraine, it will be offset against future VAT payments.
- It establishes the obligation of the seller-VAT payer to register VAT invoices for amounts exceeding UAH 100,000 in the Single Register of tax invoices and provides for instances in which the seller's right to issue VAT invoices can be terminated;
- Notwithstanding "the first event rule," the right to tax credit arises only after actual supply of goods (rendering services), etc.

The draft Law has been posted on the official STAU website for informational purposes. We also note that it has not been submitted to the Verkhovna Rada for consideration.

According to the tax authorities, adoption of the Law of Ukraine "On Changes to Some Legislative Acts of Ukraine" will increase tax payments to the budget and simplify the procedure for administering them. However, this policy could provoke the use of "shadow" schemes by taxpayers, for tax optimization purposes.

Limitation on deductibility of royalty and marketing payments

The STAU has developed the draft Law "On Amendments to the Law On Corporate Profit Tax." Under the draft Law, starting from 1 January 2011 taxpayers will be allowed to deduct royalty and marketing payments of an amount not exceeding 3% of the taxable profit for the previous year.

Hence, STAU intends to deprive taxpayers of the possibility of optimizing CPT payments by means of royalties and marketing payments. Besides increasing the tax burden, the above Law will limit foreign investors' rights, as the royalty usually exceeds the 3% limit. Notably, the draft Law does not limit the maximum royalty to be included into the customs value of imported goods (for the purposes of VAT liabilities and duties).

STAU clarifies certain VAT administration issues

The STAU has published the Letter No.27084/7/16-1517 dated 4 December 2009 summarizing certain VAT administration issues.

VAT credit on the sale of cars

If the car is excluded from fixed assets and sold as a good, the VAT payer could include in VAT credit that part of VAT accrued (paid) upon the purchase of the car that corresponds to the non-depreciated part of the car's price, but that does not exceed the car's length price on the date of the sale.

At the same time, the taxpayer has no right to VAT credit if more than 1,095 days have passed from the date the tax invoice (received when the car was purchased) was issued.

Adjustment of mistakes of the predecessor of a new company

The right of a company established as the result of reorganization to adjust the mistakes made by a predecessor in VAT reporting depends on the reorganization's legal mechanism.

If the company is established as the result of a transformation and the date of its registration matches the date of the state registration of the terminated company, VAT registration of the new company is performed under the rules prescribed for VAT re-registration. In this case, the new company can adjust the VAT reporting mistakes its predecessor made under general rules.

If the new company's registration date is a new date, cancellation of the predecessor's registration as VAT payer simultaneously takes place. Taking into consideration the fact that as a result of cancellation of the company's registration as VAT payer, the company is excluded from the Register of VAT payers, the legal successor to the company is not entitled to adjust the mistakes for the period prior to its registration.

Calculating adjustment to the VAT invoice of the branch

The head office has no legal grounds to calculate the adjustment of the VAT invoice that the branch issued before its registration as VAT payer is cancelled.

VAT refund upon contributing fixed assets to charter capital

If the taxpayer receives fixed assets as a contribution to charter capital on the customs territory of Ukraine, it is not entitled to claim VAT refund, as compensation for the received objects, but not for money, is made via corporate rights.

At the same time, upon import of fixed assets into Ukrainian customs territory as contribution to charter capital, VAT is paid during customs clearance, and thus could be considered as part of the VAT refund.

Supply of goods by non-resident which does not have the permanent establishment on the customs territory of Ukraine

Supply of goods and fixed assets that are located on the customs territory of Ukraine (without import into the territory of Ukraine) performed by non-residents is subject to VAT. The VAT-payer under these operations would be the permanent establishment of the non-resident

The non-resident's permanent establishment must register as a VAT payer in cases prescribed by para 2.3 of the article 2 of the VAT Law.

Actually, the STAU implicitly indicates that non-resident is able to perform VAT-able transactions on the territory of Ukraine only through the registered permanent establishment.

Adjustment of VAT credit on import of goods

In case of a discount from a non-resident on imported goods, when customs declaration data as well as VAT accrued and paid during customs clearance are not changed, VAT credit should not be adjusted.