RUSSIAN DESK

New overview of the court practice of the Supreme Court of the Russian Federation

On 23 December 2020 the Supreme Court of the Russian Federation approved Overview of Court Practice No. 4 for 2020. The overview contains a number of important clarifications regarding issues that arise when organisations participate in court proceedings.

Antitrust regulation

REIMBURSEMENT OF EXPENSES ON THE PAYMENT OF A REPRESENTATIVE'S SERVICES TO PARTICIPANTS IN THE CONSIDERATION OF A CASE ON A VIOLATION OF ANTITRUST LEGISLATION

The Supreme Court clarified that the participation of a person in the consideration of a case regarding a violation of antitrust legislation does not serve as grounds for the reimbursement of losses to said person in the form of the business trip expenses of the representative in connection with their presence at the meetings of the commission of the antitrust authority.

The onset of pecuniary losses in connection with the legal actions of the antitrust authority based on indicia of a violation of antitrust legislation does not attest to the illegality of the conduct of the state authority and is not sufficient for the reimbursement of damages from the public treasury.

Taxes and duties

A TAXPAYER MAY TRY TO PROVE THAT ITS DEBT TO A FOREIGN PARTY IS *DE FACTO* NOT CONTROLLED DEBT EVEN IF FORMALLY IT MEETS CORRESPONDING INDICIA INDICATED IN THE LAW (THIN CAPITALISATION RULES)

The Supreme Court stated that the thin capitalisation rules enshrined in Article 269 of the Tax Code of the Russian Federation are aimed at countering the abuse of a right and the receipt of an unsubstantiated tax benefit. For this reason, they cannot be applied in all instances on a purely formal basis.

A tax authority merely has to establish that the controlled debt of a taxpayer complies with formal criteria: the loan had been received from a Russian or foreign affiliate and had been granted despite the thin capitalisation of the borrower. Under the general rule, this is sufficient to place restrictions on the deductibility of interest expenses during the calculation of corporate income tax. However, a taxpayer is still entitled in this case to try to prove that the debt must not be recognised as controlled debt, notwithstanding compliance with formal criteria, as the actual facts demonstrate the actual business justification of such debt and the lack of intent to abuse rights.

In the opinion of the Supreme Court, any other approach would be at variance with the fundamental principles of legislation on taxes and duties, such as equality and the economic rationale of taxation.

A TAXPAYER SHOULD NOT PAY TRANSPORT TAX FOR THE PERIOD WHEN THE TAXPAYER DID NOT OWN THE VEHICLE AND IT DID NOT PHYSICALLY EXIST

Adhering to the lines of similar practice that it applies to other property taxes,[1] the Supreme Court clarified that a taxpayer should not pay transport tax if a vehicle was wrecked or destroyed, but for some reason or other continued to be registered with the taxpayer.

In the opinion of the judges, the wreckage or destruction of a vehicle serves as the grounds for the termination of title to the vehicle, and from this moment onwards transport tax should not be paid even though the Tax Code links the obligation to pay this tax to the registration of the vehicle with the taxpayer, and not to the title to the vehicle (Article 357 of the RF Tax Code).

This legal position concerns the dispute between the tax authority and an individual. Nevertheless, we believe that it may apply equally to corporate payers of the transport tax.

[1] Ruling No. 305-KG18-9064 of the Judicial Panel for Economic Disputes of the Supreme Court of the Russian Federation dated 20 September 2018 in case No. A40-154449/2017 (regarding corporate property tax).

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Procedural issues

ESTABLISHMENT OF THE LEGAL STATUS OF A FOREIGN ENTITY DURING CONSIDERATION OF DISPUTES WITH THEIR PARTICIPATION

The Supreme Court drew the attention of the courts to the need, when considering a dispute with the participation of a foreign entity, to establish its legal status (the scope of its rights and obligations) in accordance with the law of the country of incorporation of the indicated entity.

In the case which served as the basis for the issue of these clarifications by the Supreme Court, the court of first instance terminated the proceedings in the case after establishing that the respondent – an owner of an architecture bureau in the Federal Republic of Germany – had been liquidated. The Judicial Panel for Economic Disputes of the Supreme Court cited the fact that the court of first instance had established the actual liquidation on the basis of the documents of bodies that did not have the authority to confirm the legal status of the respondent, accordingly there were no grounds for terminating the proceedings in the case.

Bankruptcy

THE RIGHT OF A SHAREHOLDER TO CONTEST THE TRANSACTIONS OF A BANKRUPT COMPANY ON GENERAL GROUNDS

The commencement of receivership in respect of a bankrupt joint stock company does not prevent a shareholder from contesting the transactions of the company on general grounds outside of the bankruptcy case.

The Supreme Court once again emphasised that such restrictions of rights are not established by bankruptcy legislation, the shareholder's interests on the recovery of the bankruptcy estate of the joint stock company do not contravene either the interests of scheduled creditors on adding to the bankruptcy estate of the debtor, or the goals of the receivership.

SPECIFICS FOR THE PAYMENT OF VAT ACCRUED ON THE LEASE OF PLEDGED PROPERTY DURING A RECEIVERSHIP

The Supreme Court clarified that the amounts of VAT to be assigned from lease payments on the lease of pledged property and payable to the budget within the framework of the current liabilities of the debtor should be considered expenses on the sale of the pledged item. Costs on the payment of this tax are paid from the lease payment until it has been allocated according to the rules established by Sub-Clauses 1 and 2 of Article 138 of the Bankruptcy Law, and are not passed on to the other creditors of the debtor.

SECONDARY LIABILITY OF PERSONS THAT CAUSED DAMAGES JOINTLY WITH THE PERSON THAT CONTROLS THE DEBTOR

When considering cases on the assignment of secondary liability during a bankruptcy, the issue often arises as to whether liability should be assigned to persons that do not formally control the debtor, but *de facto* caused the damage.

Based on the example of a specific case in which the bankruptcy of the debtor was caused by the actions of persons which included both persons that control and do not control the debtor, the Supreme Court clarified that the persons that caused the damage assume secondary liability with the person controlling the debtor jointly and severally. The damage was caused as a result of the organisation by the indicated persons of the activity of a corporate group with the participation of the debtor in such a way that the losses were charged solely to the debtor, while the other participants of the group derived a profit.

CLAIM FOR THE ASSIGNMENT OF SECONDARY LIABILITY AS THE MEANS FOR RESOLVING A CORPORATE DISPUTE

The Supreme Court stated that a claim for the assignment of secondary liability may not serve as means for resolving a corporate dispute. The Supreme Court made it clear that the parties in the corporate dispute with the respondent still had the option of resorting to the remedies stipulated by corporate legislation, and not bankruptcy legislation.

STATUS OF A CREDITOR ON A CLAIM FOR THE PAYMENT OF THE ACTUAL VALUE OF THE PARTICIPATION INTEREST IN THE BANKRUPTCY CASE OF A DEBTOR

The Supreme Court ruled that if there is a legal interest related to a claim for the payment of the actual value of a participation interest in a debtor company, the respective person is entitled to participate in the case as a representative of the founders (participants) of the debtor or a representative of the owner of the debtor's property.

The full text of the Overview can be found on the official website of the Supreme Court of the Russian Federation: https://vsrf.ru/documents/practice/29528/.

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