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VAT on Transportation Services: Problems Still Remain

By Gayk Safaryan

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Gayk Safaryan
Senior Associate
CMS, Russia

Until January 1, 2011, works and services relating to the production and sale of goods under the customs regimes of export or of a free customs zone were subject to 0 percent tax under Paragraph 1, Sub-item 2, Item 1 of Article 164 of the Tax Code. Paragraph 2 of the sub-item, which stipulates 0 percent value-added tax on the works and services of a customs convoy and the transportation and shipment of imported and/or exported goods, did not specify the customs regime for the importation and/or exportation of such goods, unlike the first paragraph of the sub-item. Consequently, this resulted in ambiguity in interpreting the provision of the sub-item.

On the one hand, if Paragraph 2 was written in order to extend the domain of applying the rule stipulated in Paragraph 1, then it is rational to suppose that 0 percent VAT applies to the works and services stipulated in Paragraph 2, irrespective of the customs regime of imported and/or exported goods.

On the other hand, if Paragraph 1 and Paragraph 2 of the sub-item are construed as parts of a single legal provision, then Paragraph 2 does not create a new regulation, but, rather, clarifies Paragraph 1.

This was supported by the Constitutional Court (Ruling No. 41-O of the Constitutional Court, dated Jan. 19, 2005). Hence, under this approach, works and services set in Paragraph 2 must be taxed at the rate of 0 percent, provided they are rendered in respect of goods in the customs regime of export or of a free customs zone. Otherwise, such works and services are subject to 18 percent VAT.

Moreover, the list of works and services stipulated in Paragraph 2 was not exhaustive, which

also resulted in uncertainty on which other works and services could also fall under Paragraph 2.

In practice, the tax authorities generally adhered to the first approach and applied 0 percent VAT, regardless of the customs regime of the imported/exported goods for which the given works and services were performed. However, the court practice was not uniform. Indeed, even the Supreme Arbitration Court has changed its position from the first approach to the second one (Decree No. 16305/05 of the Presidium of the Supreme Arbitration Court, dated June 19, 2006; Ruling No. 6635/08 of the Supreme Arbitration Court, dated May 28, 2008).

The Russian legislator endeavored to solve this ambiguity in interpreting the rule by replacing Sub-item 2 of Item 1 of Article 164 of the Tax Code with new Sub-items 2.1 to 2.8, which came into force on Jan. 1, 2011.

Sub-item 2.1, which relates to the international transportation of goods, stipulates that 0 percent VAT applies if the point of delivery of the goods or the point of destination of the goods is located outside Russia (hence international transportation). The international transportation of goods comprises (1) services on the provision of railway vehicles; and (2) on forwarding services rendered under the freight forwarding agreements.

It is worth noting that even though the list of the forwarding services is exhaustive, there may be an issue on what rate is applicable to the services rendered under an agreement that is not a freight forwarding agreement.

The tax authorities claim that such services must be taxed at 18 percent, however, there is no court practice on this issue (Letter of the Finance Ministry, dated Jan, 20, 2011, No. 03-07-08/15, and dated Jan. 17, 2011, No. 03-07-08/10).

Consequently, the problem remains on the taxation of forwarding services not specified in the list of Sub-item 2.1 and on the taxation of forwarding services listed in Sub-item 2.1, but rendered under agreements that are not forwarding agreements.

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