The Legal Nature of the Additional Payment of Excise Taxes Calculated Using an Increasing Coefficient, and the Problems of Applying the Calculation Method of Additional Excise Tax in the Conditions of Applying an Increased Coefficient M

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ABSTRACT

This article is devoted to the actual problem of analyzing the signs of an additional payment for excise duties, the obligation to pay which arises in connection with exceeding the maximum volume of sales of excisable goods at the end of the calendar year. The article analyzes the problems of tax regulation calculation of an additional payment by the settlement method when determining the unfounded tax benefit received by the taxpayer.

Keywords: excise taxes on tobacco products, increasing coefficient, calculation of excise tax, calculation method, unjustified tax benefit

Pursuant Federal Law No. 401-FZ dated 30 November 2016, Article 194 of the Tax Code of the Russian Federation (RF Tax Code) was supplemented with Clause 9 which prescribes that taxpayers engaged in production of cigarettes and/or filterless cigarettes, and/or cigarillos, and/or bidi, and/or kretek cigarettes in the territory of the Russian Federation, should pay the amount of excise tax for the above excisable goods calculated for tax periods starting from 01 September (inclusive) of each calendar year through 31 December (inclusive) of the same year, using the coefficient T calculated as specified in Clause 9 of Article 194 of the RF Tax Code, if the total volume of excisable goods listed in para 1 of this Clause sold by a company over the tax period exceeds the average monthly total volume of the indicated excisable goods sold in the previous calendar year.

According to the explanatory note to the above Law, this measure was to bypass the existing long-term commodity producers' practice, when taxpayers knowing about the upcoming increase in excise rates starting from the new calendar year, sought to save on the payment of excise taxes payable to the budget through a significant increase in the volume of product sales at the end of each calendar year at lower excise rates applicable before the beginning of the next calendar year.

In other words, this situation resulted in formation of a significant volume of inventory immediately before the increase in the excise tax rate. The provision proposed under Clause 9 of Article 194 of the RF Tax Code was consequently aimed at limiting the volume of production and sales of tobacco products in the 4th quarter of each calendar year, but not at obtaining additional income to the budget through mandatory additional payment, which is nothing but additional property consequence for the taxpayer who exceeded the volume of production and sales of tobacco products in the 4th quarter as compared to the average monthly product sales volume in the previous calendar year.

In its opinion on the draft law (bill) that provided for introduction of Clause 9 into Article 194 of the RF Tax Code, the Legal Department of the Federation Council indicated shortcomings of the proposed bill provision related to the procedure for calculating the average monthly volume of product sales (total sales per year divided by 12) and comparing it with the base indicator of the previous calendar year. The shortcomings consist in the fact that the proposed legislative mechanism does not allow to distinguish between cases of increased production and sales of excisable tobacco products, both associated and not associated with tax evasion. Such regulation, as noted in the opinion, does not comply with Clause 4 of Article 3 of the Tax Code which prescribes that taxes and fees impeding non-prohibited legal economic activities of individuals and companies be inadmissible.[1]

This opinion justifies the situation where the volume of sales and production of tobacco products during one of the months of the calendar year may differ significantly from the same volumes in other months for objective reasons related to production processes. The method of calculating the coefficient applied to the amount of excise tax paid in September, October, November and December each calendar year, providing for the ratio of the total volume of excisable goods sold by a company over the tax

[1] Opinion of the Legal Department of the Federation Council Office [electronic resource]. URL: http://sozd.duma.gov.ru/bill/11078-7(дата обращения: 04.08.2020).

period/corresponding calendar month (VHn) to the average monthly total volume of specified excisable goods sold in the previous calendar year (Voß), reveals the desire of the legislator to overcome monthly fluctuations in production and sales volumes by calculating the average monthly total volume of excisable goods sold, determined by dividing the total sales of these goods for the year by 12.

In connection with the established procedure for calculating the coefficient, the question arises whether it is possible to recognize the tax benefit gained by the taxpayer as undue and understate the amount of excise taxes in the event of increased production and sales of tobacco products in July and August of each calendar year, i.e. in the months preceding the period when the coefficient is started to be applied.

First, it should be noted that, in contrast to the previously existing situation when the increase in volumes of production and sales depended directly on the increase in the tax rate, the tax benefit, after introduction of the coefficient, can no longer be associated with the increase in the rate, but correlates with the presence or absence of the taxpayer's liability to apply the coefficient to the amount of excise tax in the 4th quarter of the calendar year, depending on the quantitative indicators of production and sales of tobacco products.

Secondly, it is noteworthy that the taxpayer's liability to pay this additional payment arises only in certain cases (i.e. the payment is optional but not mandatory) and depends on the ratio of the total sales volume of excisable goods sold by a company over the tax period/the corresponding calendar month and the average monthly total volume of the indicated excisable goods sold in the previous calendar year. The focus of the provision on restricting the volume of goods sold in the last quarter of the calendar year is obvious, but at the same time the legislative prescription itself pushes the taxpayer, who is a business entity and whose purpose, in accordance with Article 2 of the Civil Code of the Russian Federation (RF Civil Code) is to derive and increase the profit gained, to distribute the expanding volumes of production and sales of tobacco products between other months of the calendar year.

It is quite logical that, due to objective reasons associated with production management and operation, the redistribution of expanded production volumes is generally possible in the 2d / 3rd quarter of the calendar year, which in no way can be considered as gaining an undue tax benefit, since the increased volume of production and sales of goods and, consequently, the need to redistribute these volumes over a calendar year, may depend on objectively changing market conditions.

As a result, due to the imposed additional payment calculated if the coefficient T is applied, the taxpayer's business activity faces the situation when inventory fails to be accumulated in the 4th quarter of the calendar year, but increased production volumes are distributed in other periods of the calendar year. Such a situation does not lead to gaining any undue tax benefit, since it actually contributes to the initial legislator's objective to restrict the volumes of production and sales in the 4th quarter of the calendar year. In addition, it should be noted that the increase in receipts of excise amounts to the budget before the 4th quarter begins due to redistribution of increased volumes during the 2d and 3rd quarters can be considered as a kind of "compensation" in the middle calendar year instead of paying an additional fee.

Thus, the additional excise tax collected in the 4th quarter is not a mandatory additional payment to the budget, but a legal and economic mechanism aimed to additionally restrict the volume of production and sales of tobacco products in the 4th quarter of each calendar year.

Note that, stating its legal views, the Constitutional Court of the Russian Federation emphasizes that the excise tax in terms of its economic and legal content (essence) is intended, through impacting the price of a particular category product, to reduce the returns from production and sales of this product, and thereby impede its entry into the market and hence its consumption.[2] Ultimately, in cases where the legislative goal to restrict the volume of production and sales of tobacco products in the 4th quarter for a specific taxpayer is achieved, the tax benefit gained by a company as a result of non-application of the coefficient in the 4th quarter due to redistribution of production volumes over the 2d and 3rd quarters of the calendar year, should be considered as due, since the 4th quarter demonstrates no non-compliances in exceeded production volumes and sales of products, and, respectively, no negative material consequences such as an additional payment which is actually a kind of "material liability" for tax law violation by the taxpayer.

The legal nature of any payment is, as a rule, identified through judicial practices, especially through the acts of the RF Constitutional Court, which, in particular, may consider any payment as indemnity,

[2] RF Constitutional Court's Decision No. 592-O dated 13 March 2018 on Refusal to Accept for Consideration the Deka Company's Claim on Infringement of Constitutional Rights and Freedoms, Clause 14, Article 187 and Clause 5, Article 200 of RF Tax Code.

compensation or sanction. For example, in its acts, the RF Constitutional Court considers a penalty as compensation for state treasury losses resulting from short-received tax amounts due to delay in tax payments. In this case, the liability to pay a penalty is derived from the main tax duty and is not an independent, but a supporting (accessory) liability.[3] In another example, the Supreme Arbitration Court of the Russian Federation recognized that the payment of penalties for using budgetary funds under a budgetary loan agreement established by provisions of Articles 290 and 291 of the Budget Code of the Russian Federation, is civil, i.e. it is a legal penalty (Article 332 of the RF Civil Code).

Thus, the judicial practice demonstrates a lot of examples when the court gives a special legal qualification to this or that additional payment based on its direction and purpose. Based on the foregoing, it seems quite legitimate to consider the difference between the amount of excise tax calculated using the increased coefficient and the amount of excise tax calculated without applying the coefficient as a sanction for exceeded volumes of tobacco production in the last quarter of the calendar year.

Thirdly, it should be noted that since the coefficient is calculated taking into account the average monthly total sales of goods in the previous year, the size of the tax benefit cannot be estimated within fluctuations in sales of one calendar year but must be estimated within two calendar years. Moreover, since in July or August the taxpayer will pay the amount of excise tax that is greater than that in the previous and subsequent months in case of increased production volume, then the specified excess may turn out to overlap the additional payment amount to be paid in the 4th quarter, i.e. there may be no tax benefit as such, or it may be insignificant for the taxpayer.

In general, in the context of the existing legislative regulation, it seems quite difficult to assess the tax benefit acquired by the taxpayer in the situation under consideration, since the tax benefit should ultimately be expressed as a quantitative amount of tax to be additionally paid to the budget.

In particular, in the event of tax authorities' claims regarding the overestimated volume of sales of goods in some months of the calendar year, the tax authority, in order to calculate the coefficient, will have to use a quantitative expression of the volume of sales of goods that differ from the actual volumes, i.e. whose calculation procedure is not established by tax legislation. The question is: how the tax authority should determine which volume of production is economically viable? It is not entitled to average the average annual volumes of the current year, since such a method for calculating production volumes in September, October, November and December of each calendar year has not been established by the Tax Code and is hardly justified, as the tax legislative regulation indicates that that the public entity has identified the need to adjust the sales volumes of the last quarter, but not those of the entire current calendar year.

According to the opinion emerging in judicial practice, the tax authority cannot independently establish methods for additional tax charges if such methods have not been set forth by tax legislation.[4] In connection with the above circumstances and the legislative uncertainty in calculating the coefficient in cases where the tax authority disputes, in quantitative terms, actual volumes of production, the question arises whether it is possible to apply the calculation method in accordance with Article 31 of the RF Tax Code, depending on the correlation of the same indicators for other similar taxpayers. At the same time, the RF Constitutional Court's legal view shall be taken into account which states that the admissibility of applying the calculation method for imputation of taxes provided for in paragraph 7, Clause 1, Article 31 of the RF Tax Code, is directly related to the liability of their correct, full and timely payment, and is caused by illegal actions (inaction) of the taxpayer. This statute not only contains a list of grounds for applying the calculation method for determining the tax liability, but also establishes a mandatory condition (method), where, if complied with, the amount of taxes can be recognized as reliable. So, the basis for the calculations is not the information on any other taxpayers, but only on those whose economic performances that affect the taxable base formation are the most similar/identical to those of the audited taxpayer. Thus, the determination of the tax liability by the calculation method does not imply its implementation on arbitrary grounds.[5] Meanwhile, the determination of taxpayer's financial indicators by calculation, using information available to the tax authorities as well as data on other similar taxpayers, is based on the hypothesis that another taxpayer who is conscien-

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[3] RF Constitutional Court's Resolution No. 20-P dated 17 December 1996 on *Constitutionality Test Case*, Clauses 2 and 3, Part 1, Article 11 of RF Law dated 24 June 1993 on *Federal Tax Police Bodies*».

[4] RF Constitutional Court's Decision No. 1822-O dated 18 September 2014, RF Supreme Arbitration Court's Decision No. VAS-8277/12 dated 05 September 2012 to Case No. A29-5132/2011; Resolution of RF Supreme Arbitration Court's Presidium No. 16282/11 dated 10 April 2012 to Case No. A55-5386/2011.

[5] RF Constitutional Court's Decision No. 1844-O dated 29 September 2015 on *Refusal to Accept for Consideration the Claim of Food Base No. 4 Ltd. on Infringement of Constitutional Rights and Freedoms*, paragraph 7, Clause 1, Article 31 of RF Tax Code.

tiously engaged in the same type of activity in a similar economic environment, has a tax base which is likely to be the same in sizes.[6] However, the use of such a method in the situation under consideration seems to be problematic, since other similar taxpayers may have the same situation associated with fluctuations in production and sales of goods, as in the case of the audited entity. In addition, other taxpayers may have special, inherent in their production only, economic and organizational features that significantly affect the production processes. This circumstance prevents from applying the method of determining the coefficient and additionally charged excise tax for other similar taxpayers.

If reliable accounting of taxable items is not available or if tax and accounting records are improperly maintained or if a documentary base is missing, which prevents the tax authority to establish the amount of a real tax liability, judicial practice generally prescribes using the calculation method for additional tax assessment. The courts declare that taxes can be correctly calculated only if incomes and expenses are properly registered, while the calculation method application involves the calculation of taxes with varying levels of probability.[7] The tax authority, in its turn, must first identify the grounds for applying the calculation method provided for in Article 31 of the RF Tax Code, and indicate them in its decision made following the tax audit results.[8] However, the additional excise tax assessment due to non-applied coefficient in most cases will not be supported by any grounds provided for in Article 31 of the RF Tax Code for the calculation method application. In the opinion that is emerging in judicial practice, the tax authority during the tax audit must identify the actual tax liabilities of the taxpayer[9], and only if such a determination is impossible, apply the calculation method.

The Constitutional Court of the Russian Federation also proceeds from the fact that the legal provisions of the Tax Code do not allow the taxpayer to be charged with additional taxes in the amount greater than that established by law, since the same provisions determine the amount of tax liability based on the actual indicators of the taxpayer's economic activity.

As for the possibility to use the coefficient applied by the taxpayer in the previous year, the tax law does not provide for such a method of additional excise tax assessment. Thus, the Tax Code currently does not establish any method for determining the estimated volumes of production and sales of excisable goods in order to calculate the coefficient upon presentation of claims by the tax authorities related to the undue tax benefit acquired by the taxpayer through the overestimation of production volumes in July-August or other months of the calendar year. The identified "estimated" volume of sales for the purpose of calculating the coefficient and arrears on excise taxes for the last quarter of the calendar year should be economically based on the relevant market research, taking into account the growth or decline of market indicators. In other words, the tax authority should specifically examine the market of relevant goods for the corresponding period of time, taking into account the fact that the total volume of tobacco products should be used to calculate the coefficient, and keeping in mind that the production and consumption market of specific types of tobacco products can behave differently.

The problem of recognizing the tax benefit as undue by virtue of Article 54.1 of the RF Tax Code, if grounds for applying the coefficient are not available, caused by fluctuations in the volume of tobacco products during the calendar year, is also associated with a special legal structure for calculating the coefficient which increases the amount of excise taxes in the last quarter of the calendar year. The fact is that Article 54.1 of the RF Tax Code is aimed at applying its provisions to civil law transactions (Clauses 2 and 3, Article 54.1, RF Tax Code), while the coefficient size is independent of the conditions of civil law transactions, but depends on the process of arranging the production and release of a certain volume of tobacco products.

Arbitrary and unjustified determination by the tax authority of the "estimated" volumes of production that differ from the actual ones, means that the tax authority, of its own free will, imputes to the taxpayer the amount of its tax liabilities calculating the coefficient and arrears at its own discretion, but fails to reconstruct its real tax liabilities, which is a significant infringement of the taxpayer's right for such tax exemption whose amount is determined solely on the basis of legislative regulations, but not at the authority's discretion.

Through setting itself the task to prevent the understated amount of excise taxes payable to the budget by virtue of a significant increase in the volume of sales in the 4th quarter of each year at lower excise rates due to the increase in rates from 01 January of the next calendar year, the legislator de-

[6] RF Supreme Court's Decision No. 302-KG15-17939 dated 25 January 2016 to Case No. A78-14492/2014.

[7] RF Supreme Arbitration Court's Presidium in Resolution No. 5/10 dated 22 June 2010 to Case No. A45-15318/2008-59/444.

[8] RF Supreme Court's Decision No. 57-KG15-8 dated 10 November 2015.

[9] Resolution of the Moscow District Arbitration Court's Resolution No. F05-17284/2018 dated 24 October 2018 to Case No. A40-105536/2017.

cided to charge an increased amount of excise tax for the above increase in production volumes resulting from the application of the coefficient in case of exceeding the amount of the usual excise payment established by Chapter 22 of the RF Tax Code for the first, second and third quarters. In other words, as mentioned above, the key objective of the legislator was to restrict the volume of production, but not to collect payments. As a result, if volumes of production and sales of tobacco products are redistributed by the taxpayer within a calendar year so that the 4th quarter demonstrates the restricted production volumes, then the tax benefit acquired by the taxpayer cannot be regarded as undue, since, through such an arrangement of production, the taxpayer fulfils the objective established by the legislator, and simultaneously gains a profit as a business entity.