

a non-resident's royalties' income is recognised as its income from a Kazakhstan source, which according to point 1 of article 193 of the Tax Code is subject to CIT at the source.

We believe that CIT at the source is, in essence, the equivalent of import customs duties which is applicable to non-commodity operations such as work (services), capital gains, non-residents' passive forms of income (dividends, interest, royalties) and others. When goods are imported, the income from non-commodity operations of a non-resident is imposed on state taxes, i.e. import customs duties, it is also to be imposed on income tax at the source from activities performed in Kazakhstan. In other words, CIT at the source is a type of "import duty" on a non-resident's income from non-commodity operations. Of course, import duties and CIT at the source are legally different in nature. For example, the burden of paying customs duties falls on the purchaser importing goods. The burden to pay CIT at the source belongs to the "seller" of work (services), the recipient of dividends, interest, royalties and others. However, these are only formal differences, and if we look at the situation from an economic standpoint, the purchaser of goods, work or services, the payer of dividends, interest or royalties are ultimately responsible for paying import duties and CIT at the source.

Thus, we believe that although there are legal grounds to do so, the simultaneous imposition of import customs duties and CIT at the source is not justified from an economic standpoint.

We believe that the above conceptual double taxation issue could be resolved in the same way as the reverse charge VAT problem. According to subpoint 2) of point 6 of article 241 of the Tax Code, reverse charge VAT is not applied if the value of work (services) has been included in customs value, and if import VAT has been paid. Similarly, as in the situation being considered, to eliminate double taxation (customs duties and CIT at the source) non-resident's income may be exempt from CIT at the source if it has already been included in the customs value of the goods being imported and if customs duties and taxes have already been paid.

On the face of it, it would be more logical for the exemption to apply to import duties rather than CIT at the source. However, we believe it worthwhile exempting CIT at the source as the rule of including royalties in customs value applied in Kazakhstan is based on general WTO guidelines for defining customs value. As Kazakhstan is trying to join the WTO, changing the current rules would be, at least, irrational. Legislative changes to CIT at the source, in our opinion, would not contradict Kazakhstan's international obligations.

We have only touched on one of the current conceptual problems of including license payments in the customs value of imported goods. In addition, other conceptual issues exist related to the need to harmonise current rules for determining customs value and transfer pricing legislation. We will be discussing this issue in more detail in upcoming issues.

