

Legal Alert

Almaty

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Kazakhstan Amends its Tax Code

In line with Baker & McKenzie's practice of keeping clients informed of important legal developments that might influence your business, we would like to draw your attention to the following recent changes in Kazakhstan's banking legislation.

Overview

On 16 November 2009, Kazakhstan adopted certain amendments to its Tax Code (the "**Tax Amendments**").¹ Most of the Tax Amendments take effect from 1 January 2010. However, some changes are effective retroactively from 1 January 2009.

The primary purpose of the Tax Amendments is to keep the current rates of the corporate income tax and the mineral extraction tax until 2012. Another objective is to simplify tax administration and clarify certain provisions of the Tax Code.²

Summary of Principal Changes

Below we summarize some of the major Tax Amendments:

1. Corporate Income Tax

(a) Rates

In its original version, the Tax Code provided for a decrease of the corporate income tax rate from 20% to 17.5% in 2010 and to 15% from 2011 onwards. The same approach applied to the general rate of the withholding tax on income of foreign companies.

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¹ Law of the Republic of Kazakhstan No. 200-IV "On Introducing Changes and Additions to Certain Legislative Acts of the Republic of Kazakhstan Concerning Taxation" dated 16 November 2009.

² Code of the Republic of Kazakhstan "On Taxes and Other Obligatory Payments to the Budget" dated 10 December 2008.

Under the Tax Amendments, the current rate of the corporate income tax and the general rate of withholding tax (20%) will remain in effect until 2012 and will be reduced to 17.5% only from 2013 and to 15% from 2014.

These changes are an attempt to boost budget shortages which have intensified during the global economic downturn.

(b) Capital Gains on Sale of Property

Before the Tax Amendments were adopted, foreign companies and individuals were subject to income tax on the capital gain arising from the sale of property located in Kazakhstan. Presumably, this provision applied to all types of property other than products designated for sale (e.g., to equipment used in production).

Under the Tax Amendments, from 1 January 2010 the tax will apply to the capital gain which arises from the sale *only* of immovable property (e.g., land and buildings) and certain other property which is subject to registration in Kazakhstan (e.g., maritime vessels, aircraft, etc.). This is an important improvement for foreign investors with movable assets located in Kazakhstan.

(c) Capital Gains on Reorganization

Prior to the Tax Amendments, the Tax Code generally was interpreted as providing for a tax-neutral treatment for corporate reorganizations (e.g., mergers or spin-offs) of Kazakhstani companies.

As a result of the Tax Amendments, however, a corporate reorganization may now lead to taxation. Specifically, if there is a difference between the value of certain non-depreciable assets transferred in a reorganization (as indicated in the transfer act or a division balance) and the balance sheet cost of such assets, such difference will be viewed as a capital gain and will be subject to the corporate income tax to be paid by the transferor. This change is effective from 1 January 2009.

2. Mineral Extraction Tax

Prior to the Tax Amendments, the Tax Code provided for a gradual increase of the rates of the mineral extraction tax in 2010 and in 2011. For example, the current 5-18% range for crude oil was supposed to increase to 6-19% in 2010 and 7-20% in 2011.

This increase was intended to compensate for the reduction of the corporate income tax rate. However, as this reduction was postponed, the Tax Amendments postpone the increase of mineral extraction tax rates until 2013 and 2014, when the rates of the minerals extraction tax will increase.

3. Tax Administration and Clarification

(a) *Certificate of Residence*

As is common in many countries, in Kazakhstan there are certain administrative procedures of applying double tax treaties. In particular, the recipient of income should submit to the Kazakhstani counterparty a certificate of its tax residency in the relevant treaty country.

Before the Tax Amendments were adopted, the Tax Code required that this certificate be delivered by the non-resident not later than the date on which payment of the relevant income is made to it. The Tax Amendments soften this rule by requiring that the certificate should be provided to the Kazakhstani counterparty not later than the first to occur of the following dates:

- 31 December of the year when the payment to the non-resident was made; or
- commencement of a regular tax audit of the Kazakhstani counterparty; or
- not later than 5 business days before completion of a non-regular tax audit of the Kazakhstani counterparty.

This amendment is effective retroactively from 1 January 2009.

(b) *Tax Residence of Foreign Individuals*

The Tax Code, prior to the Tax Amendments, provided that a foreign individual generally was to become a tax resident of Kazakhstan if one of the following conditions is met:

- he/she has spent at least 183 days in any consecutive 12-month period in Kazakhstan; and
- he/she has spent at least 183 days during three calendar years using the following formula: the number of days spent in the current year plus 1/3 of the number of days spent in the preceding year plus 1/6 of the number of days spent in the second preceding year in Kazakhstan.

The latter test was abolished by the Tax Amendments. Accordingly, from 1 January 2010, foreign individuals will generally become Kazakhstani tax residents only if they stay in Kazakhstan for at least 183 days in any consecutive 12-month period.

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