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Improving the Procedures for Concluding Transfer Pricing Agreements in Russia and Kazakhstan: a Comparative-Legal Analysis

Abstract: The article provides a comparative analysis of the procedure for considering and concluding transfer pricing agreements in the countries of the Organization for Economic Cooperation and Development, the Russian Federation and the Republic of Kazakhstan. The issues of determining the parties to the transfer pricing agreement, introducing amendments and additions to them, the timing of the final decision on the application of entrepreneurs to conclude an agreement, as well as the list of documents required for its signing are to be investigated. The discussions of civil scientists regarding the interpretation of the nature of agreements on pricing, namely, referring them to one of the types of tax control or to a contractual form of regulation of relations in the field of taxation have been studied and reflected. The positive and negative aspects of transfer pricing agreements for the state and business have been identified. It is noted that pricing agreements can help achieve a balance of public and private interests, neutralize the negative aspects of the use of transfer prices, including reducing numerous disputes and litigation between entrepreneurs and government agencies. Proposals were made to amend and supplement the legislation on transfer pricing in Russia and Kazakhstan in terms of improving the procedure for concluding transfer pricing agreements for tax purposes.
Keywords: transfer price, transfer pricing, transfer pricing agreement, transaction, business and tax risks

Introduction

The latest world events related to the collapse of oil prices, the announcement of a pandemic, etc., should trigger the search for new solutions to the problems of the economy and trade. In these realities, attention should also be paid to the issues of transfer pricing, which is understood as the process of formining the price in state-controlled transactions. In addition, in recent years, this institution has increasingly attracted the attention of state bodies and the public, who tend to believe that it is used exclusively to minimize taxes.

It is believed that the statement about the use of transfer prices by companies solely for the purpose of tax evasion or minimization is erroneous. Sharing the opin-

ion of Grundel L.P., we believe that they (transfer prices) act as a tool for rational planning of the company's activities and their use is not a violation of the law [Grundel 2014, p. 160].

One of the ways to resolve conflicts of application of transfer prices are pricing agreements.

In this regard, we analyzed the legal norms governing the conclusion of transfer pricing agreements in Russia and Kazakhstan in order to identify conflicts and gaps in this area, as well as develop proposals for their improvement.

In the course of the study, general scientific (analysis, synthesis and a systematic approach) and special (formal legal, historical legal, comparative legal) methods of cognition were used.

The theoretical basis was the work of scientists in the field of civil, business, financial and other branches of law.

Research Results

It has been established that an agreement on the application of transfer pricing is concluded between the business entity and the tax authority on the procedure for forrmining prices in controlled transactions. Its essence lies in the fact that the parties reach an agreement on the methods and sources of pricing used in transactions, in connection with which the likelihood of disputes and penalties is reduced [Volvach 2014, pp. 6–7].

It is especially productive for businessmen to sign these agreements in the absence of the necessary information about market prices in open sources of information, the uniqueness of their products and services provided, as well as when setting prices in foreign trade transactions.

The latter is due to the fact that agreed prices for international transactions minimize disputes in two or more jurisdictions at once.

One of the advantages of pricing agreements is the ability of firms to forecast taxes, reduce the level of application of sanctions, and simplify tax and financial planning. In addition, the state budget has a guarantee for a certain amount of tax revenues and investment growth. An additional positive effect for business and government agencies is the savings in time and effort spent on providing a reasonable position on pricing.

However, there are certain difficulties for the state in the application of transfer pricing agreements. So, according to Grundel L.P., these difficulties include: the need to make decisions that are significant for the interests of the budget; establishing relations with tax authorities of other countries (in the case of bilateral agreements), etc. [Grundel 2013, pp. 48–54].

In turn, as noted by Goncharenko L.I. and Vishnevskaya N.G., there is a high degree of risk of errors by officials when signing pricing agreements, since the decision to conclude it is made on the basis of predicted data on the compliance of future prices with market levels and taxes that will be charged in subsequent years [Goncharenko and Vishnevskaya 2015, p. 118].

There is an ambiguous attitude towards this institution in the legal doctrine. One group of researchers explains the nature of the agreement as a contractual form of regulation of relations in the field of taxation (Mukhamadeeva G.A., Shestakova E.V., Starilov Y.N., Davydov K.V., Ershova I.V., Demin A.V., Barulin S.V. and others). Supporters of a different interpretation of the essence of the pricing agreement mechanism see in it one of the forms of (preliminary) tax control of transfer pricing, mediated through the concept of an agreement, which does not provide for the establishment of obligations through a contract and is unequal to it (Kopina A.A., Tyutin D.V. and etc.) [Cherezov 2019, pp. 109–110]. In general, a compromise point of view is not excluded, according to which the transfer pricing institution is complex, harmoniously combining the norms of private and public law. This point of view has a right to exist.

At the same time, in the countries of the Organization for Economic Cooperation and Development (hereinafter – OECD), the institution in question has been successfully functioning for a long time. For example, the legislative possibility of concluding pricing agreements has existed in the USA and Australia since 1991, in the UK since 1999, Poland since 2006 [Grundel and Pinskaya, 2012, p.112.], Hungary since 2007, etc. In OECD countries, the subject of a pricing agreement can be an enterprise (companies) of any category (small, medium or large business), including non-residents (Great Britain, Czech Republic, Poland), and the agreements themselves are divided into unilateral, bilateral and multilateral (in Hungary, Canada, Poland, The USA, Czech Republic they apply all 3 types of agreements). Moreover, a simplified procedure for concluding preliminary agreements on pricing is widely applied to small and medium-sized enterprises (in the USA since 1996, the Netherlands since 2004, Canada since 2005, Germany and France since 2006, Australia since 2011, South Korea since 2015, etc.). Typically, the documentation requirements are lower than those in the normal pricing agreement process, and the cost of entering them is also lower [Kornienko, Minina, Korolev, Mitrofanova and Pushkareva 2021].

In most of these countries, the maximum duration of pricing agreements is up to 5 years (Hungary, Germany, Israel, Canada, Poland, France, Sweden). In addition, some countries impose fees for considering applications from entrepreneurs to conclude pricing agreements and / or making changes to them, which depend on the taxpayer category (the USA, France), type of agreement (Hungary) or transaction value (Poland). However, it is also practiced to establish a fixed amount of fees (Germany, Canada, Mexico, Czech Republic, Sweden) [Grundel 2021].

Note that the first pricing agreement was signed almost 30 years ago, back in 1991 in the United States. It was concluded between the United States, Australia and the Apple computer concern with the aim of settling prices in relations with the Australian subsidiaries of the company. Subsequently, similar agreements were concluded with Canada (1993) and Singapore (1995). This program is called "Advanced Pricing Agreements" [Kostikova 2008, pp. 53–56].

In general, it should be especially noted that the issues of consideration and conclusion of pricing agreements in OECD countries are resolved in almost the same way, since this is provided for in the rules of the international organization themselves, as well as in international legal procedures [Kornienko, Minina, Korolev, Mitrofanova and Pushkareva 2021].

Another example: in the countries of the Eurasian Economic Union (hereinafter referred to as the EAEU), the practice of concluding pricing agreements is also gradually being introduced (in Kazakhstan since 2008, Russia since 2012, Belarus since 2019). Let's consider the experience of Russia and Kazakhstan on such agreements.

Kazakhstan was the first among the EAEU countries to provide for the possibility of concluding agreements on the application of transfer prices, which was enshrined in 2008 in the Law of the Republic of Kazakhstan "On Transfer Pricing" (hereinafter – the Law of the Republic of Kazakhstan No. 67–IV) [Kazakhstanskaya Pravda 2008]. Currently, the rules for concluding an agreement on the application of transfer pricing, adopted in 2011 [Kazakhstanskaya Pravda 2012], are also in force (hereinafter – the Rules of November 24, 2011).

In Russia, the practice of signing pricing agreements has been in effect for 9 years. So, from January 1, 2012, the Federal Law of July 18, 2011 No. 227-FL "On Amendments to Certain Legislative Acts of the Russian Federation in Connection with the Improvement of the Principles for Determining Prices for Tax Purposes". The specified act has supplemented the Tax Code of the Russian Federation (hereinafter – the Tax Code of the Russian Federation) with a special section V.1 "Interdependent Persons. General provisions on prices and taxation. Tax control in connection with transactions between related parties. Pricing Agreement" [Belykh 2011, pp. 2–10].

These innovations and the signing of the first pricing agreement between OJSC NK Rosneft and the Federal Tax Service of the Russian Federation in 2012 (hereinafter referred to as the Federal Tax Service of the Russian Federation) attracted close attention of foreign experts, who indicated the possibility of further development in Russia international principles of transfer pricing [Kostin 2013, pp. 67–68]. Nevertheless, today the rules for concluding pricing agreements in Russia and Kazakhstan do not allow considering them as a risk minimization tool available to a wide range of entrepreneurs. In particular, according to the Tax Code of the Russian Federation, only the largest Russian taxpayers are given the opportunity to conclude agreements on pricing (Article 105.19 of the Tax Code of the Russian Federation). According to Kuzmin D.V., this is due to the fact that "transfer pricing is used in most cases by

vertically integrated structures, and the total amount of taxes and proceeds from the sale of goods, works and services allows them to be classified as the largest taxpayers" [Kuzmin 2021] (by order of the Federal Tax Service of the Russian Federation of May 16, 2007 No. MM-3–06 / 308 approved the criteria for classifying organizations – legal entities as the largest taxpayers).

Representatives of foreign companies operating in Russia are also deprived of the right to conclude agreements on pricing following the example of Russian organizations. Moreover, in relation to permanent establishments of foreign companies, the amount thresholds that are in effect when controlled transactions of Russian companies are detected (Article 105.14 of the Tax Code of the Russian Federation) ["Collection of Legislation of the Russian Federation" 1998] are not formally applied. Consequently, all transactions made by them with all the ensuing consequences can fall under their control. This fact leads to the complication of doing business on the territory of the country and significant labor costs both within the representative offices themselves and within the Russian organizations cooperating with them. In short, the investment attractiveness of the country is decreasing.

In turn, in Kazakhstan, any entrepreneur potentially has the opportunity to conclude a pricing agreement for controlled transactions. This also applies to non-residents – permanent representative offices of foreign companies. This conclusion follows from the following norms.

According to Article 5 of the Law of the Republic of Kazakhstan No. 67–IV, the parties of the transaction or members of an international group have the right to conclude the agreements under consideration. In this case, a participant in a transaction means an individual or legal entity that has entered into a controlled transaction (clause 16 of Article 2 of the Law of the Republic of Kazakhstan No.67–IV). As you can see, the legislator does not endow the transaction participant with any additional features, including the presence of residency. Also, the right to conclude an agreement is granted to a member of an international group, which may include non-residents of Kazakhstan, but who carry out entrepreneurial activities in the state through a structural unit, a permanent establishment (clause 30–1 of Article 2 of the Law of the Republic of Kazakhstan No. 67–IV). Among other things, the authorized bodies do not have the right to refuse an entrepreneur to conclude an agreement due to the lack of residency or other characteristics of the business (clause 6 of the Rules of October 24, 2011).

It should be noted that in Russia there is a possibility of concluding unilateral and bilateral agreements. The difference between these agreements is that the executive authority of a foreign state participates in the "bilateral" ones [Kostin 2013, pp. 67–68]. However, in Kazakhstan it is still possible to conclude only unilateral agreements. The fact that Kazakhstan has not provided practical procedures for the application of the existing conventions on the elimination of double taxation and in terms of transfers also speaks against the Kazakh legislation on transfer pricing.

Also, according to Russian legislation, a pricing agreement is concluded only in relation to one transaction or a group of similar transactions (clause 1 of Article 105.21 of the Tax Code of the Russian Federation) ["Collection of Legislation of the Russian Federation", 1998]. But the legislator does not answer the question of what is meant by a transaction. At the same time, in the notification of controlled transactions, in order to apply the transfer price control rules, each delivery is reflected, drawn up in a separate primary document (consignment note or act). When applying this approach, it is obvious how significantly, in the presence of several heterogeneous transactions, the costs of the enterprise for the conclusion of these agreements can increase. In turn, in Kazakhstan, the legislator does not specify the number or types of transactions for which the considered agreements are concluded.

So, we can formulate the following conclusion: the procedure for concluding an agreement on pricing in Russia and Kazakhstan provides for the entrepreneur to provide a large package of documents.

Since 2021, in Russia, the list of documents that must be attached by the taxpayer to the pricing agreement has been reduced from 8 to 6 points (clause 1 of Article 105.22 of the Tax Code of the Russian Federation) ["Collection of Legislation of the Russian Federation" 1998]. So, according to the Federal Law "On Amendments to Part One of the Tax Code of the Russian Federation (in terms of improving tax control over prices and the procedure for concluding an agreement on pricing for tax purposes)" dated February 17, 2021 No. 6-FL, this list has been reduced to 6 points (copies of constituent documents and certificate of state registration of a taxpayer were excluded) ["Official Internet portal of legal information" 2021]. However, it still remains open, which actually gives the tax authority the opportunity to leave at its own discretion the decision on whether the documents were submitted in full (clause 1, clause 8, Article 105.22 of the Tax Code of the Russian Federation). As a result, this circumstance may serve as the basis for refusal to sign the agreement (clause 8 of Article 105.22 of the Tax Code of the Russian Federation).

In Kazakhstan, the list of documents to be submitted consists of 10 items, but it is closed (clause 3 of the Rules of October 24, 2011). However, some of the requested documents are in the possession of the tax authorities. This applies, in particular, to a certificate or certificate of state registration (re-registration) of a legal entity.

Further, we note that the legislation of Russia and Kazakhstan provides for the same period of validity of the pricing agreement equal to 3 years (Article 105.21 of the Tax Code of the Russian Federation; clause 5 of the Rules of October 24, 2011).

Unlike Kazakhstani legislation, in Russia, an entrepreneur, subject to all the conditions of the pricing agreement, has the right to apply to the authorized body with an application to extend the validity of the pricing agreement for no more than two years (Article 105.21 of the Tax Code of the Russian Federation). Considering the complexity and cost of the process of signing a pricing agreement, it is considered to be positive that there is a possibility of extending its validity period. By the way, in in-

ternational practice, the maximum duration of such agreements is usually 5 years (in the USA – 6 years).

At the same time, it is difficult to predict and take into account possible changes in the price structure and pricing policy, which are influenced by both internal and external factors. As noted by Olofinskaya Y.P., fluctuations in the market price level can be triggered by changes in the geopolitical situation, exchange rate, production conditions, and so on. Therefore, a fixed price for several years is too risky. In this connection, the law should provide for the conditions and circumstances of amending the pricing agreements [Olofinskaya 2014, p. 56]. The above is formulated in clause 12 of Article 105.22 of the Tax Code of the Russian Federation. However, there is no such rule of law in the legislation of Kazakhstan.

There are many questions regarding the timing of consideration of applications for signing agreements. In Russia, the tax authorities have the right to consider applications from entrepreneurs for concluding pricing agreements for up to 6 months (clause 4 of Article 105.22 of the Tax Code of the Russian Federation). In this case, the data period can be extended up to 27 months. In turn, in accordance with clause 3 of the Grounds and the procedure for extending the period for considering an application for concluding a pricing agreement for tax purposes and the documents attached to it (approved by order of the Federal Tax Service of Russia dated March 26, 2012 No. MMB-7–13 / 182 @) list the grounds for extending the time limit for the final decision is not limited. These terms are striking, as noted by Filonov A.O., since during this period the conditions of commercial activity, the economic situation in the country and more may change significantly [Filonov 2013 p. 184]. And not only!

In comparison with Russian legislation, in Kazakhstan the time frame for making a decision to conclude or refuse to sign an agreement is much shorter and amounts to 60 working days (clause 5 of the Rules of October 24, 2011). There are no grounds for extending this period.

Controversial is the issue of charging fees for considering applications for concluding pricing agreements and making changes to them. In Kazakhstan, there are no fees, including state duty, for considering an application for concluding a pricing agreement (Article 609 of the Tax Code of the Republic of Kazakhstan dated December 25, 2017) ["Kazakhstanskaya Pravda" 2017]. In Russia, the size of the state duty is 2 million rubles. (Clause 133) Clause 1 of Article 333.33 of the Tax Code of the Russian Federation) ["Collection of Legislation of the Russian Federation" 1998]. It is important to emphasize that if the Russian tax authority refuses to conclude an agreement, the amount of the previously paid state fee is not refundable, since it is paid for considering an application for concluding a pricing agreement, regardless of whether such an agreement is ultimately concluded or not.

Some scientists are sure of the inexpediency of this payment (Kuzmin D.V.) [Kuzmin 2021], others speak of its unreasonably high amount (Grundel L.P. [Grundelb and Pinskaya 2012, p.112], Shestakova E.V. [Shestakova 2016, pp. 195–201], Korn-

ienko N.Y., Minina E.E., Korolev G. A., Mitrofanova E.A., Pushkareva N.A. [Kornienko, Minina, Korolev, Mitrofanova and Pushkareva 2021] and others). It is believed that the establishment of a state duty in this case is quite admissible and expedient from the point of view of replenishing the country's budget. But it is necessary to consider the issue of reducing its size or differentiate it from the cost of transactions, the category of the payer (in the case of expanding the circle of subjects of agreements).

Conclusion

Summarizing the above, in order to eliminate the circumstances that complicate the process of concluding pricing agreements in Russia and Kazakhstan, we propose:

to expand the range of business entities entitled to conclude pricing agreements by making appropriate amendments to Article 105.19 of the Tax Code of the Russian Federation. At the same time, to reduce the time for consideration by the tax authority of the applications of entrepreneurs on the conclusion of the agreements under consideration (clause 4 of Article 105.22 of the Tax Code of the Russian Federation), excluding the possibility of their extension for "unilateral agreements". In addition, to provide for a closed list of grounds for extending the period for considering an application for concluding "bilateral agreements" (clause 3 of Appendix No. 1 to the order of the Federal Tax Service of the Russian Federation of March 26, 2012 No. MMB-7–13 / 182);

in the Law of the Republic of Kazakhstan "On Transfer Pricing" to fix the possibility of concluding "bilateral agreements", as well as the norms allowing to extend the validity period of agreements on the application of transfer prices and to amend them;

in the legislation of Russia, provide for a closed list of documents attached to the application for concluding a pricing agreement (clause 1 of Article 105.22 of the Tax Code of the Russian Federation), and in the legal acts of Kazakhstan, exclude from this list documents that are in information databases tax authority, namely: a certificate or certificate of state registration (re-registration) of a legal entity (clause 3 of the Rules of October 24, 2011);

consider the possibility of reducing the state duty rate for considering an application for concluding an agreement under Russian law and making adequate amendments to it (clause 133), clause 1 of Article 333.33 of the Tax Code of the Russian Federation).

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