



Seizing opportunities

Newsletter Kazakhstan

Latest news on law, tax and business in Kazakhstan

Issue: July – September 2017 · www.roedl.de/kasakhstan | www.roedl.com/kazakhstan

Content of this issue:

- > In own Interests – New Head of Audit
- > Relationship between Kazakhstan Tax Law and International Tax Law
- > The importance of the supervisory board for medium-sized enterprises in Kazakhstan

> In own Interests – New Head of Audit

In the person of Mr. Amir Nurkassymov “Rödl & Partner” has acquired a new Head of Audit in Kazakhstan. Mr. Nurkassymov will lead as General Director the planning and conducting of audits and from now on he will be your new contact person. Using this occasion, “Rödl & Partner” would like to express our sincere gratitude to Ms. Tatyana Kim, who left the post for family reasons, for her excellent cooperation.

Mr. Nurkassymov graduated from one of the best Kazakhstani universities where he studied accounting and finance, and as early as during his studies he began to work for one of the reputed audit firms. After more than eleven years of work experience, we are glad to welcome him to our team. His experience in auditing enterprises in the food, agrarian and oil and gas sector as well as processing industry will further strengthen our audit team in Kazakhstan.

With his qualification as a certified accountant (Kazakhstan), an international accounting

professional (CPA Eurasia, CAP and CIPA) and an auditor, he will be able to successfully manage the assignments of our clients.

“Rödl & Partner” in Kazakhstan is pleased that Mr. Nurkassymov will bring his experience and professionalism to our team, which will strengthen the foundations of our cooperation and improve the quality of our services.

Mr. Nurkassymov follows Rödl & Partner’s principle of the “single carer”, which means that one contact person coordinates and supervises the affairs of each client in order to provide a focused and comprehensive consultory support on specific issues such as, for example, new IFRS standards or taxation.

We are pleased to welcome Mr. Nurkassymov to our team and wish him success!

Michael Quiring
Attorney at Law
Partner

Specification

- Experience with international and Kazakhstan audit companies, providing recommendations to clients related to internal controls, financial statement close process and accounting matters.
- Performing audits of financial statements in accordance with International Financial Reporting Standards (IFRS).

Work Experience

- Work experience with international and Kazakhstan audit companies
- More than 10 years of professional work experience in auditing (BIG4)

Areas of competence

- International Audit Standards
- International Financial Reporting Standards
- Management accounting
- Methods of analyzing the financial and economic activities of the enterprise

Languages

- Russian
- English (fluent)
- Kazakh (native)

For more information please contact



Amir Nurkassymov

General Director, Rödl & Partner Audit Kazakhstan

Tel.: +7 (727) 356-06-55

E-Mail: amir.nurkassymov@roedl.pro

Newsletter Kazakhstan

> Relationship between Kazakhstan Tax Law and International Tax Law

From Michael Quiring, Rödl & Partner Kazakhstan

The following section deals with the relationship between Kazakhstan tax law and the fundamental principles of international tax law which are enshrined in the relevant Conventions for the avoidance of double taxation (hereinafter – the Convention) and to the extent applicable in the additional Protocols to these Conventions.

In practice, single questions are increasingly arising in the process of economic cooperation with Kazakhstan partners. In particular, they are associated with the creation of a permanent establishment, computation and withholding of taxes on the part of Kazakhstan partners, submission of residency certificates and least but not least with the profit differentiation problems.

The latter issue arises if a parent company operates in Kazakhstan through the permanent local establishment. This issue recently becomes increasingly interesting for the German treasury. Many German companies are continually expanding their presence in Kazakhstan. Instead of making direct investments through separate subsidiaries, German companies very often conduct their entrepreneurial activities through a permanent establishment. Although the parent company and permanent establishment constitute a single entity from the legal point of view, but from the tax point of view, they should be considered separately. Profits relating to the activities of a permanent establishment, according to the provisions of the Convention, shall be taxable only in the state where such a permanent establishment is located. By determining the profits of a permanent establishment, the allocation of the enterprise profits as a whole to the countries participating in such (economic) process of creating values should be ensured.

Thus, the correct allocation of profits which is also fundamentally provided for in the Kazakhstan Tax Code (hereinafter – the TC) is becoming of increasing practical importance.

Creation of a permanent establishment

One of the key problems in the process of economic cooperation with Kazakhstan partners is the issue of creating a permanent establishment and the subsequent emergence of taxation right of the Kazakhstan budget. At the same time, it is necessary to be guided not only by the provisions of Kazakhstan tax law, but mostly by the provisions of the relevant Convention as a matter of priority. According to paragraph 5 of Article 2 of TC, the provisions of the international treaty generally prevail over the provisions of the national tax legislation.

The question of when a permanent establishment is created is regulated both by the Convention and by local Kazakhstan legislation. So, according to Article 5 of the Convention between the Federal Republic of Germany and the Republic of Kazakhstan, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

Only if the enterprise carries on its business in Kazakhstan in such a way, its profits may be taxed in Kazakhstan but only in the part attributable to that permanent establishment (see paragraph 2 of Article 7 of the Convention between the Federal Republic of Germany and the Republic of Kazakhstan).

However, it is necessary to make a clear distinction between two aspects. On one hand, the condition for income taxation in Kazakhstan is the existence of a fixed place of business. On the other hand, a permanent establishment should perform functions that allow to allocate any profit thereto.

Unless the provisions of the relevant Convention provide otherwise, the issue of creation of a permanent establishment is regulated by the provisions of Article 191 together with Articles 189 and 190 of TC. The provisions of Article 191 of TC contain specific conditions under which a permanent establishment is created in accordance with Kazakhstan law. So, for example, according to paragraph 1 of Article 191 of TC, this is the case if a foreign enterprise has a production site in Kazakhstan, carries out the management activities or geological study of subsurface resources, etc.

Newsletter Kazakhstan

In this regard, it is important to note that the paragraph 1 of Article 191 of TC directly determines the priority of the tax rules of the international treaty. Therefore, the verification of the fact of a permanent establishment creation should first be carried out in accordance with local Kazakhstan legislation. The next step is to check the conformity of the result with the international treaty provisions. Very often the result means that, notwithstanding the provisions of Article 191 of TC, a permanent establishment is not created. However, in many cases the question of the relationship between the local provisions of TC and the Conventions is known neither to Kazakhstan enterprises nor to Kazakhstan tax authorities. Therefore, a position is often expressed that only the provisions of Kazakhstan legislation are taken as a basis as a result of which the incomes of foreign enterprises shall be taxable in Kazakhstan. In practice, this leads to double taxation, since the German tax authorities do not recognize the alleged tax liabilities in Kazakhstan and therefore intend to tax income (again) in Germany.

We therefore strongly recommend to ensure checking the risks associated with the permanent establishment creation prior to the conclusion of contracts with Kazakhstan partners.

Only if the fact of a permanent establishment creation is identified in advance, a foreign enterprise will be able to respond and fulfill its obligations under the Kazakhstan legislation in a timely manner without any risk of paying administrative fines and penalties. In the event of a permanent establishment creation, a foreign enterprise is obliged to register it within 30 calendar days pursuant to Article 562 of TC. The term shall begin from the date of the actual creation of a permanent establishment (i.e. the date of the commencement of activities in Kazakhstan). In respect of such a date, the Kazakhstan TC indicates several dates for the purpose of timing where the earliest of such dates shall apply. So, among other things, these dates can be the following ones: the date of concluding a contract with a Kazakhstan partner, the date of signing an employment contract or a contract for the provision of paid services with individuals in Kazakhstan.

Conditions for withholding at source in accordance with TC

Together with the issue of a permanent establishment creation, Kazakhstan contractors often argue that they are obliged to withhold tax at the source of payment at the rate of 20 % and transfer it to the Kazakhstan state budget. At the same time, it is necessary to stress that Kazakhstan tax legislation along with such obligation also provides an opportunity for Kazakhstan enterprises as tax agents to exempt the foreign enterprise income from taxation.

Tax agent obligations are stipulated by Articles 192, 193 and 198 together with Article 200 of TC. The basic condition is that the foreign enterprise has income received by it as a result of economic activities in Kazakhstan or even activities outside Kazakhstan which have been carried out by it in favor (for the benefit) of Kazakhstan enterprise. The Kazakhstan enterprise shall differentiate the following situations prior to income payment to a foreign contractor.

- a) Is there any income resulting from economic activities in Kazakhstan? (place of business under subparagraph 2) of paragraph 1 of Article 192 together with Article 193 of TC);
- b) Is there any income from financial, audit, legal, advisory services, etc.? (individual services irrespective of where they are rendered under subparagraph 3) of paragraph 1 of Article 192 together with Article 193 of TC);
- c) Is there any income under Article 200 of TC received by a foreign enterprise as a result of its economic activities if such enterprise:
 - d) provided identical or homogeneous works or services both through a parent company abroad and a permanent establishment in Kazakhstan;
 - e) provided identical or homogeneous works or services with its permanent establishment in the framework of a joint project?

Newsletter Kazakhstan

It should be noted that some definitions, such as the financial or audit services, often have a statutory definition, therefore, it is possible to check in detail whether the Kazakhstan tax agent is actually obliged to withhold tax at the source of payment. On the other hand, it is necessary to check exactly whether the services were provided in Kazakhstan. Often technical services or works or engineering services are provided outside Kazakhstan. Such services are also not covered by the definition of advisory services (see subparagraph 20) of paragraph 1 of Article 12 of TC).

Often we are talking about the obligation of Kazakhstan tax agent to withhold tax at the source of payment according to Article 200 of TC. Prerequisites for the obligation to withhold tax at the source of payment, i.e. to withhold and transfer 20 % of the tax at the source of payment, along with the above conditions are available only if there is (at the same time) no contract concluded between the Kazakhstan contractor and the permanent establishment nor invoices drawn up by the permanent establishment to the Kazakhstan partner.

The fundamental obligation of a tax agent to withhold tax at the source of payment arises if the tax agent determines that the conditions for applying Articles 192, 193, 198 and 200 of TC are met.

However, the exemption from withholding at the source is possible under Article 212 of TC, if a foreign enterprise provides a tax residency certificate that meets the requirements of Article 219 of TC.

At the same time, the tax agent further checks whether the foreign enterprise has created a permanent establishment. If the tax agent identifies the fact of a permanent establishment creation (if the conditions for a permanent establishment creation corresponding to the International Treaty provisions have been identified), he is still obliged to withhold tax at the source. The possibility of the exemption from withholding at the source is eliminated in this case in accordance with paragraph 4 of Article 212 of TC.

In addition to the above, the provisions of Article 219 of TC establish a number of formal requirements to residency certificate of the foreign enterprise.

For more information please contact



Michael Quiring

Attorney at law

Deputy branch manager

Tel.: +7 (727) 356-06-55

E-Mail: michael.quiring@roedl.pro

Newsletter Kazakhstan

> The importance of the supervisory board for medium-sized enterprises in Kazakhstan

From Korlan Alikhanova, Rödl & Partner Kazakhstan

1. Increasing the role of the Supervisory Board in an LLP

In Kazakhstan, 95 % of companies are registered in the form of a Limited Liability Partnership¹ (hereinafter referred to as LLP). The reason for choosing in favor of an LLP is prevalently the amount of the authorized capital and the limitation of liability of its members, which are mostly attractive from the point of view of small and medium-sized businesses. As the company grows, the members face the issue of transferring some of the management and control functions to separate bodies of the LLP itself.

According to the LLP Law of the Republic of Kazakhstan², the bodies of an LLP include its supreme body - the General Meeting and the executive body - collegial body (Board of Directors) or the sole executive body (Director).

The most part of LLPs adhere to this particular organizational structure. In turn, with a view to exercise control over the activities of the executive body, an LLP may establish a Supervisory Board.

In particular, the issue of controlling and limiting the Director's activities is relevant for subsidiaries established in the form of an LLP with 100 % participation of a foreign company. Being in a place remote from the activities of its subsidiary, its members try to maintain control over making important decisions for the company. The most frequent solution in such situation is the extension of the powers of the General Meeting, by transferring a wide range of issues to its consideration. As a result, the members wishing to supervise the Director's activities, face the problem of prompt decision-making on many issues, which impedes the company's normal core activities.

One of the ways out of this situation is establishing the Supervisory Board, the operating procedure of which can be determined by the LLP Articles of Organization and other internal documents adopted by the General Meeting.

2. The operating procedure of the Supervisory Board of an LLP

The procedure for establishing and operation of the Supervisory Board is provided for by the Civil Code of the Republic of Kazakhstan (General Part)³ and by the LLP Law of the Republic of Kazakhstan.

The resolution to elect the Supervisory Board falls within the exclusive competence of the General Meeting. However, the establishment of the Supervisory Board to control the activities of the executive body of an LLP should be provided for by the LLP Articles of Organization. Moreover, if the LLP Articles of Organization do not provide for the election of an Audit Committee (Auditor), the Supervisory Board of the Partnership has all the rights that belong to the Audit Committee.

According to paragraph 5 of Article 57 of the LLP Law, the operating procedure of the Supervisory Board and the adoption of resolutions shall be determined by the Articles of Organization of a Partnership and by regulations and other documents adopted by the General Meeting.

Thus, if the LLP Articles of Organization provide for the possibility of establishing the Supervisory Board, then for its creation it is necessary to prepare the minutes of the General Meeting of the LLP members or the resolution of its sole member. The provisions regulating the activities of the Supervisory Board, its structure, the procedure for early termination of its activities, etc. shall be integrated into the LLP Articles of Organization.

Despite the fact that the LLP Law clearly defines the purpose of establishing the Supervisory Board - control over the activities of the executive body of the LLP, it is not determined in which form such control can be exercised. The absence of strict mandatory provisions in this case allows members to determine independently the operating procedure of adoption of resolutions by the Supervisory Board depending on the particular interests and priorities of the particular company.

¹ www.kazdata.kz

² Law of the Republic of Kazakhstan No. 220-І dated April 22, 1998, "On Limited and Additional Liability Partnerships"

³ The Civil Code of the Republic of Kazakhstan (General Part) adopted by the Supreme Council of the Republic of Kazakhstan on December 27, 1994

Newsletter Kazakhstan

Proceeding from our practice, supervising the Director's activities is most often limited to determining the range of issues for which he requires the prior approval of the Supervisory Board. However, the approval of the Supervisory Board can be obtained by sending an appropriate electronic message or resolution in a simple written form, unlike the formal procedure for documenting the resolutions of the General Meeting.

3. The operating procedure of the Supervisory Board of an LLP

Only an individual who cannot be at the same time a member of the executive body of the LLP can act as a member of the Supervisory Board.

Members of the Supervisory Board of the LLP shall be elected by the General Meeting for a fixed period of time, but not more than five years. When voting in the Supervisory Board, each member of the Supervisory Board shall have one vote.

The members of the Supervisory Board are the officials of the LLP, along with members of the executive body or the Sole Director.

This provision of paragraph 2 of Article 41 of the LLP Law raises a number of disagreements, in particular the issue of compulsory conclusion of labor contracts with members of the Supervisory Board as the officials of the LLP.

With regard to an LLP with 100 % foreign participation, the members of the Supervisory Board are generally non-residents, most often employees of the parent company, whose activities as a member of the Supervisory Board are not paid for additionally. The consequence is the lack of possibility to conclude an employment contract with such member of the Supervisory Board, at least for the reasons that in this case there are no signs of labor relations.

In this case, the legal basis for the member of the Supervisory Board to obtain the status of an LLP official arises solely within the framework of intracorporate relations, in particular based

on the resolution of the General Meeting⁴. It is possible here to apply an analogy with members of the Board of Directors in a JSC, for which there is also no direct requirement to enter into an employment contract, although according to the JSC Law⁵ they are its officials.

The basis for incidence of liability of the members of the Supervisory Board to the LLP can only be losses caused by the LLP and third parties as a result of improper exercise by the Supervisory Board of the LLP of control over the activities of its executive body.

4. Final provisions

The absence of strict mandatory provisions with regard to the activities and decision making procedure by the Supervisory Board allows the LLP members/founders to establish a supervisory body, given the interests and specifics of the operational activities of the LLP.

Therefore, the Supervisory Board acts as the "golden mean" between the desire of the company's members to supervise the activities of the Director and at the same time to not interfere with the company's operational activities.

"Rödl & Partner" will be glad to support you in establishing a Supervisory Board and to provide qualified employees to join the Supervisory Board of your company as members directly at the place of your operation in the Republic of Kazakhstan.

For more information please contact



Korlan Alikhanova

Head of Legal Department

Tel.: +7 (727) 356-06-55

E-Mail: korlan.alikhanova@roedl.pro

⁴ Karagusov F.S. "On Some Aspects of Non-contractual Liability in the Sphere of Corporate Relations", https://online.zakon.kz/Document/?doc_id=33896612#pos=1;-173

⁵ Law of the Republic of Kazakhstan No. 415-II dated May 13, 2003 "On Joint Stock Companies"

Unique combination

Rödl & Partner – The agile caring partner for Mittelstand shaped world market leaders

As lawyers, tax advisers, management and IT consultants and auditors, we are present in 108 own locations in 50 countries. Worldwide, our clients trust our 4,500 colleagues.

Rödl & Partner is not a collection of accountants, auditors, lawyers, management and tax consultants working in parallel. We work together, closely interlinked across all service lines. We think from a market perspective, from a client's perspective, where a project team possesses all the capabilities to be successful and to realise the client's goals.

Your contacts for further information:



Dr. Andreas Knaul
Attorney at law
Branch manager
Tel.: +7 (727) 356-06-55
E-Mail: andreas.knaul@roedl.pro



Michael Quiring
Attorney at law
Deputy branch manager
Tel.: +7 (727) 356-06-55
E-Mail: michael.quiring@roedl.pro

Seizing opportunities

"Despite the political crisis in Brazil and more precisely because of it, the biggest economy in Latin America, due to its resilient economic fundamentals, continues to offer multiple possibilities for investors and entrepreneurs. Seize with us the unique business opportunities in Brazil."
Rödl & Partner

"Every hand grasped, every foot put on the shoulders of another. Casteller is an opportunity for us to create a brand-new constellation of a human tower."
Castellers de Barcelona



"Each and every person counts" – to the Castellers and to us.

Human towers symbolise in a unique way the Rödl & Partner corporate culture. They personify our philosophy of solidarity, balance, courage and team spirit. They stand for the growth that is based on own resources, the growth which has made Rödl & Partner the company we are today. „Força, Equilibri, Valor i Seny“ (strength, equilibrium, valour and common sense) is the Catalan motto of all Castellers, describing their fundamental values very accurately. It is to our liking and also reflects our mentality. Therefore Rödl & Partner embarked on a collaborative journey with the representatives of this long-standing tradition of human towers – Castellers de Barcelona – in May 2011. The association from Barcelona stands, among many other things, for this intangible cultural heritage.

Imprint:

Newsletter Kazakhstan;
Issue Juli-September 2017

Publisher:

Rödl & Partner Kazakhstan
Dostyk ave 188, BC „Kulan“,
8. Stock
050051 Almaty
Tel.: + 7(727) 356-06-55
www.roedl.com/kazakhstan
E-Mail: almaty@roedl.pro

This Newsletter offers non-binding information and is intended for general information purposes only. It is not intended as legal, tax or business administration advice and cannot be relied upon as individual advice. When compiling this Newsletter and the information included herein, Rödl & Partner used every endeavour to observe due diligence as best as possible, nevertheless Rödl & Partner cannot be held liable for the correctness, up-to-date content or completeness of the presented information.

The information included herein does not relate to any specific case of an individual or a legal entity, therefore, it is advised that professional advice on individual cases is always sought. Rödl & Partner assumes no responsibility for decisions made by the reader based on this Newsletter. Should you have further questions please contact Rödl & Partner contact persons.

Responsible for the content:

Michael Quiring – michael.quiring@roedl.pro

Layout:

Diana Tsoy – diana.tsoy@roedl.pro