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Newsletter Kazakhstan

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Content of this issue:

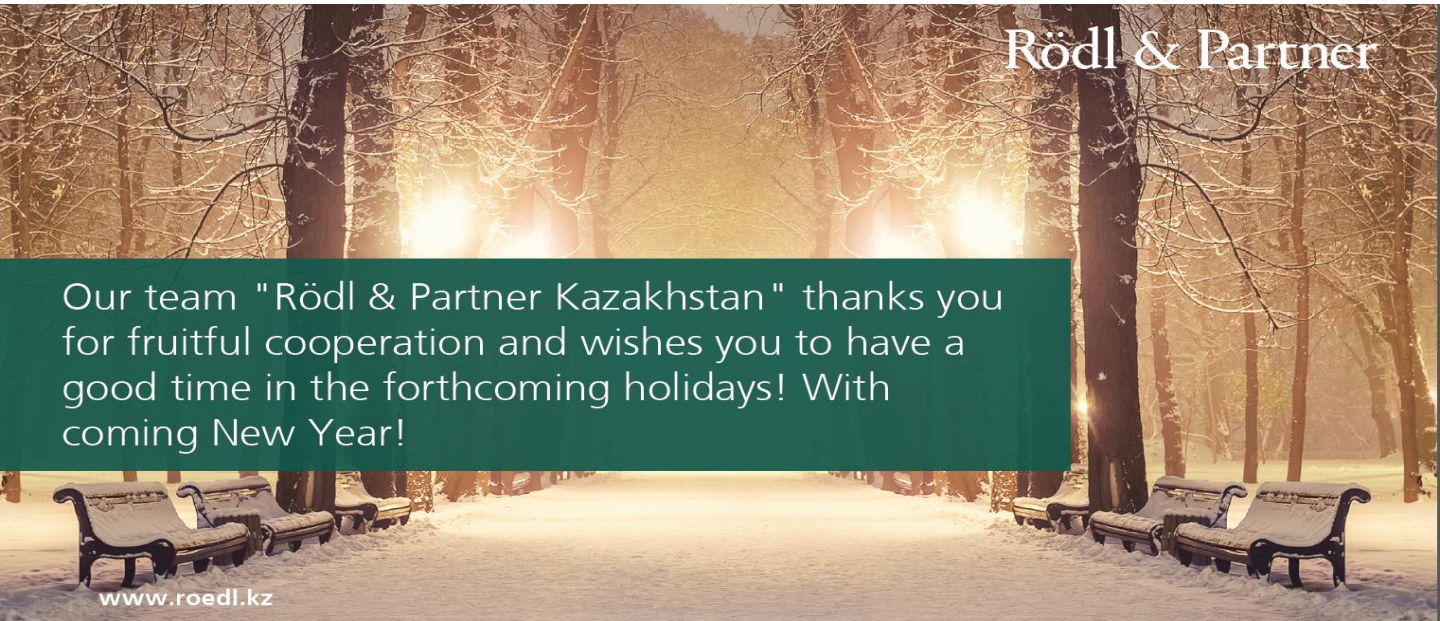
> Actual issues of withholding tax in accordance with the norms of the Kazakh Tax Code and the Convention on Avoiding of Double Taxation

From Galymbek Kereibayev, Rödl & Partner Kazakhstan

Consideration under Kazakh tax law

In this article is considered the withholding tax from the non-residents income from sources in Kazakhstan.

Art. 192, 193 and 200 par. 2 of the Kazakh Tax Code (hereinafter - TC) provide for the duty of the tax agent to withhold tax from the income non-resident from sources in the Republic of Kazakhstan.



When checking the possibility of exemption from withholding tax, the tax agent is obliged under Art. 212 para. 4 and Art. 200 para. 2 of TC to verify not only the fact of the formation of a permanent establishment, but also the attribution of income to such a permanent establishment.

The withholding of the tax at the source of payment presupposes the availability of income associated with the activities of a permanent establishment in the Republic of Kazakhstan as a result of:

- business activities in the territory of the Republic of Kazakhstan;
- providing certain types of services outside the Republic of Kazakhstan;
- attributing the income of the Head Organization abroad to a permanent establishment in the Republic of Kazakhstan.

WHT on income resulting from activities in the territory of the Republic of Kazakhstan

Art. 193 of TC provides that the income of a non-resident legal entity that carries out activities from sources in the Republic of Kazakhstan (without founding a permanent establishment) is subject of WHT-taxation without deduction.

Thus, the Tax Code provides for the availability of income from sources in the Republic of Kazakhstan, as a condition for retaining the WHT.

Art. 192 p. 1 pp. 2) of TC determines that the income from the performance of work and services in the territory of the Republic of Kazakhstan is recognized as income of a non-resident from sources in the Republic of Kazakhstan.

WHT at the source of payment from income from the provision of certain types of services outside the Republic of Kazakhstan

Art. 192 para. 1 subpara. 3) of TC provides that income from the provision of management, financial, consulting, audit, and legal services (with the exception of representation and protection of rights and legal interests in courts, arbitration, and notarial services) for outside the Republic of Kazakhstan is recognized as income of non-residents from sources in the Republic of Kazakhstan.

If services rendered by a non-resident abroad are not directly provided for in the said list, they, accordingly, will not be subject to WHT at the source of payment when making payments to a non-resident. So, for example, if technical services are provided abroad in favour of the resident of Kazakhstan, the income resulting from such services will not be subject to WHT at the source of payment.

WHT at the source of payment from the income of a branch or representative office of a non-resident legal entity

The further case is a retention of WHT from the income of a branch or representative office of a non-resident legal entity.

In accordance with Art. 191 para. 1 subpara. 9) of TC the branch office and representative office of a non-resident legal entity are recognized as permanent establishments. The Tax Code provides for the retention of WHT at the source of payment from their income under certain conditions.

Art. 200 para. 2 of TC provides for the duty to retain WHT by the tax agent at the source of payment when paying in favour of a branch or representative office of a non-resident legal entity, subject to all the following conditions:

a) *availability of income of a non-resident under Art. 198 para. 2 subpara. 4) and para. 3 of the TC resulting from:*

- carrying out activities in Kazakhstan, identical or homogeneous, that is carried out through the permanent establishment of this non-resident in Kazakhstan (Article 198 para. 2, subpara. 4) of TC);
- entrepreneurial activity of non-resident both in the Republic of Kazakhstan and abroad within the framework of one project or related projects carried out jointly with its permanent establishment in the Republic of Kazakhstan (Article 198 para. 3 of TC);

b) *the absence of a contract concluded with the branch or representative office of a non-resident legal entity (Article 200 para. 2 subpara. 1) of TC) and invoices for goods sold, work, services rendered, issued by the branch or a representative office of a non-resident legal entity (art. 200 para. 2 subpara. 2) of TC).*

Thus, the WHT at the source of payment at a rate of 20% may be withheld in the absence of a contract with the branch or representative office and an invoice issued by the branch or representative office. Corporate income tax (hereinafter – CIT) of a branch or representative office then will be reduced by the amount of WHT at the source of payment. If the amount of tax at the source of payment will be more than the CIT of the branch or the representative office, then this will be treated as a tax losses carried forward for 10 years (Article 198 para. 2 of TC).

The regulation of the Article 198, para. 2, subpara. 4) of TC

Art. 200 para.2 of TC provides for the attribution of income to a permanent establishment and retention of WHT by the tax agent in the event that a non-resident performs its activities in Kazakhstan, identical or homogeneous with that carried out in Kazakhstan by its permanent establishment (Article 198 para. 2 subpara. 4) of TC.

The condition for the application of this rule is the availability of income as a result of non-resident activities in the Republic of Kazakhstan. Such activities of a non-resident in Kazakhstan should be identical or homogeneous with that which is already being carried out in Kazakhstan by its permanent establishment.

The regulation of the Article 198 para. 3 of TC

The following case is provided in Art. 198 para. 3 of TC, according to which the WHT must be withheld by the tax agent also in the event that a non-resident legal entity carries out entrepreneurial activities both in Kazakhstan and abroad within the framework of one or related projects carried out jointly with its permanent establishment in Kazakhstan.

According to Art. 191 para. 2 of TC related projects are projects, contracts (agreements) under which they are interconnected or interdependent.

Interconnected contracts (agreements) shall mean contracts (agreements) meeting all the following conditions:

- a non-resident and its related party provide (perform) identical or homogeneous services (works) to the same tax agent or its related party;
- the period of time between the date of completion of provision of the services (performance of the works) under one contract (agreement) and the date of conclusion of other contract (agreement) does not exceed twelve successive months.

The interconnected contracts (agreements) are the contracts (agreements) concluded by a non-resident or its related party with a tax agent or its related party, the default on obligations under any of them by non-resident or its related party affect the performance of the obligations by such non-resident or its related party under other contract (agreement).

Thus, there is a risk that contracts concluded by the head office and its permanent establishment (for example: a branch) with a Kazakh client can be recognized by the Kazakh tax authorities as related projects for WHT purposes under Art. 200 para.2 of TC.

The regulations of the Double Taxation Treaties

According to Art. 2 para. 5 of TC the regulations of the Double Taxation Treaties (hereinafter referred to as "DTT") take precedence over the norms of the Tax Code.

According to Art. 7 para. 1 of DTT, concluded between Germany and Kazakhstan on 26th of November 1997, the profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein.

Thus, the DTT assumes the possibility of exemption from taxation of the WHT on income of German enterprises in the event that they do not form a permanent establishment in Kazakhstan.

The provisions of DTT-s - such as the DTT between Germany and Kazakhstan, further provide that the income of the parent organization is taxed only in the country of its residence. Thus, according to Paragraph 1 of the Protocol to this DTT, the profits related to that part of the contract that is carried out in the Contracting State in which the head office of the enterprise is located are taxable only in that State.

With regard to the services of the Head Office under the contract rendered exclusively abroad (in Germany), this means that such profits of the Head Office should be levied with CIT exclusively in Germany and cannot be attributed to the branch. A different interpretation will lead to double taxation both in Kazakhstan and in Germany.

Article 212 of TC provides for the possibility of exemption from taxation of the WHT of income of German enterprises from entrepreneurial activity on the basis of an apostilled certificate of residence. In the event that services are provided on the territory of the Republic of Kazakhstan, along with the certificate of residencce, it is necessary to submit notarized copies of constituent documents or extracts from the trade register indicating the founders (participants) and majority shareholders of the non-resident legal entity. At the same time, it is important to check the period when services are provided, excluding the fact of establishing a permanent establishment that excludes the possibility of applying the provisions of the DTT regarding the exemption of taxation in Kazakhstan.

Summary

Proceeding from the above, it is necessary to verify, not only the fact of rendering services in Kazakhstan, but also whether services provided abroad are included in the catalogue established by Art. 192 para. 1 subpara. 3) of TC. When making payments in favour of a branch or representative office of a non-resident legal entity, it is necessary to carry out a thorough check to see whether the incomes of the Head Office abroad can be attributed to a permanent establishment - in particular: within the framework of identical or homogeneous activity or under one or related contracts.

In the presence of income from sources in the Republic of Kazakhstan, it is necessary to verify the formation of a permanent establishment under Art. 5 of DTT. In the absence of a permanent establishment, it is possible to apply the provisions of the Convention with respect to exemption from taxation.

If you have any questions, we will be happy to answer your questions within the framework of a personal meeting.

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> Issue of the Tax Residence Certificate

From Ainagul Atalykova, Rödl & Partner Kazakhstan

Purposes of application of residence certificate

Many Kazakhstan companies cooperate with foreign business partners. Provisions of the international treaties are applied for partial or complete tax exemption of the non-resident's income.

So, the tax agent can has the right to apply independently their provisions under the following conditions:
- the non-resident is the final recipient of the income and a resident of the country which is a member of the international agreement;
- there is a document (certificate) confirming the resident according to Clause 4, Article 219 of the Tax Code (hereinafter -TC).

Application of the provisions of the international agreement is a widespread methods used by the tax agents. However it is necessary to consider that the international agreement shall be applicable if the non-resident provides the tax agent with an official document confirming the residence in the country that is a member of the international agreement with the Republic of Kazakhstan (Clause 3, Article 212 of the TC). In case of improper applying the provisions of the international agreement the tax agent, i.e. the Kazakhstan company shall be liable for such non-compliance. Below we will review the requirements for use of the tax residence certificate.

Requirements to residence certificates

The document confirming the residence specifies the period of time when the non-resident is acknowledged as a residence of the country that is a member of the international agreement. If the period of time is not specified, the non-resident shall be deemed to be a resident in the same calendar year in which such a document was issued. According to Clause 5 of Article 219 of the TC of the RK the following documents shall be

1) the signature of the official and the seal of the authority that certified the document of residence;
2) the signature and the seal of a foreign notary in case of provision of a notarized copy of the residence document.

Therefore, if the documents confirming the residence of the non-resident are provided without corresponding legalization (apostille), the tax agent shall withhold tax at source according to the Tax Code.

By the execution of the residence certificate it is necessary to pay attention also to the following items:

- The certificate shall clearly specify that the given company is, for instance, not registered in a specific country, but is a resident of it;
- The certificate of tax residence shall be issued by the competent tax authority of a foreign state;
- The tax residence certificate shall be signed by the official of the authorized tax authority.
- The Apostille shall certify the signature of the person who signed the tax residence certificate on behalf of the authorized tax administration of a foreign state. Often it happens so that the Apostille certified the signature of the notary who, in their turn, certified the signature of the official of a tax authority. In such cases the tax authorities consider the certificate as not apostilled or improperly apostilled with reference to the provisions of the Hague Convention provisions.
- The resident of the RK being a tax agent shall have a properly executed tax residence certificate at the moment of payment of the accrued income to the non-resident (not later).

Along with execution of the certificate it should be taken into account also date of its provision.

Date of providing residence certificate

The non-resident shall provide such document confirming the residency to the tax agent on or before one of the following dates whichever is the earliest (Clause 3, Article 212 of the TC of the RK):

1) March 31 of the calendar year following the period during which the income was paid to the non-resident or the unpaid income of the non-resident was charged to deductions;
2) date of commencement of a scheduled tax inspection for the quarter when the income was paid to the non-resident ended in the calendar year when such tax inspection to verify fulfillment of the tax obligation to pay income tax withheld at source of payment is carried out;
3) not later than five business days prior to completion of the unscheduled tax inspection for the quarter when the income was paid to the non-resident ended in the calendar year during which such tax inspection for fulfillment of the tax obligation to pay the withholding tax at source of payment is carried out. The date of completion of the unscheduled tax inspection shall be specified in the corresponding decree.

In case the nonresident renders services in the territory of the Republic of Kazakhstan within the term, which isn't leading to constituting of a permanent establishment in the Republic of Kazakhstan, the legal nonresident entity has to provide along with the certificate of residence to the tax agent an extract from the trade register (Clause 4, Article 212 of the TC of the RK).

Illegal application of provisions of the international treaty

According to article 279 of the Code of the Republic of Kazakhstan "About administrative offenses" non-deduction or incomplete deduction by the tax agent of the tax amount which are subject to deduction and (or) transfer in the budget, on term, fixed by the tax law of the Republic of Kazakhstan, involves a penalty, including, small business or non-profit organizations at a rate of twenty, subjects of medium business - at a rate of thirty, subjects of large business - of fifty percent from not withheld amount of taxes and other obligatory payments.

Non-transfer or incomplete transfer by the tax agent of the withheld tax amount which is subject to transfer in the budget, on term fixed by the tax law of the Republic of Kazakhstan involves a penalty, including, small business or non-profit organizations at a rate of five, subjects of medium business - at a rate of ten, on subjects of large business - at a rate of twenty monthly calculation index.

Entity isn't instituted to administrative action, provided by present article, by withheld (subject to deduction) to the tax amount revealed by the tax agent independently and pointed in the additional tax reporting on condition of their transfer in the budget no later than three working days from the date of submission of the additional tax reporting to national revenue authority.

Rödl & Partner will be glad to support you at execution of the residence certificate and also to provide the qualified employees for bookkeeping.

For more information please contact

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"Kazakhstan is one of Central Asia's most resource-rich countries. Crude oil and natural gas form the cornerstone of the Kazakh economy. With a share of over 87% in the region's trade, Kazakhstan is an important trading partner for Germany. Unlock the potential of this emerging market! We advise you competently and comprehensively throughout all your business ventures."

Rödl & Partner

„Just like Rödl & Partner, we too support each other and automatically function as part of the whole. This sense of togetherness always inspires us to do our best. In doing so, we are creating a structure of stability and trust for our youngsters. With this sense of reliance they climb to the top of the 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.

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