

B2B: Performance of the Duties of a VAT Tax Agent

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In accordance with Article 145.1 of the Russian Tax Code, organizations with the status of a participant in a project to implement research, development and commercialization of the results in accordance with the Federal Law "On the innovation center 'Skolkovo' are exempt from the duty of the VAT taxpayer.

However, participation in this project does not relieve such organizations of the obligation to withhold and remit the VAT for a foreign organization under implementation of works (services), which are delivered (provided) on the territory of the Russian Federation, that is, it does not exempt them from the obligations of a tax agent.

Let's consider the situation in a specific context. A Russian organization that is a member of the project "Skolkovo" is the customer of research papers from an American company that does not have a permanent establishment in Russia.

Sale of goods (works, services) on the territory of the Russian Federation, including the sale of the subject of pledge and transfer of goods (results of work, services) under a compensation agreement or novation, as well as transfer of property rights is subject to VAT by virtue of paragraph 1 Clause 1 Article 146 of the Tax Code.

In accordance with paragraph 4 Clause 1, Article 148 TC RF advisory, legal, accounting, auditing, engineering, advertising, marketing services, data processing services, as well as conducting research and development activities; transfer, provision of patents, licenses, trademarks, copyrights, or other similar rights are deemed performed in the Russian Federation, if the buyer of works (services) operates on the territory of the Russian Federation.

The place of business of the buyer shall be the territory of the Russian Federation in the case

of the actual presence of the buyer of works (services) specified in this subparagraph, in the territory of the Russian Federation on the basis of the state registration of the organization.

The current tax legislation does not disclose the concept of research and development, and therefore, by virtue of Article 11 of the Tax Code, this concept is applied in the sense in which it is used in the civil law.

Despite the fact that the contractor is a foreign entity, in its activities, for tax purposes the provisions of Russian legislation regulating the basic concepts of research and development, the procedure for concluding contracts for research and development will apply.

Basic definitions and concepts used in the field of scientific research and experimental development (R&D) are regulated by the Federal Law On Science and State Scientific and Technological Policy of 23.08.1996, No. 127-FZ, according to which scientific (research) activities is considered the activities aimed at the generation and application of new knowledge.

In accordance with paragraph 1 of Art. 769 of the Civil Code of the Russian Federation the contractor under contract to perform research work undertakes to carry out research in accordance with the technical assignment of the customer, and the customer agrees to accept the job and pay for it. The contract with the contractor may cover the entire cycle of research, development and manufacturing of samples as well its individual stages (elements).

By virtue of par. 1 Art. 770 Civil Code the performer is obliged to conduct research by his own. He has the right to involve third parties for the execution of a contract to perform research work only with the consent of the customer.

Thus, if the work specified in the agreement and the terms of reference correspond to the concept of scientific research, as provided in the Law "On Science and State Science and Technology Policy", a foreign entity is recognized to be a VAT taxpayer.

In the sale by taxpayers — foreign persons who are not registered with the tax authorities as taxpayers, of goods (works, services), the place of supply of which is the territory of the Russian Federation and which are not exempt from taxation, the tax base is defined as the sum of the income from the sale of these goods (works, services) subject to tax (Article 161 of the Tax Code).

The tax base in this case, in accordance with paragraph 2 of Art. 161 TC RF is determined by tax agents. The tax agents are organizations, which are registered with the tax authorities, acquiring on the territory of the Russian Federation goods (works, services) from foreign persons who are not registered for tax purposes in the tax authorities as taxpayers.

Tax agents must calculate, withhold and pay to the budget the respective amount of tax, regardless of whether they perform the duties of the taxpayer related to the calculation and payment of value added tax and other duties related to the calculation and payment of VAT.

As indicated above, despite the fact that, in accordance with Art. 145.1 TC RF the customer is relieved of his duties of VAT taxpayer relating to the calculation and payment of tax for ten years from the date of receipt of status of the "Skolkovo" project participant, this exemption does not indicate an exemption from the duties of a tax agent to withhold and remit VAT to budget on sales of services (works) by a foreign entity, the place of supply of which is the territory of the Russian Federation. This position is confirmed by the letter of the Ministry of Finance of Russia of 15.02.2013 No. 03-07-07/4072.

If the contract does not refer to the amount of VAT (mention of VAT), the Russian company must increase the cost of purchased goods (works, services) by the amount of VAT (18%) (Letter of the Russian Finance Ministry of 05.06.2013 N 03-03-06 / 2 / 20797). Payment of VAT to the budget must be done simultaneously with the payment of the income to a foreign company.

As a general rule, in the case of goods (works, services) purchased by Russian company — VAT payer, subject to the provisions of Articles 171, 172 of the Tax Code, the tax agent has the right to VAT tax rebate.

However, since the organization-participant of "Skolkovo" project is exempt from duties of the VAT taxpayer, it is not entitled to tax deductions for this tax (Decision of the Federal Commercial Court of Volga-Vyatka District, of 26.04.2007 on case N A43-8946/2006-34-220).

However, according to the legal position of the Constitutional Court set out in the Ruling of 29.09.2011 N 1338-O-O, the absence of the right to tax deductions with the person being exempted from VAT, does not violate the rights of the person and does not affect its position as compared with the other taxpayers, since the VAT exemption, e.g., on the grounds of Art. 145.1 the Tax Code is a benefit and the taxpayer has the right to refuse it.

Failure to perform duties of a tax agent to calculate, withhold and remit VAT to the budget at the time of payment incomes to a foreign company, which is not registered for tax purposes in the Russian Federation, entails collecting from the tax agent of VAT amounts to be withheld and transferred to the budget (Decision of the Presidium of HAC RF of 03.04. 2012 No. 15483/11), fines and tax penalties amounting to 20% of the amount subject to withholding and transfer (Article 123 of the Tax Code).

However, when applying the provisions of paragraph 4, Clause 1, Article 148 TC RF, one should consider the following.

According to par. 16 clause 3 of Article 149 TC RF on the territory of the Russian Federation the performance of research and development activities at the expense of budget system of the Russian Federation, means of the Russian Basic Research Foundation, the Russian Foundation for Technological Development and foundations supporting research, science and technology, innovation, created for this purpose in accordance with the Federal Law of August 23, 1996 N 127-FZ "On Science and State Science and Technology Policy"; performance of research and development activities by educational institutions and scientific organizations on the basis of economic contracts is not subject to taxation.

In accordance with par. 16.1 clause 3 Article 149 of the Tax Code not taxable in the Russian

Federation are performance by organizations of research, development and engineering works relating to the creation of new products and technologies or to improve the products and technologies, if the research, development and technological works include the following activities:

- development of design of engineering object or a technical system;
- development of new technologies, i.e. methods of combining physical, chemical, technological and other processes with labor processes within an integrated system generating new products (goods, works, services);
- creating pilot, i.e. not having a certificate of conformity, models of machines, equipment, materials having fundamental characteristics typical for innovations and not intended for sale to third parties, their testing during the time necessary to obtain the data, accumulation of experience and their reflection in the technical documentation.

Thus, in cases where a foreign organization not having a permanent establishment in the Russian Federation, performs works (services), the place of sale of which is the Russian Federation and which are listed in paragraphs 16 and 16.1 clause 3 Article 149 of the Tax Code, the foreign entity has no obligation to pay value added tax (Letter of the Ministry of Finance of the Russian Federation of 21.10.2008 No. 03-07-08/240, Letter of the Federal Tax Service in Moscow of 16.02 .2009 No. 16-15/013746).

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