

How the practice of appealing grounded opinions is evolving: the cassation court is another objector

FAO employees of tax and legal departments of companies that are involved in or planning to switch to tax monitoring

Pepeliaev Group advises that the Commercial Court for the Moscow Circuit has adopted resolutions that are unfavourable for taxpayers in cases that involve grounded opinions being held invalid.¹

Facts of the disputes

The circumstances of the cases are essentially identical. The participants in tax monitoring have received grounded opinions at the initiative of the tax authority (the subject matter being the reduction of the tax base under mineral extraction tax). Disagreeing with these opinions, the companies sent their objections to the Russian Federal Tax Service (the “Tax Service”) while also filing complaints against grounded opinions, which is somewhat straying from the procedure provided for in the Russian Tax Code (the “Tax Code”). The Tax Service has left the opinions to stand and has not responded to the complaints.

Once the out-of-court procedure was completed, the companies applied to court seeking to have the grounded opinions recognised invalid.

The first-level court and court of appeal concluded that a grounded opinion could not be appealed through a court.

The cassation court’s standing

The Commercial Court of Moscow Region upheld the position of the lower-level courts. Arriving at the conclusion that the grounded opinion does not have the features of an individual regulatory legal instrument, which may be appealed to a court, the court referred, among other things, to the following:

- a grounded opinion is a document of an explanatory type. This document only records the position of the tax authority about infringements that

¹ The Resolutions of the Commercial (“Arbitration”) Court for the Moscow Circuit dated 28 August 2024 in case No. [A40-305870/2023](#) of Gazpromneft Orenburg LLC, and dated 6 September 2024 in case No. [A40-306027/2023](#) of Gazpromneft Yamal LLC.

have been identified, yet the rights and obligations of taxpayers remain unchanged;

- a grounded opinion is not a decision to hold someone liable. It does not create legal implications for taxpayers in the form of liability being imposed, but is actually a proposal to the taxpayer to adjust its tax obligations voluntarily;
- a grounded opinion enables a company to assess on its own whether it is complying with the requirements of tax legislation and to make steps to prevent offences without any measures of public enforcement being taken against it (i.e. the grounded opinion is a document of a warning nature).

Pepeliaev Group's comment

Apart from the above disputes, pending in courts of the Moscow Circuit is case No. A40-305119/2023 of Gazprom - Noyabrskneftegaz LLC. The court of appeal has suspended the review of this case until the cassation appeal of Gazpromneft Yamal LLC in case No. A40-306027/2023 has been examined. It is now clear what the outcome will be in this case.

As we noted earlier², the conclusion of the courts that a grounded opinion does not have the features of an individual regulatory instrument and therefore may not be appealed in court is not beyond dispute, to say the least. On the contrary, we believe that a grounded opinion has all the features of an individual regulatory act, namely:

- it is handed down by an authorised body (a tax inspectorate that conducts monitoring);
- it is adopted according to the established form (that is provided for in the Tax Service's Order No. ED-7-23/53@ dated 22 January 2024);
- it sets out how to interpret the rules of law in a specific situation based on the assessment of the inspectorate;
- it is addressed to a specific company;
- it is intended to be used on a single occasion only (i.e. for a specific situation described in it).

² <https://www.pgplaw.ru/analytics-and-brochures/alerts/sudebnoe-obzhalovanie-motivirovannykh-mneniy-pervye-pretседentyy/>, <https://www.pgplaw.ru/analytics-and-brochures/video/motivirovannoe-mnenie-neodnoznachnye-voprosy-natalya-kovalenko/>, <https://www.pgplaw.ru/analytics-and-brochures/video/motivirovannoe-mnenie-nenormativnyy-akt-kotoryy-mozhno-obzhalovat-v-sude-eygeniy-leonov/>, <https://www.pgplaw.ru/analytics-and-brochures/video/motivirovannoe-mnenie-akt-ofitsialnogo-tolkovaniya-prava-kotoryy-mozhno-obzhalovat-v-sude/>

A grounded opinion affects the rights and legal interests of companies that are subject to monitoring and may hamper the conduct of their business because non-performance will entail a field audit and high administrative costs. Another option is also possible: the company refuses to conclude a transaction owing to the position that the inspectorate has expressed in a grounded opinion, and such opinion, therefore, is a factor that has created an obstacle to the business of the company.

Let us see whether the companies will take a decision to appeal the above judgments to the Supreme Court and, if necessary, to the Constitutional Court, but it appears that the matter is definitely worth further discussion.

In addition, in the disputes that courts have analysed they disagreed not only with the procedural part of the companies' position (as to whether a grounded opinion may be challenged), but also with the substantive part (mineral extraction tax being additionally assessed). It is interesting whether the courts would take a different view on the procedural aspect if they had supported the taxpayer in the substantive part. It is quite possible that, in such a situation, it would have been easier for the courts to acknowledge that a grounded opinion may be disputed in court proceedings.

What to think about and what to do

The outcome of cases is significant for the current and future participants in tax monitoring because the issue of whether a grounded opinion may be appealed through court is not directly regulated in legislation and is debatable.

In any event, that it is possible to obtain a grounded opinion is one of the advantages of tax monitoring and however the disputes were resolved, companies should use this tool in monitoring when the need arises.

Help from your adviser

Pepeliaev Group's specialists have extensive experience in protecting the rights of taxpayers, including of participants in tax monitoring.

We are ready to assist companies with devising their legal position and drawing up a request for a grounded opinion, to provide support during a mutual agreement procedure and in a court dispute following non-compliance with a grounded opinion with which the taxpayer does not agree.

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