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Controversial Issues in the Practice of the Repoublic of Kazakhstan Law Application in the Sphere of Subsoil Use

Summary

Declaration of Kazakhstan as a democratic secular legal and social state by the Constitution of the Republic of Kazakhstan adopted on 30 August 1995 at a Republican referendum predetermines the necessity of further strengthening of the evolved market relations and democratic institutions in the society, development and expansion of international economic cooperation. Microeconomic stability that is the basis for successful development of the state also includes, alongside with political measures, openness in the external trade, encouragement of export, minimum of restrictions in import, optimal rate of exchange and favorable conditions for external investments.

Key words: development, of subsoil, resolution, legislative base

It is no secret that up to now the "locomotive" of the country's economy is the state's raw materials branch against a background of high world prices of hydrocarbons that is successfully developing as a result of an attractive investment climate and positive legislative base available. The sphere of subsoil use in Kazakhstan remains one of priorities on whose development, and it may be said without exaggerations, the success of the whole economy of our country depends. It was the attraction of foreign investments into the sphere of subsoil use early last decade that allowed resolution of the most difficult tasks on implementing social and economic transformations. And now, when the Republic of Kazakhstan has reliably enforced its political and economic status in the whole Eurasian space and successfully develops market institutions, this sphere of economy continues to be the basis for the country's economic security. Speaking about legal regulation of the subsoil use sphere, one should note that in our country a good legislative base is created that is the basis of its successful development.

Let us recall 1995, a period of parliamentary and governmental crisis, where not only the economy but also the country's political destiny found itself under a threat. Exactly then, knowing the importance of the subsoil use sphere development for the country and people, the Republic of Kazakhstan's President N.A.Nazarbayev, proceeding from the extraordinary powers granted to him issued a number of Decrees having the force of law that became the foundation for the legal base regulating relations in the subsoil use area. These Decrees are as follows: "On Licensing", "On Subsoil and Subsoil Use", "On Oil", "On Taxes and Other Obligatory Payments" etc. Further on, these Decrees were amended and received the status of the country's laws; and a number of other statutory governmental and departmental legal acts regulating complex relations in the subsoil use sphere were passed.

It should be said that since the largest foreign investments were engaged into the sphere of economy, relations in it are regulated by legal acts dedicated to the use and protection of investments. I.e., there exists a complex system of legal acts on whose correct application the success of subsoil use development depends. Due to this, it is difficult to agree with those who think that there are no laws in the Republic of Kazakhstan that would correctly and effectively regulate relations in this sphere of economy. The matter may only concern improvement of the legislation, its further systematization and proper application, reduction of the number of governmental and departmental legal acts sometimes contradicting each other and creating conflict situations. Here there is lots of work, up to one's neck, a

they say. Unfortunately, it should be noted that the practice of law application in the sphere of subsoil use does not develop properly at present, which negatively affects the operations of business entities. Provisions of laws and other legal acts are more used for establishing dictates of government controlling agencies and state officials. Many legal acts are illegally used as a basis for interference into financial and business activities of companies operating in the sphere of subsoil use, as a source of unjustified and unlawful replenishment of the state budget, as levers for establishing monopolies in this or that adjacent sphere of economy.

I have already spoken more than once on this topic on the pages of the "Jurist" magazine and other media. These problems were repeatedly discussed from the rostra of various fora – conferences and seminars, however, "the cart is still there" meaning thing are right where they started. Not to make naked assertions I will cite one striking example of a rash improvisation in the sphere of lawmaking. So, in December 2004, on the initiative of a number of state agencies changes were introduced into Article 30-5 of the Law "On Oil" establishing full prohibition on gas flaring. This legislative innovation was adopted without considering the fact that not a single Kazakhstani company operating in the oil and gas industry had technology that would allow them not to flare gas but utilize it. Thus, with a stroke of the "legislative pen" all producing companies in the oil and gas industry were "outlawed", which entailed imposition of tough sanctions of material nature in the order of tens of millions of dollars. The existing technology of oil and gas producing and processing companies, which incidentally is difficult to be deemed as imperfect, cannot be changed overnight, since it involves complicated production and technological complexes. And changing it needs time in the order of several years. During almost 11 months, this legislative provision was in force, and during this period the companies had to make 10-fold payments as competent government agencies refused issuing those special permits allowing gas flaring in accordance with the existing technologies approved by the same state bodies. Finally, in late 2005, on the initiative of oil and gas producing companies, Kazakhstan Petroleum Association, Kazakhstan Petroleum and Gas Industry Lawyers Association (*KPLA*) and the Government itself the Parliament taking into account the existing situation adopted an amendment, changed this statutory rule and established certain mechanisms for its realization. Of course, for the community the issue of safe environment is always important, however, this issue should be resolved reasonably without violations of rights of subsoil users and other business entities. The legislative base of the country should promote effective development of the country's economy, the existing problems should be resolved in a deeply and well thought-out way rather than through bans, state measures taken should not be aimed at infringement of business entities' rights. A balance of interests should always be maintained in this important issue.

The lawmaking practice of recent years shows that the laws regulating the sphere of subsoil use are often changed and supplemented. I assess this circumstance as a negative fact. The lawmaker should not follow the tastes of departmental agencies and national companies; it should try through legislative provisions to regulate big and small issues pertaining to the oil and gas industry. The more and more often the laws are changed, the more there will be muddle and confusion in the relations regulated, and the original sense of these laws will be lost. Lawmaking likes a conservative approach. Laws should regulate important and basic relations arising in the regulated sphere of production social relations; these acts should not be lowered to the level of departmental by-laws. In any sphere of economy "the music should be ordered" not by legislative provisions but by market institutions. Laws should only establish general principles of exercising economic or other activities, they should have a small number of imperative rules for protection of the interests of the state and society, the rights of subjects of these relations, and they should not impede normal legal activities of companies. Under exactly such approach can we speak about proper law and order?

In the meanwhile, the position and actions of competent governmental agencies in the field of subsoil use and environmental protection, as well as evolving judicial and other law enforcement practice do not take into consideration the provisions of the cited laws of the Republic of Kazakhstan, international acts and standards on the issue of determining the legal and technical status of sulfur,

which leads to illegal collection of obligatory payments from subsoil users. And the amounts of these payments are quite impressive in order of billions of tenge.

One more problem is connected with production of *"common minerals" (hereinafter - CM)*[1]. Disputes on these issues between subsoil users and competent state bodies were also a subject of court proceedings, however, to our mind; neither in this issue is there a single approach based on legislative provisions, although these relations are quite well regulated by legislative acts.

Thus, in accordance with Item 4 of Article 13 of the ROK Law "On Subsoil and Subsoil Use" and Item 3 of Article 64 of the ROK Land Code granting of subsoil use right to extraction of CM for one's own needs shall be done simultaneously with the granting of a land plot under which common minerals are located for private ownership or land use. When a land plot is provided for a temporary use the conditions for using CM for personal needs may be stipulated by the agreement on temporary land use (*Item 4 of Article of ROK Law "On Subsoil and Subsoil Use"*).

So, it follows from the sense and content of the cited legislative acts' articles that an owner or holder of a land plot is entitled to produce CM for its own needs without concluding a contract on subsoil use. In the event where CM are produced for commercial or other purposes, e.g., for construction of rail or automobile ways, common bridges, then an appropriate contract for subsoil use should be concluded as per Article 13.2.1-1.2-1 of the ROK Law "On Subsoil and Subsoil Use".

These are seemingly clear statutory provisions but there are many disputes on this subject, and unfortunately they are resolved not for the benefit of subsoil users who produce CM for their own needs. Competent government agency demand conclusion of a contract for this type of subsoil use in each specific case, not only in those events where CM are produced for commercial purposes of for other purposes directly envisaged by law.

And one more disputable issue related to operation of underground installations.

In connection with this, let us consult the glossary of the Law "On Subsoil and Subsoil Use" where it is noted that *"construction and/or operation of underground installations not connected with exploration and/or production"* mean *"work on construction and/or operation of underground installations for oil and gas storage, as well as underground engineering structures for burial of radioactive wastes, hazardous substances and waste water"* (*Item 2 of Article 1 of the Law "On Subsoil and Subsoil Use"*).

And according to Article 10 of the ROK Law "On Subsoil and Subsoil Use" *"construction and/or operation of underground installations not connected with exploration and/or production"* shall be considered as one of subsoil use types.

A logical conclusion follows from here that if *"operation of underground installations"* is not connected with exploration and/or production, but is done, for example, for the purpose of *"disposal of waste waters"* received in the process of hydrocarbon production, and then there is no need for concluding a separate subsoil use contract. However, the practice knows a case where competent government agencies demanded conclusion of a separate contract for operation of underground structures when a subsoil user producing oil or conducting exploration of subsoil simultaneously was injecting (burying) industrial waste waters or drilling sludge into natural underground structures. This was done in spite of the fact that this type of activities was closely interconnected with operations on production and exploration, and in essence was a chain in the single production and technological process.

I would like to elucidate one more problem associated with disputes about making *"payments for environmental pollution"*. As is known, these relations are regulated by Chapter 83 of the Republic of Kazakhstan Code №209-II ЗРК (*hereinafter – Tax Code*) "On Taxes and Other Obligatory Payments to the Budget" dated 12 June 2001.

According to provisions set out in Articles 460 and 461 of Tax Code payers of such type of payment are individuals and legal entities carrying out activities within the framework of special nature use. At that, *"the object of levying is actual volume of emissions within and/or in excess of limits, discharges (including emergency ones) of pollutants, placement of production and consumption wastes"*.

Under Part 1 of Article 463 of Tax Code the amounts of payment for environmental pollution are calculated by taxpayers independently proceeding from actual volumes of environmental pollution and established rates. Calculations of the amounts of currents payments and declarations on sums of payment prior to submission to a tax agency are attested in a territorial authorized body of environmental protection, and then within statutorily established terms the taxpayer brings these payments to the budget.

So, Tax Code stipulates a clear procedure for making obligatory payment for special nature use. Nonetheless, there are many disputes on these issues as a result of not quite justified intervention into these tax relations of other state bodies, such as territorial authorized agencies on environmental protection, prosecutor's offices of various instances and local courts considering claims from the said institutions.

In the meantime, pursuant to Article 15 of Tax Code it is tax service agencies that are charged with the task of ensuring the fullness of entry of taxes and other obligatory payments into the budget, as well as exercising tax control of taxpayers' compliance with tax obligations. As for all other state agencies, they only are to support tax authorities in implementation of objectives on controlling execution of tax legislation.

Tax legislation strictly regulates the order and procedure of inspections, revealing and securing arrears and debts on taxes and other obligatory payments, the system of enforced collection of tax debts etc. Tax Code also enshrines the rights of taxpayers to appeal against actions and acts of tax authorities and the procedure of such appealing (*please see Sections 17 and 18 of Tax Code*).

Everything cited above evidences that where a dispute arises on tax obligations, including payments for special nature use (*please see Chapter 83 of Tax Code*) parties to such disputes may primarily be tax agencies and taxpayers, and only theoretically can one assume that at a certain stage of settling such disputes environmental protection bodies and representatives of other state agencies may be involved. And as a rule, the subject of such dispute is a demand of a tax agency to a taxpayer on the need to pay additional amounts on taxes or make other obligatory payments or pay off a debt on such payments. These demands must be based on an Act (report) of a tax audit, which incidentally may be appealed against by the taxpayer in accordance with the procedure stipulated by Chapter 101 of Tax Code.

Unfortunately, as of today, everything is done differently, either ADEP or prosecutor, more often the environmental prosecutor, based on the fact of revealing by them of concealment of volumes of emissions, discharges or storage of production and consumption wastes, without the findings of a tax audit, go to court with a claim on collection of payments for special nature use allegedly not fully made by the taxpayer. Courts consider them and more often than not satisfy them, and the subsoil user loses considerable sums of money, sometimes in the order of billions of tenge.

As a result of such law enforcement practice evolved the taxpayer is fully devoid of possibilities to appeal against state agencies' actions on claiming additional payments on taxes and other obligatory payments as per Chapter 101 of ROK Tax Code.

In conclusion, I would like to say that such forums as is held today under the auspices of the Republic of Kazakhstan Supreme Court and our foreign colleagues will contribute to elaboration of correct and unified judicial and other law enforcement practice and strengthening legality, law and order in the wide sense of these words, which in its turn will promote providing a balance of interests of all participants in legal relations in our beautiful country.

Literatura

1. According to Item 26 of Article 1 of ROK Law "On Subsoil and Subsoil Use" #2828 dated 27 January 1996 "common minerals" mean minerals (sand, clay, gravel etc.) used in their natural condition or with insignificant processing and cleaning for satisfaction of mainly local household needs".

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