

Rules for Thin Capitalization as a Deoffshorization Tool in the Republic of Kazakhstan

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Abstract

The article explores some relevant issues of increasing the efficiency of fiscal policy in the Republic of Kazakhstan in the context of integration into the global community, implementation of international agreements on avoiding double taxation by Kazakhstan, and creation of favorable conditions for the development of foreign investment in the Kazakhstan economy. The problems of applying thin capitalization in terms of its impact on the investment climate are explored on the basis of the theoretical generalization of modern Kazakhstan and foreign practice of tax harbor control over some financial flows and scientific analysis of the legal regulation of transnational capital flows. Some economic and legal principles of the current practice of taxation of nonresidents in the Republic of Kazakhstan are systematized in order to determine the areas of their reform and improve the deoffshorization tools for financial flows between economic agents. The foreign experience of control over the tax base erosion in terms of remuneration for the liabilities of companies and dividends paid to foreign individuals or legal entities in the distribution of company profits is explored. The measures that allow to achieve the optimal ratio of the fiscal function and the function of encouraging the inflow of foreign capital are recommended.

Keywords: Tax policy; Thin capitalization; Investment; Investment climate; Raising foreign investments; Transnational capital flow; Taxation of nonresidents; Controlled transactions; International agreements on avoiding double taxation; Transfer pricing regulation.



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1. Introduction

As an independent international economic agent with equal rights, due to the globalization of the global economy, the Republic of Kazakhstan is actively experiencing integration into the global community, establishing economic relations with various countries, and creating favorable conditions for the development of foreign investments in the Kazakhstan economy. Due to this, the issues of improving tax legislation on taxing nonpaying taxpayers, implementation of international agreements on avoiding double taxation by the Republic of Kazakhstan, and compliance of the national legislation of the Republic of Kazakhstan with the advances of the global practice in taxing nonresidents become particularly relevant (Lang, 2010); (Capital, 2010); (United Nations Model Double Taxation Convention between Developed and Developing Countries, 2011); (Popp and Goncharenko, 2018). Zakon.kz cited the official Akorda website, reporting that the President of Kazakhstan spoke at the 31st plenary meeting of the Council of Foreign Investors, noting that the Government of Kazakhstan had a number of specific tasks, including improving the regulatory environment and creating an attractive tax and investment climate for international business in order to overcome the difficulties associated with the rapid global changes. "The new Code on Subsoil and Subsoil Use, the Tax and Customs Codes came into effect. A set of legislative amendments was adopted on the entrepreneurship regulation. The OECD standards are implemented in all areas," said the head of state (What Nazarbayev spoke about at the meeting of the Council of Foreign Investors, 2018).

Tax competition in the world and the need to improve the efficiency of the fiscal policy require Kazakhstan to significantly liberalize the tax system, on the one hand, and to build a strict system of control over tax revenues, including transnational capital flows, on the other hand.

The following measures can be used, based on the international experience in the key areas of control over the safe harbor from taxation of interstate capital flows (Gladkov, 2011); (K., 2008); (The Development Dimension of International Investment Agreements, 2009); (Shakhmametiev, 2010):

restrictions on the "treaty shopping" use,

- transfer pricing regulation,
- control over the activities of the so-called "controlled foreign companies", restrictions on operations involving such companies through tax havens, and
- control over the use of thin capitalization or intracompany lending.

A common prerequisite for the existence of the above areas of the risk in reducing the tax base is the difference in the conditions of the local tax regimes, ramification of the network of various agreements on avoiding double taxation and the fact that not all countries have concluded such agreements. Focus of Kazakhstan on importing capital requires adequate conditions and procedures that would be attractive to foreign investors, at the same time protecting the own interests of Kazakhstan. In this regard, the level of the existing legal support for foreign investments in general, including foreign legal entities, needs to be constantly improved. For example, the transfer pricing legislation is being improved along with the reform in the tax system. This regulatory act has introduced

additional criteria for identifying certain types of transactions that are subject to control in order to prevent the tax base shifting to offshores and more equitable distribution of the tax base, as well as the concepts of "interstate reporting" and "declaration of participation in the international group" (Law of the Republic of Kazakhstan, 2008).

2. Methods of Using Thin Capitalization in Protecting Fiscal Interests of the State and the Results of the Study

Legislation against the so-called thin capitalization (insufficient capitalization) is another area in the protection of the fiscal interests of the state. Many authors are currently exploring this mechanism for controlling the interstate capital flows taxation (Silyuk, 2008); (Polezharova, 2008); (Vakhitov and Rovere, 2007); (Machekhin, 2010). In their economic content, measures of control over the thin capitalization are similar to measures of control over transfer pricing of financial agreements of a transnational group. In other words, the associated structures may be suspected in overestimating or underestimating the price of a loan in relation to the market price of credit resources. The opportunity for applying thin capitalization arises due to a significant difference between the rules of taxing the remuneration on the liabilities of a firm and dividends paid in accordance with a share in the company's equity in the tax systems of different countries.

The control of tax authorities over transactions with the signs of thin capitalization involves the introduction of certain restrictive provisions in the tax legislation. In particular, the limit of the allowable ratio of equity and borrowed capital is defined, and the tax services are entitled to reclassify the nature of the company's liabilities in the event of a deviation from the established limit, depending on the circumstances. Accordingly, remuneration payments may be reclassified as dividends.

The following are the criteria adopted in many countries for managing undercapitalization and applied to financial agreements within a transnational group (Tax Code of the Republic of Kazakhstan, 2007); (Osminin, 2010); (Terra and Wattel, 2005); (Leshchenko, 2010); (Zakharov, 2010).

a nonresident lender owns (or effectively controls) a significant percentage in the share capital of a dependent resident;

- remuneration on the above financial agreements between interdependent parties cannot be included in expenses when determining taxable income if certain restrictions are not met (for example, the fiscal authorities believe that the purpose of the transaction is to repatriate profits from high-tax jurisdictions to tax havens);
- a limit for the ratio of equity and borrowed capital is legally set, which is called a ratio of financial leverage and shows the ratio of loans and equity the company uses to finance its business (for example, the UK allows 1 to 1 ratio of loans and equity, Australia allows 3 to 1, Germany allows 9 to 1, and the US allows 3 to 1 (Fokin, 2009);
- unlawful deductions may be accounted in subsequent reporting periods or will be classified as dividends, which in turn is less attractive in terms of arising tax liabilities.

It is considered in more detail how the rules of thin capitalization influence decisions of entities investing in the economy of Kazakhstan. If a local company has foreign owners, then it will be reasonable to ask for their help in the first place if there is a need for financing, since foreign money is usually much cheaper than the Kazakh money. The foreign owners have two key ways to help with financing: a contribution to the authorized capital or a loan.

The contribution to the share capital involves the accrual of dividends, the payment of which must comply with the requirements of the legislation of the Republic of Kazakhstan. First of all, the Kazakhstan company will be able to pay dividends only if the following conditions are met (Civil Code of the Republic of Kazakhstan, 1994):

- positive amount of equity capital of the joint-stock company, taking into account the payment of dividends on its shares;
- no signs of insolvency in accordance with the legislation of the Republic of Kazakhstan on rehabilitation and bankruptcy.

Secondly, dividends will be taxed upon payment. The rate of income tax from the source of payment will be 15 % in most cases (Tax Code of the Republic of Kazakhstan, 2017). If the investor is registered in a state with preferential taxation, then dividends will be taxed 20 % to the state budget. Double tax treaties between Kazakhstan and other countries (Bulletin of international treaties of the Republic of Kazakhstan) often stipulate a lower tax rate on dividends (for example, 10 % or even 5 %), but the application of a lower rate usually requires overcoming the restrictions on the share of participation and the price of this share (for example, the treaty with Switzerland provides for a lower tax rate on dividends of 5 % provided that the Swiss owner's share is at least 10 %). Besides, the reduced dividend tax rate is not applied if dividends are paid not to the actual owner but rather to an agent or a recipient by proxy, or another third party. Thirdly, dividends will not enable a Kazakh company to save on corporate income tax because the payment of dividends does not reduce the taxable income of the company.

The situation is quite different if financial assistance is provided in the form of a loan. In this case, payments to the foreign owner will be accounted as a payment of interest on the loan. Like dividends, remuneration paid to a nonresident is usually taxed at the rate of 15 % (Tax Code of the Republic of Kazakhstan, 2017) from the source of payment. Similarly, there is a restriction for states with preferential taxation. International tax conventions provide lower rates when interest is taxed (in most cases 10 %). An important aspect in the interest taxation is the possibility to recognize them as expenses for a Kazakh company, and therefore reduce the taxable income. A Kazakh company will save 20 % on a corporate income tax. For example, if a foreign owner lender is paid 100 thousand tenge as

interest on a loan, then the net expense will be 80 thousand tenge, taking savings on corporate tax into account. A foreign owner's loan appears to be a more profitable financing option in terms of a possible reduction in tax liability. Interest is paid regardless of a positive amount of equity capital in the balance sheet and signs of insolvency.

The tax legislation of the Republic of Kazakhstan provides for a special tool to control shifting of the interest on loans from foreign owners from Kazakhstan's taxation. Article 246 of the Tax Code of the Republic of Kazakhstan considers for some generally accepted criteria in international practice for managing the insufficient capitalization tools. As experts note (Nepesov, 2007), an important criterion for thin capitalization is the availability of controlled debt to a foreign organization. The law of the Republic of Kazakhstan on transfer pricing [Law of the Republic of Kazakhstan \(2008\)](#) defines a controlled debt as a debt obligation that has arisen to:

- 1) an affiliated entity,
- 2) an entity who is a major shareholder or a major participant (owning ten or more percent of voting shares or participatory shares),
- 3) an owner of the property interconnected with the entity to whom the individual powers of the owner of the property (possession/use/disposal) are transferred,
- 4) an entity who is an official of a party to a transaction or a legal entity specified in subparagraphs 2), 5) - 8),
- 5) a legal entity controlled by a major shareholder, a major participant, or an official party to the transaction,
- 6) a legal entity in relation to which the participant in the transaction is a major shareholder or a major participant entitled to the relevant share in the property,
- 7) a legal entity under control of a third party together with a party to the transaction,
- 8) an entity who independently or jointly with its affiliates owns ten or more percent of the voting shares or participatory shares in a transaction or legal entities specified in subparagraphs 2), 5) - 7), and
- 9) participants in transactions where a price is applied that has deviations from the market price.

Aside from the transactions with an interconnected party, those with entities registered in a state with preferential taxation also fall under the thin capitalization.

Below is the formula (1) for calculating the deduction of remuneration, which serves as a limiter in determining the value of a reduced taxable income for a Kazakh company. Formula (1) excludes elements reflecting the deduction on interest payable to an independent party on loans, since there is no limit on such remunerations.

$$DR_{pip} = (AEC/AL) * 4 * (B + C + D), \quad (1)$$

where

DR_{pip} is the deduction on remuneration payable to the interconnected party,

B is the amount of remuneration payable to the related party,

AEC is the average annual amount of equity capital,

AL is the average annual amount of liabilities,

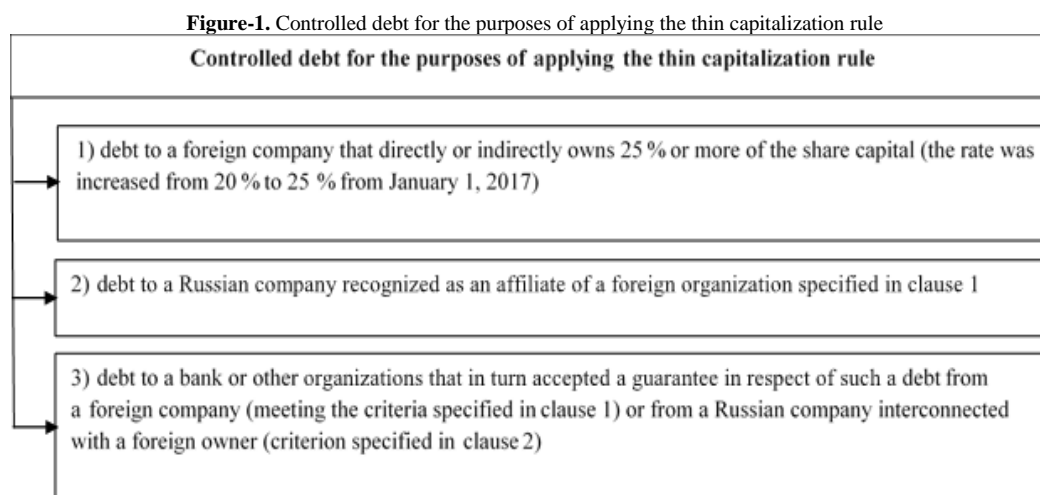
C is the amount of remuneration payable to entities registered in a state with preferential taxation, and

D is the indicator that includes the remuneration payable to an independent party on loans granted against a deposit of an interconnected party and remuneration to an independent party on loans granted against a secured guarantee, surety or other form of security for interconnected parties.

It must be noted that the indicator of financial leverage adopted in Kazakhstan is of the greatest importance, and therefore the most beneficial one. The formula shows that when determining taxable income, the deduction of the remuneration will be limited only if the amount of the company's liabilities (excluding taxes, wages, remuneration, dividends and estimated liabilities) exceeds the amount of equity capital more than 4 times.

As such, if the net assets at the reporting date are more than 4 times lower than the outstanding debt, then the rules of insufficient capitalization should be applied to the remuneration paid to the interconnected party and entities registered in countries with preferential taxation.

The thin capitalization tools provided for in the Russian tax law can be reviewed for comparison. The Russian tax law [Tax Code of the Russian Federation \(2018\)](#) states that the thin capitalization rule on corporate income tax applies to a Russian company in relation to its controlled debt to a foreign organization. There are several categories of controlled debt ([Figure 1](#)).



The capitalization ratio should be calculated to find the amount of interest that can be accounted in expenses:

$$CR = \frac{\sum CD}{EC * SP} / 3, \quad (2)$$

where

CR is the capitalization ratio,

$\sum CD$ is the amount of the controlled debt,

EC is the amount of the equity capital, taking the balance of the item "Settlements in respect of taxes and levies" into account, and

SP is the share of participation of the foreign organization in the authorized capital.

The actually accrued amount of remuneration on obligations must be divided by the capitalization ratio in order to find the limit on recognition of expenses on remuneration (2).

As such, if the controlled debt exceeds the equity capital more than three times, the company may recognize not the full amount of interest on the loan from a nonresident lender in the expenses for taxation of profits.

3. Discussion of Proposals for Improving the Efficiency of Using the Fine Capitalization Rules as a Deoffshorization Tool

Some features should be noted when comparing methods for calculating thin capitalization. First of all, just as in the Russian law, a link is established with the ratio of equity capital and liabilities, while the coefficient of allowable excess is not 3 but 4 (for nonfinancial organizations). Secondly, the ratio of equity to liabilities is not found separately for each controlled transaction – instead, average annual balance indicators are taken into account. Thirdly, the method of the Kazakhstan tax code does not account for the value of the participation share of a foreign organization in the authorized capital of the borrowing resident.

Below is a simple example when a foreign investor that owns a 25 % share in the capital of the invested company decided to issue a loan in the amount of one million Euros, while the borrowing company has no other significant liabilities. It is assumed that the amount of the actually accrued remuneration is 110 thousand Euros. The results of the comparison of the Kazakh and Russian methods for calculating thin capitalization for various indicators of equity capital are provided in Table 1.

Table-1. Comparison of estimating the remunerations attributable to expenses

Indicators	Amounts according to the RF Tax Code, Euros	Amounts according to the RK Tax Code, Euros
Estimated amount of expenses on remuneration at the amount of equity capital of 100 thousand Euros	8,250	44,000
Estimated amount of expenses on remuneration at the amount of equity capital of 200 thousand Euros	16,500	88,000
Estimated amount of expenses on remuneration at the amount of equity capital of 250 thousand Euros	20,625	110,000
Estimated amount of expenses on remuneration at the amount of equity capital of 1,000 thousand Euros	82,500	440,000
Estimated amount of expenses on remuneration at the amount of equity capital of 1,333 thousand Euros	110,000	586,652

Table 1 reveals that the formulation of thin capitalization rules under the above example conditions is more beneficial for an investor in Kazakhstan, since all payments on a loan to an interconnected investor can be accounted in the expenses as a reduction in the taxable income at a ratio of equity to liabilities of 0.25. According to the method of calculation under Russian law, the entire amount of the accrued interest on a loan to a foreign investor can be exempted from taxation only if the ratio of equity to the amount of controlled debt (excluding equity participation) is 1.33.

Undoubtedly, the calculation according to the Kazakhstan method will change if additional liabilities are introduced in the model even if they are not classified as transactions with interconnected parties. In this case, the ratio of equity to liabilities will change, and the deductible amount will decrease regardless of the fact that nothing has changed in the transaction with a foreign investor so that the excess of the paid remuneration will be taxed. An example can use the same initial data, with the only addition of a liability to an independent party worth two million Euros with a remuneration rate of 10 %. Table 1 shows that with the equity capital of 100 thousand Euros, the amount of the remuneration exempt from taxation was 8.25 thousand Euros (8.5 % of the accrued value) according to the Russian method, and 44 thousand Euros (40 % of the accrued value) according to the Kazakh method – it was 5 times more profitable for a foreign investor. If an additional obligation worth 2 million Euros is added to the model, the Kazakhstan method changes the ratio of the borrower's company's equity to the amount raised, which leads to a decrease in the size of the expanded deduction on remuneration to 14.7 thousand Euros (13 % of the accrued value). The higher is the ratio of financial leverage, the higher is the share of borrowed funds – and, therefore, the higher is the risk. In the above example, the amount of nontaxable remuneration according to the Kazakhstan method gives a similar result as in Russia only when the ratio of financial leverage falls below 2 %.

As such, the thin capitalization tools provided for in the Kazakh tax law look more attractive from a financial standpoint for a foreign investor. However, attention should be paid to the fact that a transaction can be considered controlled in the Russian Federation only when the share of a lending foreign investor is 25 % or more, while the threshold value meaning the control in Kazakhstan law is 10 %. In the initial example with a loan to a resident company of one million Euros (there are no other significant liabilities), interest rate on a loan of 10 %, equity of 100 thousand Euros, and a foreign investor, the entire amount of interest will be attributed to the expenses under the Russian rules, and only 40 % of the accrued value will be attributed to the expenses under Kazakh rules.

In case of exceeding the marginal value of the remuneration accrued on a controlled liability, the borrowing company withholds the income tax of 15 % in accordance with the requirements of the Russian tax law. There is no requirement to reclassify remunerations to dividends in Kazakhstan. According to Article 646 of the Kazakhstan tax code, remuneration and dividends are subject to income tax at a rate of 15 %.

Another situation that is worth noting is when the company's equity capital is negative. In such a situation, the ratio of financial leverage is recognized as zero, which means that the remunerations payable to the interconnected party are not deductible when determining taxable income. It would be fair to transfer not the entire amount of remuneration on controlled debt to the taxable category, but only to the extent above the market price of the loan.

When a nonresident provides loans (credit or state external borrowings) reflected in the State budget of the Republic of Kazakhstan or estimates of the National Bank of Kazakhstan, i.e. in the state represented by its authorized bodies, the interest received from such operations is not taxed. There is a similar situation with the income received by nonresidents as interest or income (discount) on the state securities or bonds of local loans, or debt securities, for which the fulfillment of obligations is secured by state or local guarantees sold or placed to nonresidents outside the territory of the Republic of Kazakhstan through authorized nonresident agents, or interest paid to nonresidents for those received by the state or local budgets, which are reflected in the State Budget or local budgets, or estimates of the National Bank of the Republic of Kazakhstan, or for the loans (credit) received by business entities and that are secured by state or local guarantees. As such, the legislator is trying to attract foreign capital to lend to the Kazakh economy, using the incentive function of taxation – namely, tax benefits.

4. Conclusion

The development of market relations in the Republic of Kazakhstan, the task of raising its economy, and its integration into the world economic process necessitate the large-scale attraction of foreign capital into the country's economy. Foreign legal entities operating in the economic space of Kazakhstan through their representative offices are one of the forms of such cooperation. Their number is constantly increasing. The level of legal support for foreign investments in general and foreign legal entities in particular is at a sufficient level in the country, but it needs to be constantly improved, taking new trends into account.

Since Kazakhstan is a country focused on importing capital and serving as a source of income for foreign investments, it is of particular importance to establish adequate conditions and procedures that would be attractive to a foreign investor and at the same time would protect the state interests. In this regard, further improvement of the tax legislation is the necessary first step to achieve these goals.

The author studied the foreign experience of taxation of nonresident individuals in the context of adaptation to the Kazakh practice in order to develop ways to optimize taxation. Based on the studied practice, it can be concluded that the rules of thin capitalization gradually find a wider application in Kazakhstan and participate in the formation of a new complex set of rules on deoffshorization.

As a result of the study and analysis of domestic and foreign experience, the necessity of improving the thin capitalization rules currently in force in the Republic of Kazakhstan has been substantiated. The developed proposals are objectively required to stimulate the inflow of foreign capital to Kazakhstan, as well as to implement the deoffshorization policy for the financial flows of economic entities. The introduced deoffshorization tools for transnational capital flows should not limit the amount of investment through intragroup loans. Even if the associated structures apply a nonmarket interest rate when concluding financial agreements, which has signs of thin capitalization, these situations require a special analysis of risks. Discrimination by the fact of ownership and control of the interest payer's capital by its recipient creditor should be eliminated.

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