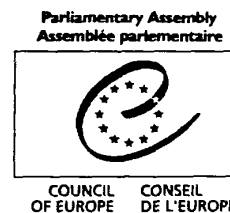


Parliamentary Assembly Assemblée parlementaire



Doc 10368 Addendum
24 January 2005

The circumstances surrounding the arrest and prosecution of leading Yukos executives

Addendum to Report
Committee on Legal Affairs and Human Rights
Rapporteur: Mrs Sabine Leutheusser-Schnarrenberger, Germany, Liberal, Democratic and Reformers Group

A. Introduction

1. Following the adoption of the report in the Committee for Legal Affairs and Human Rights on 25 November 2004, a number of events have prompted me to present the following additional information to the Assembly.

B. Reply of the Federal Tax Service¹

i. Comparative Tax Burdens on Yukos and its competitors

2. On 5 January 2005, the Rapporteur received a reply to the questions I had asked the head of the Federal Tax Service, Mr Serdyukov, following my visit to Moscow in September.²

3. As regards the requested official figures on the comparative tax burden for oil producing companies, the reply was evasive³.

4. The question on Yukos' tax burden before and after the reassessments was not answered because of the confidentiality of such information; I was encouraged to obtain the information from the taxpayer itself, i.e. from Yukos.

5. I had already received this information from Yukos' CEO Steven Theede and the CFO, Bruce Misamore, during my visit to Moscow in September⁴. My question to the Federal Tax Service was intended to cross-check the information provided by Yukos, in line with my quest for utmost fairness and objectivity. I take it that if the information provided by Yukos, which I published in the Explanatory Memorandum with the proviso that confirmation by the Federal Tax Service was still outstanding, were false, Mr Serdyukov would have said so in his reply.

¹ Text appended (Russian original and English translation).

² cf. para. 67 of the Explanatory Memorandum (Doc. 10368).

³ I asked for information on the total tax burden per *barrel* of oil produced, for different Russian oil producers, including Yukos; the reply was that the information was not available as the competent authorities calculated in *tons*. However, information based on calculations in tons was not provided either.

⁴ cf. para. 64 of the Explanatory Memorandum (Doc. 10368) and footnote 14.

6. I must therefore assume that the total tax burden for Yukos, including the retroactive reassessments, is indeed about triple that of its Russian competitors and that the total tax burden for 2002 exceeds Yukos' turnover for that year.

ii. Temporary reprieve for taxpayers threatened by financial difficulties

7. The reply to my question regarding the legal possibility of temporary reprieve for taxpayers threatened by financial difficulties following tax reassessments is clear: the law does not allow for any such reprieve if procedures for criminal tax evasion have been instituted.

8. While the answer is quite clear, the categorical exclusion of any payment facilities to avoid bankruptcy for the sole reason of the opening of criminal proceedings raises legal issues concerning the principles of proportionality and the presumption of innocence (Article 6 paragraph of the 2 ECHR).

iii. Treatment of other Russian oil companies having used the same tax minimisation schemes

9. In reply to my question whether other Russian oil companies, and if so which ones, had been subjected to similar reassessments and their executives criminally prosecuted, given that we had been told that other oil and resource companies had used the same tax minimisation schemes, I was given detailed legal explanations, underpinned by copies of judgments of different Russian and CIS courts, according to which agreements between local and regional authorities granting individual taxpayers privileges with regard to federal taxes are legally invalid.

10. The question of the legality, in tax law, of the tax minimisation schemes used by Yukos, as well as many other resource extraction companies between 2000 and 2002, was neither the subject of my question, nor even of my report. The reply mentions some other companies⁵ whose agreements with local authorities have been declared unlawful. But the core of my question – whether Yukos' competitors and their leading executives have been subjected to the same excessive enforcement measures and even criminal prosecutions, has not been addressed.

11. I must therefore conclude that Yukos and its leading executives have indeed been "arbitrarily singled out by the authorities", as it is said in paragraph 9 of the draft resolution.

C. New developments and further information relating to "the circumstances surrounding the arrest and prosecution of leading Yukos executives"

i. Sale of Yugansneftegaz

12. What was still not certain at the time the Committee on Legal Affairs and Human Rights adopted the report – i.e. that Yukos' principal asset, its oil-producing subsidiary Yugansneftegaz, would be sold off below market value to players closely linked to the Kremlin⁶, has meanwhile turned into actual fact: on 19 December 2004, "Baikal Finance Group", registered under an address in Twer in central Russia, which houses a fast-food joint ("Café London"), a mobile phone shop and the liquor store "Dionis", successfully bought Yugansneftegaz for € 7 bn, i.e. less than half of the "fair value" estimated inter alia by Dresdner Kleinwort Wasserstein at an auction in which other potential bidders, including from abroad, were discreetly "discouraged" from participating.⁷ Reportedly, the detour via Baikal Finance Group and Rosneft⁸, the State-owned oil company to whom the original buyers are said to have transferred Yugansneftegaz, had become necessary after Gazprom and international banks supporting Gazprom's expected bid had been discouraged from acting overtly as buyers by an injunction pronounced by a Texan court a few days before the auction pronounced at the request of Yukos. At the end of the day, Yugansneftegaz has been effectively re-nationalised.

⁵ The Bort-M closed joint-stock company, Megalion limited liability company, Orbitalnye sistemy limited liability company, all in the special district of Baykonur; Lukoil and Bashneftekhim; Lukoil-Ukhtaneftepererabotka joint stock company and the Polikon limited liability company whose agreement was declared null and void by a court for having been concluded for the sole purpose of avoiding taxation.

⁶ cf. Explanatory Memorandum, para. 68.

⁷ This has been widely reported in the press, for example SPIEGEL 19 and 20 December 2004, WELT 20 and 21 December 2004, Berliner Zeitung 20 December 2004, Le Monde 20 December 2004.

⁸ Itar-Tass 22 December 2004 : Rosneft bought 100% of Baikal Finance's share in Yugansneftegaz.

13. The auction and the proceedings leading up to it have been widely criticised internationally, for example by the spokesperson of the US State Department, who highlighted the lack of transparency and independence of the courts leading to a loss of confidence of foreign investors⁹, and by the Finnish Minister for Foreign Affairs, Erkki Tuomioja, who said that the re-nationalisation of Yukos was not the right way to promote foreign investment in Russia^{10,11}. Kremlin economic advisor Illarionov and Economic Affairs Minister German Gref also criticised the handling of the Yukos affair and the sell-off Yuganskneftegaz, recalling that the State had proved to be an "inefficient" owner of key industrial assets. Mr Illarionov was reportedly recently demoted and lost his function as the Russian "sherpa" for the G8 economic summit process.¹²

ii. European Court of Human Rights asking for explanations from the Russian authorities

14. On 14 December 2004, the Court, which had granted the Yukos case priority in July 2004, asked the Russian authorities for explanation on six substantive points arising from the company's April 2004 application. The questions concern, inter alia, the fairness of the hearings before the competent Russian courts, and issues related to the deprivation of property (Article 1 of Protocol 1 ECHR), and to the principle of *nullum crimen, nulla poena sine lege* (Article 7 of the ECHR).

iii. New developments in the court proceedings – allegations of increased pressures on lawyers and witnesses

15. On 12 January 2005, Mr Khodorkovsky – who has rarely taken the floor in the courtroom until now – made a statement bitterly accusing the State organs of having destroyed the very riches that they say they want him to return. Citing numerous procedural violations by the prosecution tolerated by the court, he said that he lost all faith in the authorities' objectivity. In the interest of the country, society and the prosecution and courts themselves, he called for a truly independent judiciary. Prosecutor Shokhin replied via Interfax that Mr Khodorkovsky, in order to avoid punishment, just tried to blacken those who perform their duty.

16. On 14 January 2005, it was announced that new criminal charges for money laundering (article 174 part 1 of the Russian Criminal Code, i.e. legalisation of proceeds of crime) would be brought against Mr Khodorkovsky and Mr Lebedev.¹³

17. On 18 January 2005, Mr Robert Amsterdam, international legal counsel for Mr Khodorkovsky and Mr Lebedev, sent me a written statement with fresh allegations of increased pressures on lawyers working on the Yukos case and witnesses of the defense¹⁴.

⁹ Cited in AFP 21 December 2004

¹⁰ Cited by DPA 12 January 2005. The Kremlin's handling of the Yukos affair was also criticised by parliamentarians from different parties in Germany. By contrast, chancellor Schröder's public statements regarding the Yukos affair have remained remarkably conciliatory. Some articles in the press have linked the German leader's position with financial interests of German banks and energy companies such as E-On, which holds a stake in Gazprom (cf. SPIEGEL online 20 and 21 December 2004, Berliner Zeitung 20 December 2004).

¹¹ In the United Kingdom, Malcolm Bruce MP has tabled, on 12 January 2005, an "early day motion" in the House of Commons which refers to criticism by the European Commission, the OECD and numerous Russian and international human rights organisations of the politically-motivated proceedings against Mr Khodorkovsky and his associates and the massive breaches of the rule of law in these proceedings.

¹² Reuters, 4 January 2005.

¹³ according to AFP and BBC.

¹⁴ "With respect to the actual trial of Khodorkovsky and Lebedev, I advise and attach hereto a motion filed in Meshchansky Court on 17 January 2004. This is a response to the systematic harassment of defense witnesses by the organs of power, in which the defense declares that it refuses to call any more witnesses in the trial, "inasmuch as we can not thereby give cause for the application of measures of a repressive character towards law-abiding citizens, as well as create conditions for the formation of new charges against our defense clients. [...]"

Specifically, I would draw your attention to the charges that have been brought against Dmitry Gololobov, former head of the Yukos Legal Department, which have seen him and others flee from Russia. In response to Mr. Gololobov's departure, the Procuracy arrested Yukos lawyer Svetlana Bakhmina. She was taken in for questioning at 5:00 in the morning on 9 December 2004, in front of her two young children. After an interrogation that lasted into the night, she lost consciousness and had to be taken to the prison hospital. Her interrogation continued the following morning. Ms. Bakhmina remains confined under guard in an Isolator to this day. She is considered by many to be a hostage of the Procuracy, being held in place of Mr. Gololobov.

This practice of taking hostages is fairly well established in the recent annals of the Procuracy and is further demonstrated in this particular case by the arrests of lawyer Elena Agranovskaya of the firm «ALN Feldmans». It is believed that this lawyer was arrested as a substitute for another lawyer from the same firm, Mr. Pavel Ivlev, who has fled to the US after being charged with economic crimes. I should point out that advocate Anton Drel is also a member of this law firm." (extract from Mr Amsterdam's note)

APPENDIX I

Letter from Mrs S. Leutheusser-Schnarrenberger, Rapporteur

to K.I. Kosachev, Chairman of the State Duma Committee on international affairs and leader of the Russian Federation Federal Assembly delegation to the Parliamentary Assembly of the Council of Europe

Dear Mr Kosachev,

Please let me thank you, first of all, for organising the official appointments during my second visit to Moscow last week, in particular that with the Head of the Federal Tax Service, Mr Anatoly Serdyukov.

As during my first visit, I was able to ask my questions and I obtained useful answers. In my meeting with Mr Serdyukov, some questions remained open, as Mr Serdyukov needed some time to consult with his experts. We therefore agreed that I would transmit these questions also in writing, through your good offices.

I would therefore be grateful if you could transmit the appended list of questions to Mr Serdyukov, and inform me of his answers as soon as possible. As it is my intention to finalise my draft report in good time before the Committee meeting in mid-November, in order to give all delegations enough time to study it and prepare for the discussion in Committee, I would be grateful if I could have the answers by Friday 22 October 2004.

Yours sincerely

Sabine Leutheusser-Schnarrenberger

Questions for the Head of the Federal Tax Service, Mr Anatoly Serdyukov

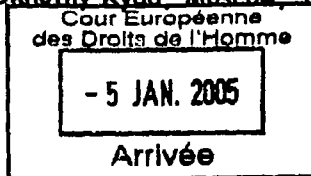
1. What is the total tax burden (profit taxes and extraction duties) per barrel of crude oil sold by Yukos (in the years 2000, 2001, 2003, before and after the reassessments)? Please provide comparative figures for other major Russian oil producers, and, if possible, for oil producers operating in other European countries.
2. What are the criteria and conditions (regulations and practice) under which payment of reassessed taxes is habitually deferred or re-scheduled in the presence of possible financial difficulties of the debtor?
3. In view of the recent Accounts Chamber report, which according to press reports concluded that several major Russian oil companies used similar "tax minimisation schemes" during the period in question, could you provide me with the names of any oil companies other than Yukos against which the Federal Tax Service has taken similar action up to forced execution of claims?

APPENDIX II

**ДЕЛЕГАЦИЯ
ФЕДЕРАЛЬНОГО СОБРАНИЯ РОССИЙСКОЙ ФЕДЕРАЦИИ
В ПАРЛАМЕНТСКОЙ АССАМБЛЕЕ СОВЕТА ЕВРОПЫ
DELEGATION OF THE FEDERAL ASSEMBLY OF THE RUSSIAN FEDERATION
TO THE PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE
DELEGATION DE L'ASSEMBLEE FEDERALE DE LA RUSSIE A L'ASSEMBLEE
PARLEMENTAIRE DU CONCEIL DE L'EUROPE**

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Moscow, December 3, 2004

Dear Mrs. Leutheusser-Schnarrenberger,

Please, find enclosed the copy of the letter and additional materials we received as an answer to your questions from the Federal Tax Service of the Russian Federation. Unfortunately, we received it after the sitting of the Committee on Legal Affairs and Human Rights was held in November.

We also apologize for sending these materials in Russian as we do not have any possibility right now to translate them into English.

Yours sincerely,

Konstantin KOSACHEV

Chairman of the Russian Delegation
to the Parliamentary Assembly of the
Council of Europe

**Mrs. Sabine Leutheusser-Schnarrenberger
Rapporteur
Committee on Legal Affairs and
Human Rights
Parliamentary Assembly
Council of Europe**



**МИНИСТЕРСТВО
РОССИЙСКОЙ ФЕДЕРАЦИИ
ПО НАЛОГАМ И СБОРАМ**

ЗАМЕСТИТЕЛЬ МИНИСТРА

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Телефон: 913-00-09; Телефакс: 913-00-05;
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№ 117-9-30/144

На № 3.16-27/299 от 13.10.2004

Председателю Комитета
Государственной Думы
по международным делам
руководителю делегации Федерального
Собрания Российской Федерации в
ПАСЕ

К.И. Косачеву

Уважаемый Константин Иосифович!

Министерство Российской Федерации по налогам и сборам рассмотрело направленное Вами письмо докладчика Парламентской ассамблеи Совета Европы Сабины Лойтхойзер-Шнарренбергер от 06.10.2004 и сообщает следующее.

1. В соответствии с положениями законодательства о налогах и сборах, а также в соответствии с законодательно установленными стандартами единиц измерения МНС России в своей работе пользуется показателями, рассчитанными на тонну нефти, а не на баррель. Информация о зарубежной практике по расчету подобных показателей в МНС России отсутствует.

В отношении вопроса о налоговых начислениях по ОАО «НК «ЮКОС» сообщить информацию не представляется возможным, так как в соответствии со статьей 102 Налогового кодекса Российской Федерации указанная информация о конкретном налогоплательщике составляет налоговую тайну, и за ее разглашение предусмотрена ответственность.

Данная информация может быть получена непосредственно у налогоплательщика при его желании раскрыть соответствующие сведения.

2. По вопросу, касающемуся предоставления отсрочек и рассрочек по уплате налогов и сборов МНС России сообщает следующее.

Данный вопрос регулируется главой 9 Налогового кодекса Российской Федерации.

В соответствии с абзацем 2 пункта 2 статьи 61 Налогового кодекса Российской Федерации срок уплаты налога может быть изменен в отношении всей подлежащей

уплате суммы налога либо ее части с начислением процентов на неуплаченную сумму налога, кроме предусмотренных исключений.

Обстоятельства, исключающие изменение срока уплаты налога, установлены статьей 62 Налогового кодекса Российской Федерации.

В соответствии с подпунктом 2 пункта 1 статьи 62 Налогового кодекса Российской Федерации срок уплаты налога не может быть изменен, если в отношении лица, претендующего на такое изменение, проводится производство по делу о налоговом правонарушении.

3. Относительно сведений об иных нефтяных компаниях, использующих схемы уклонения от налогообложения, МНС России сообщает следующее.

Анализ судебной практики по делам с участием налоговых органов показывает, что рядом налогоплательщиков, осуществляющих деятельность по реализации нефти и нефтепродуктов, применялись схемы уклонения от налогообложения.

Факты такого уклонения от налогообложения проверялись и были подтверждены вступившими в законную силу судебными актами (см. приложения к настоящему письму).

Так, на территории города-космодрома Байконур, который является территорией, арендованной Российской Федерацией у Республики Казахстан, на основании соглашения от 28.03.94 и межправительственного Договора аренды комплекса «Байконур» от 10.12.1994, распространилась практика регистрации организаций с целью ухода от налогообложения.

Еще в Решении от 26.12.2001 № ГКПИ2001-1758, 2001-1794 по жалобам ООО «Поликон» и ЗАО «Борт-М» о признании недействительным (незаконным) Постановления правительства Российской Федерации от 25.10.2001 № 747 «Об утверждении Правил предоставления налоговых льгот организациям и индивидуальным предпринимателям, зарегистрированным на территории г. Байконура», Верховный Суд Российской Федерации отмечал – «В последние годы на территории г. Байконура распространилась практика регистрации организаций, осуществляющих свою деятельность за пределами указанной территории. Администрация города в нарушение действующего законодательства представляет налогоплательщикам, зарегистрированным на территории г. Байконура, индивидуальные льготы по уплате федеральных регулирующих налогов». Далее, в определении Кассационной коллегии от 28.02.2002 № КАС02-59, подтвердившем законность принятого ранее решения, Верховный Суд Российской Федерации указал – «действующее законодательство Российской Федерации не предусматривает для местных органов власти, в том числе для городов федерального значения, право устанавливать и предоставлять льготы по федеральным налогам». При этом в вышеуказанных судебных актах обращено внимание на необходимость соблюдения статьи 56 Налогового кодекса Российской Федерации, запрещающих предоставление налоговых льгот индивидуального характера.

Аналогичные выводы о незаконности предоставления индивидуальных льгот отдельным категориям налогоплательщиков содержатся в следующих судебных актах:

- в постановлении Федерального арбитражного суда Московского округа от 18.10.2002 по делу № КА-А41/6947-02 по иску прокурора комплекса «Байконур» в защиту интересов государства и общества к Администрации г. Байконур и ЗАО «Борт-М» о признании недействительным договора № У-83/01 от 01.02.2001 о налоговых освобождениях и инвестициях, заключенного между Администрацией г. Байконур и ЗАО «Борт-М»;

- в постановлении Федерального арбитражного суда Московского округа от 25.02.2003 по делу № КА-А41/9033-02 по иску прокурора комплекса «Байконур» в защиту интересов государства и общества к Администрации г. Байконур и ООО «Мегалион» о признании недействительным договора № У-305/00 от 26.06.2000 о налоговых освобождениях и инвестициях, заключенного между Администрацией г. Байконур и ООО «Мегалион»;

- в постановлении Федерального арбитражного суда Московского округа от 25.02.2003 по делу № КА-А41/475-03 по иску прокурора комплекса «Байконур» в защиту интересов государства и общества к Администрации г. Байконур и ООО «Орбитальные системы» о признании недействительным договора № У-85/01 от 01.02.2001 о налоговых освобождениях и инвестициях, заключенного между Администрацией г. Байконур и ООО «Орбитальные системы».

Необходимо обратить внимание, что организации, зарегистрированные на территориях с льготным налогообложением, заключали договоры аренды производственных мощностей для переработки нефти и производства нефтепродуктов. Однако фактически весь производственный цикл осуществлялся силами арендодателей – нефтеперерабатывающими предприятиями, а договоры аренды заключались исключительно с целью уклонения нефтеперерабатывающими заводами, в том числе принадлежащими холдинговым компаниям «ЛУКОЙЛ», «Башнефтехим», от уплаты налогов.

Выводы судов о применении холдингом «Башнефтехим» схемы с использованием в целях ухода от налогообложения организаций зарегистрированных на территории с льготным режимом налогообложения изложены:

- в постановлении Федерального арбитражного суда Уральского округа от 10.12.2002 по делу № Ф09-1307/02-ГК;

- в постановлении Федерального арбитражного суда Московского округа от 17.03.2003 по делу № КГ-А41/1271-03;

- в постановлении Федерального арбитражного суда московского округа от 28.02.2003 по делу № КГ-А41/1608-03.

Рассмотрены судами и схемы, использованные нефтяной компанией «ЛУКОЙЛ». Например, в постановлении Федерального арбитражного суда Московского округа от 23.08.2002 по делу № КГ-А41/5478-02 суд пришел к выводу о ничтожности договора аренды, заключенного между ОАО «Лукойл-Ухтанефтепереработка» и ООО «Поликон» как заключенного с единственной целью – уход от налогообложения.

Ранее, 23 января 2002 года, Федеральный арбитражный суд Московского округа по делу № КА-А40/8180-02 вынес частное определение в адрес поставщика ОАО

«Восточно-сибирская нефтегазовая компания» (общество в настоящее время принадлежащее нефтяной компании «ЮКОС»), согласно которому осуществление реализации нефти по цене, увеличенной на сумму налога на добавленную стоимость нарушает нормы законов «О налоге на добавленную стоимость» и «О закрытом административно-территориальном образовании».

Наконец, вопрос использования схем минимизации налогообложения являлся предметом рассмотрения Экономического Суда Содружества независимых государств при принятии решения от 11.03.2004 по делу № 01-1/6-03 по запросу Правительства республики Казахстан о толковании применения абзаца 7 пункта 1 статьи и абзаца 6 пункта 2 статьи 12 Соглашения между республикой Казахстан и Российской Федерацией о статусе г. Байконур, порядке формирования и статусе его органов исполнительной власти от 23.12.1995.

Экономический суд Содружества независимых государств проанализировал действующее российское законодательство в отношении предоставления льгот налогоплательщикам (стр. 4 решения от 11.03.2004) и указал, что нормы законодательства о налогах и сборах, определяющие основания, порядок и условия применения льгот по налогам и сборам, и тем более льготы по федеральным налогам, не могут носить индивидуального характера.

При этом Экономический суд Содружества независимых государств на странице 6-7 указанного решения отметил, что ни налоговое, ни бюджетное законодательство Российской Федерации не предусматривают полномочий местных органов власти, в том числе местных органов управления ЗАТО, а также г. Байконур по предоставлению льгот по федеральным налогам и сборам.

Приложение: материалы судебной практики – 1 экз. на 28 листах.

Letter from the Deputy Minister, Russian Federation Ministry of Taxes and Duties

to K.I. Kosachev, Chairman of the State Duma Committee on international affairs and leader of the Russian Federation Federal Assembly delegation to the Parliamentary Assembly of the Council of Europe

Ref. IG-9-30/144
no. 3.16-27/299, 13 October 2004

Dear Konstantin Iosevich,

The Russian Federation Ministry of Taxes and Duties has examined the letter of 6 October 2004 forwarded by you from the Council of Europe Parliamentary Assembly rapporteur, Sabine Leutheusser-Schnarrenberger, and its response is as follows:

1. In accordance with legislative provisions on taxes and duties and also in line with the legislatively established standards for units of measurement, the Ministry of Taxes and Duties uses indicators based on tonnes of oil and not on barrels. The Ministry has no information on other countries' practices in calculating such indicators.

As regards the question of additional taxation of the Yukos joint stock oil corporation, it is not possible to provide any information since, under Article 102 of the Russian Federation Tax Code, information concerning a specific taxpayer is covered by fiscal secrecy and any person disclosing it is liable to prosecution.

The information concerned may be obtained directly from the taxpayer if they wish to disclose it.

2. Concerning the matter of extensions and postponements of deadlines for payment of taxes and duties, the position of the Russian Federation Ministry of Taxes and Duties is as follows:

This question is governed by Chapter 9 of the Russian Federation Tax Code.

In accordance with Article 61 paragraph 2 indent 2 of the Russian Federation Tax Code, the deadline for payment of tax may be altered for the entire amount of tax to be paid or part thereof, with an additional percentage levied on the amount of unpaid tax, there being provision for certain exceptions.

The circumstances in which the deadline for tax payment may not be altered are established by Article 62 of the Russian Federation Tax Code.

Under Article 62 paragraph 1 sub-paragraph 2 of the Tax Code, the deadline for payment of tax may not be altered if there are legal proceedings for a tax violation against the person seeking to have the deadline altered.

3. As regards information on other oil companies using tax avoidance schemes, the view of the Russian Federation Ministry of Taxes and Duties is as follows:

Analysis of judicial practice in cases joined by the tax authorities shows that a number of taxpaying entities engaged in the production of oil and oil products have used tax avoidance schemes.

The circumstances of such tax avoidance have been verified and confirmed in court decisions which have entered into legal force (see enclosed documentation).

On the territory of the Baykonur space city complex, which is leased by the Russian Federation from the Republic of Kazakhstan under an agreement of 28 March 1994 and an intergovernmental agreement on the leasing of the Baykonur space complex of 10 December 1994, the practice of registering organisations for tax avoidance purposes has become widespread.

In its decision no. GKPI2001-1758, 2001-1794 of 26 December 2001 concerning the applications by the Polikon limited liability company and the Bort-M closed joint-stock company to have the Russian Federation Government decree no. 747 of 25 October 2001 "Establishing Rules governing the granting of tax privileges to organisations and individual entrepreneurs registered on the territory of the Baykonur space city complex" declared invalid (unlawful), the Supreme Court of the Russian Federation stated: "In recent years, on the territory of the Baykonur space city complex, the practice of registering organisations carrying out their activities outside that territory has become widespread. The city authorities, in breach of current legislation, are offering taxpaying entities registered on the territory of Baykonur individual privileges regarding the payment of regulatory federal taxes". Furthermore, in ruling no. KAS02-59 of the Chamber of Cassation of 28 February 2002 confirming the lawfulness of a previous decision, the Supreme Court of the Russian Federation stated: "the current legislation of the Russian Federation does not entitle local authorities, including cities of federal significance, to establish and grant privileges regarding federal taxes". Moreover, the aforementioned judicial decision emphasises the necessity of complying with Article 56 of the Russian Federation Tax Code, which prohibits the granting of tax privileges on an individual basis.

Similar conclusions as to the unlawfulness of granting individual privileges to specific categories of taxpayers are set out in the following judicial acts:

- the decision of the Federal Commercial court of the Moscow district of 18 October 2002 in case no. KA-A41/6947-02 brought by the prosecutor of the Baykonur space city complex in order to protect the interests of the State and society against the Administration of the city of Baykonur and the Bort-M closed joint-stock company, with the aim of nullifying agreement no. U-83/01 of 1 February 2001 on tax exemptions and investments concluded between the Administration of the city of Baykonur and the Bort-M closed joint-stock company;

- the decision of the Federal Commercial court of the Moscow district of 25 February 2003 in case no. KA-A41/9033-02 brought by the prosecutor of the Baykonur space city complex in order to protect the interests of the State and society against the Administration of the city of Baykonur and the Megalion limited liability company, with the aim of nullifying agreement no. U-305/00 of 26 June 2000 on tax exemptions and investments concluded between the Administration of the city of Baykonur and the Megalion limited liability company;

- the decision of the Federal Commercial court of the Moscow district of 25 February 2003 in case no. KA-A41/475-03 brought by the prosecutor of the Baykonur space city complex in order to protect the interests of the State and society against the Administration of the city of Baykonur and the Orbitalnye sistemy limited liability company, with the aim of nullifying agreement no. U-85/01 of 1 February 2001 on tax exemptions and investments concluded between the Administration of the city of Baykonur and the Orbitalnye sistemy limited liability company.

It must be pointed out that organisations registered in territories with advantageous taxation have concluded agreements regarding the leasing of production capacities for the processing of oil and production of oil products. In fact, however, the entire production cycle is carried out by operatives of the lessor, namely oil processing enterprises, while the leasing agreements were concluded solely for the purpose of tax avoidance by oil processing plants, including the associated holding companies, Lukoil and Bashneftkhim.

Courts' conclusions concerning the Bashneftkhim holding company's exploitation of tax schemes using organisations registered in territory with favourable fiscal conditions are set out in:

- the decision of the Federal Commercial court of the Ural district of 10 December 2002 in case no. F09-1307/02-GK;

- the decision of the Federal Commercial court of the Moscow district of 17 March 2003 in case no. KG-A41/1271-03;

- the decision of the Federal Commercial court of the Moscow district of 28 February 2003 in case no. KG-A41/1608-03.

Courts have also looked at schemes exploited by the Lukoil oil company. In the decision of the Federal Commercial court of the Moscow district of 23 August 2002 in case no. KG-A41/5478-02, for example, the court concluded that the leasing agreement between the Lukoil-Ukhtaneftepererabotka joint stock company and the Polikon limited liability company was null and void as it had been concluded for the sole purpose of avoiding taxation.

Previously, on 23 January 2002, in case no. KA-A40/8180-02, the Federal Commercial court of the Moscow district had pronounced a partial ruling in respect of the producer company, the East Siberian oil and gas company (a company now owned by the YUKOS oil company), stating that the production of oil at a price inflated by the amount of value-added tax was a violation of the norms of the laws "On value-added tax" and "On enclaved administrative-territorial entities".

Finally, the question of exploiting schemes to minimise tax has been focused on by the Economic Court of the Commonwealth of Independent States, in its decision of 11 March 2004 in case no. 01-1/6-03 concerning the application by the Government of the Republic of Kazakhstan to interpret the application of paragraph 1 indent 7 and paragraph 2 indent 6 of Article 12 of the Agreement of 23 December 1995 between the Republic of Kazakhstan and the Russian Federation concerning the status of the city of Baykonur, the regulations for forming its executive authorities and their status.

The Economic Court of the Commonwealth of Independent States analysed the current legislation of Russia as regards the granting of privileges to taxpaying entities (page 4 of the decision of 11 March 2004) and stated that the norms of legislation on taxes and duties setting forth the bases, regulations and conditions governing the use of privileges concerning taxes and duties, and accordingly privileges regarding federal taxes, could not be applied on an individual basis.

On pages 6 to 7 of the aforementioned decision, the Economic Court of the Commonwealth of Independent States pointed out that neither the fiscal nor the budgetary legislation of the Russian Federation empowered local authorities, including the local authorities of an enclaved administrative-territorial entity and thus the city of Baykonur, to grant privileges regarding federal taxes and duties.

enc.: case-law material - 1 copy of 28 pages (at the disposal of interested members with the Secretariat).

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Reporting committee: Committee on Legal Affairs and Human Rights

Reference to committee: Doc 10083, Reference No 2931 of 2 March 2004

Addendum approved by the committee on 24 January 2005

Secretaries to the committee: Mr Schokkenbroek, Mr Schirmer, Ms Clamer, Mr Milner