

## The International Comparative Legal Guide to: Corporate Tax 2008

A practical insight to cross-border Corporate Tax work



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ACCURA Advokataktieselskab  
Arnold Bloch Leibler  
Arthur Cox  
Avanzia Tax Advisors  
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Zaid Ibrahim & Co

# Kazakhstan

Abai Shaikenov



Salans LLP

Madi Mukhametzhonov



## 1 General: Treaties

### 1.1 How many income tax treaties are currently in force in your jurisdiction?

Kazakhstan is currently a party to more than 36 bilateral treaties on avoidance of double taxation, including with the USA, Italy, Canada, Germany, Turkey, France, the Netherlands and the UK.

### 1.2 Do they generally follow the OECD or another model?

Generally, all of the income tax treaties concluded by Kazakhstan follow the OECD model; however, since the treaties are bilateral in nature, the co-signatory countries sometimes introduce changes which may affect the applicability of the conventions.

### 1.3 Do treaties have to be incorporated into domestic law before they take effect?

Under Article 4.3 of Kazakhstan's Constitution, international treaties apply directly unless such treaty envisages the issuance of a domestic legislative act. The double tax treaties concluded by Kazakhstan do not normally provide for such a requirement. However, before the treaty takes effect it must be ratified by Kazakhstan's Parliament. Only after the treaty has been ratified by the Parliament and all ratification procedures (i.e. exchange of letters) have been completed can the treaty be applied in Kazakhstan. When applying the treaty, it should be noted that Kazakhstan's Tax Code, which came into force as of January 1, 2002, contains procedures regulating the administration of provisions of international treaties entered into by Kazakhstan. In practice, such procedures could limit or complicate the application of such treaty.

### 1.4 Do they generally incorporate anti-treaty shopping rules (or "limitation of benefits" articles)?

Anti-treaty shopping rules or special provisions limiting the applicability of the benefits provided by a certain treaty, which prevent the misuse of the convention, are normally present in the treaties concluded by Kazakhstan. In particular, in addition to other limitations, such anti-treaty shopping limitations are included in the following double taxation treaties: Kazakhstan-UK; Kazakhstan-USA; Kazakhstan-Italy; and Kazakhstan-Germany. Each agreement may establish the scope of the limitations. For example, Article XI of the Protocol to the

Kazakhstan-Netherlands double taxation treaty limits the application of reduced rates for interest or royalties if the indebtedness was specifically created in order to benefit from the treaty, thus requiring the tax authorities planning to apply such limitation to consult with the tax authorities of another country.

Other specific regulations may also be established. For instance, the Kazakhstan-Italy double taxation treaty provides that any benefits of the treaty may be forfeited if the main purpose is to seek the benefits of the treaty, thus entitling the tax authorities to analyse the amount and nature of income, the circumstances under which the income appeared, the residency of persons who legally/actually control or possess the income, etc. Another example is the Kazakhstan-UK double taxation treaty, under which reduced rates are not applicable if the company takes advantages of local legislation on foreign investment stimulation, and at the same time, the main purpose(s) is to seek the benefit of the treaty.

Finally, the RK Tax Code generally prohibits the use of benefits provided by double taxation avoidance treaties for the benefit of a resident of a country that does not have a treaty with Kazakhstan. However, it is not clear what the term 'use of benefits for the benefit of a resident of another country' exactly means and how the RK tax authorities enforce such prohibition.

### 1.5 Are treaties overridden by any rules of domestic law (whether existing when the treaty takes effect or introduced subsequently)?

Article 4.2 of Kazakhstan's Constitution establishes the precedence of international treaties ratified by the Republic over domestic laws and regulations. Since all the international double tax treaties are subject to ratification by the Parliament, they all supersede the provisions of local legislation.

## 2 Transaction Taxes

### 2.1 Are there any documentary taxes in your jurisdiction?

Kazakhstan's Tax Code envisages payment of a special duty for the registration of rights to immovable property and transactions concerning the same, as well as in the case of receipt of duplicates of the documents confirming state registration. The amount of duty depends on the types of property and rights to be registered. For example, for registration of property rights to non-residential buildings, the duty may range from 10 to 25 monthly calculation indices ("MCIs") (approximately US \$83-\$193). MCI is a special

co-efficient established by Kazakhstan's legislation concerning the state budget for a certain period of each year. The duty is non-refundable unless the registration is abandoned before the actual submission of the documents. Should an agreement on the sale of immovable property be notarised by a state notary, a state duty for notarial actions in an amount of up to 10 MCIs must be paid (approximately US \$83). It does not appear that other taxes or duties would apply in the event of title transfer to immovable property, except for the capital gains tax equivalent indicated below. Various duties may be levied for the registration of legal entities and individual entrepreneurs, various means of transport, medical drugs, as well as for the issuance of licenses and some other performance of certain other legal actions. Kazakhstan's Tax Code does not provide for any specific tax that would apply to the transfer of shares.

## 2.2 Do you have Value Added Tax (or a similar tax)? If so, at what rate or rates?

Kazakhstan legislation provides for Value Added Tax ("VAT"). The tax base for VAT is defined as turnover from the sale of goods (works, services) not exempt from VAT and taxable import. VAT is currently charged at 14%; however, a 13% rate of VAT will be applicable starting from January 1, 2008. No special reduced rates are envisaged by legislation, except for zero-rate VAT described in question 2.3 below.

## 2.3 Is VAT (or any similar tax) charged on all transactions or are there any relevant exclusions?

VAT is charged on almost all transactions; however, Kazakhstan's tax legislation provides for a set of exemptions. First, the tax legislation provides for exemptions depending upon the place of realisation. For example, for goods, the place of realisation is the place where transportation commences if the goods are to be transported or the place of transfer if no transportation is envisaged as required by Article 215.1 of Kazakhstan's Tax Code. The Tax Code also provides specific rules to determine where works and services are realised. For example, consulting, auditing, engineering, legal, accounting, advertising, information processing and some other services are deemed to be realised at the location of entrepreneurial activity of the purchaser of such services.

In addition, in some limited cases Kazakhstan's legislation establishes exemptions from VAT or provides for zero-rated VAT. A list of the types of goods and services that are exempt from VAT is provided under legislation (i.e. payment into the charter capital of a subsidiary; services related to international transportation; or goods transferred pursuant to a financial lease - Articles 225 and 228 of the Tax Code). Zero-rated VAT is applicable primarily in the following cases:

- for the export of goods from the Republic of Kazakhstan;
- for certain international transportation services;
- for the sale of precious metals to the RK National Bank and/or other financial organisations;
- for the sale of certain goods on the territories of special economic zones (under certain conditions);
- for the sale of goods produced by a tax payer to another tax payer who has concluded a concession agreement for the implementation of an infrastructure project with the RK Government (during the construction of new objects); and
- for the sale of imported goods which are exempt from VAT under certain subsoil use contracts concluded with the RK Government.

The difference between the amounts that are exempt from VAT and amounts subject to zero-rated VAT can be described as follows: the VAT charged and paid by the previous seller of goods or services ("input VAT") may be eligible for a refund (only in limited cases) or an offset of VAT against other tax liabilities, if goods or services are resold at zero-rated VAT. However, with regard to VAT exemptions, legislation does not allow for the recognition of input VAT for exempt amounts.

## 2.4 Is it always fully recoverable by all businesses? If not, what are the relevant restrictions?

Input VAT incurred for the purchase of goods (works, services) used for generating taxable turnover may be offset against output VAT. VAT paid on imported goods is treated as input VAT and qualifies for credit against output VAT.

VAT recoverability depends upon whether the sum in the invoice can be indicated as input VAT. Under Article 236 of Kazakhstan's Tax Code, an amount of VAT cannot be designated as input VAT for the following goods:

- goods (works, services) related to activities unrelated to the entrepreneurial activity of the taxpayer;
- residential buildings (except for buildings used for hotels) and goods (works, services) used for the repair of such residential buildings (with some exceptions with regard to rented buildings);
- cars purchased as fixed assets;
- goods (services) used for the repair of leased residential buildings (except for reimbursable costs associated with such repair); and
- gifts (either in the form of goods, works, or services), except for cases when such goods are provided from outside Kazakhstan and the recipient of the goods paid import VAT.

It is only possible to recover VAT from the budget if the input VAT exceeds the VAT payable by the company, which can only occur if turnovers are charged at zero-rated VAT. If a disposal is released from VAT, recovery will not be possible. However, legislation establishes additional restrictions on VAT refunds. Full VAT refunds are only possible with respect to the export of goods if the disposal at zero-rated VAT takes place permanently and if it comprises no less than 70% of all sales for each of the three months preceding the date of filing the application for the VAT refund. If such circumstances are not satisfied, the VAT refund would be limited to the amount of input VAT for goods used only in the production of goods (works, services) charged with VAT at zero rate less any indebtedness for the previous periods as stipulated by Articles 251.2 and 251.3 of Kazakhstan's Tax Code. In any event, indebtedness for VAT or other taxes for the previous tax periods would decrease the amount of VAT allowed to be offset or refunded. With some very limited exceptions, in the absence of zero-rated VAT turnovers, input VAT can only be offset against current or future VAT liabilities. The refund of VAT for zero-rate turnovers is only possible after a special tax audit performed by the tax authorities in order to ensure the accuracy of the input VAT and its designation of zero-rated VAT.

## 2.5 Are there any other transaction taxes?

Although Kazakhstan's legislation does not envisage the application of other direct transaction taxes, the disposal of certain goods (as well as interests, securities) may result in the need to pay corporate income tax, if the goods purchased for one price are sold for a higher price

(thus realising a profit). The application of such tax and the rates are discussed further in section 5 regarding Capital Gains.

## 2.6 Are there any other indirect taxes of which we should be aware?

### Excises

Excises are charged for certain goods produced on the territory of the Republic of Kazakhstan or imported thereto.

Under Article 257.1 of Kazakhstan's Tax Code the goods subject to excise are:

- a) all kinds of spirits;
- b) alcoholic products;
- c) tobacco products;
- d) gasoline (except for aviation), diesel fuel;
- e) cars (except for cars with manual controls specifically designed for disabled persons); and
- f) crude oil, gas condensate (currently charged at zero rate).

The rates for excise on goods are established by Kazakhstan's Government either as a percentage of the value of goods or as an absolute sum per unit. In addition, excise is applicable to the following types of activities:

- a) gambling; and
- b) organisation and running of lotteries.

Kazakhstan's Government establishes the minimum and maximum rates for excise on objects of gambling, whereas the local authorities are free to establish the exact rates within a region.

### Rent tax for Exported Crude Oil, Gas Condensate

In addition, rent tax is applicable to taxpayers selling crude oil and gas condensate for export (except for subsoil users operating under production sharing contracts). The base for the rent tax is calculated based on the volume of the exported crude oil and gas condensate and market price adjusted through special discounts/overheads depending on its quality. The rate of the rent tax varies depending on the current market prices from 0% (if the market price is less than US \$19/barrel) to 33% (if the market price is over US \$40/barrel). The rent tax recently appeared in Kazakhstan's legislation, and the practice regarding this tax is not well developed.

## 3 Cross-border Payments

### 3.1 Would there be any WHT on royalties paid by a local company to a non-resident?

Under Articles 178.9 and 180(5) of Kazakhstan's Tax Code, royalty payments received by a non-resident without a permanent establishment in Kazakhstan from the following individuals is subject to WHT at the rate of 20% and is to be paid by:

- Kazakhstan resident; or
- Non-resident in relation to activity in Kazakhstan via a permanent establishment.

According to Article 200.1 of Kazakhstan's Tax Code, if there is a ratified double taxation avoidance treaty in place between Kazakhstan and the country of a non-resident's place of residency, the rate of WHT on royalties may be reduced by the withholding tax agent to the rate provided for in such treaty on the basis of properly formalised documents confirming the tax residency of such non-resident, provided such non-resident is the final recipient of the royalty payment. Usually, such treaties provide for a tax rate of 10% on royalties.

### 3.2 Would there be any WHT on interest paid by a local company to a non-resident?

Under Articles 178.7, 178.8 and 180(1) of Kazakhstan's Tax Code, the interest payments received by a non-resident without a permanent establishment in Kazakhstan from Kazakhstan sources is subject to WHT at the rate of 15%. As mentioned above, if there is a treaty in place between Kazakhstan and the relevant jurisdiction, and the aforementioned requirements are met, the WHT rate on interest may be reduced to the rate as provided for in a treaty, which is usually 10%.

### 3.3 Would relief for interest so paid be restricted by reference to "thin capitalisation" rules?

Kazakhstan's legislation does not envisage direct regulations or limitations with regard to thin capitalisation. However, since 1 January 2004, a different mechanism has been used for the calculation of the maximum amount of interest which can be deducted for the purposes of decreasing corporate income tax. The maximum amount of the deduction is limited to the *sum of interest paid to the residents plus the amount calculated under the following formula:*

$$(A / B) \times C \times D$$

Where:

- A=Average Own Capital Amount - a simple average of the sums of own capital (i.e. assets less liabilities) at the end of each month of the reporting tax period;
- B=Average Liabilities Amount - a simple average of the maximum sums of liabilities for which the interest is paid, within each month of the reporting tax period;
- C=Limit Coefficient - is equal to seven for financial organisations (e.g. banks) and is equal to four for any other legal entities; and
- D=Interest Paid To Non-residents.

If the interest paid exceeds the above limit, then only the amount within the limit may be deducted.

As a result of the above, if the ratio of owned capital to liabilities is low, the company would not be able to deduct the interest in full. Therefore, some of the advantages of thin capitalisation would not be available. Thus, apart from the above and provisions of some tax treaties limiting the applicability of the treaty (if the benefit of the treaty was the parties' main purpose and intention), we do not see any other restrictions that would affect thin capitalisation.

### 3.4 If so, is there a "safe harbour" by reference to which tax relief is assured?

Due to the difference in tax treaties which may affect the possibility of tax relief, and due to the fact that the legislation is constantly being amended, it is difficult to make any suggestions with regard to a "safe harbour" within the current framework of Kazakhstan's law. Moreover, the above rule limiting the deductible amount is unlikely to be avoided due to the simplicity of the mechanism. However, it is possible to consider a more complicated scheme; for example, whereby a loan is advanced by another local entity controlled by the parent company, in which case the interest would be deductible in full.

### 3.5 Would any such “thin capitalisation” rules extend to debt advanced by a third party but guaranteed by a parent company?

The above deductibility limitation would apply in any case in which interest is paid to non-residents. As we noted above, if the interest is paid to a resident, it should be deductible in full.

### 3.6 Is any withholding tax imposed on dividends paid by a locally resident company to a non-resident?

Under Articles 178.6 and 180(1) of Kazakhstan's Tax Code, dividends issued by a resident entity to a non-resident, and income from a participatory interest in such entity received by a non-resident having no permanent establishment in Kazakhstan, are subject to WHT at the rate of 15%. If there is a treaty in place between Kazakhstan and the relevant jurisdiction and the non-resident entity is an actual recipient of the dividends, the WHT rate on interest may normally be reduced to 5-10%. However, in such case the actual recipient must possess no less than 10% of the capital of the company paying the dividends. Otherwise, the treaties still provide for a limited rate normally equal to 15%, which is the normal rate of WHT under Kazakhstan's Tax Code.

### 3.7 Does your country have transfer pricing rules?

The transfer pricing regulation is made under Kazakhstan's Law “On State Control over Application of Transfer Prices” dated 5 January 2001 (the “**Transfer Pricing Law**”). Pursuant to Article 3 of the Transfer Pricing Law, state control is extended to the following international business transactions:

- transactions between interdependent and interrelated parties;
- barter transactions;
- when fulfilling obligations arising from the transactions which are closed by offsetting the mutual obligations (including offsetting the assignment of the claim);
- transactions concluded with entities (or persons) registered (or residing) or having bank accounts in foreign states, (i) the legislation of which does not allow disclosure or submission of information when carrying out financial operations, or (ii) which provide for preferential treatment in terms of taxation (including offshore zones);
- transactions concluded with legal entities which have tax allowances or enjoy tax rates that are different from the tax rates established by tax legislation; and
- transactions concluded with legal entities which have stated losses in tax returns for the last two tax periods preceding the year in which the transaction is concluded.

Kazakhstan's tax authorities may adjust the price of goods, works and services established by the parties in any of the foregoing transactions under the Transfer Pricing Law for the purposes of calculating taxes. With regard to transactions which are not included in the above list, if the price of goods or services established in non-arm's length transactions deviates from the market price for the same goods and services by more than 10%, there is a risk of adjustment of said price by Kazakhstan's tax authorities through transfer pricing control mechanisms established under legislation.

The Transfer Pricing Law is a newly adopted law and the practise of its application is not well-developed and not always consistent. For this reason, a number of efforts are being taken

by companies together with the tax authorities to develop a unified approach to the application of the said law.

## 4 Tax on Business Operations: General

### 4.1 What is the headline rate of tax on corporate profits?

In general, corporate income tax is paid by those residents and non-residents having a permanent establishment in Kazakhstan. Under Kazakhstan's Tax Code, the taxable income of such companies is normally subject to corporate income tax at a rate of 30%, with possible deductions of various expenses related to obtaining such annual gross income, including expenses on fixed assets. The income of non-residents having no permanent establishment in Kazakhstan is taxed by WHT at the source of income at a rate of up to 20% depending on the type of income. The liability to withhold the amount lies with the entity paying such income (Article 179.6 of Kazakhstan's Tax Code). No deductions are available for non-residents; therefore, tax is charged from the gross amount of income paid to the non-resident. Please also note the applicability of net profits taxes referred to in question 6.3.

### 4.2 When is that tax generally payable?

Under Article 137.1 of Kazakhstan's Tax Code, a taxpayer is obliged to file a corporate income tax declaration before March 31 of the year following the reporting period. A taxpayer is obliged to pay corporate income tax in advance. For this reason, taxpayers must provide the calculations of the income tax based on estimated income to be received during the year before January 20 (before submission of the corporate income tax declaration for the previous year), and within 20 days after submission of the corporate income tax declaration for the previous year for the remaining period. Based on such calculations, taxpayers are obliged to pay preliminary tax on a monthly basis no later than on the 20th day of each month. Final payments with regard to corporate income tax should be paid within 10 days after the deadline for the corporate income tax declaration submission; therefore it should be paid before April 10. The legislation establishes strict penalties for under-estimation of the corporate income tax for the purpose of the advance payments.

With regard to the WHT at the source of income, if the sum had been paid to the non-resident, the tax should be transferred to the state budget within 20 days after the end of the month in which the payment was made. If the sums were accrued but not paid, and were already claimed for the deductions from the corporate income tax, Kazakhstan's Tax Code requires the tax to be transferred to the state budget within 10 days from the aforementioned deadline for the submission of corporate income tax declaration.

### 4.3 What is the tax base for that tax (profits pursuant to commercial accounts subject to adjustments; other tax base)?

The tax base for corporate income tax is taxable income and income taxed at the source of payment. Under Article 79 of Kazakhstan's Tax Code, taxable income is defined as the difference between the annual taxable income and the deductions allowed by the Tax Code. Kazakhstan's Tax Code does not directly provide that the pure accounting data should be the basis for the corporate income tax calculation. However, some articles provide for the necessity to use

accounting information, for example for determining the value of fixed assets. Under Article 66.1 of the Tax Code, accounting documentation includes the primary document, **accounting registries** and other documents, which are the basis for determining the tax base and for the calculation of tax obligations. As a result, in order to determine the tax base, companies should use the accounting documentation; however, all of the calculations should be done in accordance with the rules established by the Tax Code.

First, Kazakhstan's Tax Code does not allow certain types of expenses to be deducted from the annual gross income, including those which are not related to the receipt of the annual gross income, those related to the construction or purchase of fixed assets, fines and penalties subject to payment to the state budget, gifts to other persons, deductions in amounts exceeding the limits established by the Tax Code, etc. Second, the tax legislation establishes different limits for depreciation deductions and specific rules for the calculation of such deductions.

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#### 4.4 If it otherwise differs from the profit shown in commercial accounts, what are the main differences?

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Please refer to question 4.3 above.

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#### 4.5 Are there any tax grouping rules? Do these allow for relief in your jurisdiction for losses of overseas subsidiaries?

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Each entity is considered to be a different taxpayer under Kazakhstan's Tax Code and no tax grouping rules are established by the legislation. The only rules related to tax grouping present in the Tax Code are the rules established in Article 130. This Article requires those residents directly or indirectly possessing 10% or more of the capital of a non-resident entity gaining profit in a country with a favourable taxation (e.g. "tax haven"), to include the profit related to the resident in the taxable income of the same. The same should apply if a resident participates in other forms of commercial activity without the creation of a legal entity. A country is considered to have favourable taxation if the tax rate in such state comprises no more than 1/3 of the tax rate established by the Tax Code, or it has laws on the confidentiality of financial information or information about companies which allow information on the actual holder of property or income to be kept secret. The list of such countries has been established by the RK Government.

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#### 4.6 Is tax imposed at a different rate upon distributed, as opposed to retained, profits?

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As we noted above, if a company decides to pay dividends, it must apply WHT at the source of income at a rate of 15% (or less under a double taxation treaty). If no profits are drawn from a company, no tax should normally apply. Apart from the above, no other special taxes or corrections are required and the rate of corporate income tax would not be affected. At the same time, net profit of a permanent establishment of a non-resident is subject to 15% net profit tax (unless reduced on the basis of a treaty) irrespective of whether or not it has been distributed to a parent company.

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#### 4.7 What other national taxes (excluding those dealt with in "Transaction Taxes", above) are there - e.g. property taxes, etc.?

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##### *Individual income tax*

Income paid to employees and other individuals, except for individual entrepreneurs, advocates and private notaries should be

taxed at the source of payment by resident legal entities, or non-residents having permanent establishments in Kazakhstan. The tax is charged at a rate of 10% (except for dividends which are taxed at a rate of 5%).

##### *Social Tax*

Social tax is paid by resident legal entities and non-residents having a permanent establishment in Kazakhstan based on the expenses of the employer for the payment of income to its employees and other individuals (with the exception of certain types of income listed in the Code). Social tax is applied based on a regressive scale depending upon the income of the particular Kazakhstan employee, and the rate varies from 20% to 7%. Expenses for the payment of income to foreign administrative-management or engineering-technical personnel are also taxed based on a regressive scale, though the rate varies from 11% to 5%. It appears that, starting from the 1 January 2008, social tax will be applied based on a regressive scale depending upon the income of both local and foreign personnel, and the uniform rate will vary from 13% to 5%.

##### *Taxes Applicable on Subsurface Users*

There is a special set of taxes which may be applicable to subsurface users. These taxes include:

- excess profit tax;
- special payments for subsurface users;
- bonuses (subscription, commercial discovery);
- royalties;
- share of the Republic of Kazakhstan; and
- additional subsoil user payments under production-sharing contracts (PSA's).

Currently, Kazakhstan's legislation provides for two models of taxation for subsoil use activity. The first model envisages payment of all of the above taxes, except for share of the Republic of Kazakhstan, and under this model the tax regime cannot be stabilised/grandfathered. The second model is applicable when there is a PSA where the share of the Republic of Kazakhstan is paid in addition to all other taxes, except for the rent tax for exported crude oil, royalty, excise for crude oil, gas condensate, excess profit tax, land tax and property tax. Under the second model taxpayers also must pay an additional subsoil users payment which is the difference between 5-10% (40% after full cost recovery) of the cost of extracted production and actual state revenues in the form of taxes (excluding VAT and withholding taxes). The tax regime for the second model is established by the contract, but it must comply with the regime effective as at the date on which the PSA (contract) is concluded.

##### *Property Tax*

Property tax is charged to legal entities and individual entrepreneurs having fixed assets or intangible assets on the territory of the Republic of Kazakhstan (except for land, means of transportation, fixed assets temporarily closed down based on the decision of Kazakhstan's Government and some others). Normally the tax is applied at a rate of 1% of the average annual value of the fixed assets and the intangible assets.

##### *Transport Tax*

Transport Tax is paid by those individuals and legal entities owning property that is classified as a means of transportation. Means of transportation that are taxed include cars, trucks, buses, motorcycles, boats, yachts, and aircrafts. The applicable tax rate depends on the term of use, power of the engine, date of purchase and other factors.

##### *Land Tax*

Land tax is paid by individuals and legal entities owning land as property or having it for its permanent use, as a temporary primary

gratis use (except for certain categories). The tax base is calculated by multiplying the volume of land of a certain category by the tax rate established by Kazakhstan's Tax Code. The tax rate depends upon the type of land and its quality for agricultural use.

#### **Duties and Payments**

Depending on the type of activity of a legal entity or for certain actions, other duties or payments may be applicable to legal entities in Kazakhstan.

#### **4.8 Are there any local taxes not dealt with in answers to other questions?**

Kazakhstan's legislation does not provide for local taxes (i.e. taxes established by local authorities), and local authorities are only able to establish rates for some taxes and duties. Therefore, no taxes other than those mentioned herein may be applicable.

### **5 Capital Gains**

#### **5.1 Is there a special set of rules for taxing capital gains and losses?**

Although Kazakhstan's legislation does not establish specific rules with regard to the taxation of capital gains, capital gains could be taxed based on the general rule of the taxability of profits earned from disposal thereof. However, please note that in such case capital gains tax is only triggered in case of disposal of property.

#### **5.2 If so, is the rate of tax imposed upon capital gains different from the rate imposed upon business profits?**

For residents and non-residents having a permanent establishment, the capital gain is included in the gross annual income of legal entities and taxed at the rate of 30% (with a possible deduction of expenses related to the commercial activity from the gross income). Capital gains in such case are determined as the difference between the price of the sale of fixed assets, stocks, shares in legal entities, etc. and their account value.

Capital gains of non-residents without a permanent establishment are subject to WHT at the rate of 20% with no deductions. In the case of individuals, capital gains are treated as own income and are taxed at the relevant rate (10%). For individuals, capital gains are determined as the difference between the sale of immovable property, shares/stocks, etc. and its purchase cost.

#### **5.3 Is there a participation exemption or relief for reinvestment?**

No. Taxation is governed by the simple rules applicable to corporate income tax, which does not provide for such participation exemptions or reinvestment relief. This is further supported by taking into account the lack of tax grouping regulation. At the same time, participation exemption is only available to resident companies which do not pay corporate income tax on dividends received from resident companies.

### **6 Branch or Subsidiary?**

#### **6.1 What taxes (e.g. capital duty) would be imposed upon the formation of a subsidiary?**

No specific taxes should apply upon the formation of a subsidiary in Kazakhstan. There is a duty for state registration of legal entities, which currently equals 7,600 KZT (approx. \$65 USD).

#### **6.2 Are there any other significant taxes or fees that would be incurred by a locally formed subsidiary but not by a branch of a non-resident company?**

Kazakhstan legislation does not envisage specific taxes applicable only to local subsidiaries but not to branches. The only difference is that a subsidiary pays withholding tax on dividends, while branches pay net profit tax.

#### **6.3 How would the taxable profits of a local branch be determined?**

The taxable profits of a local branch are determined in the same manner as that of a resident company (please see question 6.2 above). The only exception is that branches may also deduct expenses incurred by its parent company in connection with and for the purpose of generating income by the branch.

#### **6.4 Would such a branch be subject to a branch profits tax (or other tax limited to branches of non-resident companies)?**

In addition to the 30% corporate income tax, branches in Kazakhstan must pay an equivalent for branch profit taxes - net profit tax. Kazakhstan's tax legislation defines "net profit" as taxable income less the amount of corporate income tax, compounded for this taxable income. The 15% net profit tax should be compounded from the amount of income, and will be stayed after payment of the corporate income tax. The compounded amount of net profit tax must be indicated in a corporate income tax declaration. A foreign entity operating through a branch is required to pay net profit tax within ten working days after the deadline for the submission of the corporate income tax declaration. A branch of a foreign company, unlike a subsidiary, must pay net profit tax even if it decides not to distribute profit to the parent company in a given year. The rate of net profit tax may be reduced if there is a respective treaty in place.

#### **6.5 Would a branch benefit from tax treaty provisions, or some of them?**

Generally speaking, there are no specific limitations on branches for benefits under tax treaty provisions. Some provisions of the tax treaties cannot be utilised by branches because a branch is an unincorporated division of a parent company. The following are examples of some of the benefits available to branches:

- under a tax treaty, normally a branch's net profit tax can be reduced from 15% to 5-10% (for example, Article 25.8 of the Kazakhstan-UK tax treaty and Article 10.8 of the Kazakhstan-Netherlands tax treaty); and
- a tax treaty may allow for the deduction of expenses incurred for the commercial activity of the permanent establishment (i.e. the branch), including management and administrative expenses which normally cannot be deducted (for example, Article 7.3 of the Kazakhstan-UK tax treaty and Article 7.3

of the Kazakhstan-Netherlands tax treaty).

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**6.6** Would any withholding tax or other tax be imposed as the result of a remittance of profits by the branch?

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No, provided that the branch has paid corporate income tax and net profit tax.

## 7 Anti-avoidance

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**7.1** How does your jurisdiction address the issue of preventing tax avoidance? For example, is there a general anti-avoidance rule or a disclosure rule imposing a requirement to disclose avoidance schemes in advance of the company's tax return being submitted?

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The issue of preventing tax avoidance is addressed in Kazakhstan by: (i) establishing administrative (i.e. fines) and criminal liability for tax avoidance; (ii) prohibiting the use of benefits provided by double taxation avoidance treaties for the benefit of a non-resident residing in a country that does not have a treaty with Kazakhstan; (iii) establishing the requirement to report on income generated by entities registered in black-listed countries and owned by residents of Kazakhstan; (iv) prohibiting the deducting of payments made to fake companies (from the date criminal activity commenced as established by a court) and/or dormant companies which are excluded from the registry of taxpayers; and (v) other methods (such as tax audits etc.). Kazakhstan's legislation does not provide a requirement to disclose avoidance schemes in advance of the company's tax return being submitted.

**Abai Shaikenov**

Salans LLP  
135 Abylai Khan Ave.  
Almaty 050000  
Kazakhstan

*Tel:* +7 727 258 2380  
*Fax:* +7 727 258 2381  
*Email:* [ashaikenov@salans.com](mailto:ashaikenov@salans.com)  
*URL:* [www.salans.com](http://www.salans.com)

Abai Shaikenov is a partner in the Salans Almaty office. Mr. Shaikenov graduated with honours from Kazakh State Legal Institute, the Asia-American Institute in Transnational Law under the auspices of Duke University School of Law and the University of Hong Kong Faculty of Law. Abai is Salans' leading lawyer on Kazakhstan tax litigation matters and has extensive experience in tax and securities regulations, oil and gas law, corporate, energy, banking, foreign exchange control, and environmental law. His work extends to advising on multilateral institution financing, structuring of transactions, foreign investment, intellectual property, and various corporate matters related to doing business in Kazakhstan. Mr. Shaikenov has authored numerous articles published internationally and in Kazakhstan. Abai is a member of Kazakhstan's Petroleum Lawyers' Association. He is fluent in Russian, English, and Kazakh.

**Madi Mukhametzhanov**

Salans LLP  
135 Abylai Khan Ave.  
Almaty 050000  
Kazakhstan

*Tel:* +7 727 258 2380  
*Fax:* +7 727 258 2381  
*Email:* [mmukhametzhanov@salans.com](mailto:mmukhametzhanov@salans.com)  
*URL:* [www.salans.com](http://www.salans.com)

Madi Mukhametzhanov is a senior associate in the Salans Almaty office. He concentrates on tax and corporate law. Mr. Mukhametzhanov is experienced in providing advice on a broad range of cross-border transactions and finding solutions to legal and tax issues arising from such transactions. Madi also has considerable experience in due diligence reporting for M&A work and in domestic litigation and dispute resolution for international clients doing business in Kazakhstan. Mr. Mukhametzhanov graduated from Kazakh State Law Academy. In addition, he completed a training course, "development and introduction of Quality Management System in Accordance with ISO 9001:2000", held by BM Trada, a certification company accredited by UKAS. Madi is fluent in Russian, English, and Kazakh.



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Salans has been active in Kazakhstan since 1990. The Almaty office officially opened in 1994; in 2001 we opened a satellite office in Atyrau.

We successfully combine detailed knowledge of Kazakh law and practice with the firm's experience elsewhere in the CIS and Eastern Europe in similar legal specialisations and industries. All of the lawyers in our Kazakhstan offices speak fluent English and Russian and several speak Kazakh, French, Italian and other languages as well.

With lawyers qualified to act on the whole spectrum of legal issues in Kazakhstan, the particular specialities of our practice include tax matters, corporate, project and pre-export finance, energy and natural resource projects, investment, arbitration and litigation, M&A, privatisation, securities, IPR and telecommunications.