

PAPER • OPEN ACCESS

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To cite this article: V E Varavenko *et al* 2018 *IOP Conf. Ser.: Mater. Sci. Eng.* **463** 042100

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Special Economic Zones of the Russian Far East: economic and legal prerequisites for improvement of investment climate

V E Varavenko ¹, S F Litvinova ², M V Niyazova ³

¹ Vladivostok State University of Economics Service, Vladivostok, Russia

² Vladivostok State University of Economics Service, Vladivostok, Russia,

³ Vladivostok Branch of the Russian Customs Academy, Vladivostok, Russia

E-mail: marinav.var@gmail.com

Abstract. Enhancing the attractiveness of the Russian Far East's investment climate receives considerable attention. For this purpose free economic zones and specific organizational set-ups for development are being created. However, the first results of their functioning give reasons to point to the need to improve processes. By using the method of economic and legal analysis of legal acts, the authors propose solutions to three key problems. The authors clarify the interpretation of the concept of the 'resident of Advanced Development Territories of the Far East' by analyzing its constitutive elements 'registration' and 'implementation of activities', as well as provide options for dealing with problems at law enforcement and law making levels. The study reveals that problems relating to residents' realization of the right to declare Value Added Tax reimbursement are embedded in the condition of its application, in other words, in the underdevelopment of a guarantee instrument between the bodies of the Federal Tax Service and the management company, as well as in the limited financial capacity of the latter. To assess the effectiveness of protective functions and powers of the management company, the authors analyse the released practice of commercial courts in the Far Eastern Federal District on disputes involving both the residents of the territories with special business regimes and the management company. The authors draw attention to the ineffectiveness of the management company in this direction and recommend undertaking a preliminary (pre-trial) analysis of contentious situations involving residents on the basis of criteria formulated in this paper.

1 Introduction

The year 2015 was marked by expanding the toolbox of Free Economic Zones to the Russian Far East with the enactment of two significant Federal laws aimed at improving the favourableness of investment climate in the region. They are the Federal Law No. 473-FZ "On the Territories of Advanced Social and Economic Development in the Russian Federation" dated the 29th of December 2014 (the ADT Law) and Federal Law No. 212-FZ "On the Free Port of Vladivostok" dated the 13th of July 2015 (the Vladivostok Free Port Law (VFP Law)).

The main theoretical foundations relating to the issues of enhancing Russia's investment attractiveness by implementing special regimes for entrepreneurial activities in such economic institutions as free economic zones can be found in the following works [2–10; 12; 13; 17; 19; 21; 23; 25; 26; etc.]. Among researchers of regional distinctive features and, in particular, of the Far East of Russia, it should be mentioned I.A. Makarov [15], A.F. Pashchenko [18], E.V. Polukhin [20], N.D. Sigova [22], V.A. Uvarov [24]. Most of these works have been published before the ADT Law and FPV Law entered into force and new institutions of free economic zones in the Far Eastern Region



were created. There are numerous papers in scientific periodicals, for example [11; 14], that reflect results obtained from the comparative analysis of special and general regimes for entrepreneurial activity and investing into the free economic zones, specifics of benefits granted under the ADT Law and VFP Law.

However, over the time, studying the evolving practice of implementing the laws is becoming a relevant issue. Therefore, the objective of the study, drawing on the first experience of applying rules of the laws, is to identify, analyse and propose solutions to the problems relating to the establishment and development of free economic zones by the example of the Advanced Development Territories of the Far East and Free Port of Vladivostok as the institutes for enhancing the attractiveness of investment climate in the region.

2 Methods

The study dwells on the theoretical approaches to exploring the relations arising from the work on creation and functioning of free economic zones (by the example of ADT and VFP) as the economic institution promoting the improvement of investment attractiveness of economy. The study is based on the dialectical method that predetermines a study of objective economic laws, regular patterns, phenomena and legal validity. The methods for empirical and theoretical levels of research are applied. The methods of economic analysis, as well as logical, formal and legal, comparative and legal methods enable authors to analyse legal acts which regulate the activities in the Territories of Advanced Development (ADTs) and Free Port of Vladivostok and affect the improvement of the investment climate attractiveness.

3 Results

The main findings of the study disclose the issues relating to interpreting fundamental concepts of the ADT legislation, residents' application of the right to declare Value Added Tax (VAT) reimbursement, as well as the issues regarding the effectiveness of the protection of rights and legal interests provided for residents by a management company.

3.1 The topical issues of interpreting the “ADT resident”, “registration”, “location of activities” as the core concepts of the ADT legislation

One of the core concepts that underpin the ADT Law is the category of a “resident of the Territory of Advanced Social and Economic Development” (an ADT resident). The essential signs of this concept serve as criteria which commercial companies and (or) individual entrepreneurs, who intend to obtain the status of an ADT resident, must comply with. Since the special regime for the entrepreneurial activities in the ADTs is applied to a well-defined territory, the legislator has laid down in the definition of the concept “ADT resident” the criteria that guarantee the space localization of economic activity within the ADT territorial limits. Is this enactment effective and has it met its objective?

At first sight, everything seems simple and transparent. However, completing the requirement for the state registration of an individual within the ADT boundaries and in compliance with the Civil Code, as well as with both “On State Registration of Legal Entities and Individual Entrepreneurs’ and “On Federal Address System” Federal Laws becomes impossible due to the number of reasons – the number of ADTs are being created according to the “greenfield” scenario: there are no administration blocks and housing within the boundaries of the ADT land plots.

The solution to this problem lies inside the law-enforcement and law-making levels. The “law-making” approach has been implemented by specialists of the management company and is based on the interpretation of the Russian Federation Government’s Order of November 19, 2014 No 1221 and the Order of the Ministry of Finance of November 5, 2015 No 171n. As a result, “the territory” started to be used as a constitutive element of a separate address. In other words, the address (location) of a legal entity–resident, when it is registered, can be specified by the corresponding ADT, for instance: “Nadezhdinskaya” ADT, Volno-Nadezhdinskoye village, Nadezhdinsky area, Primorsky Krai,

Russia". As of October 27, 2016, according to the Register data of the ADT residents, 22 enterprises out of 91 per five ADTs were registered in such a way.

The "law-making" approach lies in clarifying the definition of the term "ADT resident". For example, it is possible to use the approach laid down in the Federal Law of July 22, 2005 No 116-FZ "On Special Economic Zones in the Russian Federation". Another decision is to make an addition to the content of the Article 12 of the ADT Law, in particular: 1) including in the part 3 a reference to the general prohibition against residents' creating not only subsidiaries and representative offices but also other standalone entities, 2) completing by the part 3.1 which would contain the exemption from the general prohibition against the creation of standalone entities (granting a resident the right to urgently (temporarily) establish a subsidiary beyond the ADT in order to ensure that the resident's office subdivisions could operate but under the duty to liquidate it, as soon as the appropriate infrastructure facilities within the ADT boundaries are created).

Moving on to the "implementation of activities", we point out that certain activities which are set out in the Russian Federation Government's resolutions on creating ADTs and supported by the government, by their very nature, cannot be localized within the ADT boundaries. For example, they are "fishing and fish farming", "the activities of travel agencies and other organizations providing services in the tourism industry", "water transport activities". Can the residents' activities be regarded as economic and subject to preferential treatment in this case?

The problem can be resolved by specifying the concept of "location of the activities" at the law enforcement and law making levels. Using the doctrines of personal law developed by private international law and applied in the field of customs, currency and tax regulation for identifying parties subject to the relevant administrative and legal regimes is promising. At the level of law enforcement, such a specification may be an official interpretation that provides both analysis and assessment of the situation, as well as defines a position on the issue of the location of the resident's activities. The solution of the problem at the level of law-making requires a legal act with specifying rules to be adopted.

3.2 The topical issues of applying the right to declare Value Added Tax reimbursement

One of the tax benefits for the ADT and VFP residents is the declarative order for reimbursement of Value Added Tax (VAT) which has been implemented in accordance with the Article 176.1 of the Tax Code of the Russian Federation since 2009. The procedure allows setting off or reimbursing the tax until the cameral tax check of the VAT declaration is completed, within 11-16 days from the date of filling in a declaration (the total period for setting off / reimbursing of tax amount is equal to 101 days).

The procedure for its application is fairly transparent and fast. The challenges that arise from the ADT and VFP residents' implementation of the right to this benefit are not rooted in the procedure itself, but in the condition of its application, and are related to the need to submit to a tax authority a copy (copies) of the guarantee agreement concluded between the management company and the tax authority of the Federal Tax Service that imposes the obligation on the management company to give back to the budget tax amounts reimbursed to a resident if there are no grounds for such reimbursement.

There are two problems regarding the conclusion of the guarantee agreement identified. The first one relates to the management company's scope of powers. The functions and powers of the management company are fully set out in the ADT and VFP laws and have no reference to its right to vouch for the fulfilment of obligations assumed by the residents to their counterparties and state authorities. The second one is related to the performance of the guarantee agreement and refers to the procedure of involving a guarantor in fulfilling the responsibility to return tax amounts by a resident and to the availability of financial opportunities. It should be noted that the problems mentioned above are surmountable and can be resolved by introducing additions to the relevant Federal Laws. However, the other one goes beyond the legal mechanisms for the implementation of the benefit analysed. Let us assume the results of cameral tax checks of the residents are unsatisfactory and tax authorities overrule

the decisions on tax amount reimbursement; a resident evades voluntary fulfilment of the obligation to return the VAT amount and tax authorities apply to the management company for claiming the tax amount recovery. According to the management company's report on the working results for the first half of 2016, the amount of the ADT and VFP residents' total investments in purchasing fixed assets, design and construction of production facilities has amounted to 284 100 000 000 rubles. The share of VAT in the structure of these costs, which can potentially be claimed for reimbursement by the ADT and VFP residents, is 51 100 000 000 rubles. However, the funding of the management company's activities in 2016 amounts to 6 168 261 100 rubles.

These figures indicate the lack of financial and economic prerequisites for applying the guarantee instrument and therefore the lack of the benefit of the declarative order for VAT reimbursement to the ADT and VFP residents. Overcoming the problem requires a set of financial, economic, institutional and legal measures, including forecasting and planning the costs for implementing benefits; designating the responsible for the timely and proper implementation of procedures in drawing up and executing budgets; allocating population's costs risks for implementing benefits between the management company and residents.

3.3 Topical issues associated with protecting the rights and legal interests of the ADT and VFP residents

On July 13, 2015, the ADT Law was amended, and the management company is entitled to represent and protect the residents' interests in court. The similar rule of the law applied to the VFP residents entered into force in October 2015. This right is one of the functions for managing the territories of free economic zones, assigned to the management company, and can be considered as one of the measures of "the government support" for the residents. The practice of the management company's performance of "the protective" function does not go beyond the disputes arising from the relations ensuing from the implementation of investment projects by the legal entities and individual entrepreneurs – ADT and VFP residents. In each case, the management company makes a decision on application / non-application of the mechanisms for protecting resident's interests. By the degree of the finality of requirements, this rule refers to imperative norms [1; 16]. This means that, when deciding to exercise the right, the management company cannot independently go beyond the behaviour pattern provided by the law. In other words, "protective" functions stipulate the procedural roles of the management company. In the first case, in accordance with the Commercial Procedure Code of the Russian Federation, the management company may act as a representative of the plaintiff or defendant; in the second case, as a plaintiff or an applicant. The other procedural roles within the proceeding of protection residents' rights are not permissible.

According to the database of commercial courts' verdicts "Elektronnoye pravosudie" (eng. 'Electronic Justice'/ ras.arbitr.ru), within the period from December 2015 to February 2017, with the involvement of residents, the management company took participation in seven trials, which were held by the commercial courts of the Far Eastern Federal District. Six out of seven disputes arose out of the administrative and other public relations; one dispute arose out of the civil-law matters. Let us consider in more details the administrative disputes: five out of six disputes were initiated by the ADT and VFP residents, one lawsuit was initiated by the management company engaged in protecting the resident's rights; two disputes arose out of the relations of the implementation of tax control measures, the reason for the rest was rooted in the relations of the use and protection of land.

Disputes arisen out of the relations of tax control were tried by the Commercial Court of the Amurskaya Oblast. The plaintiffs were the residents of the "Priamurskaya" ADT, who appealed the refusal of the Federal Tax Service to reimburse VAT and apply tax liability measures. When performing its "protective" functions, the management company supported the position of the plaintiffs and brought the representatives to trials. However, the management company appeared in the proceeding as a third party and did not make distant claims, and the contested acts of the tax inspection were not connected with the period of the implementation of the residents' projects, as they were enacted prior to the entry into force of the ADT Law.

The land disputes related to the VFP residents' appeal against the refusal of the local government to provide land plots were tried by the Commercial Court of the Primorsky Krai. In two cases, the management company appeared in the court as a third party and did not make distant claims, but sided with the defendant on the initiative of the latter; in trials, it confirmed the lack of the connection of the residents' claims with the investment project and the site for its implementation. In the third (similar) case, the management company appeared as a plaintiff and set out to prove that the defendant's decision to refuse to grant a land plot to a resident is unlawful. However, during the proceeding, it was confirmed that the defendant acted in accordance with the rules of the land legislation, and the requested land plot was not connected with the site where the investment project was implemented by the resident.

To evaluate the quality of the management company's work regarding the land disputes, the attention should be paid to the similarity of these cases: the Municipal Property Administration acted within the powers granted by and in accordance with the land legislation; the requested land plots had no connection with the nature and site of the investment project implementation; the cases were heard within the similar time period; moreover, in court sessions the same employees appeared as the representatives of the management company. Thus, the land disputes are characterized by the contradictory position of the management company. The results of the analysis obtained from the published court practice testify to the ineffectiveness of the management company's activities in protecting the rights of residents. In order to avoid any mistakes in this area, the management company is recommended to undertake both a preliminary analysis of disputes with the involvement of residents and pre-trial counsellings of residents with a view to studying the prospects of taking legal action.

4 Conclusion

To sum up, the results obtained from the analysis of the separate measures to enhance the Russian Far East's investment attractiveness point to a number of problems related to the legislative, financial, economic, organizational and management areas of the functioning of free economic zones (by the example of ADT and VFP) as the economic institution.

Further directions aimed at the improvement envisage the following: (1) improving the legislative framework for regulating parties involved in creating and developing the ADT and VFP, including specifying the conceptual system of laws, adopting by-laws and regulations that specify and develop the provisions of laws; (2) creating the financial and economic prerequisites for practicable implementation of benefits and preferences, the application of which is set out in the current ADT and VFP legislation, for example, building up a "guarantee" fund for securing guarantee agreements which are concluded between the management company and tax authorities; (3) improving the business processes of the management company for interaction with the ADT and VFP residents, in particular, in the field of representation and protection of the residents' rights and legal interests.

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