

The foreign investments in SEZs as the most perspective mechanism of PPP



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Relative quiet conditions in the investment market give time for reconsideration and principle restructuring of the elements of the given market sector. The participants again have a real opportunity to evaluate the efficiency of any given investment mechanisms.

The government acts as one of the participants. During the past years it offered variety of mechanisms to maintain investments, including foreign ones. Among such mechanisms there are agreements of products separation, financial tenancy, and investment programs, and special economic zones (SEZs).

The given article will regard the Special Economic Zones. It will render the consideration of specificity and advantages of foreign investment in SEZs in comparison with other mechanisms of foreign investment offered by the Russian legislation.

Legal and regulatory framework

First of all it is necessary to show the legislative basis that controls the mechanisms of investment. It is essential to note such Federal laws as "Foreign investments in RF", "Investment activity in RF that fulfilled in the form capital outlay", "Special Economic Zones in the Russian Federation".

The Federal law "Foreign investment in the Russian Federation" regulates:

- direct capital expenditure in Russian economic communities,
- relations regarding the foreign investor's purchase of the share in the charter capital of the commercial organization that was or being newly created in the territory of the Russian Federation in the form of economic society or association.
- investment of the capital in main funds of the subsidiary of the foreign legal body that is created in the territory of the Russian Federation.

The Federal law "Investment activity in RF that fulfilled in the form capital outlay" regulates investments in capital expenditure objects. The last mean different kinds of newly created property that pertain to private, state, municipal or other forms of ownership subject to the exception established by the federal laws.

These two laws as a single set form the basis for organization of the investment process in the context of market-based economy, and herewith provide the access to the investment market of Russia for the Russian and foreign investors.

The Federal law "Special Economic Zones of the Russian Federation" defines:

- special requirements to the commercial organizations that can maintain the activity in the territory of the SEZ; and the character of the fulfilled activity.
- the set of tax privileges and other bonuses.
- application of special customs regulations.

The given law does not fulfill direct regulation of foreign investment mechanisms. However it can be applied for this purpose with the help of mechanisms stipulated by the "Foreign investment in the Russian Federation Act".

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There are the following optional norms that indirectly influence the conditions of investment:

- Tax Code of the Russian Federation,
- Customs Code of the Russian Federation,
- Federal laws "Joint stock companies", "Protection of rights and legal interests of

investors in the stock market”, “Stock market” and others.

The special status of entrepreneurial activity in Special Economic Zones.

In view of its specific task the SEZ legislation defines the regular mechanism of investment. Actually, the main aim of the SEZ is investment in a limited area for maintaining the commercial activity of a definite character.

There are several characteristics pertaining SEZ to the mechanisms of investment:

- creation of SEZ in the territory that is not prepared for maintaining the activity stipulated by the status of SEZ.

Actually choosing the territory it is necessary to take into account the presence of infrastructure objects, but however these objects are not enough for entrepreneurship, and that demands additional investment in engineer preparation of the territory.

- Occurrence of obligations of the government regarding the investment in preparation of the given territory for an appropriate activity. And the given liabilities are taken both in the federal and the regional levels, and primarily concern the investment in capital construction objects.

- Occurrence of obligations on the part of commercial organizations in respect of investment in the preparation of the territory. Besides it concerns not only the obligatory requirements to the sum of the capital outlays in the sea-port and industrial production special economic zones. Valuation of prescheduled investments is a necessary element of admittance of the commercial organization to maintain the activity in the territory of SEZ.

The key provision of the SEZ legislation that defines the specificity of investment of foreign capital in SEZ is a demand of registration of the commercial organization in accordance with the Russian legislation. The requirement of state registration of the legal body is given in article 51 of the Civil Code of the Russian Federation. According to it the legal body is deemed to be created from the moment of its state registration. The location of the legal body is governed by the place of its state registration. (p. 2 art. 54 Civil Code of the Russian Federation).

Thus in order to become a resident of SEZ the commercial organization must have a location in the territory of a special economic zone where it will carry out its activity as a resident. Therefore foreign legal bodies can not be SEZ residents indirectly.

The given restriction concerns the subsidiaries and the representatives of foreign commercial organizations as well. That is stipulated by the concept of SEZ resident as a commercial organization. The subsidiary office, the representative are not legal bodies but the separated departments that are located apart its head office (art. 55 the Civil Code of the Russian Federation), and consequently they are not commercial organizations and can not be SEZ residents.

Therefore foreign companies are offered two ways of investment in commercial organizations that act as residents of SEZ.

The first way is creation of commercial organizations with foreign investment that is a Russian commercial organization the shareholders composition of which include a foreign investor due to the investment of the foreign capital in the object of entrepreneurial activity in the territory of a SEZ both in the form of monetary assets and property.

The second way is acquisition of the partnership share in an already created economic company that possess the SEZ resident status.

The first way

The legislation of SEZ doesn't include the procedure of creation of a commercial organization with foreign partnership in the territory of Russia. That's why it is essential to use special norms like such federal laws as "Foreign investment in the

Russian Federation”, “Capital investment activity in the Russian Federation”.

The p. 2, art. 20 of the “Act of the foreign investments in the Russian Federation” says that commercial legal bodies with foreign investment are state registration in the order established by the FL “State registration of legal bodies”. The Russian investment legislation approaches to the legal status of foreign investments on the basis of the national regime. In accordance with the “Foreign investment in the Russian Federation Act” dated from July 09, 1999 (art. 4) admittance of foreign investments must be carried out on the general basis with Russian individual persons and legal entities. At least the given arguments can not be less favorable for foreign investors and investments.

As a rule the foreign investor must have the same regulations and obligations as the domestic one has. The national regime that applies to foreign investments excludes discrimination of the foreign investor depending on the citizenship or origin country of investments.

That is the general direction of development of legal regulation of economic relations with participation of foreign capital.

As a matter of principle the investment guarantees are provided within the internal legal order.

Particularly the provision of the p. 5 art. 4 of the “Act of the foreign investments in the Russian Federation” establishes that “the foreign investor, a commercial organization with foreign investment that was created in the territory of the Russian Federation, in which the foreign investor possesses no less than 10% of the share in the charter capital of the definite organization in case of fulfillment of reinvestment; use the legal defense, guarantees and privileges established by the legal federal law”.

However the given legal regime applies to the foreign investor in case of fulfillment of capital investment in the objects of entrepreneurial activity in the territory of the Russian Federation at the expense of outcome or benefit of the foreign investor or a commercial organization with foreign investments.

It should be noted that subsidiary and affiliated societies of the commercial organization with foreign investments do not use legal defense, guarantees and privileges established by the Act of Foreign Investment in the context of maintaining their entrepreneurial activity in the Russian territory (p. 4 art. 4 of the “Act of the foreign investments in the Russian Federation”).

Regarding the mode of investment via acquisition of participation share in an already created economic society that gained the SEZ resident status it is essential to remember the changes made in the legal status of LLCs on the ground that the given business legal structure of economic societies is quite widespread.

In December 30, 2008 the Federal law regarding the changes in p. 1 of the Civil Code of the Russian Federation and the separate legislative acts of the Russian Federation as well as the Federal Law dated from February 08, 1998 № 14-FZ “Act of Limited Liability Companies”.

Particularly from July 1, 2009 the procedure of alienation and pledge of the society partnership share.

Besides the law changed the procedure and conditions of sale and other ways of alienation of the partnership share in favor of the third person.

The price is defined either according to the price of the offer to the third person or the price preliminary established in the charter.

The price defined by the charter can be in a fixed sum or calculated on one of the criteria (the cost of capital account, book value of an asset, net income and etc.).

The approach of the legislator to the solution of the problem concerning the withdrawal of the participant from the company can be called revolutionary.

In the companies created after July 1, 2009 the withdrawal without the consent of other participants is possible only in case of existence of the given provision in the charter of the community. It means that if the participants do not make a special note of in this regard the withdrawal of the participant from the community without the consent of other participants will be impossible.

There is no problem of withdrawal of participants from the community for LLC created before July 1 2009 in case the charter stipulates the norm that allows the withdrawal without consent any time.

However if there is no similar provision in the charter from July 01, 2009 the withdrawal is regarded according to a new provision of law.

The procedure of acquisition of the participants' shares by the community underwent the changes as well.

Favorable regulation

The SEZ legislation as a mechanism of management of investment activity being defined it is essential to define the status of a private investor within this mechanism. It can be done through the preferences given by this mechanism. And the list of these preferences is rather significant.

It covers three key business directions:

1. privileges in the sphere of customs and tax regulation,
2. state financing of infrastructure,
3. reduce of administration obstacles.

The legislation elaborated the sector of customs and tax preferences more specifically. However most private investors believe that the role of the sector in increase of attractiveness of the given investment mechanism is the least significant.

Particularly one can single out two directions of customs and tax regulation of foreign investment in special economic zones. The first direction concerns privileges that cover the process of foreign investment fulfillment.

Specifically it is stipulated by the provisions of art.16 of the "Act of the foreign investments in the Russian Federation" that provides that the customs payment privileges are given to foreign investors and commercial organizations with foreign investments provided they carry out the priority investment project in accordance with the customs regulations of the Russian Federation and the Russian legislation of taxes and charges.

The privileges are examined more detailed in the law concerning the customs tariff dated from May 21, 1993 № 5003-1 specifically in art. 37.

According thereto it is permitted to provide tariff preferences in the form of refund of paid duties, decrease of the rate of duty and exclusive exemption from duties in regards to the goods imported in the customs territory of the Russian Federation as a contribution in charter funds of companies with foreign investment and foreign companies.

The given provision has a lot of cases of disputes.

Specifically the decree of FAS of north-western district dated from July 12, 2006 regarding case № A26-10554/2005-27. The case is exposed by the dispute of applicability of privileges given in import of goods in the customs territory of the

Russian Federation as an investment in the charter capital of the economic society.

Resolving the dispute the court proceeded from the fact that the privileges regarding customs duties are given to investors and commercial organizations with foreign investment in case they maintain the priority investment project in accordance with the customs legislation of the Russian Federation and the Russian tax and charges regulations (art.16 of the Federal law dated from July 09, 1999 №160-FZ " Act of the foreign investments in the Russian Federation").

Subject to article 34 of the customs tariff act the privileges are provided only on the decision of the Russian Government.

Herewith the tariff preference means the privilege in respect of the goods that is provided on the terms of reciprocity or unilaterally and transferred across the customs border of the Russian Federation in the form of the reimbursement of the previously paid fee, exemption from the fee, decrease of the fee rate, establishment of tariff quotes for the preferential import (export) of the goods.

Trade policy of the Russian Federation within the limits of its customs territory it is assumed to provide tariff preferences in the form of the reimbursed of paid fee, decrease of the fee rate and exclusive exemption from the fee with respect to the goods imported to the territory of the Russian Federation in the form of the holdings in the charter funds of companies with foreign investments and foreign organizations (article 37 of the "Customs tariff act").

The conditional exemption from customs fee is stipulated by the p.2 of the article 319 of the Labour Code of the Russian Federation.

According to point 1 of statement № 883 of the RF government the goods imported to the territory of the Russian federation in the form of investment of a foreign incorporator in the charter capital are exempted from the customs duty in condition of the following factors:

- the goods are not excisable;
- the goods are referred to the main production funds;
- the goods are imported in the terms fixed by the foundation documents for formation of the charter capital.

Thus for exemption from customs duties it is necessary to observe the set of conditions as a single set. The courts established that in the given case the goods are imported in the Russian Federation with the purpose of adding it to the charter capital of the company upon the expiry of the 6-month term that is stipulated by the foundation documents of the community.

Therewith the import of the goods is connected with the formation but not the increase of the charter capital of the commercial organization.

The second direction is regulation of the economic activity within the terms of the special economic zone.

Proceeding from the analysis of the norms of customs regulation of activity in the territory of SEZ it is essential to make a conclusion that the main task of SEZs is activation of the foreign trade activity of organization locating in the territory of Russia.

More specifically the SEZ legislation stipulated using of the special customs regime that is effective in the territory of the special economic zone that is the free customs zone regime.

On the basis of article 37 of the "Act of Special Economic Zones of the Russian Federation" with the use of the free customs zone regime the foreign goods are located and used within the limits of the SEZ territory:

- without customs duties and VAT,
- without application of prohibitions and restrictions of economic character

Russian goods are accommodated in the territory of SEZ and used on conditions that are applied:

- for export in accordance with customs export regime,
- by payment of excise,
- without payment of export customs duties.

The customs regime of free customs zone can include:

- 1) foreign goods, imported in the customs territory of the Russian Federation from foreign countries;
- 2) Russian and foreign goods imported in the territory of SEZ from other part of customs territory of the Russian Federation;
- 3) Russian and foreign goods that are located in the territory of the special economic zone and purchased from persons that are not residents of SEZ.

Besides the customs duties and VAT are reimbursed by tax agencies in case the SEZ residents place the foreign goods imported into SEZ territory from other parts of RF customs territory under the customs regime of free customs zone or the goods purchased from persons that are nor SEZ residents. The reason is that exemption from import customs duties and VAT or their reimbursement are stipulated by export of goods from the RF territory in accordance with the customs regulations.

According to p. 5, article 37 of the law "Foreign investments in the Russian Federation" the goods placed under the customs regime of free customs zone can be used in any operation provided the operations conform with the conditions of agreements concerning industrial-production or technological-introduction activity.

Herewith the RF government is eligible to establish a list of prohibited operations that are fulfilled with the goods placed under the customs regime of the free customs regime zone. As a result one can see a situation where the goods imported from abroad gives more benefit rather than from the territory of Russia that consequently gives advantages to the companies that possess wide foreign trade connections.

There is a situation in the international practice where the main motive force of SEZ development in agriculturally developed countries is not foreign investments but a national private capital. And in developing countries and countries with transition economy it is vice versa – the main source is foreign investments and loans of international credit organizations.

The regime of free customs zone stipulated for SEZ in the Russian Legislation is targeted to the export production. That allows importing of the constituent parts and materials from abroad without payment of VAT and customs duty. After processing – exporting to the Russian territory that is including VAT and export duty payment, or exporting out of Russian border but without VAT and customs duty payment.

The given regime allows stimulating of export rather effectively.

Thus the modern policy of the Russian government in the sphere of regulation of investment activity in SEZ is directed to the attraction of foreign investors. And evaluating customs privileges provided to private investors in the SEZ territory one can say that foreign investments in SEZ have big support of the RF government.

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