HOW TO SURVIVE NEW NORMATIVE MONETARY VALUATION OF LANDS IN 2017? (means drastically higher or lower land tax or rent)

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Since the beginning of this year, many taxpayers in Ukraine have been surprised by excerpts of normative monetary valuation (hereinafter – “NMV”) of their lands indicating significantly new numbers. In some cases the valuation was doubled (!) as to compare with the previous year, however in others – it was reduced by 3.5 (!) times – affecting pro rata land tax and rent. Such alterations appeared without recent approvals of new local technical documents on land valuation, and with relatively small 6% annual inflation rate (which is also included into NMV). This has happened thankfully to new “Regulation on normative monetary valuation of lands within settlements” approved by the order of the Ministry of Agrarian Policy and Food of Ukraine No.489 as of November 25, 2016 (“Regulation No.489”).

This article questions the legality of the application of Regulation No.489 during issuance of the excerpts of NMV in the conditions when local technical documents on land valuation were not formally adapted. We will discuss the legal grounds, which may be used to challenge the application of the Regulation No.489 in the mentioned situations as well as to cancel the changed NMV. However, we have also good news for those being satisfied by the new NMV. There are sound arguments in support of filling tax declarations and allocation of relevant taxes on the base of the new excerpts of NMV, which will be revised in the second part below.

1. Illegal “hybrid” application of Regulation No.489

Regulation No.489 changed the approach to definition of the coefficient of “functional use” (KF) of lands (the key coefficient in the calculation on normative monetary valuation). According to the new rules, KF should be defined according to information in the State Land Cadaster regarding code of designated purpose of the respective land plot. If there is no information about the land plot itself in the electronic database of the cadaster or no code of designated purpose is assigned according to the actual classification (2010), KF of 2.0 shall be applied by default. Here we would set aside deontological issue of de-facto penalizing private entities for omissions in the public cadaster, and focus on the legal defects in widespread practice of application of Regulation No.489 during issuance of new excerpts of NMV.

Both, land tax and lease payment for state and municipal lands, are considered as twofold local land-related tax according to the Tax Code of Ukraine. Under the Tax Code it is the competence of municipal councils to establish all elements of this local tax, including its base (NMV plus inflation rate) and rates.

Laws on land valuation envisage that technical documents of NMV (within settlements) should be drafted by land-management entities and then endorsed for legal effect by the decision of the municipal council. I.e., establishing NMV (apart from further inflation indexing) shall be by respective act of the local self-government body. The legislation provides for the frequency of updates of such decisions – once at 5-7 years. Regulation No.489 per se specifies methodology, which should be applied by land-management entities during preparation of new technical documents of NMV. Neither Regulation No.489, nor other legal act ceases effect and application of technical documents of NMV put legally in force before 2017 or requires their immediate substitution/modification.

Excerpt of technical documents of NMV legally (and literally) means an extract concerning the land plot from the whole content of technical documents of NMV of lands approved within city or village. However, this year excerpts of NMV are issued with “hybrid” application of Regulation No.489 without amending current NMV approved by local councils: the new coefficients are applied under Regulation No.489 to the basic indicators provided by the technical documents of NMV, which were developed according to the old regulation on valuation. Consequently, land cadaster authorities disregard competence of municipal councils on approval of local taxes and significantly alternate NMV without its legalization on the local level.

Inconsistency of such “hybrid” application of Regulation No.489 could be demonstrated by the example of the decision of the Kyiv City Council No.23/23 of July 3, 2014 on the approval of technical documents of NMV for the Kyiv’s lands. This decision was published together with the table, which includes all approved coefficients of NMV for lands of all types of functional usage located in the different city planning zones. The table was filled based on the old types of “functional usage” which does not correspond to the new approach according Regulation No.489. For example, KF could not be equal 2.0 according to this table. Even in case similar tables are not published along with decisions of some other municipal councils, it must be in the relevant technical documents of NMV.

The abovementioned provides grounds to challenge “hybrid” application of Regulation No.489 when local technical documents on land valuation were not formally adapted to it. Moreover, decisions taken on new normative valuation continue to be issued with many errors, including procedural and material ones. Here we established successful practice of challenging and cancellation of both unjust individual excerpts of NMV and illegal local decisions on approval of technical documents of NMV.

2. The right to apply new excerpts of NMV for tax purposes

The position described above does not deprive the taxpayer its right to use obtained excerpt of NMV for filing land tax declarations when it meets or exceeds expectations.

According to the Law “On the State Land Cadaster”, information of the cadaster is official; the cadaster is kept with purpose of providing information to state and municipal authorities, legal entities and individuals, for managing land relations, conducting land valuation, collecting the fee for land, etc. The Tax Code (Art. 286.3) also stipulates that information of the cadaster is the ground for assessing the land tax. That is why land cadaster bodies are authorized to issue excerpt of NMV. In addition, the Tax Code (Art. 286.2) provides that taxpayer should supplement its land tax declaration with certificate (excerpt) of NMV when first time submission or in case new NMV is approved.

Despite legally provided by the law with respective right, as a matter of practice, the taxpayer has no direct access to the data of the cadaster regarding NMV of its land plot yet. The legal requirement that NMV should be posted on online cadaster map, is still not implemented. The technical documents of NMV usually also remain unpublished. Therefore, taxpayer usually does not have all necessary information for independent verification, which makes excerpt of NMV normally the only available official source of information about normative monetary value of the land plot.

Having anticipated the unjustified application of the increased coefficient of functional usage (KF), the taxpayer can apply in advance to the cadaster for improving code of the designated purpose of the land plot. Please note that the new code must be confirmed by the existing technical documents on allotment or inventory of the land plot. Correction of the information in the cadaster will create grounds allowing issuance of the excerpt of NMV with improved coefficient of functional usage (KF).

Another way to challenge new higher land-related charges may be to challenge the legality of the above-discussed ‘hybrid’ application of the new valuation procedure.

Yet, for those facing lower charges under the discussed ‘hybrid’, the law provides possibility to do so as the taxpayers shall merely rely on the data provided from the cadaster rather than make respective calculations independently. Yet, there is risk that the tax office will come later to collect the difference in case the currently applied erroneous approach will be corrected.