



The Association of European Businesses

Development of Tax Legislation and Enforcement Practices – First Half of 2011

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29 June 2011

Swissotel Krasnye Holmy

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Association of European Businesses in the
Russian Federation



Transfer Pricing – Has Ice Been Broken?

Evgenia Veter and Svetlana Stroykova

29th June 2011

1. Overview of the Draft Law, Evgenia Veter
2. AEB Position Paper, Svetlana Stroykova

TP Reform: Status

- Updated draft law made public 4 May 2011
- Even more OECD alignment is added to the new draft
- Expected introduction date – 1 January 2012
 - with 2012-2013 being transition years
- 2nd and 3rd readings
 - recent indications are that it may happen in July

TP Reform: Primary Implications

- Introduction of the arm's length principle
- Substance-over-form approach
- Controlled transactions:
 - Cross-border related parties – all
 - Cross-border / third-party
 - “Black-listed” jurisdiction
 - Certain commodity groups
 - Domestic / related party
 - Large volume (exceptions apply, incl. consolidated tax regime);
 - Some other criteria

April 5th, 2011

TP Reform: Primary Implications

- Arm's length range
- Five TP methods
- TP documentation / reporting requirements
- Dedicated TP audits
- Corresponding adjustments
 - domestic transactions
- TP penalty provisions
- APA program (2013 onwards)

TP Reform: What Is New?

- Domestic transactions
 - Increased thresholds for 2012 and 2013
 - Exemptions from TP control (one region, no losses etc)
- Prices applied in line with anti-monopoly regulations should be accepted
- Regulated prices should be accepted
 - But need to fit into the range
- All objects of civil rights are subject to control
- Functional analysis is optional
- TP reporting – due by 20 May
- TP documentation – due within 30 days, not earlier than 1 June

April 5th, 2011

AEB Position paper - provisions to consider (1 of 4)

- ***Retroactive transfer pricing adjustments***: these are not stipulated under the current Draft Law
 - Suggestion: To include a provision allowing taxpayers to adjust sales/expenses for transfer pricing purposes and submit revised tax returns without triggering tax audits
- ***Correlative (symmetrical) adjustments***: are currently available only for RLEs
 - Suggestion: FLEs doing business in Russia via a PE should be eligible for correlative adjustments
- ***Regulated prices (regulated mark-ups)***: calculation of arm's length range, is it possible in practice? Pricing protocols already are in place and reviewed by regulators
 - Suggestion: To exclude the arm's length range calculation requirement for regulated goods transactions

AEB Position paper - provisions to consider (2 of 4)

- ***Special transfer pricing audits***: some provisions are not specifically addressed in respect to transfer pricing audits
 - Suggestion: To extend general tax audit rules to transfer pricing audits
- ***Advance Pricing Agreements***: are currently provided only for RLEs, attribution of profit to a PE is a grey area and requires the same treatment as other pricing arrangements
 - Suggestion: To extend the provisions re conclusion of APAs to FLEs doing business in Russia via PEs

AEB Position paper - provisions to consider (3 of 4)

- ***Controlled transactions with goods which are subject to mineral extraction tax:***
 - Suggestion: To limit controlled transactions with goods which are subject to mineral extraction tax, to transactions where mineral extraction tax is calculated as a percentage of sales prices
- ***Assessment of late payment interest for transfer pricing adjustments with respect to domestic transactions:***
 - Suggestion: To include a provision stipulating that no late payment interest is due from a taxpayer as long as the tax is fully paid to another regional budget (e.g. late payment interest settlements between the regional budgets)

AEB Position paper - provisions to consider (4 of 4)

- ***Correlation between antimonopoly and transfer pricing control:***
 - Suggestion: To introduce similar provisions for customs valuation, if customs value is adjusted upwards, increased deduction of the underlying costs is applicable for transfer pricing purposes and vice versa
- ***Self adjustments of tax liabilities by taxpayers (including correlative adjustments, if any):***
 - Suggestion: To include the provisions in the Tax Code establishing that in case of a self assessment of additional taxes, correlative adjustments are made automatically
- ***All objects of civil law are subject to pricing control, including interest:***
 - Suggestion: To align transfer pricing rules regarding determination of arm's length interest income with interest deduction provisions



Evgenia Veter

Partner, Transfer Pricing
Ernst & Young (CIS) B.V.

+7 495 660 4880

evgenia.veter@ru.ey.com

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Svetlana Stroykova

Director, Transfer Pricing &
International Tax Structuring
PwC Russia

+7 495 967 6024 (direct)

+7 495 233 5071 (secretary)

svetlana.stroykova@ru.pwc.com

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Development of Russian VAT Legislation

Orlov Mikhail

29th June 2011

Content

(Draft law № 482215-5)

- **General 0% VAT issues:**
 - Documents confirming 0% VAT rate;
 - New services subject to 0% VAT rate;
 - supply of goods for international organizations.
- **0% VAT rate on transportation services within Customs Union**
- **‘Adjusting’ VAT-invoices**
- **Other VAT issues:**
 - Sales of quotas on emission of greenhouse gases under Kyoto Protocol to the UN Framework Convention on Climate Change
 - Provision of services (works) on continental shelf

April 5th, 2011

General 0% VAT issues

- List of documents confirming 0% VAT rate was shortened – no need to present payment documents;
- List of services subject to 0% VAT rate was extended – transportation services from ports on the territory of Russia to destination point on the territory of Russia;
- Supply of goods for international organizations.

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0% VAT rate on transportation services within Customs Union (1/2)

- **Services provided by organizations or by individual entrepreneurs:**
 - Services on provision of railway rolling stock and containers for transportation of goods through the territory of the country – member of Customs Union
 - Transport and forwarding services provided under a freight forwarding agreement during organization of services on transportation of goods through the territory of the country – member of Customs Union

0% VAT rate on transportation services within Customs Union (2/2)

- **Services provided by Russian carriers on railway transport:**
 - Work (services) on transportation of goods exported from Russian territory to the territory of a foreign country which is a member of Customs Union and works (services) directly connected with transportation of such goods which price is indicated in transportation documents;
 - Works (services) on transportation of goods from a foreign country which is not a member of Customs Union through the territory of the country – member of Customs Union and works (services) directly connected with transportation of such goods which price is indicated in transportation documents.

‘Adjusting’ VAT-invoices

- New document is introduced - ‘adjusting’ VAT-invoice
- ‘Adjusting’ VAT-invoice is issued if cost of goods (works, services), property rights is changed
- Contract (other agreement), other primary documents confirming agreement of a buyer on change of cost of released goods (works, services) – ground for issuance of ‘adjusting’ VAT-invoice

April 5th, 2011

Other VAT Issues

- Sales of quotas on emission of greenhouse gases under Kyoto Protocol to the UN Framework Convention on Climate Change
- Provision of services (works) on continental shelf



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Innovations and Taxes

Arseny Seidov, Partner, Baker & McKenzie

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Innovations – Key Developments in 2010-2011

- Deducting research and development (R&D) expenses – a set of positive amendments (132-FZ)
- Depreciation of R&D and energy-efficient assets
- New reserve for R&D projects
- Amortizing and selling innovation-related IP
- Tax benefits for Skolkovo residents
- Miscellaneous

June 29th, 2011

Deducting R&D Expenses

- Prior to 2011:
 - Expenses are deductible evenly within 1 year
 - In case of negative results, upon the taxpayer's confirmations on negative outcome
 - In case of positive results, only upon actual use of the results in the business activity
 - The rule induced businesses to claim negative results from even positive R&D projects to take earlier tax deductions (plus reporting and statistical distortions)
- As of 2011:
 - Prior rules liberalized:
 - Written confirmations on negative outcomes of R&D projects removed
 - Criterion for mandatory use of R&D results in business activity removed
 - Requirement to deduct R&D expenses throughout 1 year removed
 - Now immediate deduction allowed for R&D expenses producing negative results
 - Discretionary 2-year deduction of R&D expenses for any positive R&D projects

150% Deduction Coefficient for R&D

- Before 2011:
 - Applicable to:
 - limited categories of activities (not widely used), and
 - special R&D funds co-financed by the government
 - Insufficient case law and guidance from the Finance Ministry and Federal Tax Service
- As of 2011:
 - The application of the coefficient is more limited:
 - newly defined categories of expenses within the permitted types of activity
 - for other R&D expenses (e.g. tests), the 150% coefficient is limited to 75% of the taxpayer's R&D staff wage costs
 - BUT new requirement introduced to prepare reports on R&D activity
 - disclosure of sensitive information to the tax authorities – may put at risk some R&D efforts
 - tax authorities may verify reports through “third-party” expertise

Creating and Selling Newly Created IP

- **Converting R&D results into patents / intangible assets**
 - Prior to 2011, patentable IP should have been accounted as intangible asset subject to amortization
 - As of 2011, taxpayers have discretion to
 - (a) treat patentable R&D results as an amortizable IP object, or
 - (b) deduct such R&D expenses within a 2-year term
 - Thus, deducting patentable IP throughout the 2-year term becomes more tax-efficient
- **Selling IP**
 - In case of taking 150% deduction for R&D expenses, losses resulting from the sale of resulting IP are not recognized for tax purposes

R&D Reserve, Depreciation Ratios & Other

- New separate reserve for R&D
 - Budgeted amount (not subject to change)
 - Reserve amount capped at 3% of sales income
 - Maximum term of up to 2 years (to be reflected in the tax accounting policy)
 - Unused reserve amounts to be restored (may require submitting amended tax returns)
 - Reserve deduction does not depend on R&D project outcome
- Max. depreciation ratio of 3 for fixed assets used solely in R&D activities
- Max. depreciation ratio of 2 for energy-efficient fixed assets
- 3-year property tax exemption for energy-efficient assets (applies as of 2012)
- Endowments (targeted capital fund) for non-commercial entities
 - Endowment operations tax free
 - Applicable to charitable activities only

Tax Incentives for Skolkovo Residents

- Profits tax exemption if gross income does not exceed RUR 1 bln.
- VAT exemption and property tax exemption if gross profits do not exceed RUR 300 mln.
- 14% rate for social security contributions to the State Pension Fund
- Exemption from import duty and customs VAT
 - territory-based limitation to be removed
- Simplified accounting if gross income does not exceed RUR 1 bln.



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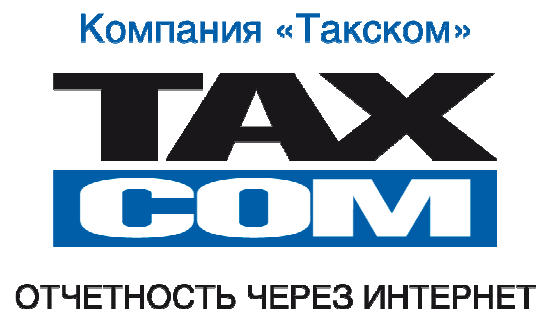
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**Электронные
счета-фактуры:
легитимный статус,
преимущества,
перспективы**

www.taxcom.ru

2009 г. - по поручению Правительства РФ Минфин и ФНС России проводят **пилотный проект** по обмену электронными счетами-фактурами (компания «Такском» - оператора пилотного проекта).

2010 г. - **изменения в Налоговый кодекс РФ** (Федеральный закон от 27.07.2010 № 229-ФЗ) - возможность составления и обмена счетами-фактурами в электронном виде.

2011 г. - Минфин России утвердил **«Порядок выставления и получения счетов-фактур в электронном виде по телекоммуникационным каналам связи с применением электронной цифровой подписи»** (Приказ Минфина России от 25.04.2011 № 50н, зарегистрирован в Минюсте России, 25.05.2011, № 20860)

2011 г. - ФНС России утвердила **«Порядок направления требования о предоставлении документов (информации) и порядок представления документов (информации) по требованию налогового органа в электронном виде по телекоммуникационным каналам связи»** (зарегистрирован в Минюсте России, 28.03.2011, № 20303)

- Счета-фактуры составляются:
 - **по взаимному согласию** сторон сделки
 - **при наличии технических средств и возможностей** для приема и обработки этих счетов-фактур
 - **в соответствии с установленными форматами и Порядком.**
- Счета-фактуры **выставляются и получаются через Оператора электронного документооборота**, который:
 - **гарантирует доставку**
 - **и подтверждает дату выставления и получения документов.**
- Обмен может осуществляться **через одного или нескольких Операторов** электронного документооборота.



- Все счета-фактуры подписываются электронной подписью,
 - выданной **доверенным УЦ ФНС России**,
 - с использованием **сертифицированных СКЗИ**, **совместимых** с аналогичными средствами **ФНС России**.
- Выставление и получение счетов-фактур в электронном виде может осуществляться **в зашифрованном или в незашифрованном виде**.



- Продавец и покупатель осуществляют электронный документооборот по каждому счету-фактуре в отдельности.
- Регистрация электронного счета-фактуры в журнале выставленных и полученных счетов-фактур осуществляется **в соответствии с датами, указанными в подтверждении Оператора** электронного документооборота.





Необходимо утверждение еще ряда документов:

- Внесение изменений в **Постановление Правительства от 02.12.2000 № 914** (формы документов);
- Утверждение ФНС России **форматов счетов-фактур, журнала учета СФ, книг продаж и покупок** и форм и форматов сопутствующих документов;
- Утверждение ФНС России **порядка аккредитации Операторов** электронного документооборота.



- **Сокращение прямых расходов:**
 - сокращение расходов на печать, почтовую пересылку и хранение бумажных счетов-фактур.
- **Экономия времени:**
 - сокращение времени на доставку, регистрацию и согласование документов;
 - возможность круглосуточно в режиме on-line осуществлять любые операции с документами: поиск, загрузка, печать, оплата, сверка, отклонение, а также отслеживать их движение.



Электронный документооборот первичными бухгалтерскими документами позволит:

- Сократить общее количество бумажных документов на 25-75%;
- Сократить время обработки документов на 75%;
- Повысить производительность бухгалтерии на 20%;
- Достичь общей экономии на уровне 1-2% от оборота компании.

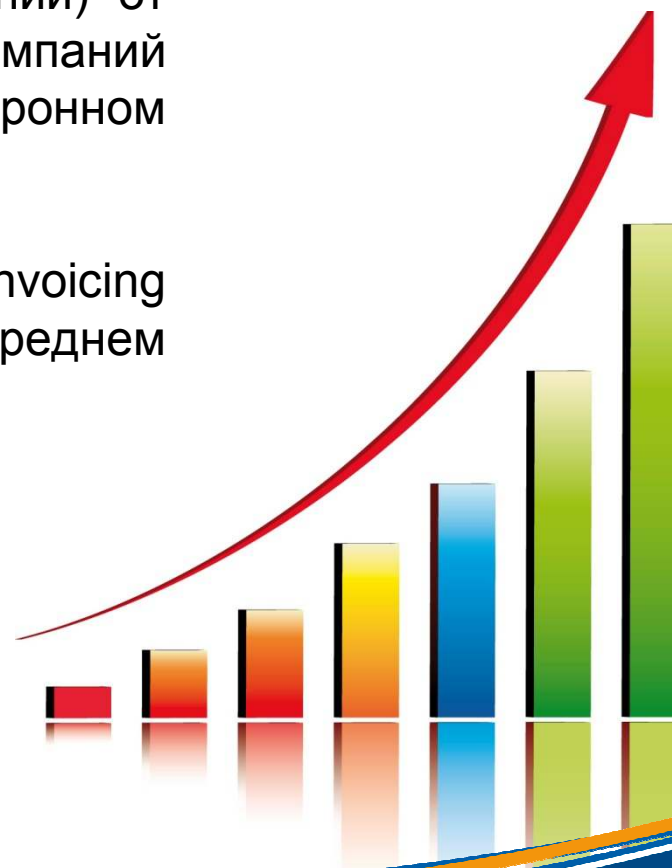
Затраты (прямые и косвенные) на бумажные счета составляют до 30-50 евро.

Полная автоматизации процесса обмена, обработки и хранения электронных счетов снижают затраты до 1 евро.

(по данным Bruno Koch, Bilentis)

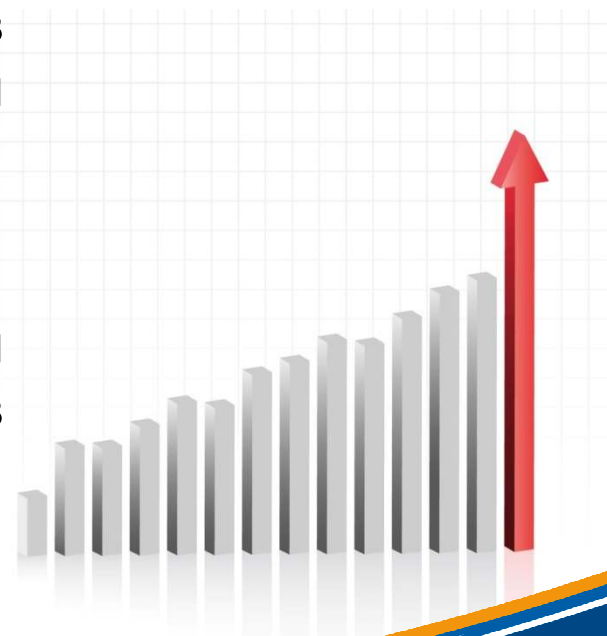


- В 2009 год 40% (2,2 млн. компаний) от общего числа всех европейских компаний обменивались документами в электронном виде, в том числе и счетами.
- В 2011г. степень проникновения e-invoicing в секторе B2B в Европе в среднем составит г. 12%.
- Страны-лидеры:
 - Финляндия – 78%,
 - Швеция – 66%,
 - Германия – 50%.



Переход от мягких к более жестким моделям привлечения:

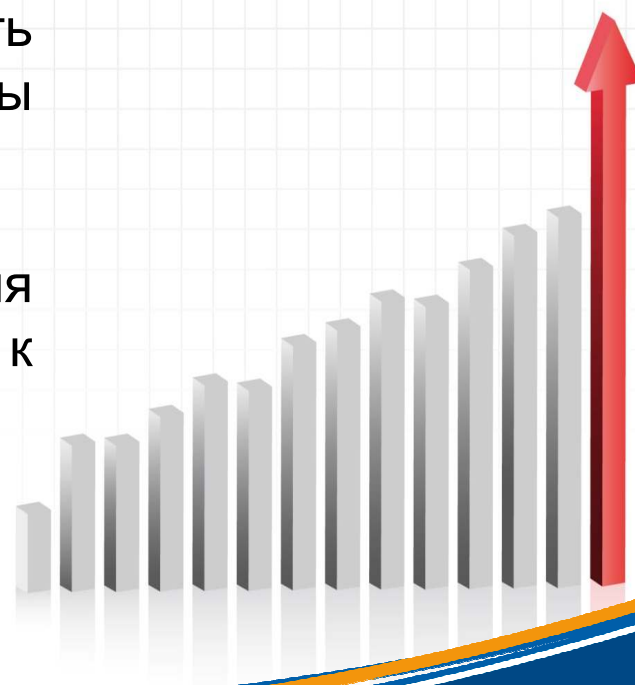
- большинство крупных компаний ЕС все чаще **обязывают** своих клиентов принимать/передавать счета в электронном виде, либо заплатить штраф 2,5 € за 1 документ в бумажной форме
- в некоторых странах вводится **обязательный порядок** представления электронных счетов при работе по государственным контрактам



Готовность бизнеса - 62% организаций и 55% индивидуальных предпринимателей сдают отчетность в электронном виде по ТКС.

Готовность налоговых органов – есть возможности и желание принимать документы в электронном виде.

По оценкам европейских экспертов Россия имеет все шансы быстро подтянуться к лидерам



**СПАСИБО ЗА
ВНИМАНИЕ!**

ВОПРОСЫ?



The Association of European Businesses

Overview of Enforcement Practices on Tax Matters: Major Cases

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Key Tax Litigation Trends *2010-2011*

Maria Vinogradova
Manager, Tax Dispute Resolution
Deloitte

29 June 2011



General trends

- Case law formally established
- Guarantees of taxpayers' procedural rights
- Pre-court procedural violations prohibited
- “Bad faith” contractors still hot

Case law

Constitutional Court Resolution No 1-P of 21.01.2010

- Supreme Arbitrage Court resolutions changing interpretation of substantive tax laws constitute obligatory judicial precedents
- Such resolutions may result in prior court precedents being reconsidered to comply with the obligatory precedent

Guarantees of taxpayers' procedural rights

- The right to file and hear notices of objections (Resolution of **16.06.2009**)
- Limitation of desk tax audit duration (Resolution of **17.11.2009**)
- Decisions signed by an official not considering the tax audit findings (Resolution of **29.09.2010**)
- Tax authorities' rights during desk audits (Resolution of **26.04.2011**)
- Appeals to higher level tax authorities (Resolution of **19.04.2011**)

Pre-court procedural violations by tax authorities

Result in the tax assessment being invalidated solely on procedural grounds

“Bad faith” contractors still hot

- Documents signed by unauthorised individuals (Resolution of **11.11.2008**)
- Reality of transactions and awareness of contractors’ tax violations (Resolutions of **09.03.2010, 20.04.2010**)
- Disputable positions (Resolutions of **25.05.2010, 19.04.2011**)

Contacts

Maria Vinogradova

Manager, Tax Dispute Resolution

Deloitte

mvinogradova@deloitte.ru

Key Procedural and Profits Tax Cases – *First Half of 2011*

Natalia Markova

Manager, Tax Dispute Resolution
Noerr

29 June 2011

Key court cases: procedural issues

- **Supreme *Arbitrazh* Court Resolution dated 24 May 2011 No. 18421/10 (Agrotekhmash-T case)**
A denial of a VAT refund should be appealed first to the higher tax authorities, and only then to the courts. Appeals against both a decision to hold the taxpayer liable for taxes and a decision refusing a VAT refund have to be filed at the same time; the taxpayer is not entitled to choose which decision to appeal.
- **Supreme *Arbitrazh* Court Resolution dated 19 April 2011 No. 16240/10 (Tarasova case)**
In accordance with p. 5 article 101.2 of the Tax Code, a taxpayer is entitled to appeal a decision of the tax authorities in court in full, regardless of the fact that when the decision was earlier appealed to the higher tax authorities in full, the detailed arguments covered only part of the decision.
- **Supreme *Arbitrazh* Court Resolution dated 26 April 2011 No. 17393/10 (Ruf' LLC case)**
During a desk tax audit the tax authorities have no right to carry out tax inspection measures regarding the company's relationships with individuals, including requisitioning information on the origin of goods.
- **Supreme *Arbitrazh* Court Resolution dated 26 April 2011 No. 18120/10 (Rodnik LLC case)**
Tax authorities can seize original documents for the purpose of graphological analysis, even when there are no grounds provided by article 94 of the Tax Code.

Key court cases: corporate profit tax

- **Supreme *Arbitrazh* Court Resolution dated 14 June 2011 No. 15093/10 (SABMiller RUS case)**
Licence fees paid by a trading company for the use of trademarks are deductible expenses.
Moreover, separation of production and sales activities between entities is consistent with business practices.
- **9th *Arbitrazh* Appellate Court Resolution dated 20 April 2011 No. 09АП-4781/2011-AK; 09АП-4783/2011-AK (IKEA MOS case)**
Work on developing premises carried out by tenants prior to its coming into service increases the initial cost of construction and should be included by the landlord in the taxable income.

Contacts

Natalia Markova

Manager, PhD

Tax and Financial Advisory Services

natalia.markova@noerr.com

Noerr OOO

1-ya Brestskaya Ul. 29

125047 Moscow

Russia

T +7 495 7995696

www.noerr.com

Highlights of the Latest Case Law on Other Tax Issues – *First Half of 2011*

Evgeny Timofeev

Partner

Salans

29 June 2011

KOMOS Group: VAT Credits where Implied Rates Subsequently Change

- Buyer is to purchase from Seller yet unknown selection of goods and advances to Seller 118 RUB
 - Parties conservatively believe the goods to be selected will be subject to 18% VAT rate, so Seller issues advance VAT invoice for 100 RUB (price) + 18 RUB of VAT
 - On receipt of advance Seller accrues 18 RUB VAT due to the treasury, Purchaser credits 18 RUB VAT
 - However, all actual goods selected and sold/purchased are subject to 10% rate, so Seller issues supply VAT invoice for 107.27 RUB (price) + 10.73 RUB VAT (still 118 RUB of payment)
 - On supply Seller credits 18 RUB and accrues 10.73 RUB of VAT; Purchaser reinstates 18 RUB of credit and credits 10.73 RUB instead
 - No difference to what would have happened if the parties applied 10% rate from the start
- Practice now approved!
 - Argument of necessary corrective returns filing rejected (no incompleteness, no mistakes)
 - Remember *Dirol Cadbury* (2009) – bonus affects VAT tax base and triggers corrective filings “if necessary”. Now clear – no necessity whatsoever (no incompleteness, no mistakes)

29 June 2011

Uralstroimekhanizatsiya: VAT Refund and Interest

- Refund decision to be issued simultaneously with the recovery decision
- No refund request necessary
- Refund request only needed to get the monies into a specified bank account (or possibly if you want offset?)
- Hence, interest accrues from 12th day after the end of the desk tax audit irrespective of the refund request
- Are you certain no interest is due to you?

Other Decisions

- *Transneft-Service*: Even if tax authorities agree with VAT credits only in some of episodes, they have to refund corresponding VAT irrespective of breaches found in other episodes
- *Forward*: no VAT counter claims in field tax audits allowed unless corrected returns filed
 - => No VAT “tax pillows” possible except for simple overpayments
- *Gazprom Mezhhregiongaz*: Real estate purchased from somebody else is only subject to asset tax upon the transfer of property right
- *Kyblyakova*: Failure to pay late payment interest is enough to strip Art. 81 RTC protection for underpayment penalties under Art. 122 RTC

Other Decisions

- *Vostokflot*: Services related to import of goods are (were) subject to 0% VAT rate
 - Well, if you really want the 18% rate, you can have it... (*Summit Motors, 2009*)
- *Lenzoloto*: One-off additions to retiring employees' pensions are non-deductible irrespective of the employment agreement
- *BusinessAlcoGroup* (FAS MO): bonuses received by purchaser are subject to VAT
 - ???!!!
 - Entry into *The most idiotic decision of the year* contest

Contacts

Evgeny Timofeev

Partner, Tax

Salans

ETimofeev@salans.com



The Association of European Businesses (AEB)

Ul. Krasnoproletarskya 16, bld.3

127473 Moscow, Russia

Tel.: +7 (495) 234 27 64

www.aebrus.ru