



DEOFFSHORIZATION - TAXATION ASPECTS

**29 October 2014
Hotel Ararat Park Hyatt**



Alina Lavrentieva

PwC, Chairperson of the AEB Taxation Committee

WELCOME ADDRESS



Round table discussion with participation of S.D.Shatalov and AEB Taxation Committee experts



Association
of European
Businesses

Tax Residency rules

Mikhail Filinov

PwC

Basic rule

One of three is enough

- Relative majority of the Board meetings
- Insignificantly smaller activities of the executive body
- Main officers primarily working on the foreign company matters in Russia

Exclusions

- Shareholders' activities
- Preparation for the Board meetings
- Group-level activities

Additional rule

“Additional reasons” -> “any of the following”

- Accounting and bookkeeping
- Administration of the companies
- Allocation of tasks to staff

Exemptions

- Documented substance or residency in a treaty country
- Participation in PSA (and alike) and new sea oilfield operator
- Qualifying subholdings
- Issuers of bonds
- Investment fund managers



Beneficial ownership concept

Kirill Vikulov
Baker & McKenzie

Beneficial owner (BO). Context. Recent Changes

Reduced tax treaty rates and tax exemptions apply to a resident of a contracting state, if such resident is the BO of [income].

The New Draft Law restates the previously suggested BO definitions:

- *"a person [...] having a right to independently use or dispose of this income [...], considering its functions and taken risks." (Art. 7)*
- *"a person that [...] actually derives the benefit from the income and determines its economic destiny" (Art. 312.3)*

New "look-through" approach for all types of income:

- if the BO is a Russian resident – no tax withholding (subject to notification procedure to be set by the Ministry of Finance)
- foreign BOs apply their tax treaties for indirect payments

Domestic vs. OECD (tax treaty) approach

2014 OECD Model Tax Commentaries - new negative definition of the BO:

- clarifies “paid... to a resident”; should be understood in light of the object and purpose of the OECD MC (i.e., Autonomous interpretation);
- does not apply to agents and nominees, since they are not treated as owners for tax purposes – i.e., are not taxed on this income;
- does not apply when the recipient’s right to use and enjoy the [income] is clearly constrained by a contractual or legal obligation to pass the payment received to another person;
- not includes contractual or legal obligation that are not dependent on the receipt of the payment e.g., as a debtor/party to fin. transaction.

OECD expressly confirmed the narrow use of the BO rule. The BO “*does not deal with other cases of treaty shopping*” and does not supersede “limitations of benefits” and “conduit company” rules.



CFC rules

Marina Belyakova

EY

Proposed Russian CFC rules: what's new?

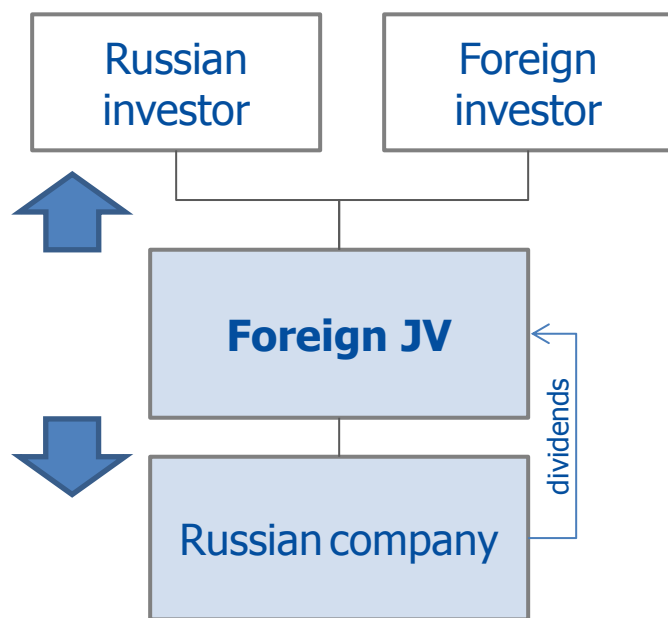
New exemptions from CFC:

- Exemption for active companies (more than 80% active income)
- Weighed average calculation of effective tax rate (13% proposed for dividends)
- Additional industrial exemptions (shelf projects, eurobond SPVs), no exemption for foreign public companies

Basis of CFC profits calculation and disclosure requirements:

- Local audited financial statements as a basis for CFC profits calculation (what if no mandatory audit?)
- Loss carry forward of CFCs from 2012-2014 available
- Disclosure required for all companies meeting the general thresholds for CFC (including companies falling under exemptions)

Should foreign investors care about Russian CFC?



In general

- No direct impact of Russian CFCs on foreign groups

CFC challenges for JVs:

- Russian JV partners incentivized to distribute maximum profits to manage the CFC exposure

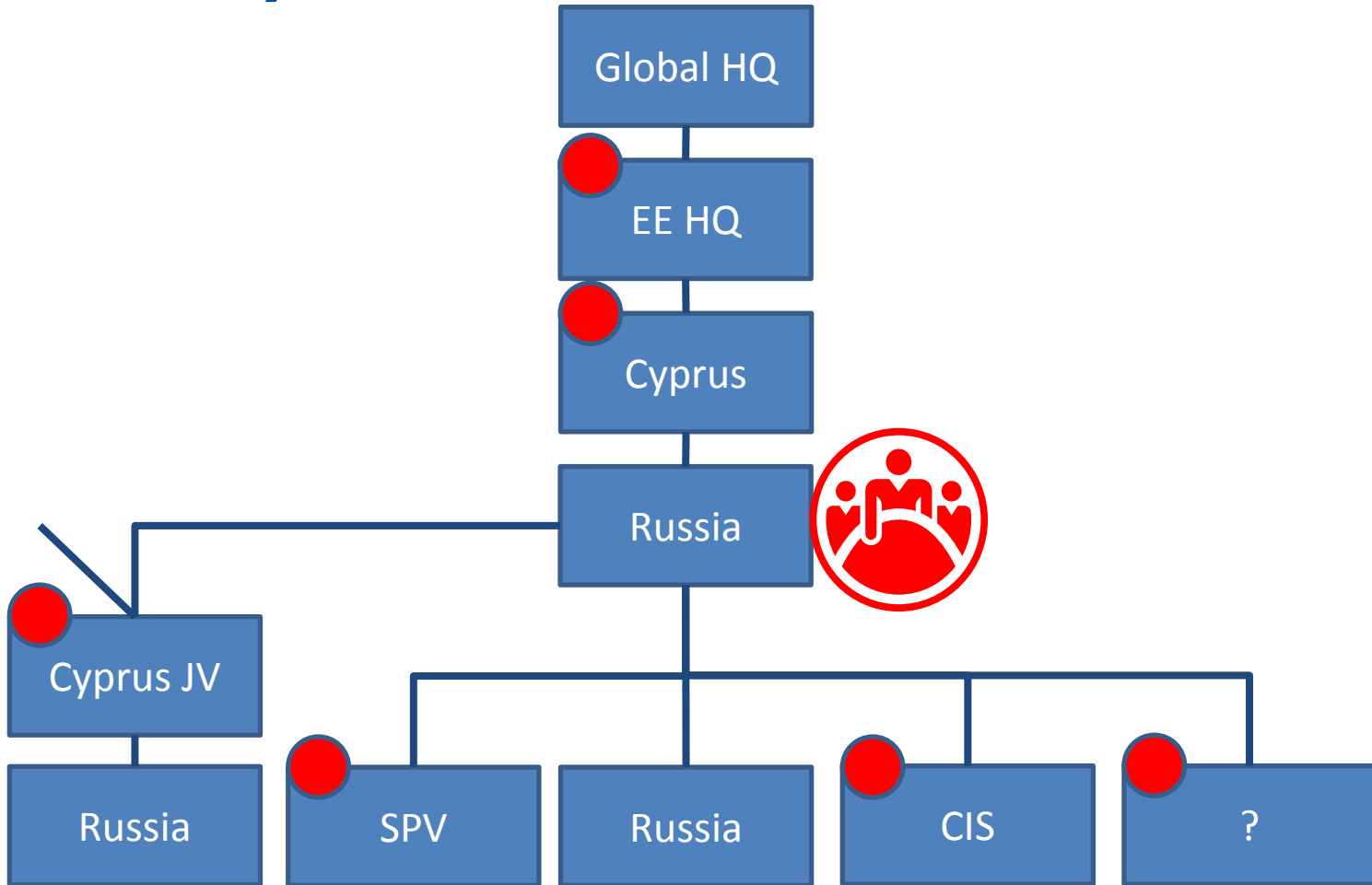
while

- Foreign partner may be interested in reinvestment of profits



Questions and issues for discussion

Tax residency - Real life



Tax residency rules - questions and issues

Quotes from the clients:

- “The subholdings exemption will never work, as I do not see any logic behind it”
- “I will never get a certificate of residency to my [Cyprus] companies resident in Russia” – tax administration matters
- “I am flying to [Cyprus] all the time to vote, so I am safe?”
- VAT?

Beneficial ownership – questions and issues

- Would the Tax Code rule apply if there is no BO requirement under the relevant tax treaty?
- What is the purpose of having three BO definitions: (1) positive and (2) negative definitions under Art. 7, (3) definition under Art. 312?
- How is the Tax Code rule aligned against the OECD BO definition? How would the contradictions be handled?
- Would the legal owner of income (not agent or nominee) be recognized as a BO, where most of the income is used to settle a debt obligation on an economically justified transaction?
- Would the current withholding tax exemption for Eurobonds stay or be superseded by the new BO rule?
- Request for BO confirmation: a right or an obligation? What should be the form and would it release a tax agent from tax liability?

CFC rules – questions and issues

- Should dividends be always treated as passive income? Dividends from active companies/ high-tax jurisdictions (German and UK CFCs)? Concept of active holdings (regional sub-holding companies in Japan CFC)? OECD approach?
- What is the basis for CFC profits calculation for companies which are not subject to mandatory audit? Russian tax rules based on source documents? Can audited financial statements still be used as a basis?
- Double taxation of CFC profits: (1) under CFC rules and (2) at further distribution as dividends to Russian residents. Stimulus to never distribute funds to Russia once taxed under CFC? Should double taxation be eliminated? Exemption or reinvestment relief?
- CFC treatment of genuine investment funds and other “structures”: are they treated as CFCs if participation is >25% but no there is no control (e.g. limited partners in funds)



CFC regimes. International practice - lessons learned.

Alexander Guskov
IBFS united

Facts and Figures

- CFC rules were enacted in 1962 (US), 1972 (Germany), 1984 (UK), 2001 (Brazil), 2008 (China) etc
- G20 countries (except Saudi Arabia, Russia* and India*) have been using CFC rules for many years.
- Low-tax jurisdictions mostly have no CFC rules (the Netherlands, Switzerland, Luxembourg, Singapore, Hong Kong etc).
- There is a global trend for tightening of CFC regimes.

Global Lessons in Brief

1. CFC legislation can influence on migration of corporate headquarters.
2. Introducing of CFC rules usually do not lead to remarkable increase of government revenues. However, cases of CFC rules abolishment are unknown.
3. Due to different reasons of introducing, CFC rules significantly vary in different countries, that makes it very difficult for multinational business to comply with.
4. Ambiguities on CFC regimes still are not cleared up regarding compatibility with:
 - Tax treaties (art. 7 of OECD MTC)
 - Treaty of the EU (art. 49 “freedom of establishment” of TFEU)
 - Constitution law (principles of equivalence and legality)



Global Practices in Brief

- Weakening of UK CFC legislation as an encouraging measure for multinationals to base activities in UK.
- Brazilian Supreme court judgment of CFC regime constitutionality.
- Widening the application scope of Danish CFC rules to controlled domestic companies as a respond to Cadbury Schweppes Case.



Association
of European
Businesses

THANK YOU!



SESSION 2:

NON - TAX DEOFFSHORIZATION MEASURES AND COURT PRACTICE



Legal liability in tax sphere – new approach

Mikhail Orlov

Head of Tax and Legal KPMG Russia & CIS

Tax liability for violation of CFC rules

- Liability of controlling persons for not provision of financial report of CFC or audit report (if such audit report is required by foreign legislation) (Article 126, clause 1.1)
Fine: RUB 100 000
 - Liability of foreign companies, having a property taxable in Russia, for not provision of information about their shareholders or participants (Article 129.1, clause 4)
Fine: 100% of the amount of property tax
 - Liability of taxpayers for nonpayment or underpayment of tax due to non-inclusion of share of CFC's income into tax base (Article 129.5)
Fine: 20% of not paid/underpaid taxes, but not less than RUB 100 000
 - Liability for not provision a notification about CFC in due date or provision a notification containing unreliable information (Article 129.6)
Fine: RUB 100 000
- Liability for not provision a notification about participation in foreign company in a due date or provision a notification containing unreliable information (Article 129.6)
- Fine RUB 50 000**



The Draft Law N599584-6 initiated by Members of the Council of Federation

New types of the tax crimes are proposed in the Draft Law (Article 199 Criminal Code)

Tax evasion performed by

- Organized group
- Using illegally established legal entities
- Non-disclosing or falsification of information related to CFC or controlled transactions

Federal Law N308-FZ dated 22 October 2014

- Decision of tax authorities issued after a tax audit no more required for starting criminal case
- Investigator after receiving a report from agency of inquiry sends data to a tax authority with preliminary calculation of additionally assessed taxes (fines and interest)
- In 15 days the tax authority sends to the investigator:
 - a conclusion about tax violations of the taxpayers, if the tax audit was performed;
 - an information that tax audit is being performed;
 - an information that it has no information about tax violations since a tax audit wasn't performed

NB!

- The investigator is not obliged to follow tax authority's conclusions
- The investigator has a right to start criminal case before receiving a tax authority's answer.
- A Taxpayer can avoid criminal prosecution by paying additionally assessed taxes (fines and interest) calculated by tax authority.



Association
of European
Businesses

THANK YOU!



The first 7 elements of the Action Plan

Victor Matchekhin
Linklaters

BEPS: Background

- 2013
 - BEPS (Base Erosion Profit Shifting) Report
 - BEPS Action Plan (15 items)

- 2014 (September)
 - 7 Action Plan Reports

7 Action Plan Reports

- the tax challenges of the digital economy (Action 1) **FNL**
- hybrid mismatch arrangements (Action 2) **DRFT**
- harmful tax practices (Action 5) **ITRM**
- prevent the abuse of tax treaties (Action 6) **DRFT**
- transfer pricing issues in the key area of intangibles (Action 8) **DRFT**
- improved transfer pricing documentation and a template for country-by-country reporting (Action 13) **DRFT**
- the feasibility of developing a multilateral instrument to amend bilateral tax treaties (Action 15) **FNL**



BEPS Reports: Effect on Russian Tax Life?

- OECD tax documents:
 - Legal Side (Global and Russia)
 - Tax Policy/Tax Administration

- Potential Practical Effect in Russia
 - TP documentation
 - the abuse of tax treaties



Association
of European
Businesses

THANK YOU!



Exchange of information & tax audits abroad – recent Russian developments in 2014-2015

Artem Toropov

Senior Associate / International Tax
Goltsblat BLP

Goltsblat BLP LLP is the Russian practice of Berwin Leighton Paisner (BLP), an award-winning international law firm with offices in London, Moscow, Abu Dhabi, Beijing, Berlin, Brussels, Dubai, Frankfurt, Hong Kong, Paris and Singapore



Ratification of the Multilateral OECD Mutual Assistance Convention

1. Multilateral convention, more than 70+ countries participating, effective in 60+ countries
 - UK & the Netherlands have extended the Convention to their overseas territories & dependencies (BVI, Cayman, Curacao, Jersey, Guernsey, Isle of Man, etc.)
2. Legal framework for cooperation with DTT & non-DTT partners, including offshore jurisdictions
 - exchange of information (on request / automatic / spontaneous)
 - tax audits abroad
 - assistance in recovery & collection
3. Signed by Russia in 2011, not ratified yet (currently, Russia mainly uses DTTs as legal basis for exchange)
4. **Basis for implementation of the OECD Standard for Automatic Exchange of Financial Account Information (expected before the end of 2015 with participation of the OECD Global Transparency Forum)**
5. **(!) Mechanism for enforcement of the upcoming CFC rules & other “deoffshorisation” measures**



Ratification of the Multilateral OECD Mutual Assistance Convention

1. **Draft Russian Law on Ratification** (No. 540271-6)
 - Submitted by the Government, **adopted by the Duma on 17 October 2014** (Resolution 5150-6 GD), sent to the Federation Council
2. Ratification with reservations
 - Taxes covered (regional taxes, VAT, inheritance taxes, etc. excluded), assistance in collection limited (Russian regulations to be developed), statute of limitations limited (2013, 2014, 2015)
3. Russian competent authorities – Federal Tax Service, Federal Bailiffs' Service
4. Ratification expected before the year, entry in force in March 2015, application to periods starting 1 January 2016, bilateral protocols with specific jurisdictions can be expected
5. **Changes to national legislation of foreign jurisdictions on bank secrecy? (already partially implemented in countries like Switzerland, Austria, Luxembourg, Cyprus)**
6. **Declarative or truly effective? Will or absence of will to cooperate? Enforcement power? Flight to non-cooperative jurisdictions?**
7. **At least two years after ratification required for automatic exchange to work (according to M.Mishustin, head of the Federal Tax Service)**



Bilateral Model Information Exchange Agreement Approved

1. Separate bilateral agreements are required for effective implementation of information exchange measures & participation in tax audits abroad
2. **Government-approved Model Information Exchange agreement** (Resolution No. 805 dated 14 August 2014)
3. Information exchange (on request / automatic / spontaneous)
 - **(!) Specific rules on trusts & foundations; information can be requested in relation to settlors, protectors & beneficiaries**
4. Tax audits abroad include interrogation of individuals, review of documents, etc.
5. Sources of information – banks, auditors, trust companies, nominees, etc.
6. Spontaneous reporting – Russian “Anti-FATCA”, Article 6 of the Law No. 173-FZ dated 28 June 2014
7. **Again, declarative or truly effective? Changes to national legislation of foreign jurisdictions on bank secrecy? Will or absence of will to cooperate? Enforcement power? Flight to non-cooperative jurisdictions?**
8. **Federal Tax Service has suggested that the Finance Ministry initiates negotiations with Lichtenstein, BVI, Cayman Islands, Bahamas, Gibraltar, Jersey, Guernsey & Isle of Man.**



Association
of European
Businesses

THANK YOU!



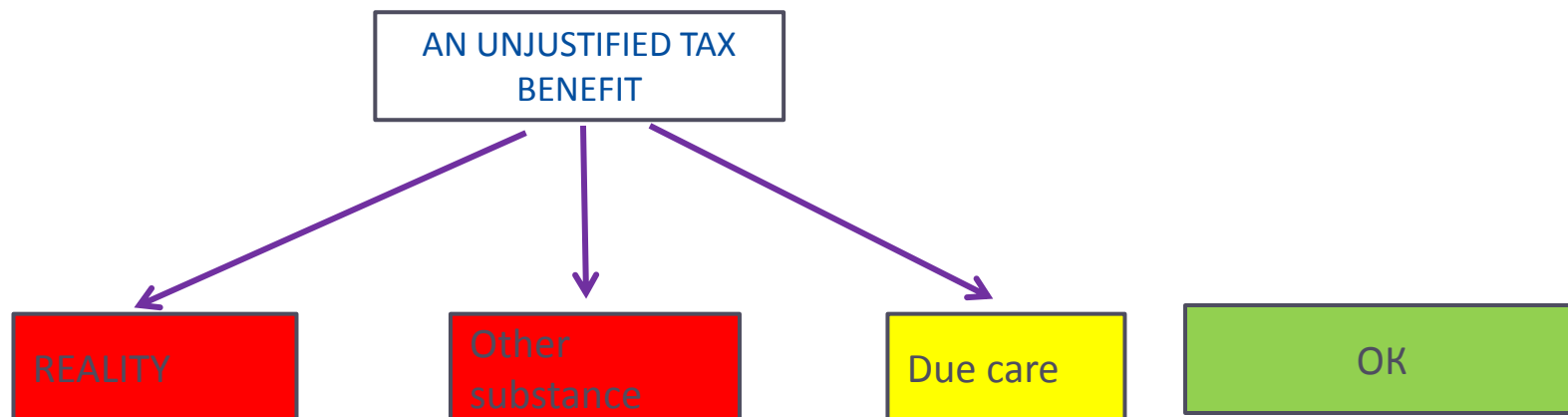
Anton Nikiforov
Partner, Attorney

**THE CONCEPT OF AN
UNJUSTIFIED TAX BENEFIT IN
CROSS-BORDER TRANSACTIONS**



**ORDER No. MMV-7-13/309@
of the Russian Federal Tax Service dated 5 June 2014 'On
approving the Regulations on the Transfer Pricing Department of
the Federal Tax Service'**

**LETTER NO. 03-01-18/9-170 OF THE RUSSIAN MINISTRY OF
FINANCE dated 14 November 2012.**



Article 9 of the OECD Model Tax Convention on Income and Capital (adjustment to profits)

"Arm's length" principle

Decision No. A40-143354/13 of the Moscow State Commercial ('Arbitration') Court dated 8 July 2014 (Bank BNP Paribas CJSC)

Decision No. A40-132387/13 of the Moscow State Commercial ('Arbitration') Court dated 23 April 2014 (Commerzbank CJSC)

Resolution No. 09AP-2672/2013 of the 9th State Commercial ('Arbitration') Appeal Court dated 3 April 2013 (Natixis Bank CJSC)

Resolution No. A40-4381/13 of the Federal State Commercial Court for the Moscow Circuit dated 21 July 2014 (Mazda Motor Rus LLC)



Resolution No. 09AP-22065/2014-AK of the 9th State Commercial ('Arbitration') Appeal Court dated 21 July 2014 ("Royal Water")



1794
1926
1936

... The above circumstances attest to the fact that the actions of the Claimant were deliberate; therefore, the provisions of article 5(2) of the Tax Code do not apply to the Claimant



Q&A