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Development of the tax system in 2008, prospects for 2009-2011

December 3, 2008, PricewaterhouseCoopers, Moscow



Amendments to Part One of the Tax Code

Andrei Ignatov
Tax Partner

Changes to Part 1 of Tax Code

- ▶ Federal Law No. 137-FZ of 27 July 2006
 - Obligatory procedure of pre-trial appeal
- ▶ Federal Law No. 224-FZ of 26 November 2008
 - Addresses certain tax administration issues
 - Crisis-driven matters
 - Significant changes to Part II of Tax Code
- ▶ Some norms still pending until 2010

Pre-Trial Appeal

- ▶ A judicial claim could be filed only after an appeal with a higher level tax authority
- ▶ Objective: to decrease courts' workload
- ▶ Likely effect: increase of timing of appeal proceedings
- ▶ The new rule applies to “relationships arising since 1 January 2009”. What could this be?

Tax Settlement Deferrals

- ▶ Additional deferrals from Minister of Finance to qualifying taxpayers:
 - Federal taxes only + respective fines and interest
 - Period of deferral - up to five years
 - Could be without collateral
- ▶ Taxpayers qualifying for five years deferral :
 - Indebtedness exceed RUR10 bln.
 - One-off settlement might give rise to adverse social and economic consequences
- ▶ Objective: preventive measures in crisis times

Some Other Changes

- ▶ Restriction of usage of unlawfully obtained evidences
- ▶ The period for conducting in-house tax audit is to be measured from the date of submission of tax return
- ▶ Tax audit report and decision must be delivered to a taxpayer within 5 days from the date of issuance
- ▶ Positive changes to tax law could be enforced immediately upon publication

Changes Pending until 2010

- ▶ Responsibility of tax authorities for non-timely cancellation of suspension of operations of bank accounts
- ▶ Correction of mistakes resulted in tax overpayment could be done in the current tax period
- ▶ Tax authorities do not have the right to require documents repeatedly

Thank you!

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The new tax depreciation rules

3 December 2008

TAX

Tax depreciation

Main changes introduced by the federal law # 158-FZ (1/2)

➤ *Choice of a method*

- ✓ The taxpayer's tax accounting policy shall stipulate **one depreciation method for all the fixed assets** (excluding those to be specifically treated under the law)
- ✓ The reducing-balance method may be changed to the straight-line method **only once every 5 years**
- ✓ The straight-line method may be changed to the reducing-balance method without time limitations, but should be applied **from the beginning of a tax period**

➤ *Depreciable items*

- ✓ In addition to fixed assets, depreciable items include:
 - inseparable improvements of fixed assets received under a free-of-charge use agreement, provided that such improvements are made by the borrower upon the lender's approval
 - intangibles (to be pooled similarly to the fixed assets when applying the reducing-balance method)

➤ *Adjustment coefficients*

- ✓ The special adjustment coefficient of 0.5 (currently applicable to cars with historical cost exceeding 600,000 RUR and passenger minibuses with historical cost exceeding 800,000 RUR) **is abolished**

Tax depreciation

Main changes introduced by the federal law # 158-FZ (2/2)

➤ *Rules of reducing balance calculation*

- ✓ Depreciable assets **are to be pooled into depreciation groups** based on their useful life periods determined according to the law
 - sub-groups are to be created if decreasing/multiplication coefficients are applied
- ✓ Depreciation is calculated for **the aggregate balance** (total net book value of the assets) of a depreciation group (sub-groups) on the starting date of each month
- ✓ **Fixed depreciation rates** are established for the groups
- ✓ In case of disposal of a depreciable asset the aggregate value of the corresponding group (sub-group) is decreased by the net book value of the asset; the resulting aggregate balance continues to be depreciated
- ✓ Should the aggregate value of a depreciation group (sub-group) become **less than 20,000 RUR**, this depreciation group (sub-group) is to be eliminated (provided that no new assets relating to this group are acquired by the taxpayer); the net book aggregate value should be included into the non-sales expenses of the subsequent month

Reducing-balance method: formulae change

Current method (till 31 December 2008)

$$S_{NBV}^{FA} \times K$$

Net book value of a fixed asset

Depreciation rate, %

$K = (2/n) \times 100\%$ – depreciation rate, defined for the object (until the month following the month in which net book value achieved 20% of the initial value)

$K = (1/N) \times 100\%$ – depreciation rate, defined for the object (from the month following the month in which the net book value achieved 20% of the initial value)

n – useful life of the object

N – period of residual life of the object from the moment when net book value achieved 20% of the initial value

New method (from 01 January 2009)

$$S_{NBV}^{\Sigma} \times K$$

Aggregate balance of a depreciation group

The fixed depreciation rate, %

$$S_{NBV} = S \times (1 - 0,01 \times K)^n$$

Historical cost of an asset

The number of complete months from the date of inclusion of the asset into the appropriate depreciation group (sub-group) till the date of its exclusion from this group (sub-group)

New rules - practical aspects

Current and new reducing-balance methods: general comparison

Higher depreciation rates

- ✓ The new depreciation rates exceed (except for depreciation group I) the upper limit of the currently allowed range of rates (please refer to the table on the right)

A faster write-off of net book value

- ✓ Currently the reducing-balance formula is applicable till the moment when the net book value of an asset reaches 20% of its historical cost (afterwards, the net book value is depreciated similarly to the straight-line method during the remaining useful life of the asset)
- ✓ Under the new rules, the reducing-balance formula, is applied till the net book value of the depreciation group reaches 20,000 RUR; afterwards, the taxpayer is entitled to deduct the entire amount of the net book value in the respective tax period (however, the grouping of the assets makes it more difficult to reach the 20,000 RUR de minimis limit)

Pursuant to the above, the new rules in general appear to provide a higher profits tax saving, due to:

- ✓ increased depreciation rates
- ✓ increase of the net book value portion depreciable via a reducing-balance formula
- ✓ possibility for one-time write-off of the net book value upon reaching the threshold of 20,000 RUR (instead of allocating it throughout the residual life of an asset)

Depreciation group	Monthly depreciation rates, %	
	New	Current
I	14,3	8,33 – 16,67
II	8,8	5,56 - 8,00
III	5,6	3,33 - 5,41
IV	3,8	2,38 - 3,28
V	2,7	1,67 - 2,35
VI	1,8	1,11 - 1,65
VII	1,3	0,83 - 1,10
VIII	1,0	0,67 - 0,83
IX	0,8	0,56 - 0,66
X	0,7	≤ 0,55

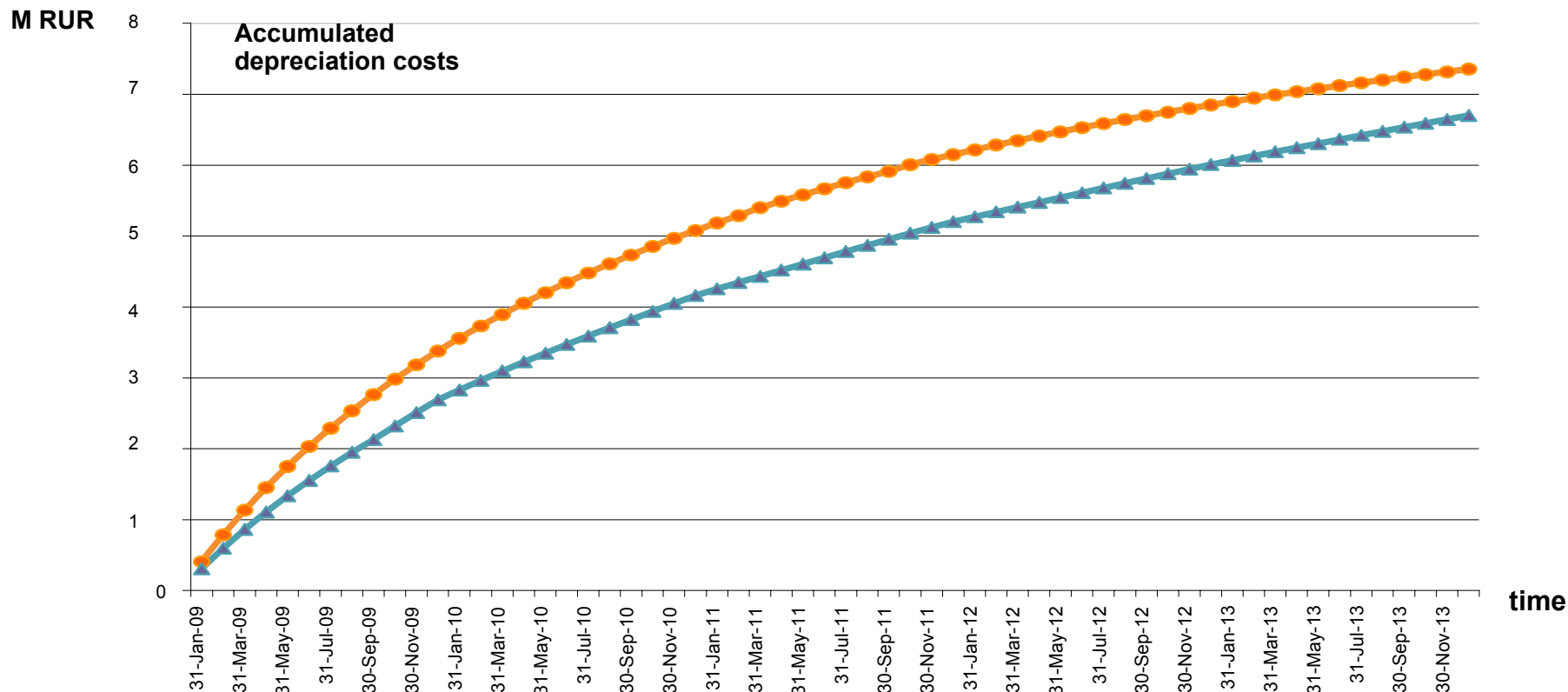
New rules vs. current ones – Model case 1

Comparison of the two reducing-balance methods

Model assumptions

- ✓ Period: 5 years
- ✓ For the current rules: all the assets are depreciated via the reducing-balance method
- ✓ From here onwards, the assets belonging to groups I - VII are analyzed

—●— New method
—▲— Current method



New rules vs. current ones – Model case 2

Choice of a depreciation method – “new assets” (1/2)

Model assumptions

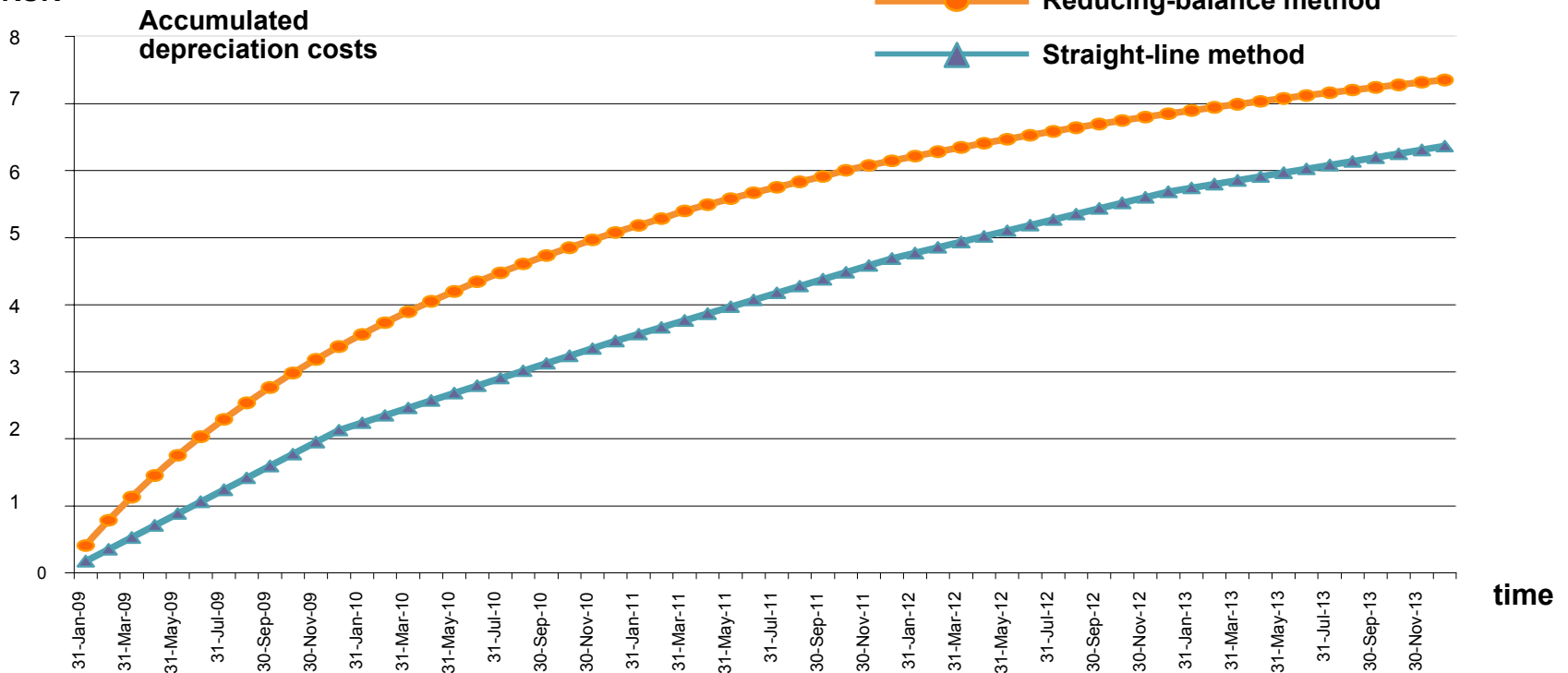
- ✓ Period: 5 years
- ✓ The majority of the assets are recently new, i.e. their net book value as of 01 January 2009 is close to the historical cost
- ✓ No significant disposals of depreciable are planned in the near future



General conclusion

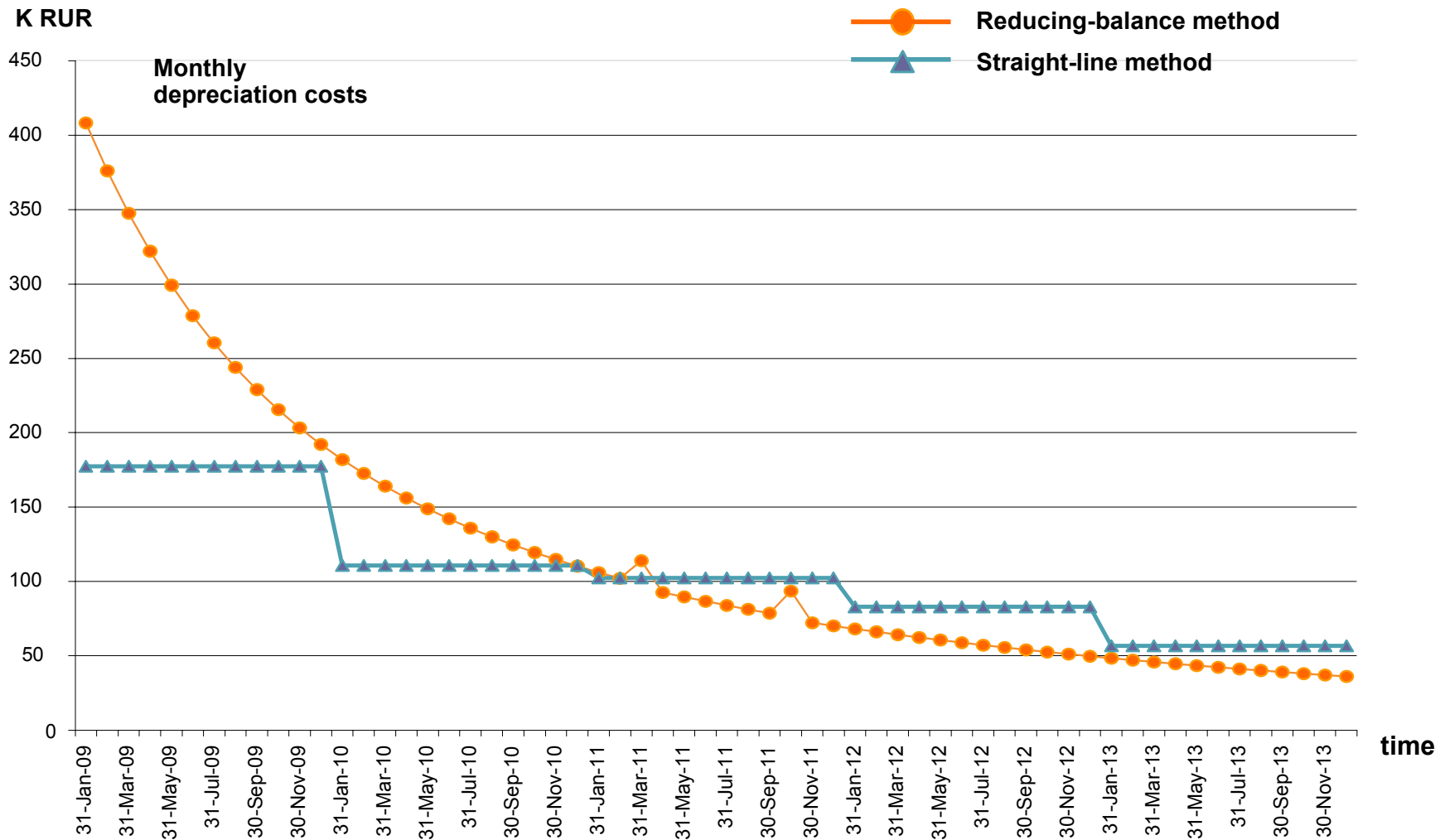
The reducing-balance method appears to be more efficient due to a faster deduction of the assets net book value

M RUR



New rules vs. current ones – Model case 2

Choice of a depreciation method – “new assets” (2/2)



New rules vs. current ones – Model case 3

Choice of a depreciation method for “old assets” (1/2)

Model assumptions

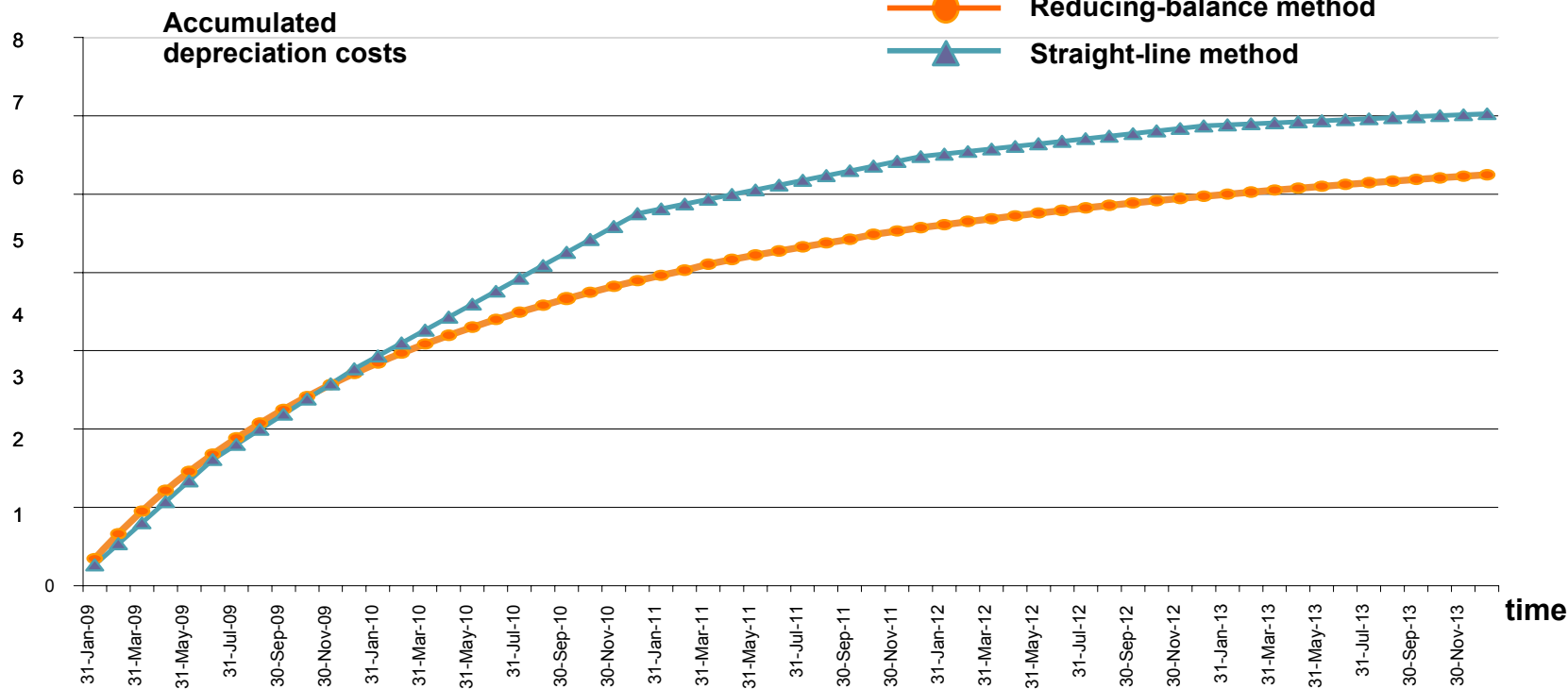
- ✓ Period: 5 years
- ✓ The majority of the assets are substantially depreciated as of 01 January 2009 (and some reach full depreciation during the analyzed period)
- ✓ No significant purchases of depreciable assets are planned in the near future

General conclusion

The straight-line method may be more efficient due to gradual deduction of the relatively low “old assets” net book value (instead of fast write-off within a shorter period)



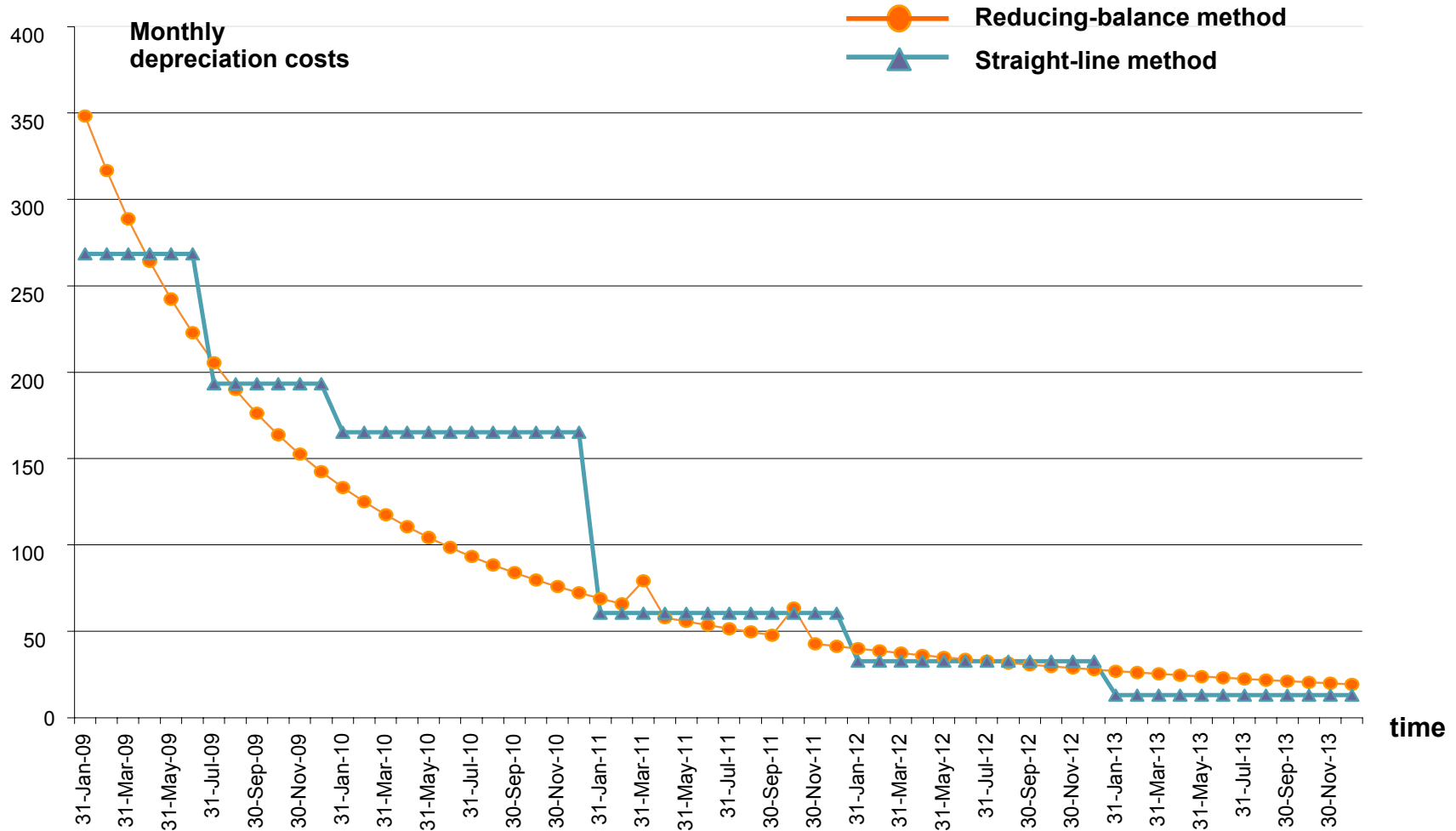
M RUR



New rules vs. current ones – Model case 3

Choice of a depreciation method for “old assets” (2/2)

K RUR

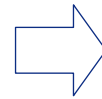


New rules vs. current ones – Model case 4

Choice of a depreciation method – “replacement of old assets” (1/2)

Model assumptions

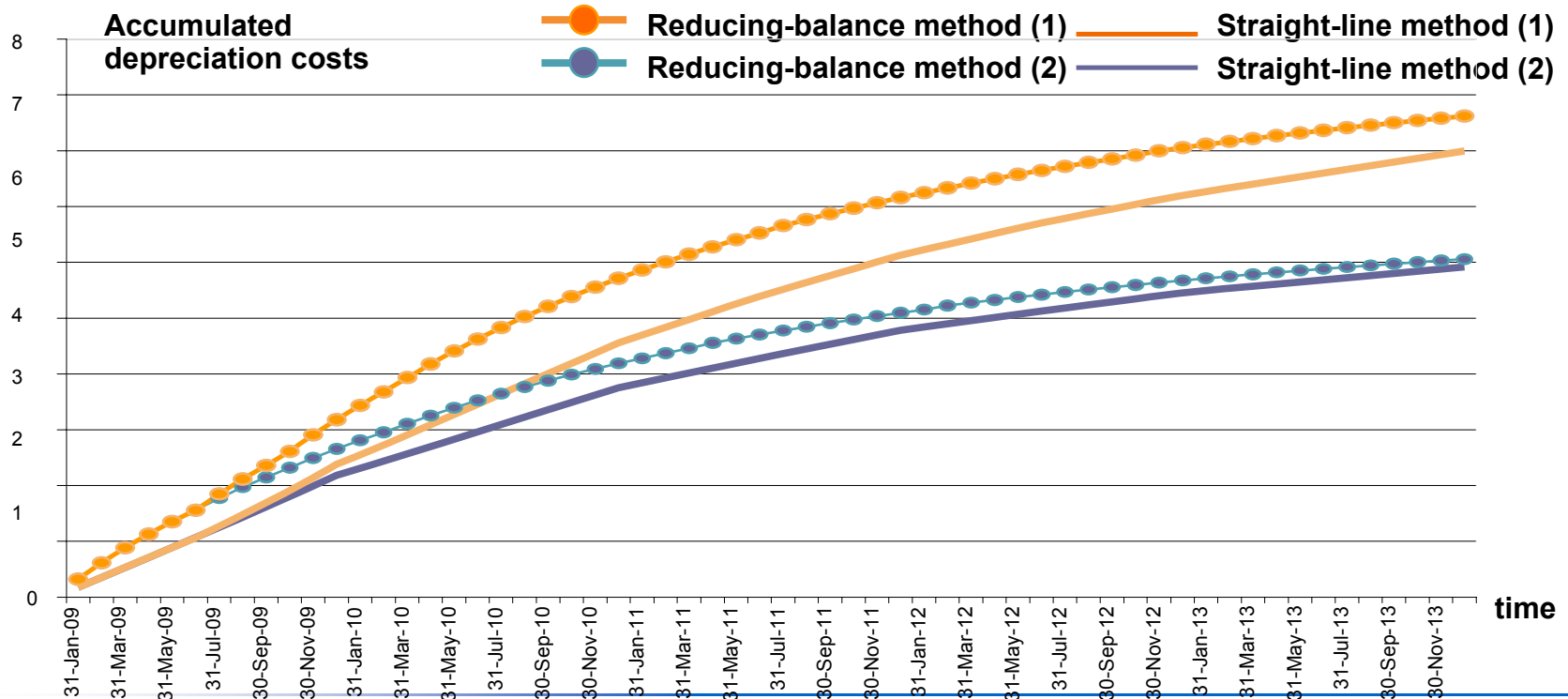
- ✓ Period: 5 years
- ✓ The majority of the assets are substantially depreciated as of 01 January 2009
- ✓ The company has acquired new assets to replace “old assets”; in Scenario (1) the total value of new assets is higher than in Scenario (2)
- ✓ No significant disposals of assets are planned in the near future



General conclusion

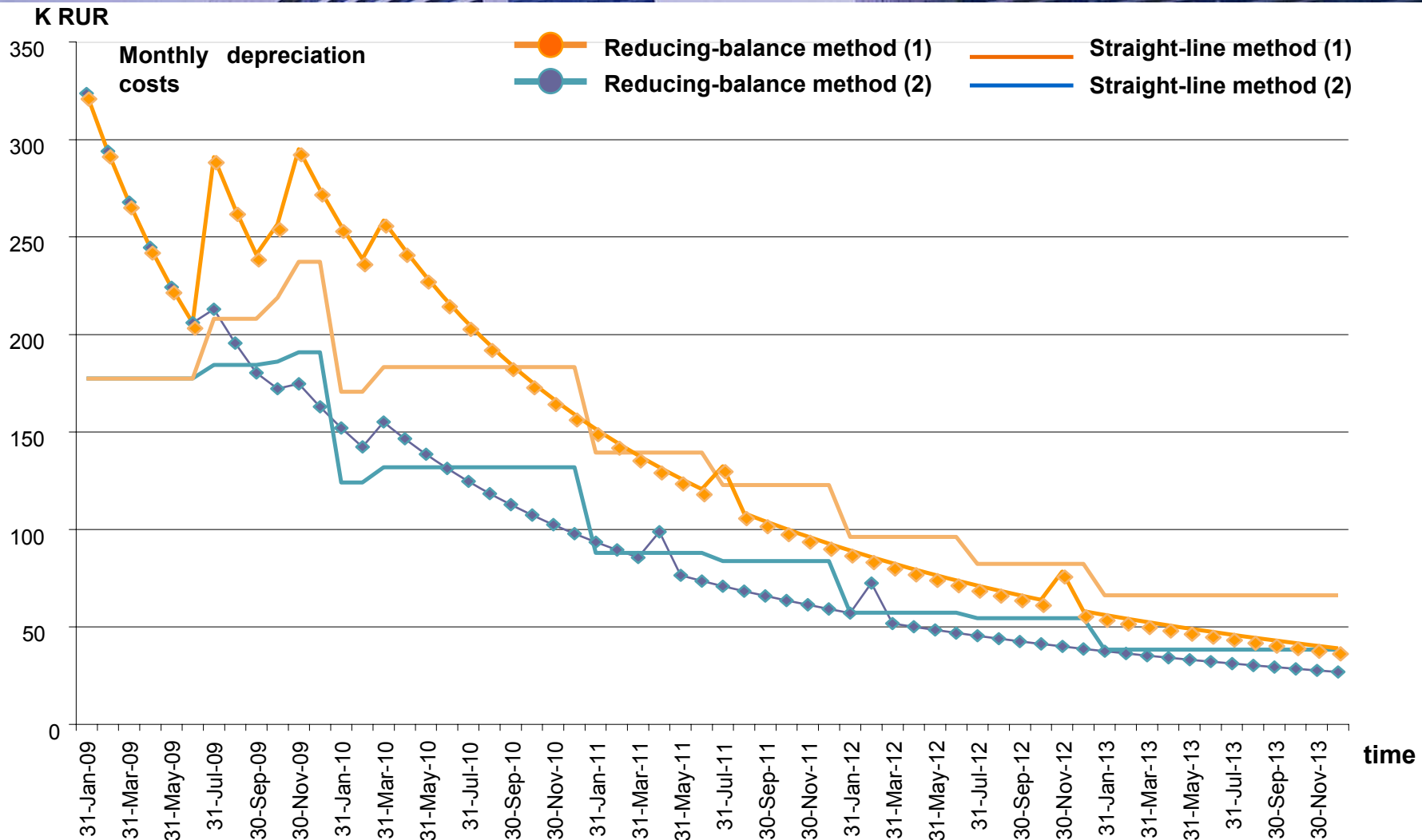
Should numerous replacement of old (depreciated) assets for new ones is anticipated in the near future, **the efficiency of the reducing-balance method increases proportionally** to the share of the new assets value in the total depreciable value of all assets

M RUR



New rules vs. current ones – Model case 4

Choice of a depreciation method – “replacement of old assets” (2/2)

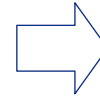


New rules vs. current ones – Model case 5

Choice of a depreciation method – “leasehold improvements” (1/2)

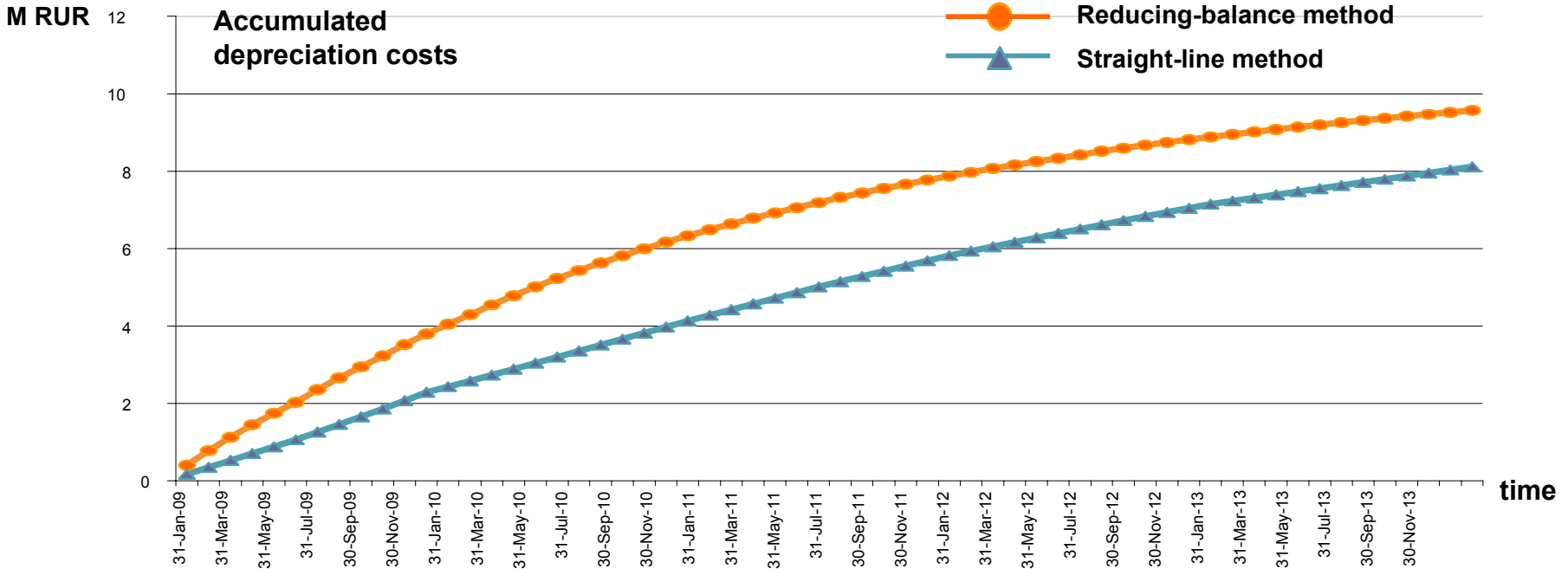
Model assumptions

- ✓ Period: 5 years
- ✓ The company has material leasehold improvements with the useful life significantly exceeding the lease contract period
- ✓ Upon expiration of the lease contract the leasehold improvements are to be transferred free-of-charge to the lessor and their net book value is to be included into non-deductible costs of the company



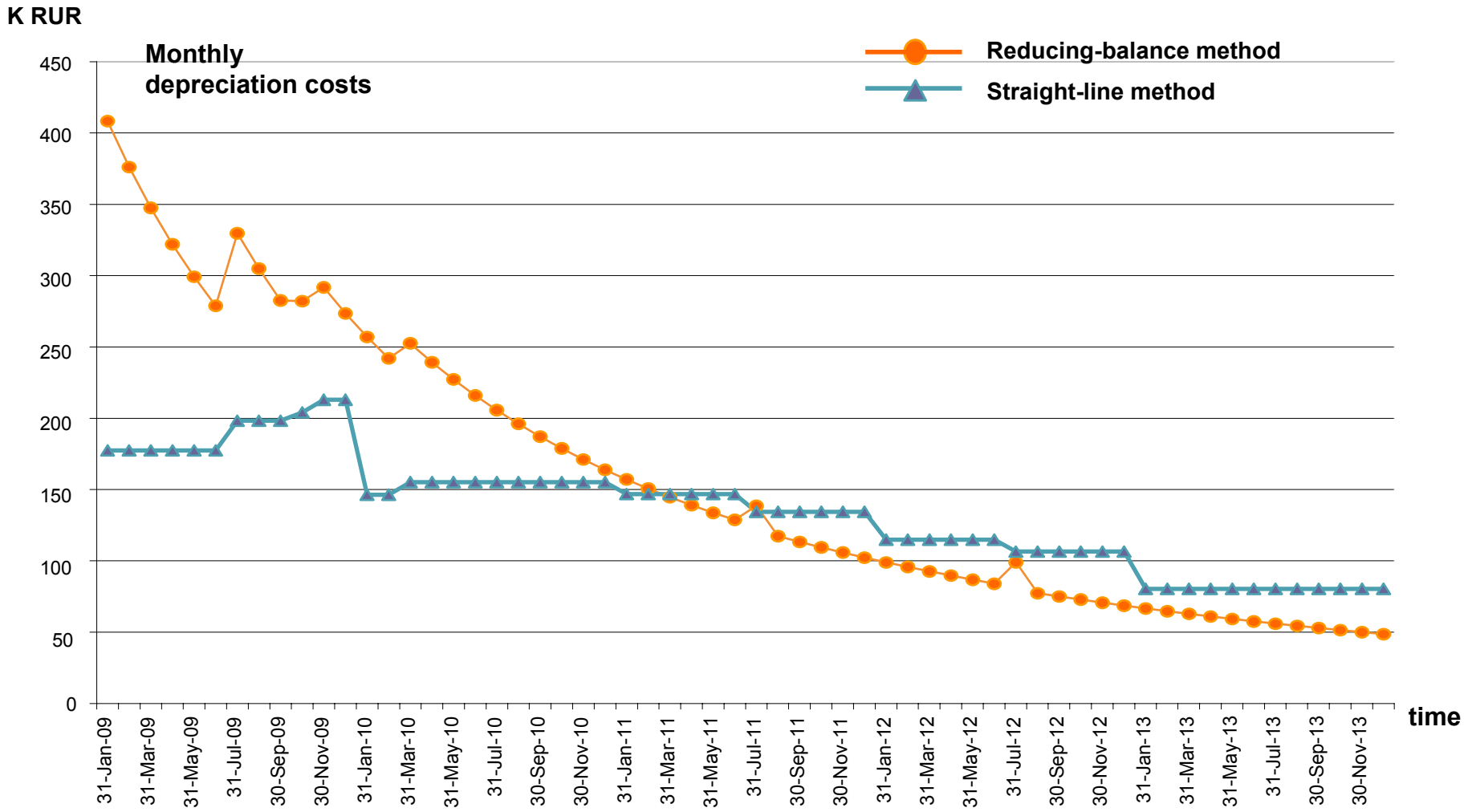
General conclusion

The reducing-balance method appears to be substantially more efficient, as it should allow to depreciate (and deduct for profits tax purposes) the higher portion of leasehold improvements' value within the lease period



New rules vs. current ones – Model case 5

Choice of a depreciation method – “leasehold improvements” (2/2)



New rules - issues for consideration

There are several points worth being taken into account in course of practical implementation the new provisions of the Tax Code regarding the depreciation rules, in particular:

➤ *The assets are grouped for tax depreciation purposes only*

Assets accounting per item is to be continued, for the purposes of (a) depreciating under the Russian accounting standards; and (b) computing the tax effect of disposal of an asset

➤ *Transitional rules*

There are a number of areas where the transitional rules are absent, for example:

- ✓ The Tax Code stipulates an exact formula for calculating the net book value of depreciable assets under the reducing-balance method (*please refer to slide 4*):

$$S_{NBV} = S \times (1 - 0,01 \times K)^n$$

However, in relation to the assets which have been already put in use and partially depreciated by 01.01.2009, the law is silent on the exact application of the above formula. It is the sense of the Tax Code wording that for such assets **S** is to represent **not the historical cost, but the net book value as of the date of inclusion of the asset** into a depreciation group (generally – as of 01.01.2009)

- ✓ Furthermore, it is not addressed by the law, how the assets with the residual value below 20% of the historical cost should be depreciated via reducing-balance method after 01.01.2009

➤ *Assets recorded at the balances of subdivisions*

The Tax Code does not provide for any clarifications regarding whether the depreciable assets of a subdivision (a branch) should form subgroups in the respective depreciation groups created by the company or whether they should be included into depreciation groups with no regard to their location

➤ *Intangible assets depreciation*

Intangible assets are to be allocated to depreciation groups according to their useful life periods. At the same time, no clarification is provided as to whether separate subgroups should be created for them or whether the intangibles should be included into groups alongside fixed assets

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NEW PROVISIONS OF THE RF TAX CODE REGARDING OTHER PROFIT TAX MATTERS

December 3rd, 2008

**Ludmila Dyakonova
Senior Tax Consultant
Mazars Russia**

CONTENTS

- **Anti-crisis measures**
- **Incentive of social programs**
- **Improvement of existing rules**
- **Elimination of technical mistakes**
- **Centralized payment of tax**
- **Possibility to pay tax in foreign currency by tax agents**
- **Incentive of R&D companies**
- **Concession agreements**

The overview is based on the Federal Laws No. 55 dd. 30/04/2008; No. 158 dd. 22/06/2008; No. 108 dd. 30/06/2008; No. 224 dd. 26/11/2008.

The overview does not cover amendments connected with use of natural resources and Olympic Games 2014.

ANTI-CRISIS MEASURES

Starting from 27th Nov, 2008 there is a possibility to switch to calculation and payment of monthly advance payments for Q4, 2008 from actual profit provided that:

- *respective amendment in the Internal Tax Policy is made;*
- *the tax authority has been accordingly notified before the due date of the advance payment.*

Outcome: Benefit from amendment would have been higher if it were adopted earlier.

ANTI-CRISIS MEASURES

- After 01/01/2009: Reduction of Profit Tax rate by 4% (from 24% down to 20%) - federal part of tax reduced from 6,5% down to 2,5%
- After 01/01/2009: Limits for deductibility of interest on liabilities (non-applicable to “controlled” or “comparable” liabilities) will be increased until 31/12/2009:
 - 1,5 (Before 01/01/2009 – 1,1) of official bank rate of CB RF – for liabilities in rubles;
 - 22%(Before 01/01/2009 – 15%) - for liabilities in foreign currency.

INCENTIVE OF SOCIAL PROGRAMS

Deductible payroll expenses (Article 255)

+

After 01/01/2009:

Additional pension contributions paid under Federal Law No. 56-FZ dd. 30/04/2008

Reimbursement to employees of interest paid under mortgage loans within 3% of total payroll expenses (effective till 2012)

Before 01/01/2009:

Payments for voluntary personal insurance, specifying payment of medical expenses for insured employees by an insurer, within 3% of total payroll expenses (Article 255)



After 01/01/2009:

~~3%~~ 6%

INCENTIVE OF SOCIAL PROGRAMS

Before 01/01/2009:

Training expenses aimed at improvement of professional skills (without increase of educational level) are deductible

provided that:

- *trainees are employees;*
- *trainer is an accredited (licensed) educational institution.*
(Article 264)



After 01/01/2009:

Training & educational expenses (e.g. higher education) are deductible provided that:

- *trainees are employees or non-employees (under certain conditions);*
- *trainer is a licensed educational institution.*
(Article 264)

INCENTIVE OF SOCIAL PROGRAMS

Before 01/01/2009:

Non-deductible

expenses: *material aid to employees (including first down payment for housing, mortgage loans repayment, etc.) (Article 270)*



After 01/01/2009:

Non-deductible

expenses: *material aid to employees (including first down payment for housing, mortgage loans repayment, etc.) (Article 270)*

Outcome: New provision does not correspond to intended support of social programs since after 01/01/2009 any kind of material aid to employees will be under question (excl. compensation of interest on mortgage loans within 3% of payroll expenses)

INCENTIVE OF SOCIAL PROGRAMS

Before 01/01/2009:

Per diem allowance is deductible only within the Law limits

(Article 270, Article 264)



After 01/01/2009:

No need for application of the Law limits

Outcome: Adaptation of the law provision with the reality, limits set by the company acts should still be observed

IMPROVEMENT OF EXISTING RULES

Before 01/01/2009: Book value of property, property rights & liabilities are recognizable by a successor after reorganization (Article 252)

+

After 01/01/2009: Book value of non-property rights

Outcome: Provision of more fair conditions for a successor

Before 01/01/2009: Recognition of license fees for software within 10 KRUR at once (Article 264)



After 01/01/2009:
~~10~~ 20 KRUR

Outcome: Elimination of the existed legal collision

IMPROVEMENT OF EXISTING RULES

Non-deductible incomes
(Article 251)

+

After 01/01/2009:

Capital non-separable
investments into fixed assets
given for free-of-charge use

Outcome: Logical improvement of the rules

List of non-deductible
expenses (Article 270)

+

After 01/01/2009:

Remuneration to members of
the Board of Directors

Outcome: “Unhappy end” of the long dispute

IMPROVEMENT OF EXISTING RULES

After 01/01/2009:

~~“voluntary insurance of property”~~ “voluntary property insurance”

Deductible
voluntary
insurance
payments
(Article 263)

+

Payments for voluntary liability insurance related to contractual obligations

provided that

such insurance is obligatory in accordance with international liabilities of the RF or international requirements

Other payments for voluntary property insurance
provided that

such insurance is obligatory for business activity in accordance with the Russian legislation

Outcome: Correction of non-appropriate legal term and enlargement of list of deductible voluntary insurance payments

IMPROVEMENT OF EXISTING RULES

Before 01/01/2009:
Expenses related to liquidation of fixed assets, including its book value (Article 265)

+

After 01/01/2009:
intangible assets

Material expenses (Article 254)

+

After 01/01/2009:
Expenses for production/acquisition of the power,
Profit Tax paid from stocktaking surplus of other property

Outcome: Logical improvement of the rules

ELIMINATION OF TECHNICAL MISTAKES

Before 01/01/2009:

Recognition loss after sale of property
(Article 264)

+

After 01/01/2009:

Loss after sale of property rights (shares in LLC, etc.)

Outcome: Elimination of the existed “unfairness”

Before 01/01/2009:

One of conditions for application of 0% tax rate to dividends – period of participation of a shareholder not less than 365 days
(Article 284)



After 01/01/2009:

365 calendar days

Outcome: Correction of a technical mistake

CENTRALIZED PAYMENT OF TAX

Before 01/01/2009:

Possible after notification of tax offices before 31st Dec of a preceding year
(Article 288)

+

After 01/01/2009:

The Notification shall be submitted only in case of changes in quantity of subdivisions (or change of the existed tax payment order) in the controlling territory of the respective tax office.

Deadline for submission: within 10 working days after the end of the reporting period when a subdivision was created/liquidated

Centralized payment of tax shall be made starting from the reporting period following the period when such separate subdivision was created.

POSSIBILITY TO PAY TAX BY TAX AGENTS IN FOREIGN CURRENCY

- After 01/01/2009: Withholding Russian Profit Tax on income received by a foreign company in a foreign currency can be remitted to the budget of the Russian Federation in such foreign currency (p. 1 of Art. 310 of the Tax Code).
 - The rule was under moratorium during 2008

Outcome: Practical issues may be faced

INCENTIVE OF R&D COMPANIES

Deductible
R&D expenses
(Article 262)

+

After 01/01/2009:

Possibility to apply increasing coefficient 1,5

Possibility to deduct R&D expenses with negative results

Provided that

R&D expenses are in the Special List of the Government

Outcome: More favorable conditions of taxation for R&D works. As of today, the Special List does not exist.

CONCESSION AGREEMENTS

Non-taxable
incomes
(Article 251)

+

After 01/01/2009:

Property and property rights
received under concession
agreements

Deductible
expenses
(Article 264)

+

After 01/01/2009:

Concession fee for use of
concession objects

Outcome: Elimination of unclarity in taxation of
payments made under concession agreements



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Coffee break



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“What is a day?”

Russian tax residency rules – 2008 interpretation changes

Anna Savon, 3 December 2008



Agenda

- Tax Residency: interpretation changing?
- Legislative changes:
 - Material benefit
 - Bank interest
 - Education costs
 - Mortgage loans
 - Medical Insurance
 - Per diems
 - Business Trips
 - Participating in state pension

Tax Residency: Interpretation Changing?

- Tax resident: 183 or more days in Russia in a 12-month rolling period
- Days of “actual presence in Russia”



Tax Residency: Interpretation Changing?

- Existing approach - arrival day not included in the calculations
- Based on Part 1 of the Tax Code (Art. 6.1)
- Supported by clarifications of the Federal Tax Service and court practice

Tax Residency: Interpretation Changing?

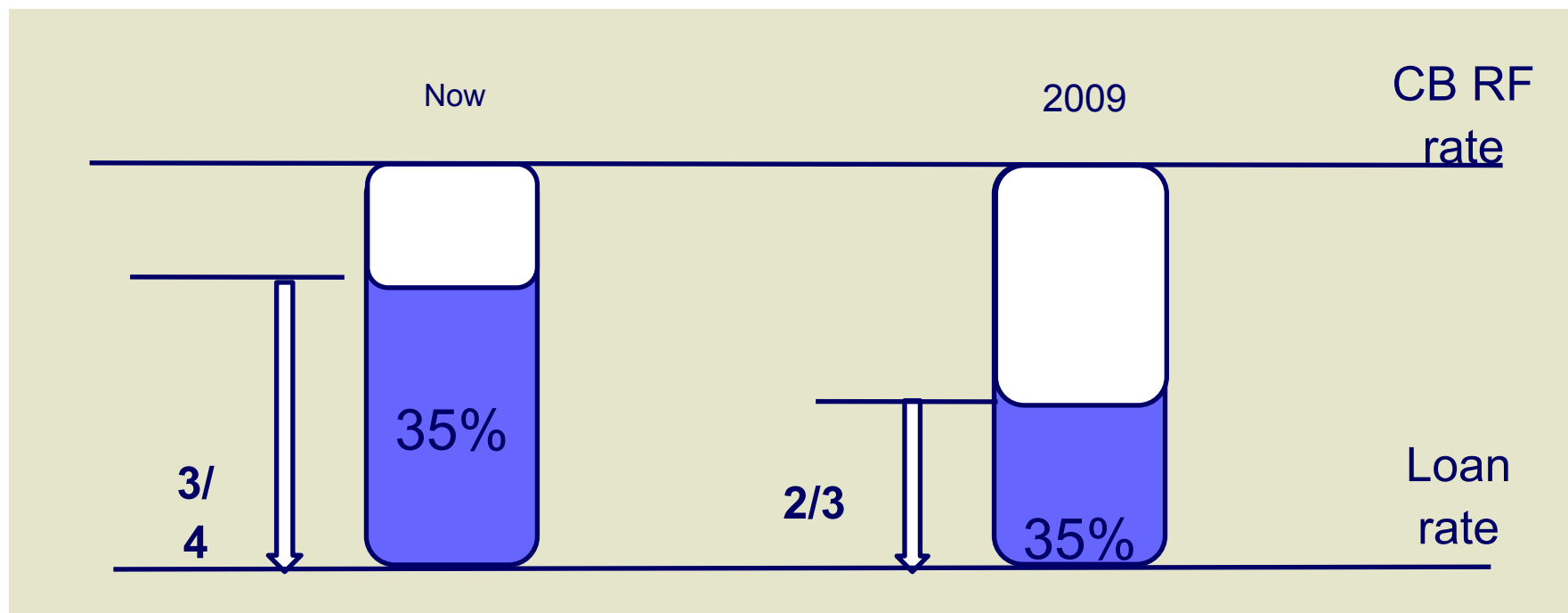
- The Ministry of Finance recently expressed position:
 - Letter № 03-04-05-01/228 dated 03.07.2008
 - Letter № 03-04-06-01/187 dated 04.07.2008
- Any day when the individual is present in Russia should be included in the calculations, including the arrival day
- Art. 6.1 of Tax Code not applicable for determination of tax status

Tax Residency: Interpretation Changing?

- New approach - potential impact on frequent travelers/rotators
- Impacts both Russian and foreign nationals
- Change of tax status from “non-resident” to “resident”:
 - Lower tax rate (+)
 - Deductions available (+)
 - Worldwide income taxable in Russia (+\(-)

Legislative changes: Material benefit

- Material benefit on beneficial Ruble loans
- 35% Personal income tax rate
- Starting 2009 taxable threshold reduced from $\frac{3}{4}$ to $\frac{2}{3}$ of the Central Bank of RF rate



Legislative changes: Bank Interest

- Starting 2009 interest on Ruble bank deposits not subject to Personal income tax if deposit rate does not exceed CB RF rate + 5 percentage points



Legislative changes: Education Costs

- Currently education costs covered by company:
 - subject to Personal income tax unless education is aimed at enhancing professional skills
 - non deductible for Profits tax purposes unless education is aimed at enhancing professional skills

Legislative changes: Education Costs

- Starting 2009 education costs in Russian and foreign educational institutions, including general educational programs:
 - not subject to Personal income tax
 - deductible for Profits tax purposes (subject to met conditions)
 - not subject to Unified Social Tax (provided the costs are deductible for Profits tax)

Legislative changes: Mortgage Loans

- Applicable: 1 January 2009 – 1 January 2012
- Reimbursing employees interest on mortgage loans:
 - Profits tax: deductible within 3% of payroll expenses
 - Personal income tax: non taxable if deductible for Profits tax purposes
 - Unified Social Tax: non taxable if deductible for Profits tax purposes

Legislative changes: Medical Insurance

- Currently employer contributions to voluntary medical insurance coverage are deductible within 3% of payroll expenses
- Starting 2009 - deductible within 6% of payroll expenses



Legislative changes: Per Diems

- Current situation
- Non taxable limits for Personal income tax purposes
 - RUB 700 for business trips within Russia
 - RUB 2,500 for overseas business trips
- Limits set by the Government for Profits tax purposes
 - RUB 100 for business trips within Russia
 - USD norms for overseas business trips

Legislative changes: Per Diems

- Starting 2009
- Non taxable limits for Personal income tax purposes
 - RUB 700 for business trips within Russia
 - RUB 2,500 for overseas business trips
- Deductible for Profits tax purposes as per company internal policy

Legislative changes: Participating in State Pension

- Starting 2009 individuals can contribute to accumulative part of Russian state pension
- Application submitted to the pension authorities via employer
- Employer deducts voluntary contributions from salary and remits it to the pension authorities
- Voluntary pension contributions qualify for social deduction (claimed via a tax return)

Legislative changes: Participating in State Pension

- State match:
 - available for individuals who applied for voluntary participation during 1 October 2008 – 1 October 2013
 - available if individual contributions are RUB 2,000 and above
 - RUB 12,000 cap
 - limited for 10 years
 - not subject to Personal income tax

Legislative changes: Participating in State Pension

- Employer match:
 - not subject to Personal income tax within RUB 12,000
 - not subject to Unified social tax within RUB 12,000
 - deductible for Profits tax purposes within cumulative pension & insurance limit of 12% of payroll expenses

Legislative changes: Sale of securities

- New deduction for individuals – Russian tax residents - with regard to the income from sale of units in investment funds and securities traded on a stock exchange if the individual have owned the securities or units for at least a year prior to realization
- Cap - RUB 10 million
- Individuals are obliged to report sale of property rights on the tax return

Legislative changes: Property Deduction

- Retroactive to January 1, 2008, a deduction of RUB 1 million for newly acquired or built property will apply



Deloitte.



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Наиболее важные судебные решения по налоговым спорам за 2008 год

*Юлия Александрова,
Старший юрист
«Пепеляев, Гольцблат и партнеры»
3 декабря 2008 г.*

Общие вопросы

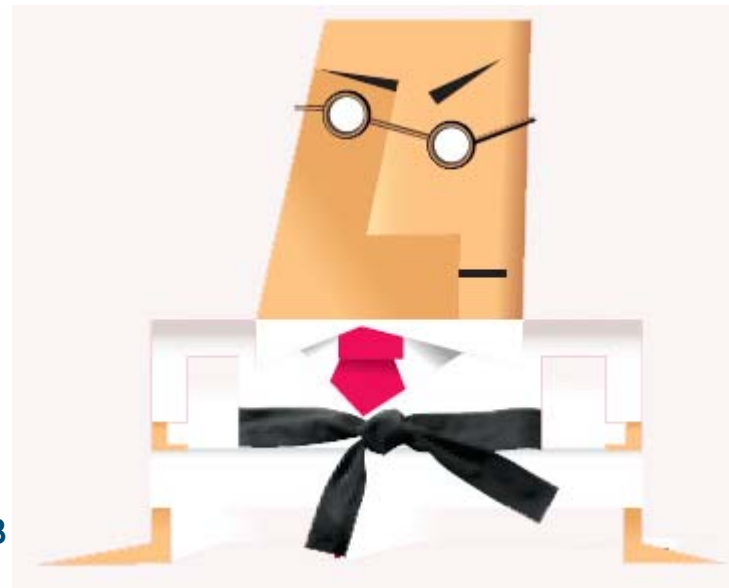


Представление в суд документов, не представленных в инспекцию

Если без уважительных причин истребованные документы не были представлены для проверки в налоговый орган, то налогоплательщик не вправе ими обосновывать незаконность вынесенного инспекцией решения.

Уважительные причины непредставления документов:
соответствующие документы были изъяты;

Большой объём запрошенных документов
(напр., более 1,5 тыс.)



Источник: Определение ВАС РФ от 08.05.2008 г. № 4702/98, Постановление Пленума ВАС РФ от 18.12.2007 № 65, п. 3.3 определения КС РФ от 12.07.2006 № 267-О



Налог на прибыль

Налог на прибыль. Выплаты за рубеж: если документы, позволяющие не облагать их налогом, появились позже

Если на момент проверки организация располагает доказательствами нахождения получателя дохода на территории государства, с которым заключено соглашение об избежании двойного налогообложения, основания для привлечения налогового агента к ответственности по ст. 123 НК РФ отсутствуют.

Обоснование: условием для применения ответственности налогового агента по ст. 123 НК РФ является наличие обязанности у налогоплательщика, которому перечисляется доход, по уплате налога на территории РФ;

иностранное юридическое лицо не являлось плательщиком налога на территории РФ в силу международного соглашения, в связи с чем в действиях налогового агента состава указанного правонарушения не имеется;

получение подтверждения о местонахождении иностранного контрагента после выплаты дохода не опровергает отсутствие у него обязанности по уплате налога в бюджет на основании международного соглашения.

Источники: Постановления Президиума ВАС РФ от 29.05.2007 г. № 1646/07 и от 06.02.2007 г. № 13225/06.

В каком периоде следует отражать доходы и убытки прошлых лет

Убытки прошлых налоговых периодов, выявленные в текущем отчетном (налоговом) периоде приравниваются к внереализационным расходам на основании подп. 1 ст. 265 НК РФ. Однако **убытком может быть признана только отрицательная разница между доходами и расходами.**

В случае же выявления расходов, неучтенных в соответствующем налоговом периоде, которые не могут квалифицироваться как убытки, налогоплательщик обязан подать **уточненную налоговую декларацию с отражением расходов в периоде совершения ошибки.**

Положения подп. 1 п. 2 ст. 265 НК РФ подлежат применению в текущем налоговом периоде только в случае, когда **период возникновения расходов неизвестен.**

Источник: *Постановление Президиума ВАС РФ от 09.09.2008 г. № 4894/08.*

Материалами дела подтверждается, что расходы прошлых лет, выявленные налогоплательщиком в 2003 году, понесены в 2001-2002 годах, то есть периоды, к которым они относятся, известны.

Таким образом, суды сделали вывод о том, что налогоплательщик неправомерно отразил расходы и доходы 2001-2002 годов при расчете налога на прибыль за 2003 год.

Источник: *Постановление ФАС ВВО от 16.06.2008 г., Определение ВАС РФ от 23.10.2008 г. № 13264/08 об отказе в передаче данного дела в Президиум ВАС РФ.*

Однако **прочие и внереализационные** расходы могут быть учтены на основании п. 7 ст. 272 НК РФ, в частности, дата расчетов в соответствии с условиями заключенных договоров или дата предъявления налогоплательщику документов, служащих основанием для произведения расчетов. Выводы, сделанные ВАС РФ Постановлении № 4894/08, в случае если указанная дата пришлась на следующий налоговый период, неприменимы.

Источник: *Определение ВАС РФ от 31.10.2008 г. № 13864/08.*

Налог на прибыль. Расходы по договору на оказание управленческих услуг

Налогоплательщик правомерно отнес в состав расходов в целях налогообложения прибыли вознаграждение, выплаченное по ДОГОВОРУ ОКАЗАНИЯ УПРАВЛЕНЧЕСКИХ УСЛУГ. Тот факт, что осуществление расходов не привело к увеличению прибыли в данном налоговом периоде не свидетельствует об отсутствии экономической выгоды.

Обоснование:

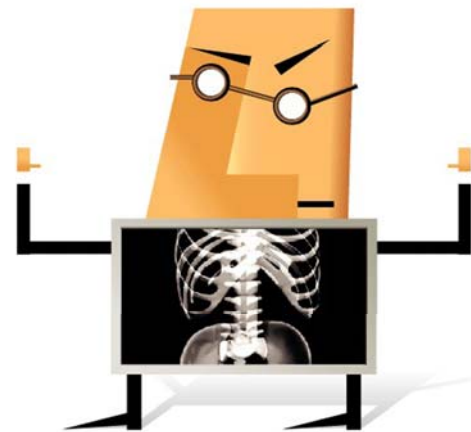
- расходы по договору оказания управленческих услуг соответствуют требованиям ст. 252 НК РФ, являются документально подтвержденными и экономически оправданными.
- вывод налогового органа о том, что осуществление расходов не привело к увеличению прибыли в данном налоговом периоде не свидетельствует об отсутствии экономической выгоды, положительных изменений от управленческой деятельности в следующих налоговых периодах.

Источник: *Определение об отказе в передаче дела в Президиум ВАС РФ от 21.01.2008 г. № 18018/07.*

Определение прибыли по операциям с ценными бумагами

Прибыль по операциями с ценными бумагами **может быть уменьшена на сумму убытка по основной деятельности того же налогового периода.**

Ограничение установлено «в обратную сторону», т.е. убыток по ценным бумагам не может уменьшать положительный результат от иной деятельности.



Обосновано: ссылкой на буквальное толкование, на порядок расчёта налоговой базы (ст. 315 НК РФ) и на порядок заполнения декларации.

Источник: *Постановление Президиума ВАС РФ от 26 февраля 2008 г. N 14908/07 (Горьковский завод аппаратуры связи им. А.С. Попова)*

Доп. выводы: ссылка в НК РФ на отдельное исчисление базы не означает автоматически невозможность её последующего сальдирования с другими показателями. Применяются только те последствия отдельного исчисления, которые указаны в НК.

Аналогичное применение: объекты ОПХ (ст. 275.1 НК РФ), фин. инструменты срочных сделок (ст. 304 НК РФ)



Источник: Постановление
Президиума ВАС РФ от
28.10.2008 № 6272/08
(Русс-Нефть)

Факты: организация продала долю в уставном капитале.

Налоговый орган: продажа произведена по цене ниже рыночной. Рыночная цена равна соответствующей доли чистых активов.

ВАС РФ: метод чистых активов для определения рыночной цены должен применяться лишь в тех случаях, когда НК РФ предусматривает его применение (продажа акций, приобретение предприятия как имущественного комплекса, вклад в УК).

Правил применять метод чистых активов при продаже доли в ООО НК РФ не содержит.



НДС

НДС. Передача рекламной продукции

Безвозмездная ПЕРЕДАЧА ПОТЕНЦИАЛЬНЫМ ПОТРЕБИТЕЛЯМ в ходе рекламных мероприятий рекламной продукции (буклеты, карандаши, ручки) при условии включения расходов на рекламу в стоимость реализуемого товара, с которой уплачивается НДС, НЕ ЯВЛЯЕТСЯ РЕАЛИЗАЦИЕЙ.

Обоснование:

- налогоплательщик, организовывая рекламные мероприятия оплатил рекламную продукцию с учетом НДС;
- расходы на рекламу налогоплательщик включал в стоимость реализуемого товара, с которой уплачивал НДС;
- рекламная продукция в данном случае не реализовывалась, а только способствовала продаже производимой продукции и, следовательно, не подлежит налогообложению НДС.

Источник: *Определение об отказе в передаче дела в Президиум ВАС РФ от 24.12.2007 г. № 17088/07.*

Применение правила о проявлении должной степени осмотрительности

Недостаточная осмотрительность в выборе контрагента имеет место, в частности, при **одновременном** наличии следующих обстоятельств:

- 1) налогоплательщик, приобретая имущество, **имел возможность отследить историю сделок с ним** (например, недвижимость);
- 2) не учёл подозрительный характер предшествующих покупке сделок контрагента (приобретение здания **незадолго до перепродажи** его налогоплательщику **по цене в 4,5 раза ниже** той, по которой оно перепродано налогоплательщику);
- 3) контрагент не оплатил в бюджет соответствующую сумму НДС, полученную от налогоплательщика.

Источник: *Постановление Президиума ВАС РФ от 12 февраля 2008 г. N 12210/07 (Перекрёсток)*



Премии за объём закупок НДС не облагаются

За выполнение плана закупок в предыдущем месяце выплачен ретро-бонус в текущем. Выплата перечислением либо списанием части дебиторской задолженности.

Премия не изменяла цены ранее отгруженной покупателю продукции. Поэтому, нет оснований изменять ранее выписанные счета-фактуры и накладные, а НДС должен быть уплачен со всей суммы реализации.

Не является дарением, т.к. обусловлен выполнением покупателем определённых условий договора поставки.

В документах по предоставлению ретро-бонуса НДС выделять нельзя в связи с отсутствием объекта НДС у поставщика.

Источник: Постановление ФАС СЗО от 08.08.2008 и Постановление 13 ААС от 25.04.2008 по делу № А56-38100/2007



Вычет НДС не может быть произведён ранее периода получения счёта-фактуры

Статьёй 172 НК РФ право на получение налоговых вычетов обусловлено наличием у налогоплательщика счетов-фактур, выставленных поставщиками.

Поэтому, только в этих периодах, а не ранее, у налогоплательщика и возникло право на вычет НДС по товарам (работам, услугам) принятым к учёту в предшествующих периодах.

Источник: Постановление ФАС МО от 28 октября 2008 г. N КА-А40/5254-08 по ОАО "Самотлорнефтегаз"



НДС. Ответственность за применение вычетов в более позднем периоде

ПРИМЕНЕНИЕ ВЫЧЕТОВ ПО НДС В БОЛЕЕ ПОЗДНЕМ НАЛОГОВОМ ПЕРИОДЕ (после того, как у налогоплательщика фактически появилось право на вычет) не приводит к возникновению недоимки, в связи с чем основания для привлечения налогоплательщика к ответственности по ст. 122 НК РФ отсутствуют.

Обоснование: согласно п. 1 ст. 122 НК РФ налогоплательщик может быть привлечён к налоговой ответственности только в случае неуплаты или неполной уплаты сумм налога;

применение налогового вычета в более позднем налоговом периоде, то есть после того как налогоплательщиком соблюдены все условия для реализации права на вычет, означает, что в предыдущем периоде у него имеется переплата по налогу в том же размере или занижена сумма НДС к возмещению;

отражение вычетов в более позднем периоде не приводит к возникновению недоимки, и, следовательно, основания для привлечения налогоплательщика к ответственности отсутствуют.

Источник: *Определение об отказе в передаче дела в Президиум ВАС РФ от 09.11.2007 г. № 14041/07.*

НДС. Внесение исправлений в счета-фактуры (1)

Налоговый орган не может отказать в праве на применение налоговых вычетов, если ИСПРАВЛЕННЫЕ СЧЕТА-ФАКТУРЫ ПРЕДСТАВЛЕНЫ в налоговый орган ДО ВЫНЕСЕНИЯ РЕШЕНИЯ ПО РЕЗУЛЬТАТАМ НАЛОГОВОЙ ПРОВЕРКИ.

Обоснование: законодательство о налогах и сборах не исключает право поставщика на внесение исправлений в счета-фактуры, либо их замену на оформленные в установленном порядке и последующее право налогоплательщика на представление исправленных документов налоговому органу.

Условие:

исправленные счета-фактуры должны быть представлены до вынесения налоговым органом решения по результатам проверки.

Источники: Определения ВАС РФ от 12.11.2007 г. № 14278/07, от 12.11.2007 г. № 14326/07, от 12.11.2007 г. № 14072/07, от 29.10.2007 г. № 11294, от 8 мая 2008 г. № 5715/08, от 7 мая 2008 г. N 710/08, от 29.10.2008 г. № 9961/08

НДС. Внесение исправлений в счета-фактуры (2)

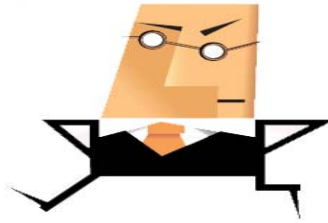
Период применения налогового вычета определяется датой, когда соблюдено последнее из необходимых условий применения вычета. Получение исправленного счёта-фактуры к таким условиям не относится.

Поэтому, если условия вычета были соблюдены в январе, а исправления в счёт-фактуру внесены в апреле, то вычеты по исправленному счёту-фактуре применимы в январе.

Источник: Постановление Президиума ВАС РФ от 03.06.2008 г. № 615/08 по Феррум Трейд, Постановление ФАС МО от 27.11.2007 № КА-А40/12833-07 по Оренбургнефть



Санкции за неуплату НДС по истечении 180 дневного срока



При неуплате НДС по истечении 180-дневного срока привлечение к ответственности является правомерным.

Санкции по п. 1 ст. 122 НК РФ применяются даже несмотря на то, что право на применение нулевой ставки НДС позднее было подтверждено.

Нарушение считается окончательным, если налог не был уплачен на 181 день, а не в день отгрузки (оплаты).

Источник: Постановление ВАС РФ от 11.03.2008 № 13920/07 по заводу «Измерон», от 11 марта 2008 г. N 15079/07 (Арниви-Р)

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A stylized blue globe icon with a grid of latitude and longitude lines, positioned on the left side of the slide.

Prospects of the Russian Tax System Development for 2009-2011

Arseny Seidov

Senior Tax Associate, Baker & McKenzie

December 3, 2008

Russian Tax Policy Guidelines for 2009-2011

- Complete revision of transfer pricing rules
- Tax consolidation for profits tax purposes
- Tax changes for operations in the stock market
- Controlled foreign corporation rules
- Tax incentives for IT and innovative activities
- International cooperation and exchange of information with tax authorities of foreign jurisdictions

Transfer Pricing Rules (1)

- Currently, undeveloped and have limited application
 - 3 traditional transaction-based methods
 - Lack of data sources on market prices
 - 20% safe-harbor for pricing fluctuations
 - No documentation requirement
 - No advance pricing agreements
- Taxpayers often use aggressive transfer pricing techniques for tax optimization purposes
- Tax authorities revert to economic justification test and good-faith taxpayer, business purpose and unjustified tax benefits doctrines in purely transfer pricing cases

Transfer Pricing Rules (2)

- Clear need to comply with OECD TP Guidelines
- New law expected not earlier than 2010 (together with tax consolidation law)
- Latest draft law introduced a completely separate and detailed chapter on transfer pricing to the Tax Code
 - 2 profit-based methods added + 1 processed product price method
 - Market price range introduced
 - No corresponding adjustment
 - No 20% safe harbor
 - Many pricing data sources
 - Extensive documentation requirements
 - APA allowed
- New draft law is being developed
- Business may want to start getting prepared in advance and reconsider its long-term tax planning strategies

Tax Consolidation

- Expected not earlier than 2010 (together with new transfer pricing laws)
- Only for profits tax purposes (no VAT consolidation)
- “Internal” transactions disregarded – no transfer pricing adjustments possible
- Concept of “responsible taxpayer”
- Benefits and downsides of tax consolidation
- International standards and EU developments

Controlled Foreign Corporation Rules

- Current practice and trends worldwide
- Principle of “capital export neutrality”
 - Taxpayer’s subsidiaries residing in jurisdictions with lower income tax rate are subject to same tax burden on a current basis as if they conducted business domestically
 - Active business income exception
- Basics and mechanics of CFC rules
- Application of CFC rules to Russia
 - Does Russia need those rules?
 - How will they impact the state economy and investment climate?
 - Are the tax authorities prepared to administer and implement them?

Key Areas for Development (1)

- Promoting IT and innovative sectors of economy
 - No VAT on software licenses and imports of technological equipment
 - Profits tax incentives and other tax benefits
- Participation exemption regime (0% dividend tax)
 - RUR 500 mln. investment requirement to be repealed
- Tax developments in financial market
 - Announced relief from capital gains tax for individuals and corporations (subject to 1-year holding period)

Key Areas for Development (2)

- Exchange of information
 - Grey imports, transfer pricing cases, etc.
 - Data on bank accounts and non-declared profits of Russian taxpayers
 - Eligibility for treaty benefits (*e.g.* beneficial ownership, residency)
- Dealing with non-bona fide taxpayers
 - Current practice in Russia vs. worldwide standards
 - Prospects of development of case law and statutory rules in Russia



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**Thank you very much for
your attention!**