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# IS THE RUSSIAN TAX REFORM AT AN END?

**16 December 2015**  
**Ararat Park Hyatt**





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# **Dr. Frank Schauff**

## **CEO, AEB**

# ***OPENING REMARKS***



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# **Dr. Alina Lavrentieva**

## **Chairperson of the AEB Taxation Committee, PwC**

### ***OPENING REMARKS***



# **Sergey Shatalov**

**Deputy Minister of Finance of the  
RF**

## ***RUSSIAN TAX SYSTEM – NEW TASKS AND CHALLENGES***



# Alexandra Kadet

**Deputy Head of the Unit of  
information exchange with  
foreign countries, Department of  
standards and international  
relations, Federal Tax Service of  
the Russian Federation**



# **SESSION 1. TAXATION AND TAX ADMINISTRATION OF CROSS-BORDER TRANSACTIONS**



# Experts:

**Arseny Seidov**, Baker & McKenzie

**Evgenya Veter**, EY

**Nina Gulis**, KPMG

**Anton Nikiforov**, Pepeliaev Group



# BEPS final reports - what is next?

**Arseny Seidov**

*Partner, Tax*

*Baker & McKenzie*



## ***OECD BEPS Reports***

- Historical background and role of BEPS in global tax landscape
- Issued by OECD on 5 October 2015, endorsed by G20 in November:
  - Action 1: Tax challenges of the digital economy
  - Actions 2, 4, 5, 6: Preventing double non-taxation and tax avoidance
  - Action 3: Designing effective CFC rules
  - Action 7: Preventing artificial avoidance of PE status
  - Actions 8-10, 13: Transfer pricing issues
  - Action 11: Measuring and Monitoring BEPS
  - Action 12: Mandatory Disclosure Rules
  - Action 14: Making Dispute Resolution Mechanisms More Effective
  - Action 15: Developing a Multilateral Instrument to Modify DTTs



## ***BEPS Implications on IP box regimes: How it affects tax planning for Russia?***

- OECD/G20 approved BEPS Final Report, including Action 5: Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance to tackle any preferential tax regimes including Patent/IP Boxes;
- Suspension/revision of European beneficial Patent/IP tax regimes as of 1 July 2016
- Introduction of the ***modified nexus approach***
- Focus on substantial activity and preventing abusive structure, aligning taxation with substance to ensure that:
  - Taxable profits can no longer be artificially shifted away from the countries where value is created
  - Tax benefit on IP income ***proportionate*** to the expenditures incurred by the same taxpayer
- Issues for Russia:
  - Current R&D contracts on cost-plus basis
  - Assignment of exclusive IP rights developed in Russia
  - Reconsidering tax structuring for future IP income



## ***Impact of BEPS on Russian Tax Policy Trends***

- Exchange of information:
  - Accession to the OECD Common Reporting Standard (CRS)
  - Changes to the Russian Tax Code on automatic information exchange
- Revision of thin capitalisation rules:
  - Currently postponed
  - Plans to introduce further amendments, based on Action 4 (Limiting Base Erosion Involving Interest Deductions and Other Financial Payments)
- Enhancement of Russian CFC Rules:
  - New set of amendments is currently undergoing public discussions
- Complex revision of Russian transfer pricing rules



# Transfer Pricing – What's New?

**Evgenia Veter**  
Partner, EY

## ***Action 13 – Master-file, local file and CBC reporting***

### **What happened**

#### **Master file**

High-level information about the multinational enterprise's (MNE's) business, transfer pricing policies and agreements with tax authorities in a single document available to all tax authorities where the MNE has operations

#### **Local file**

Detailed information about the local business, including related-party payments and receipts for products, services, royalties, interest, etc.

#### **CbC report**

High-level information about the jurisdictional allocation of profits, revenues, employees and assets

### **Questions to ask**

- » Which countries where your company operates require new TP documentation?
- » Are the reporting requirements the same?
- » When should this be done?
- » How does your current TP documentation compare to the new requirements?
- » Are there any gaps?

## ***Action 7 – Permanent Establishment***

### **What happened**

- » Preventing foreign enterprises from operating in a country without creating a PE:
  - » Commissionaire and similar sales and marketing models are at risk
  - » Controlled commissionaires are de facto dependent agents
  - » PE exemptions restricted to activities that are preparatory or auxiliary
  - » Preparatory or auxiliary activities that are a cohesive part of other business activities in the country may create a PE

### **Questions to ask**

- » For companies with a commissionaire or other comparable sales / marketing model:
  - » Is your transfer pricing appropriate?
  - » Are you comfortable accepting a PE?
  - » Is conversion to a buy-sell distribution model an alternative?
- » Does your company rely on auxiliary or preparatory treatment in Russia?
- » Is PE risk increasing for your Russian business?

## ***Actions 8-10 – Intangibles/ risk and capital/ high risk transactions***

### **What happened**

- » New versions of the OECD TP Guidelines:
  - » Chapter VI: intangibles, including new guidance on the return to funding activities and on hard-to-value intangibles
  - » Chapter VIII: cost contribution arrangements
- » New guidance on:
  - » Commodity transactions [additions to Chapter II of the OECD TP Guidelines]
  - » Low-value adding intragroup services [revisions to chapter VII of the OECD TP Guidelines]
- » Amended guidance on:
  - » Identification of transaction / control of a risk / when the actual transaction may be disregarded for TP purposes
- » Confirmed new guidance on comparability factors including:
  - » Location savings, assembled workforce, and MNC group synergies (additions to chapter I of the OECD TP Guidelines)

### **Questions to ask**

- » When and how do revisions to these guidelines become relevant / effective in Russia?
- » Which structures are most at risk?
- » What should your company be doing to address those risks?
- » Do the IP owners or other entrepreneurs within the group manage relevant commercial risks, including oversight of IP development, protection and exploitation (including DEMPE functions)?



# Beneficial ownership concept

**Nina Goulis**  
**Partner, Tax**  
**KPMG**



## *Beneficial Owner concept: now in the Russian law*



### Beneficial owner (BO)

- The entity may use and/or dispose of income at its own discretion;
- The entity for the benefit of which another entity is authorized to legitimately dispose of such income



### NOT a beneficial owner

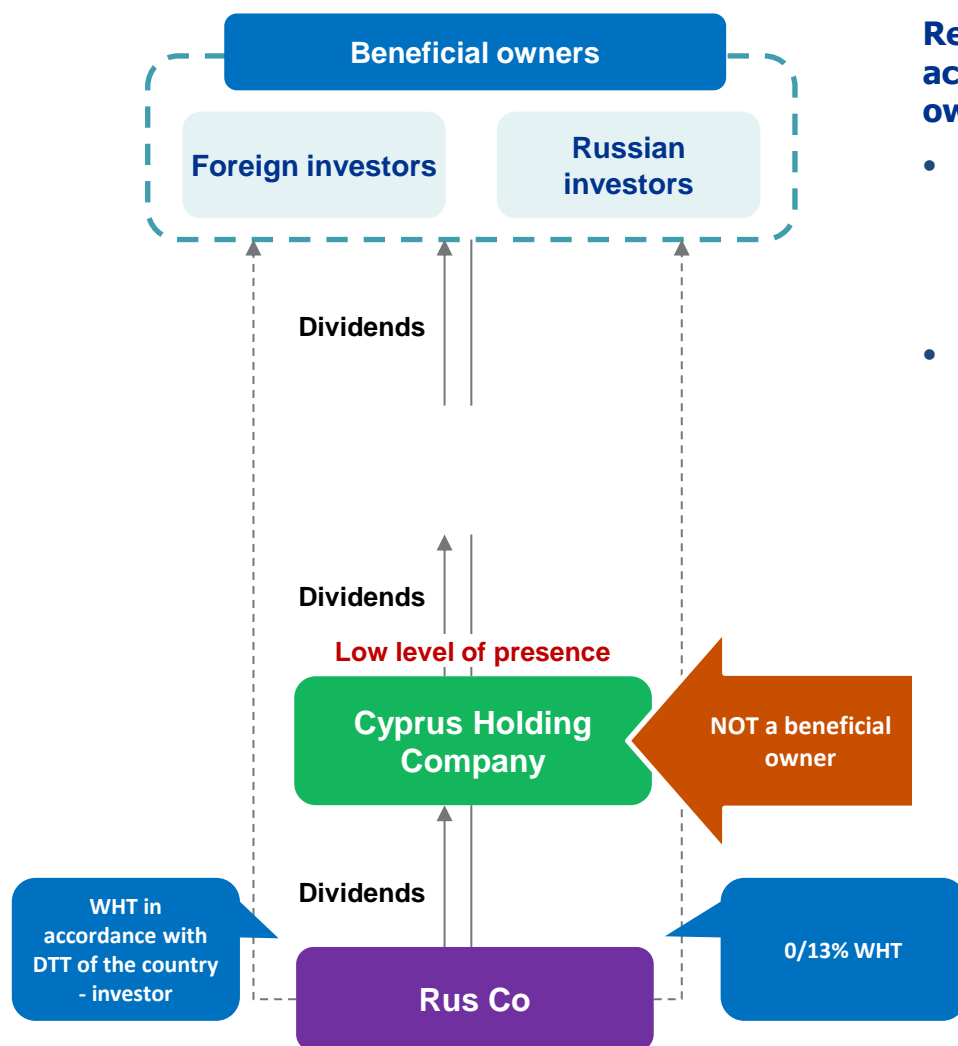
- Has limited authorities in relation to disposal of the respective income;
- Exercises mediation function with respect to the income; and
- Performs no other functions and assumes no risks; directly or indirectly pays income to an entity which would not be entitled to any DTT exemptions if it directly received it

### Application of a “look through” approach

This approach is applied if an entity which receives dividends IS **NOT a beneficial owner of income**

- **BO - resident in Russia**: the WHT on distributions is **0% (for companies with qualified membership) and 13% (in other cases)**
- **BO - resident in a foreign state**: WHT **as provided in DTT between the Russian Federation and the respective state**

# Beneficial Owner concept: a "look through" approach



## Rejection of application of reduced rates to CyprusCo in accordance with the DTT and recognition of beneficial owners of income paid from Russia

- RusCo **has a right** to ask the following information
  - a confirmation from Cyprus Holding Company that it is a beneficial owner of the income
  - information about a company that it recognizes as a BO
- A requirement might be needed for a direct interest of the investor in equity for the purposes of application of the DTT with the Russian Federation



### BUT:

- **Historical risks**
- **Lack of clarity in the legislation with respect to the method of checking the beneficial owner's status**
- **According to the planned changes, a foreign company must submit to RusCo confirmation about its BO status before the actual payment of income. Otherwise, general provisions of legislation apply**



## *Beneficial Owner concept: trends in court practice*

Company	Reference	Type of income
<b>Cases rules in favour of the tax authorities</b>		
TD Petelino LLC	Resolution of the 9 <sup>th</sup> Appellation court dated 04 August 2015 №A40-12815/15	Royalty
Nestle LLC	Resolution of the AC Moscow region dated 30 October 2015 №A40-16883/15	Interest
MDM bank	Decision of the Moscow AC dated 29 October 2015 № A40-116746/2015 (first instance)	Dividends
<b>Cases ruled in favour of the taxpayers</b>		
JSC "Saint-Petersburg Telekom"*	Resolution of the 9 <sup>th</sup> Appellation court dated 24 September 2015 № A40-187121/14	Dividends
CJSC "Votek Mobile"**	Resolution of the Arbitration court of the Central region dated 10 September 2015 №A14-13723/2013	Dividends
JSC "Moskommertsbank"	Resolution of the 9 <sup>th</sup> Appellation court dated 26 January 2015 №A40-100177/13	Interest

\* Consideration by the Moscow region arbitration court 14 January 2016 (cassation)

\*\* The tax authorities submitted an appeal to the Supreme Court



# CFC legislation developments

**Anton Nikiforov**

Partner, Pepeliaev Group



1. Expanding the list of entities that must submit notifications (article 23(3.3) of the Russian Tax Code).
2. Excluding some types of income when determining an active foreign company (article 25.13-1(6.1) of the Russian Tax Code).
3. Provision of explanations by a taxpayer with respect to a lack of information on the membership of all the Russian tax residents.  
Exemption of taxpayers from liability and default interest (10-50)  
(article 25.14 (10-12) of the Russian Tax Code)



4. Specifics of determining the profit of a controlled foreign company which is an unincorporated structure (article 25.15(1.1) of the Russian Tax Code).

Obtaining the rights to control an unincorporated foreign structure has been excluded from income (article 210 (1) of the Russian Tax Code).

Income gained from an unincorporated foreign structure within the limits of the cost of property or property rights that were contributed earlier, has become exempt from taxation (this is different from distribution of profit) (article 217 (63) of the Russian Tax Code).

5. The procedure for calculating expenses relating to securities (purchased from a controlled foreign company, obtained upon liquidation) (article 214.1 (13.1), article 214.1 (13.2) of the Russian Tax Code).

Excluding from the income the cost of property (except for monetary funds) and property rights obtained upon liquidation (article 217(60) of the Russian Tax Code).



6. The procedure for determining the membership interest of an entity in a company (REPO, loan of securities, etc.) article 105.2 (4-7) of the Russian Tax Code).

7. Updating the conditions for foreign companies not to be treated as Russian tax residents (article 246.2(7) of the Tax Code; also, liquidation to be completed by 1 January 2018).

A 0% rate applies to dividends received by foreign companies that have voluntarily admitted that they are tax residents of Russia.

8. Obligation of the foreign company to provide confirmation that it is the beneficial owner of income (to be able to apply international treaties) (article 312(1) of the Tax Code).

9. Updating the procedure for determining the income (loss) of a controlled foreign company: selecting the method, requirements for the financial statements, excluding certain income and expenses from profit (article 309.1 of the Tax Code).



# **SESSION 2. RUSSIAN TAX LEGISLATION DEVELOPMENTS AND PRACTICE**





# Experts:

**Vladimir Konstantinov, PwC**

**Andrey Bashkirov, Procter &  
Gamble**

**Alexander Erasov, Goltsblat BLP**

**Kirill Roubalskiy, Dentons**



# Key VAT Trends in 2015

**Vladimir Konstantinov**  
Partner, PwC

# New VAT return in 2015 - Main Mismatches Identified

## Examples of identified mismatches:

1

Taxpayer Identification Number/Tax Registration Code

2

Mismatches with counterparty

3

Code of type of transactions

4

“Old” periods (VAT invoices from 2014 and earlier)

5

Control ratios

6

Double entry of VAT invoices

## What is next?

- ✓ Increase amount of requires
- ✓ The right of inspection premises and documents of the taxpayer

✓ Changes in Government Decree № 1137

✓ Matching with banking transactions



*vehicle tracking system*

# ***VAT recovery within 3 year period***

Federal Law № 382-FZ from 29.11.2014



**New risks?!**

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# ***Draft legislation on abolishing VAT on advance payment***

**Is it positive?**

Public discussion has finished on  
8 December 2015



## ***No separate accounting on export***

First reading was on 19 June 2015



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## ***A concept of "right abuse"***

First reading was on 15 May 2015





# **Ecological Charge: more questions than answers**

**Andrey Bashkirov**  
Procter and Gamble

## *Ecological Charge is...*

- Part of the new Waste Management legislation
- Alternative to waste (self)utilization
- A new tax?



## *What's new?*

- Taxable waste as new object of taxation
- Manufacturers and importers as taxpayers
  - Introduction into circulation?
- Tax computation:
  - Tax rate \* Weight OR Quantity \* Utilization target

Экологический сбор рассчитывается посредством умножения ставки экологического сбора на массу товара или на количество единиц товара (в зависимости от вида товаров), ..., либо на массу упаковки, использованной для производства такого товара, и на норматив утилизации.

- RosPrirodNadzor as a (tax) body



## *What's next?*

- Rates pending
- ? for 2016 and on
- No penalties
- No interest
- 0 for 2015



# NEW IN LIABILITY FOR TAX CRIMES

**Alexander Erasov**  
Goltsblat BLP

## *What is going on?*

- ✓ Changes to the procedure for initiating tax-related criminal cases
- ✓ More stringent legislation
- ✓ Supreme Court of the Russian Federation has secured the possibility of company tax arrears being recovered from guilty individuals
- ✓ Progressive practical application of subsidiary liability
- ✓ Increasing involvement of law-enforcement bodies
- ✓ Frequent application of non-tax articles of the Russian Criminal Code
- ✓ Rise in criminal cases



**THE GAME HAS CHANGED**

## ***How do courts react?***

- The number of cases won by taxpayers is falling – it has become much more difficult to win a tax case
  - Decisions of commercial courts may have wordings indicating elements of a crime
- NB:** The circumstances identified in commercial court decisions are recognised in a criminal case without additional checking (*res judicata*)

## **The law-enforcement bodies are also on the alert:**

*Sunrise Tour case*

*Purgaz case*

*SU-155 cases*

*Bazis case*

*and many more...*

*\*According to the statistics, only **1 of 1000** criminal public prosecution cases ends in a verdict of non-guilty*

## ***What to do?***

- ✓ **Never** fear!
- ✓ Take account of criminal law **risks**
- ✓ Don't be **foolish!**
- ✓ Assess the situation correctly: most challenges result from incorrect **assessment** of risks and possibilities
- ✓ Identify potentially dangerous areas – **forewarned is forearmed**
- ✓ Think of evidence in **advance**
- ✓ Pursue a **complex** and step-by-step approach to defence
- ✓ Choose an advocate **beforehand** (*Si vis pacem, para bellum*)





# Key Tax Cases of 2015

**Kirill Roubalsky**  
Dentons

## *Key Tax Cases*

### **10. Oriflame Cosmetics (A40-138879/14)**

Cross-border license agreement is a tax scheme

### **9. Aviakompania Kogalimavia (A40-58052/15)**

In order to deduct a company must check if the services provided to them are VATable

### **8. Astellas Pharma (A40-155695/12)**

Auxiliary services to a distributor create a PE

### **8. AKB Avangard (305-KГ14-5758)**

The court injunction order is not a remedy for a freezing order of a tax authority



## *Key Tax Cases*

**6. Sony Mobile Communications Rus (the Russian Constitutional Court )**  
Insurance indemnity must not lead to double VAT taxation

**5. Ignatova (the Presidium of the Supreme Court, 8-ПВ15)**  
An individual's net income out of a claim assignment to be taxed (substance over form)

**4. Komi Teplovaya Kompaniya (A29-10095/2014) (also – Iterra, Muravlenkovskaya  
Transportnaya Kompaniya, etc.)**  
Non-controlled loans may be controlled under TP rules?

## *Key Tax Cases*

### **3. TD Petelino (A40-12815/15)/Cheremnovskiy Sakharniy Zavod (A03-14667/2015)**

Treaty shopping is bad/No zero tax on dividends payable to a PE

### **2. MDM-Bank (A40-116746/15)**

A Cypriot broker is not a beneficiary owner eligible for treaty benefits

### **1. Domanov (the Supreme Court, No. 57-KΓ15-8)**

Expenditure does not equals taxable income



# Q&A