



## **The Association of European Businesses is concerned about the Federal Tax Service of Russia's comments on the application of international double taxation treaties**

The Association of European Businesses in Russia is expressing its concerns about certain conclusions and positions presented in the Federal Tax Service of Russia's letter dated 28.04.2018 No. CA-4-9/8285@ On the Practice of Consideration of Disputes as regards the Application of the Concept of a Person Having Actual Income Right (Beneficiary Owner) (hereinafter referred to as the Letter).

The Letter summarizes court cases, which, according to the Federal Tax Service (hereinafter referred to as the FTS of Russia), have shaped the arbitration courts' approach to assessment of the lawfulness of benefits under international double taxation treaties of the Russian Federation and acknowledgement of certain circumstances as abuse of the norms of such treaties.

While the relevant authority for commenting double taxation treaties provisions is the Ministry of Finance of Russia, tax authorities must abide by the FTS of Russia's letters for the purpose of tax control.

In connection with this, the AEB is concerned about several conclusions contained in the Letter that may result in a risk of claims against companies making payments to foreign recipients (including for past fiscal periods) without any intent to abuse the norms of relevant international treaties, namely:

1. The FTS of Russia deems it impossible to apply benefits under international treaties in case of payment of interests or dividends to foreign companies whose activities are conducted exclusively in the form of investment in and financing of group companies. Thus, exclusively holding and/or financing activities become equal to a sign of abuse of tax treaties. Such a conclusion, contradictory to international approaches (in particular, that of OECD), and failing to comply with the provisions of current international double taxation

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treaties of the RF, results in significant risks for the majority of current holding and financial structures.

2. In its Letter, the FTS of Russia notes that activities conducted exclusively in the form of investment in or financing of group companies (holdings) or related entities do not prove that independent entrepreneurial activities are being conducted. In our opinion, this conclusion fails to comply with the definition of entrepreneurial activities contained in the Civil Code of the RF. Besides, as a rule, holding and financial companies cannot simultaneously carry out other operational activities in order to ensure division of risks.
3. In the absence of a uniform judicial practice the Federal Tax Service of Russia in the Letter refers solely to disputes won by tax authorities and does not mention judicial acts rendered in favor of taxpayers. Also, the Federal Tax Service of Russia recognizes as "formed approaches" the findings of the courts set out in the decisions of the first-instance arbitration courts, including those that have not entered into force as of the date of the Letter's preparation.

AEB sent a request to the Head of the Federal Tax Service to meet with European investors to discuss the current situation and clarify the positions.

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