



Association
of European
Businesses

**Business meeting organized by
the AEB Taxation Committee**

THE RESPONSIBILITY OF COMPANY'S EXECUTIVES FOR TAX VIOLATIONS: SURVIVE AND WIN



Dr. Alina Lavrentieva

Chairperson of the AEB Taxation
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OPENING REMARKS

SESSION 1



- Subsidiary responsibility of controlling persons: new in the law on bankruptcy and court practice
- Criminal prosecution for tax crimes: how to minimize risks for bona fide taxpayers?
- Collecting of organizations' tax debts from executives: the position of the Constitutional Court and the Federal Tax Service



SECONDARY LIABILITY OF CONTROLLING PARTIES: NEW DEVELOPMENTS IN LEGISLATION ON BANKRUPTCY AND IN CASE LAW

Yulia Litovtseva

Pepeliaev Group

What happened?



Important!!!

- Retroactive effect;
- Punitive bias.

Federal law
No. 266-FZ dated 29 July 2017



Letter No. SA-4-18/16148@
of the Russian Federal Tax Service dated 16
August 2017



Resolution No. 53 of the Plenum of the
Russian Supreme Court dated 21 December 2017

What changed?



1. New criteria for identifying a controlling party.
2. The period for the “revision” begins 3 years before an **objective** bankruptcy.
3. Liability can be imposed under any bankruptcy procedure, as well as outside a bankruptcy case.
4. Proving a controlling party’s fault has been made easier:
 - new presumptions;
 - expanded body of evidence;
 - nominal directors’ ‘deals’ with the court.
5. Creditors choose the method for collecting losses from the controlling party.



Russian Constitutional Court: what do you need to bear in mind?



**Resolution No. 39-P of the Russian
Constitutional Court dated 8
December 2017**



It has been acknowledged that a company's tax debts being collected from individuals is in line with the Russian Constitution

Fines for tax violations may not be recovered from individuals

The defendant's financial situation should be taken into account

VS

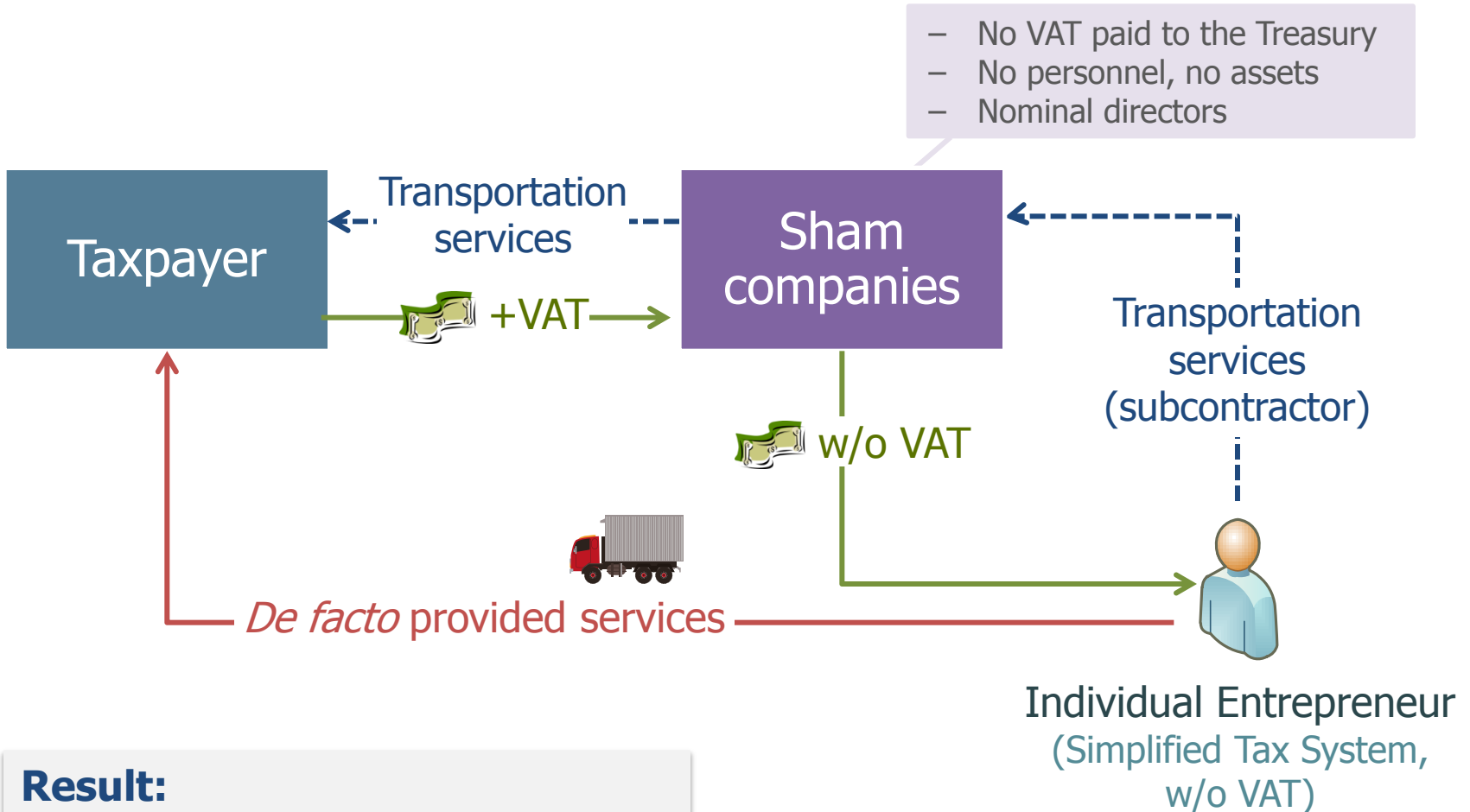
Letter No. SA-4-18/45@ of the Russian Federal Tax Service dated 9 January 2018



CRIMINAL PROSECUTION FOR TAX CRIMES: HOW TO MINIMIZE RISKS FOR BONA FIDE TAXPAYERS?

Alexander Erasov
Goltsblat BLP

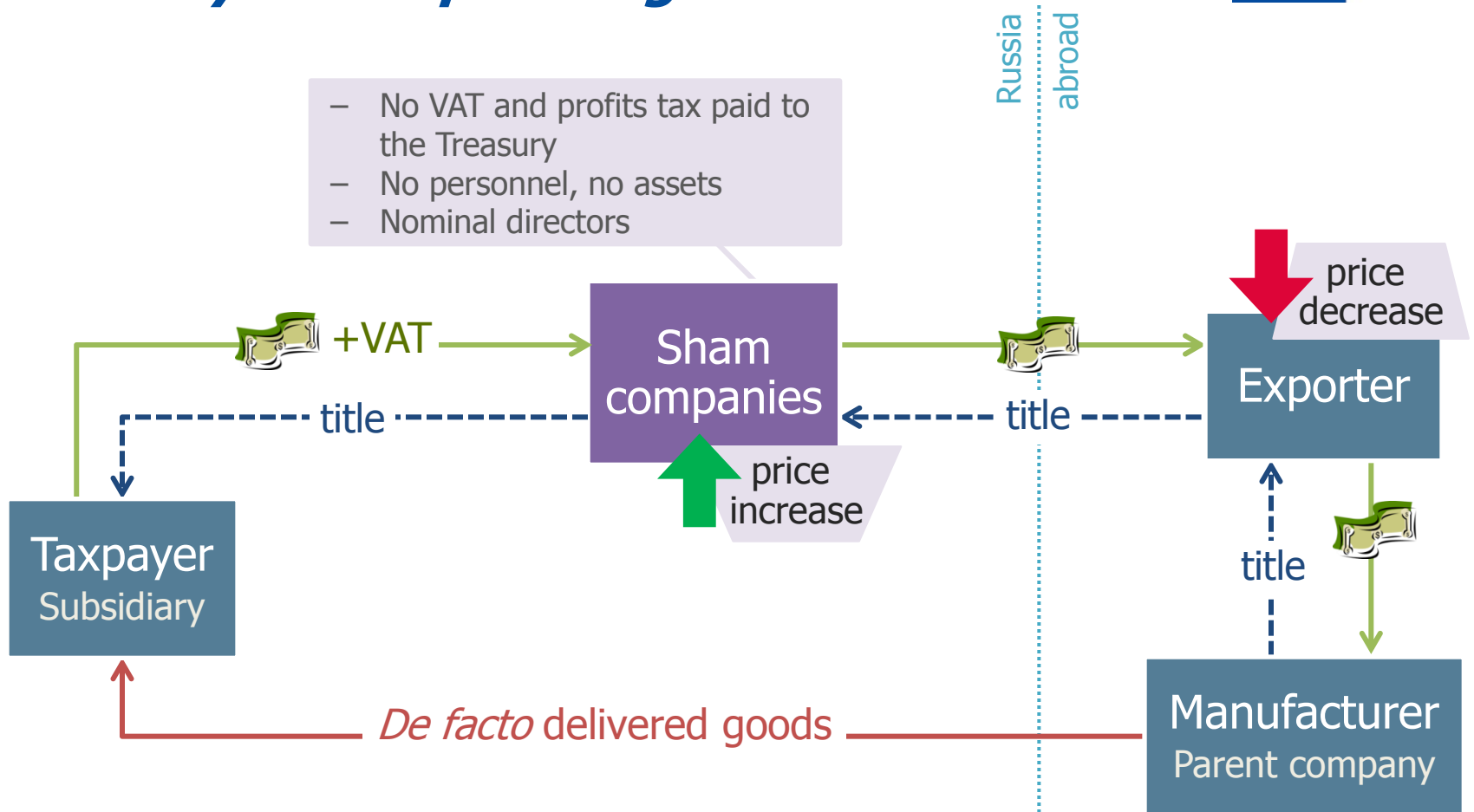
Case study 1 – Transportation services



Result:

- VAT reimbursement denied
- Criminal proceedings initiated

Case study 2 – Import of goods

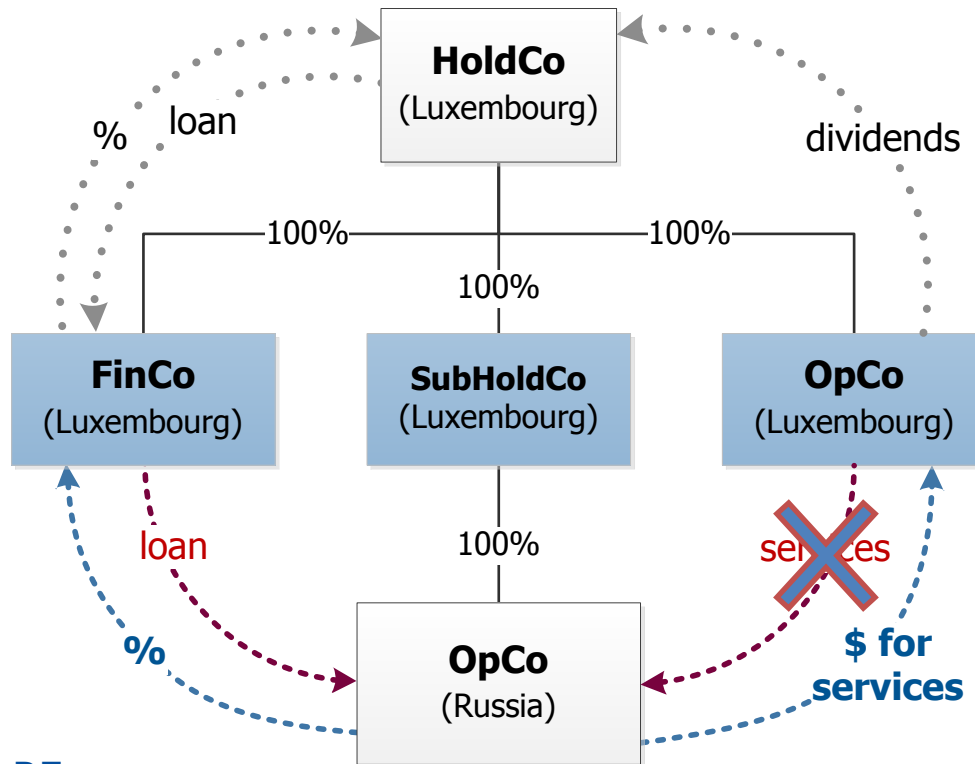


- No VAT and profits tax paid to the Treasury
- No personnel, no assets
- Nominal directors

Result:

- Additional VAT and profits tax assessment
- Criminal proceedings initiated

Case study 3 – Intragroup transactions



Reality of services is challenged

Articles of the RF Criminal Code:

174	174.1
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Articles of the RF Criminal Code:

199	159	199.1
193	193.1	



COLLECTION OF TAX DEBTS OF ORGANIZATIONS FROM OFFICIALS: POSITION OF THE CONSTITUTIONAL COURT

Anton Zykov
Deloitte

Ruling of the Constitutional Court No. 39-Π



Responsibility occurs for persons who have been subject to criminal prosecution. Outcome is not relevant.



The amount of damage to be refunded includes arrears and penalties, but not a fine



Main conditions of responsibility:

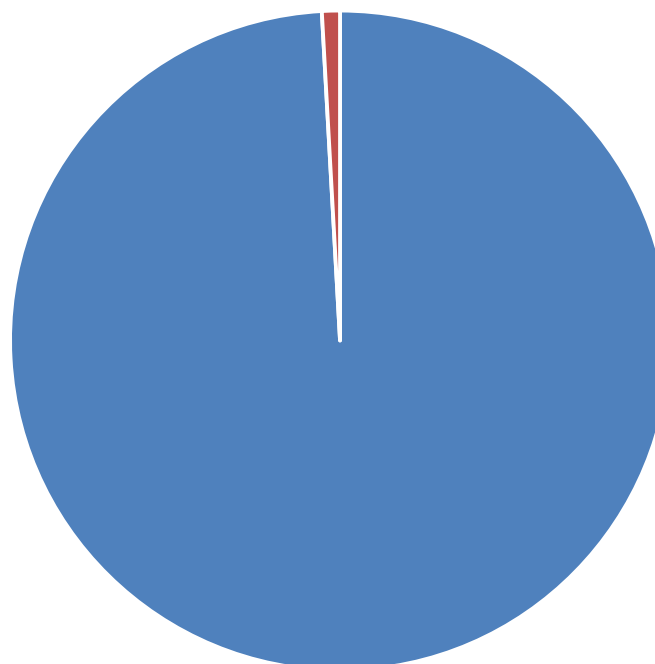
- exhaustion special tools to collect tax arrears
(exc.- the organization serves only as a "cover" for the actions of the controlling person)
- establishment of a full civil tort:
 - the illegitimacy of the actions of a person
 - guilt
 - cause-and-effect relationship between actions and harm
- assessment of the amount of damage that can really be recovered from an individual

Ruling No. 39-Π. Was It A Surprise?

- 28 May 2013, No. 786-O
Termination of criminal procedure does not exempt the guilty from compensating damages in civil trial
- 24 March 2017, No. 9-Π
Tax refunds could be recovered back by the government in civil (non-tax) proceedings
- 28 February 2017 No. 396-O
Tax arrears could be collected from individual convicted for tax avoidance irrespective of his/her personal gain

Is The Constitutional Court Still Relevant?

Statistics of applications to the
Constitutional Court since 2012



■ total number of applications (95 721) ■ on tax law (844)



TAX DEBTS RECOVERY: FEDERAL TAX SERVICE'S POSITION

Alexey Nesterenko

Ernst and Young (CIS)

When ...

... out of legal grounds for tax recovery from company-taxpayer (liable party)

Matter	Comment
<p>Tax authorities should produce at least one proof of exhaustion, such as:</p>	<ul style="list-style-type: none"> ▶ return of writ of execution; ▶ termination of bankruptcy proceedings of company-taxpayer; ▶ signs of an inactive legal entity (company-taxpayer); ▶ entry for inaccurate data in USRLE; ▶ impossibility of satisfying of tax authorities' claims based upon analysis of financial and economic indicators of company-taxpayer carried out by tax authorities; ▶ no legal and (or) factual grounds for tax debts recovery from third parties

double recovery (from a company-taxpayer and company's executives) is not permitted: proofs of ordinary measures application should be provided by tax authorities

- ▶ when intentional guilt is revealed, unacceptable to reduce the amount of harm (despite of property status)
- ▶ changes in extent of damage (based on degree of guilt) should correlate with changes in extent of damage of another guilty person

Burden of proof

Tax authorities' responsibility

Matter	Comment
<p>Corpus delicti</p> <p>Harmful consequence</p> <p>Evidences</p>	<ul style="list-style-type: none"> ▶ evidences of corpus delicti in the actions of a company's executive(-s) ▶ proofs of unlawful harm-doing and extent of damage ▶ tax audits' materials, materials of preliminary investigation, information on actual circumstances of an offence committed
<p>Involvement</p>	<ul style="list-style-type: none"> ▶ evidences of involvement of a company's executive(-s) in an offence commission
<p>Benefit (<i>optional</i>)</p>	<ul style="list-style-type: none"> ▶ increase of material prosperity of a company's executive(-s) and (or) his family members at the period of an offense commission

Taxpayers' responsibility (tricky facts)

Matter	Comment
<p>Prejudicial nature</p>	<ul style="list-style-type: none"> ▶ presumption of guilt of a harm-doer, absence of guilt is proved by a harm-doer
<p>Tax debts recovery</p>	<ul style="list-style-type: none"> ▶ evidence of other legal and factual mechanisms for tax debts recovery by a company-taxpayer provided by law

Application of mechanism

Centralization of the function by Federal Tax Service

Matter

Tax debt recovery from company's executives mechanism

Comment

- ▶ exceptional character of this mechanism
- ▶ compliance with the requirements of appropriateness
- ▶ submission civil claims on such cases to the Federal Tax Service for approval
- ▶ implementation of mechanisms stipulated by tax law in other cases

Interim measures

Matter

Execution of judgement

Comment

- ▶ submission of claim at the stage of preliminary investigation
- ▶ rendering of assistance in identifying property to be seized
- ▶ file petition to the court

SESSION 2



- • Overview of amendments to the Code of the RF on administrative offences in respect of liability of executives for violation of currency legislation
- Bringing to administrative responsibility - what is dangerous for the representatives of international companies?
- Liability insurance for executives – a light in the dark?



OVERVIEW OF AMENDMENTS TO THE CODE OF THE RF ON ADMINISTRATIVE OFFENCES IN RESPECT OF LIABILITY OF EXECUTIVES FOR VIOLATION OF CURRENCY LEGISLATION

Tatiana Kirgetova

Gide Loyrette Nouel

Overview of amendments to the Code of the RF on administrative offences in respect of liability of executives for violation of currency legislation

➤ Starting from 14 May 2018:

- ✓ based on amendments to the Code of Administrative Offences of the Russian Federation (the "**Code**") penalties for a violation of currency legislation are established for executives under part 1, 4, 4.1 and 5 of Article 15.25 of the Code (*currently only individual entrepreneurs are considered as executives (должностные лица)* for the purposes of applying part 1, 4, 4.1 and 5 of Article 15.25 of the Code);
- ✓ if an executive repeatedly commits an offence under parts 1, 4, 4.1 and 5 of Article 15.25 of the Code, then the executive will be disqualified for a period from 6 months to 3 years



Overview of amendments to the Code of the RF on administrative offences in respect of liability of executives for violation of currency legislation

- Letter of the Ministry of Finance of the RF and Federal Tax Service of the RF dated 12 December 2017 No OA-4-17/325-FZ;
- Letter of the Federal Tax Services of the RF dated 16 July 2017 No 3H-3-17/5523@.



BRINGING TO ADMINISTRATIVE RESPONSIBILITY – WHAT IS DANGEROUS FOR THE REPRESENTATIVES OF INTERNATIONAL COMPANIES

Valery Getmanenko

Baker McKenzie



Key Elements of Administrative Responsibility

- **Subjects**
 - Russian and foreign companies;
 - Officers: top executives and key employees (Russian and foreign citizens); and
 - Russian and foreign citizens
- **Penalties**
 - Fine on companies, officers or citizens (*e.g.* imposed on officers for tax and accounting violations: Articles 15.3, 15.5, 15.6, 15.11 of the Code of Administrative Offenses)
 - Disqualification of officers (*e.g.* 1-2 years for repeated accounting violations)
 - Suspension of operation of company (*e.g.* 14-90 days for migration violations)
 - Administrative expulsion from Russia of foreign citizens, and other
- **Statute of Limitations (change frequently)**
 - 1 year (*e.g.* tax and migration violations), 2 years (*e.g.* currency control violations)
- **Government Authorities**
 - Detecting and documenting the violation with a protocol (initiating the administrative case): *e.g.* FTS - for tax and currency control violations, MVD - for migration violations, etc. pursuant to Article 28.3 of the Code
 - Considering the violation and imposing the penalty with a decree: *e.g.* judge (justice of the peace) for tax and migration violations, etc., pursuant to Articles 23.1-23.86 of the Code

Small Administrative Violations: Inconspicuous but Insidious

- **Road Traffic Code Violations:**
 - check the data base regularly: <https://shtrafy-gibdd.ru/>
- **Migration Registration Violations:**
 - Article 18.8 of the Code of Administrative Offenses of the Russian Federation
- **Any other violations** penalizing the officer/responsible employee (General Director, Director of the Branch Office or Representative Office, etc.) by the relevant government authorities:
 - tax and accounting
 - currency control
 - data privacy
 - labor law
 - migration law
 - other

Major Consequences of a Small Penalty

- **Top executives and key employees who are foreign citizens:**
 - **may not ENTER Russia:**
 - for the period of 3 years: Point 4 of Article 26 of the Federal Law of 15 August 1996 N 114-FZ
 - for the period of 5 years: Point 11 of Article 27 of the Federal Law of 15 August 1996 N 114-FZ
 - until the fine is paid: Point 10 of Article 27 of the Federal Law of 15 August 1996 N 114-FZ
 - **may not EXIT Russia:**
 - until the penalty is executed or cancelled: Point 5 of Article 28 of the Federal Law of 15 August 1996 N 114-FZ
 - Article 67 of the Federal Law of 2 October 2007 N 229-FZ
 - **may not be issued a new work permit or their current work permit may be cancelled:**
 - Point 7 of Part 9 of Article 18 of the Federal Law of 25 July 2002 N 115-FZ



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Vladimir Kremer

AIG

Business meeting organized by the AEB Taxation Committee, 14 March 2018, MOSCOW



D&O Liability Insurance

Vladimir Kremer

AIG

D&O in couple of words

- Existing and operating in Russia since 1996
- The policy bought by the Company but is for D&Os (Company might be added as well but only for Securities Claims)
- All D&Os are covered blanket
- The policy is called Liability (third party) insurance but in Russian law it is more relevant in the financial risk (first party) insurance



Defence Costs



Judgements or Settlements



Additional / Related Expenses

Which restrictions of the policy may be applicable in case of the tax claim?

- The amount of tax is excluded from the definition of covered Loss
- The amount of VAT shall be excluded in case it can be offset
- Normally the policy has administrative/criminal liability exclusion (but in case the final adjudication establishes that the relevant conduct has occurred)

Are the Controlling Persons covered under the D&O policy?

Who is insured

- Board of Directors (independent directors frequently have additional benefits)
- Management Board
- Officers (CEO, CFO, CIO, etc.)
- Other managers
- Legal successors: spouse/partners, heirs, legal representatives
- **Company** (but ONLY in respect of Securities claims)

But only in respect of their acts in their aforesaid capacities!



Vadim Zaripov

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CLOSING REMARKS



Q&A