

“Development of the Russian Tax System in 2012 and Prospects for 2013 - 2015”

Quality Information | Effective Lobbying | Valuable Networking

- *Business meeting*

Mikhail Orlov

KPMG

December 19, 2012

Depreciation

(the Federal Law #206-FZ of 29.11.2012)

- *General rules of depreciation are now applied to property classified as mobilization capacity.*
- *Depreciation of property, including property that is subject to state registration, starts from the 1st day of the month following the month when this property was put into operation (the date of the state registration is not important!).*
- *“Depreciation premium” must be restored if the property is sold to related parties. However, the restored sum is added to the residual value of the property.*
- *Starting from 2014, increasing depreciation coefficients will not be applied to the property put into records after January 1st, 2014.*

Property tax **(the Federal Law #202-FZ of 29.11.2012)**

- *Movable property put into records as fixed asset after January 1st, 2013 is not subject to property tax.*
- *Public railways, long-distance pipelines and power transmission lines are now subject to property tax with rates not exceeding:*

| | |
|----------------|-------------|
| <i>in 2013</i> | <i>0.4%</i> |
| <i>in 2014</i> | <i>0.7%</i> |
| <i>in 2015</i> | <i>1%</i> |
| <i>in 2016</i> | <i>1.3%</i> |
| <i>in 2017</i> | <i>1.6%</i> |
| <i>in 2018</i> | <i>1.9%</i> |

Deduction of interest expenses

(the Federal Law #206-FZ of 29.11.2012)

- *Limits of interests on debt liabilities set in point 1.1. of the article 269 of the Tax Code remain in force till December 31st, 2013:*
 - *1.8% of the Central Bank Refinancing Rate for ruble debt liabilities*
 - *0.8% of the Central Bank Refinancing Rate for foreign currency debt liabilities*

Expected changes in tax legislation

- *Improvement of tax administration*
- *Transfer pricing*
- *VAT treatment of bonuses*
- *Tax treatment of goods losses*
- *Payment of dividends through depositaries*

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Svetlana Stroykova

PwC

December 19, 2012

Controlled transactions (*Art. 105.14 of the Tax Code*)

Financial thresholds calculation – adding income computed under Chapter 25 for both parties to the transaction

There may be cases when calculating the financial threshold transactions with a number of parties are summed up (Letter of 05.09.2012 N 03-01-18/6-122)

Threshold is not reached – does not mean no tax control (Letter of 28.08.2012 N 03-01-18/6-115)

Usage of “calculated” income of another party of a transaction (in the absence of actual data) (Letter of 28.08.2012 N 03-01-18/6-109)

Controlled transactions (*continued*)

Art. 105.3 applies to determination of arm's length interest rates , Art.269 deals with maximum deductible interest (Letter of 28.08.2012 N 03-01-18/6-114)

“Transaction date” and moment of income recognition ?

Mismatch between financial thresholds for documentation and information in the notifications

Interest income is taken into account when calculating the threshold, the body of a loan – does not. (Letter of 23.05.2012 N 03-01-18/4-67)

Exclusion of Cyprus from the backlist, the range of offshore controllable transactions is reduced

- *Business meeting*

Alexei Sobchuk

Deloitte

December 19, 2012



ИНН

КПП

Стр

Фамилия _____ и. о. _____

Раздел 1А. Сведения о контролируемой сделке (группе однородных сделок)

Порядковый номер сделки по уведомлению

010

I. Основания для контроля сделки (группы однородных сделок) в соответствии со статьей 105.14 Налогового кодекса Российской Федерации (далее – Кодекс)**100 Взаимозависимость**

2 Основания отнесения сделки к контролируемой согласно статье 105.14 Кодекса

121 122 123 124 0 - нет

1 - да

3 Особенности отнесения сделки к контролируемой, если сделка совершена между взаимозависимыми лицами, местом регистрации, либо местом жительства, либо местом налогового резидентства всех сторон и выгодоприобретателей по которой является Российская Федерация, в соответствии со статьей 105.14 Кодекса

131 132 133 134 135 0 - нет

1 - да

II. Сведения о контролируемой сделке (группе однородных сделок)

1 Группа однородных сделок 0 - нет 200

1 - да

2 Код наименования сделки 210

2.1 Код стороны сделки, которой является налогоплательщик 211

3 Признак определения цены сделки с учетом особенностей, предусмотренных статьей 105.4 Кодекса (регулируемые цены) 0 - нет 220

1 - да

220.1 Признак определения цены (комментарий)

4 Код определения цены сделки 230

230.1 Код определения цены (комментарий)**240 и 240.1 Метод + комментарий****250 – 259 Код источника информации**

7 Количество участников сделки 260

260.1 Количество участников сделки (комментарий)**III. Сумма полученных доходов и сумма произведенных расходов налогоплательщика по контролируемой сделке (группе однородных сделок)**

1 Сумма доходов налогоплательщика по контролируемой сделке (группе однородных сделок) в рублях 300

1.1 в том числе сумма доходов по сделкам, цены которых подлежат регулированию 301

2 Сумма расходов (убытков) налогоплательщика по контролируемой сделке (группе однородных сделок) в рублях 310

2.1 в том числе сумма расходов по сделкам, цены которых подлежат регулированию 311

* Отчество указывается при наличии
* Справочно.

Достоверность и полноту сведений, указанных на данной странице, подтверждаю:

(подпись)

(дата)

The Association of European Businesses



Section 1a: Information regarding controlled transaction



ИНН _____
КПП _____ Стр. _____

Фамилия _____ И. О. _____

Раздел 1Б. Сведения о предмете сделки (группы однородных сделок)

I. Общие сведения о предмете сделки (группы однородных сделок)

010 Порядковый номер сделки (из раздела 1А) _____ 020 Тип предмета сделки ☐ 1 - товар
☐ 2 - работа, услуга
☐ 3 - иной объект гражданских прав

II. Перечень предметов сделки (группы однородных сделок)

030 Наименование предмета сделки

Код предмета сделки (код по ТН ВЭД) _____ Код предмета сделки (код по ОКП) _____ Код предмета сделки (код по ОКВЭД) _____ Номер другого участника сделки _____
040 _____ 043 _____ 045 _____ 050 _____

060 Номер договора

Дата договора

065 _____

070 Код страны происхождения предмета сделки по классификатору ОКМС (цифровой) _____

080 Место отправки (погрузки) товара в соответствии с товаросопроводительными документами (заполняется только для товаров)

Код страны

по классификатору ОКМС (цифровой) _____

Регион (код) _____

Город _____

Населенный пункт (село, поселок и т.д.) _____

090 Место совершения сделки (адрес места доставки (разгрузки) товара; оказания услуги, работы; совершения сделки с иными объектами гражданских прав)

Код страны

по классификатору ОКМС (цифровой) _____

Регион (код) _____

Город _____

Населенный пункт (село, поселок и т.д.) _____

Код условия поставки (заполняется только для товаров)

100 _____

110 Код ОКЕИ

120 Количество

130 Цена за единицу

140 Итого стоимость

150 Дата сделки

¹ Число указывается при наличии.

Достоверность и полноту сведений, указанных на данной странице, подтверждаю:

_____ (подпись) _____ (дата)

The Association of European Businesses



Section 1b: Information regarding subject of transaction

- *Business meeting*

Evgenia Veter *Ernst & Young*

Typical questions we face (1)

1. Can we leverage from a global (OECD-like) TP documentation?
 - ▶ YES BUT need to localize for Russia (functional analysis validation, local comparables, TP methods justification, translation)
2. What are the consequences if we don't prepare Russian TP documentation for 2012?
 - ▶ No penalty, BUT risk of tax assessment and late payment interest if the prices are not arm's length

Typical questions we face (2)

3. Will local benchmarking studies be required?
 - ▶ YES, if a tested party is located in Russia
4. Does TNMM allow grouping of all transactions?
 - ▶ YES BUT only for 'homogeneous' transactions
 - ▶ What is 'homogeneous'?
5. Should the margins be derived from RU GAAP?
 - ▶ YES, foreign GAAP accounts are not relevant
6. Should each and every TP method be analysed?
 - ▶ NO, but strongly recommended

Typical questions we face (3)

7. What TP methods really take a priority?
 - ▶ Resale Minus and CUP
8. What if the margin is outside of the arm's length range?
 - ▶ Above the range → no downward adjustment
 - ▶ Below the range → upward adjustment is difficult, but possible

- *Business meeting*

Stanislav Tourbanov

CMS

December 19, 2012

Current Status

- Resolution of the Constitutional Court №1543-O dated 24/09/2012
 - Attempt to regard provisions of Article 265.2.5) unconstitutional failed
 - The right of the taxpayer to support inventory losses from shortage and theft by any documents from competent authorities is confirmed by the Court
 - Implications
 - Real practical impact is questionable – circular processes result in practical deadlock
 - Concept of “absence of guilty persons” and engagement of competent authorities are not challenged
- New Draft Law
 - Prepared by the Ministry of Finance
 - Available on <http://www1.minfin.ru/ru/legislation/projorders/>

New Draft Law

- Introduction of special deductibility rules for retail
 - Deduction of shortages of “purchased” goods according to the list approved by the Government and identified during stock-take within 0,75% of revenue from sale of above goods
- Deductibility criteria
 1. Revenue from self-service sale of “purchased” goods exceeds 70% of total retail sales
 2. Separate accounting with respect to revenue and shortages of goods by type of goods
 3. Audit statement “on the system of internal controls in the field of inventory accounting of the taxpayer”
 4. Stock-take act confirming the volume of shortages broken down by the list of the goods adopted by the Government and approved by the audit statement
- Introduction of terms “self-service” and “shortage”
 - Self-service – way of sale allowing direct self-selection of goods by consumers and their self-presentation for payment in cash or by pay-cards through cash desk equipment.
 - Shortage - “insufficient availability” (“неполное наличие”) of goods identified during the stock-take, which can not be justified by natural waste or can not be allocated to guilty persons “due to their absence”, confirmed by the stock-take act

New Draft Law – proposed Amendments

- Expansion of the scope of the Draft Law
 - Elimination of term “purchased” goods
 - Inclusion of “small-batch” (“мелкооптовый”) trade in the scope
- Clarification and simplification of deductibility criteria
 - Clarification of the contents and the form of the audit statement on internal controls of inventory.
 - Removal of the requirement for approval of stock-take acts by the audit statement
- Clarification of the term “shortage”
 - Replacement of “insufficient availability” by “absence (including incompleteness) of goods” (“отсутствие (включая некомплектность)”))
 - Correction of “absence of guilty persons” to inability to identify guilty persons
- Raising the deductibility threshold to 1% of revenue
- Introduction of transparent structure of the list of goods to be approved by the Government

- *Business meeting*

Arseny Seidov

Baker & McKenzie

December 19, 2012

Changes to tax treaty network

- Protocol to DTT with Cyprus entered into force
 - Increase of capital requirement from USD 100K to EUR 100K for 5% dividend withholding tax – check the need to recapitalize
 - Pitfalls for real estate holding companies
 - applicable after 4 years
 - could be avoided through careful structuring
 - Exchange of information
 - mind domestic procedure rules for actual application
 - Limitation on benefits
- Protocol to DTT with Switzerland entered into force
 - Generally similar provisions
 - Interest withholding tax rate reduced to 0%
- Protocol to DTT with Luxembourg awaiting ratification

Use of Cyprus for participation exemption regime

- Cyprus removed from the Ministry of Finance “black list of offshore jurisdictions” as of January 1, 2013
- Now 0% profits tax rate for inbound dividends under participation exemption
- Cyprus can become favorable jurisdiction for offshore securities trading
 - but mind business purpose and economic substance tests
- No longer “automatic” treatment of transactions with Cyprus-based unrelated entities as controlled transactions for transfer pricing purposes

Beneficial ownership concept

- No beneficial ownership rules in the Russian Tax Code
- “Technical” application of treaties based on residency tests
 - scarce attempts to disallow treaty benefits by declining residency status to Cyprus-based companies under effective management test
- MinFin guidance letters on “actual owner of income”, ADRs, Eurobonds
- Draft amendment to Article 7 of the Russian Tax Code (MinFin, 2009)
 - DTT should not apply if the beneficial owner does not reside in the treaty jurisdiction
- Draft law on taxation of offshore transactions (FTS, 2012)
 - Intent to combat abuse of tax treaties and encourage information disclosure on beneficial owners and introduce quasi-CFC rules
 - New concepts of “beneficial owners” and “offshore zones”
 - New expense deductibility and information disclosure rules
- Draft laws addressing tax avoidance involving offshore intermediaries / conduits and defining beneficial owner concept and establishing CFC rules to be prepared by **4th quarter 2013**

Post-Naryanmarneftegas era

- Reclassification beyond literal reading of statutory rules
- Double tax treaty principles not always taken into account
- New term “conduit entity” introduced at trial and appeal levels
- Rising role of Commentary to OECD Tax Treaty Model in tax audits and court proceedings
- Greater attention of FTS to beneficial ownership, conduit entities, treaty shopping concepts and transactions with “offshore” entities
- *Eastern Value Partners v. Federal Tax Service (2012)*
 - 1st instance in August 2012 and appeal in December 2012 in favor of the taxpayer, but decision might be further challenged before the federal circuit court – need to monitor developments

Risks in legislative vacuum

- Adjusted or alternative judicial interpretation of terms “*beneficial owner*” and “*entity having actual right to income*”
- Extended and more sophisticated reading of court-made doctrines of “*business purpose*” and “*unjustified tax benefits*”
 - risk of long-term benchmarking to tougher standards (e.g. objective prong of the economic substance doctrine in the United States)
 - adverse shifts in macroeconomic drivers of fiscal policy
- Litigation strategy and tactics, if built solely on general tax principles, rather than on documented substance
- No common or ideal approach and case specific

Mitigation alternatives

- Think about substance in advance of tax structuring
 - existing long-term transactions (e.g. financing, IP licensing) may be at risk
 - revisit structures and approaches to transactions regularly
- Benchmark to more advanced tax jurisdictions, subject to maturity of tax laws and court system
- Factor in potential tax exposure for risk management and decision models purposes
- Retroactive structuring may be also an option
 - mind amending tax returns backwards and reopening years for repeat audit
- Use of the beneficial ownership language under Luxembourg DTT as safe harbor?

- *Business meeting*

Evgeniy Timofeev

Goltsblat BLP

December 19, 2012

- *Dirol Cadbury (2009) and Leroy Merlin (2012) – yes, bonuses (like volume based) ARE retroactive price decreases*
- *The Law as of 1/10/2011: Buyer to pay, settle with Seller, Seller to recover – this only with a corrective VAT invoice*
- *The Government as of 1/04/2012: Here comes the mandatory form which you cannot use (1 corrective invoice per each original replicating the latter's contents and tripling it)*
- *Where do we go from here?*

- *The ideal solution: bonuses are VAT neutral (and have always been in the relevant past)*

- *The draft law with a retroactivity clause sits with the Government/ Parliament and will remain there at least till spring (will it make it? what will it look like in the end? will the retroactivity clause survive?)*

- *The workable solution: sue the Government and issue one corrective VAT invoice per bonus, not per original VAT invoice*

- *This is hassle but at least one can live with it*

- *And it is out of hands of the Government*

▪ *Follow the case “Jaguar Land Rover et al vs. Government of the Russian Federation” heard by Supreme Arbitration Court*

- Preliminary hearings are over

- 27 December this year – the Judgment Day!

(if it comes to it - the end of the world is closer)

- *Business meeting*

Nikolay Baranov

Noerr

December 19, 2012

Thin capitalization rules – key rules and developments of 2011

- ***Russian legislation:***

- Controlled debts: 20% ownership (or other criteria);
- Debt-to-equity ratio: 3:1 (or 12,5:1);
- Reclassification to dividends: deductibility limits, WHT on dividends.

- ***DTT protection:***

- Non-discrimination provisions;
- No direct limitations (except for arm-length principal);
- Unlimited deductibility (e.g. protocol to Russia-Germany DTT).

- ***Case Severny Kuzbass:***

- Non-discrimination provisions of the DTTs do not exclude application of Russian thin capitalization rules (e.g. if arm-length principal is not followed).

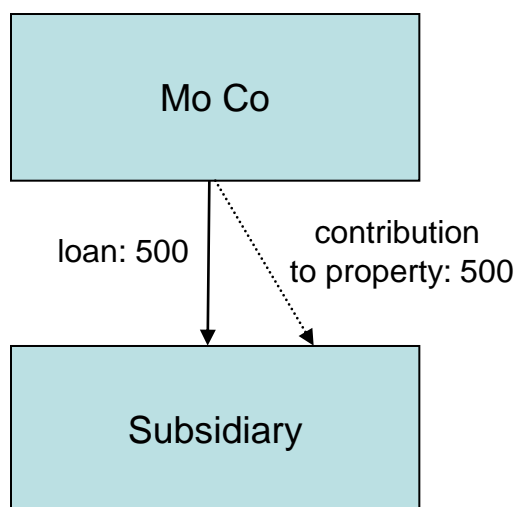
- ***Case Narjanmarneftegaz:***

- Russian thin capitalization rules may apply to foreign “sister” loans;
- Specific circumstances.

Further developments of 2012

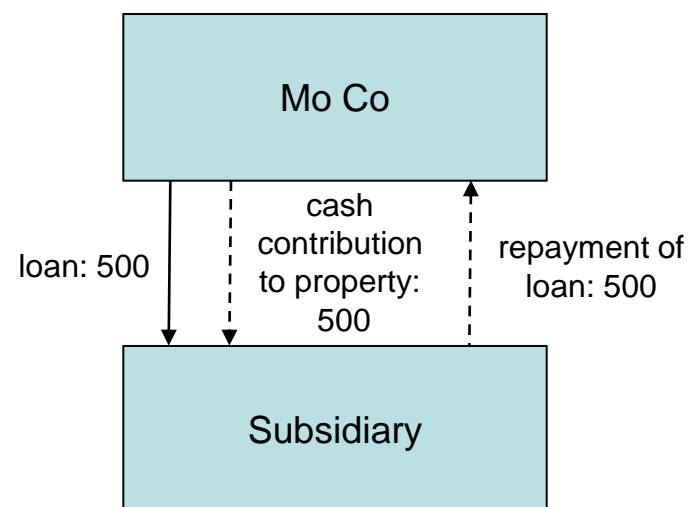
- ***Positive practice: unlimited deduction under protocols to DTT***
 - Cases: Continental Tyres RUS, Wintershall Holding, Federal Mogul;
 - Facts are different from those described in Severny Kuzbass case;
 - Tax authorities did not argue arm-length terms of loans.
- ***Negative practice: application of Severny Kuzbass case***
 - Many cases: e.g. SRV-Papula, Terminal Sibir, Telenedelya, Snezhnoe;
 - Significant gearing, interrelations between lender and borrower, no repayment of the loan, struggle with tax minimisation;
 - Commerzbank case: protocol can not be applied; comparison with statistical data of Central Bank RF.
- ***Risks protection ?***
 - Sister companies;
 - TP documentation;
 - Financial restructuring (several solutions).

➤ **Option 1. Non-cash solution**



| | Before | After |
|-------------------------|--------|-------|
| Chapter capital | 100 | 100 |
| Reserves (add. capital) | - | 500 |
| Retained earnings | (200) | (200) |
| | <hr/> | <hr/> |
| Equity and reserves | (100) | 400 |
| Loan | 500 | - |

➤ **Option 2. Cash solution**



| | Before | After |
|-------------------------|--------|-------|
| Chapter capital | 100 | 100 |
| Reserves (add. capital) | - | 500 |
| Retained earnings | (200) | (200) |
| | <hr/> | <hr/> |
| Equity and reserves | (100) | 400 |
| Loan | 500 | - |

- *Business meeting*

Vadim Zaripov

Pepeliaev Group

December 19, 2012

Loyalty Partners Vostok case: taxation of customer loyalty programs

SAC Resolution of 26.06.2012 #16370/11

Tax authority and a tax payer can enter into amicable settlement agreement to settle a tax dispute.

Ulyanovsk Motor plants case: non-withholding of VAT by a tax agent

SAC Resolution of 03.04.2012 #15483/11

A tax agent which did not withhold VAT when paying to a foreign counterparty, shall calculate and pay VAT to the budget. This VAT can be further recovered.

Kamsky plant case: actual amount of the tax benefit

SAC Resolution of 03.07.2012 #2341/12

The actual amount of the tax benefit received by a buyer from non bona-fide suppliers shall be determined based on market prices



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