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LEGAL CERTAINTY AS A CONDITION FOR THE APPLICATION OF REGULATIONS ON TAX BENEFITS (USING THE EXAMPLE OF THE IT INDUSTRY)**

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Subject. The article examines the challenges of implementing and enforcing industry-specific tax incentives using the example of the IT industry. The specifics of the legal framework governing tax incentives for IT companies, which have undergone significant revisions since 2021, are discussed. Focus is placed on ensuring the availability of instruments providing legal certainty in this area.

The purpose of the study. The aim is to identify existing legal issues that limit the application of tax incentives. With regard to the identified gaps in legislation and suboptimal instruments used in establishing IT incentives, measures are proposed to address the situation and increase legal certainty.

Methodology. The emphasis is placed on using general scientific methods, such as analysis and synthesis, as well as specific scientific methods like the formal legal method and the method of legal modeling.

Conclusions. It is concluded that there are few effective mechanisms in the legislation to address promptly the legal uncertainty arising when implementing tax incentives for IT companies. The legal aspects of the qualification of an IT company established within a group as an artificial structure separated for the purpose of applying tax incentives are discussed. The issue of suboptimal structures for current limitations on income derived from IT activities has been identified, and proposals for resolving this issue have been made, including through improvements to tax legislation.

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1. Introduction

Tax incentives are an essential tool for achieving the regulatory objectives of taxation. The literature notes that with the help of tax benefits, in particular, the modernization of the structure of the economy is carried out [1, p. 54], while the introduction of benefits is conditioned both by the needs of maintaining economic development and solving social problems [2, p. 129]. Tax benefits have a positive impact on the development of various areas of public relations. For example, tax benefits are mentioned as a major way in which tax law affects environmental protection [3, p. 122].

In 2021-2024, the legislator paid special attention to tax benefits for the information technology industry (hereinafter referred to as IT), the task of increasing the volume of which was set at the state level [4, p. 100]. It is planned to maintain these benefits in the future. As indicated in the Main Directions of the Budget, Tax, Customs and Tariff Policy of the Russian Federation for 2025 and for the planned period of 2026 and 2027, in order to increase investments in domestic IT solutions and increase the level of "digital maturity" of key sectors of the economy and the social sphere, a favorable tax regime will be applied for organizations operating in the field of IT or radioelectronic industry, including a unified reduced social security rate, a reduced the corporate income tax rate, as well as an increased expense coefficient for domestic digital solutions when calculating income tax[1].

IT companies have been granted tax benefits that were not so significant before [5, p. 146], and other support measures, bans and restrictions have been established on carrying out a number of state control measures against them.

The use of benefits reduces the tax burden on businesses, so the tax authorities pay extra attention to the legality of their use. For this reason, it is particularly important to have legal guarantees that ensure the certainty of the requirements established for the application of benefits, the predictability of administrative approaches, and the protection of the right to use benefits in the event of a dispute. As the Constitutional Court of the Russian Federation has rightly noted, "in order to organize the planning of economic activity, a taxpayer must be informed in advance about the composition and content of his tax obligations," and "the costs of paying fiscal payments should not have sudden character."[2]

The article provides an overview of the issues of applying legislation on tax benefits provided to IT companies (hereinafter referred to as IT benefits). In March 2025, the moratorium on tax audits of IT companies is coming to an end, which will lead to an increase in the number of audits, which were conducted only in some cases during the moratorium period [6, p. 132]. In addition, since the beginning of the implementation in 2021 of the tax maneuver initiated by the President of the Russian Federation[3] in the IT industry, new legal issues have emerged.

2. Law enforcement issues arising from the application of IT benefits

Taxpayers often experience difficulties when using IT benefits. First of all, it is a matter of matching income from IT activities with the list established by the Tax Code of the Russian Federation (hereinafter referred to as "the Tax Code") (such income is called specialized or qualified). The importance of this subject is supported by numerous letters from the Ministry of Finance of Russia[4]. Even at the start of the IT

[1] URL: https://minfin.gov.ru/ru/document?id_4=308751-osnovnye_napravleniya_byudzhetnoi_nalogovoi_i_tamozhenno-tarifnoi_politiki_rossiiskoi_federatsii_na_2025_god_i_na_ planovyi_period_2026_i_2027_godov (date of request: 02.10.2024).

[2] Resolution of the Constitutional Court of the Russian Federation dated February 28, 2019 No. 13-P.

[3] On the tax maneuver in the IT industry // Ministry of Finance of Russia: official website. URL: https://minfin.gov.ru/ru/press-center/?id_ 4=37115-o_nalogovom_manevre_v_it-otrasli (date of request: 20.07.2024).

[4] For example, letters of the Ministry of Finance of the Russian Federation dated December 26, 2019 No. 03-15-06/102240, dated October 14, 2020 No. 03-15-06/89541, dated July 14, 2023 No. 03-03-06/3/66138, dated August 31, 2023, no. 03-03-06/1/83043, dated September 28, 2023, No. 03-03-06/1/92449.

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maneuver in 2021, the opinion was expressed that the main disputes would relate to meeting the conditions for receiving a certain percentage of income from specific types of activity [7, p. 74].

The minimum level of qualified income from the company's IT activities, which is a condition for obtaining IT benefits, is 70% as of 2022 (Clause 1.15 of Article 284 of the Tax Code). In defining the range of relevant income taken into account when calculating the share of qualified income, the legislator did not include new industry terms in the text of the Tax Code, including those that reflect the process of creating and maintaining software. The changes to the Tax Code were not accompanied by clarification of industry terminology standards[5]. This makes it difficult to distinguish between some terms, which may affect the legal classification of income. The literature suggests the need to introduce "exhaustive definitions of the concepts of 'development', 'adaptation', 'modification', 'installation', 'testing', 'maintenance'" [8]. The authors also point out the existence of gaps in the law, using the terms "financial service" and "banking service" as examples [9, p. 128].

In the absence of a definition for these and other terms, taxpayers and law enforcement agencies are guided by letters from the Ministry of Finance of Russia[6], which are not normative legal acts. This allows a public authority to change and clarify their position. However, it does not add legal certainty. The described situation is similar to that of letters from the Federal Tax Service of Russia, which are not formally normative legal acts, but in fact have regulatory properties [10, p. 72].

In our opinion, a solution to this problem would be to update the relevant IT standards and include new definitions in tax legislation.

3. The tax aspect of separating an IT company within a group

Another significant issue is the qualification of the separation of an IT company applying for tax benefits within a group of interdependent persons. Since a benefit is a special right of a person, the method of exercising this right must be predictable [2, p. 134]. However, already at the initial stage of the IT maneuver, a question arose regarding eligibility for IT benefits for intra-group companies, that is, members of a group of related entities. The reason for this was the massive allocation of IT departments to independent legal entities in order to meet the requirement for a share of qualified income.

To assess the feasibility of creating an IT company applying benefits within a group of companies, it is necessary to answer two questions:

– Is the creation of a company that works solely for the needs of its group or with limited external sales, a distortion of information about the facts of economic life (clause 1, Article 54.1 of the Tax Code)?

– Does such a step comply with the provisions of clauses 1 and 2 of Article 54.1 of the Tax Code, which prohibit obtaining tax savings as a primary goal of the transaction?

In a letter dated March 17, 2022, № SD-4-2/3289 "On tax benefits for IT businesses", the Federal Tax Service of Russia explained that the main purpose test does not apply to IT companies that were created as a result of reorganization. The Federal Tax Service of Russia has acknowledged the fact of tax savings due to the creation of an IT company within a group and has indicated that, within the framework of tax control, this effect should not be taken into account in the absence of any other circumstances.

Let's return to the first, most complex issue. The separation of an IT company in a group is often considered in terms of "splitting up" a business, where several new entities are created based on an existing organization in order to maintain a preferred special tax regime [11, p. 42]. This is one of the instruments for reducing the tax burden. It is

[5] GOST R ISO/IEC 14764-2002 "Information Technology. Software maintenance" (adopted and put into effect by Resolution No. 248-st of the State Standard of the Russian Federation dated June 25, 2002); GOST 28806-90 "Software quality. Terms and definitions" (approved and put into effect by Resolution No. 3278 of the USSR State Standard of December 25, 1990), etc.

[6] For example, letters of the Ministry of Finance of the Russian Federation: dated January 27, 2022, No. P11-2-05-200-3571, dated October 11, 2021, No. P11-2-05-200-44970, dated September 7, 2021, No. P11-2-05-200-38749.

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achieved by dividing the main organization into new artificially created entities in order to apply preferential tax regimes to them [12, p. 95]. It should be noted that Article 54.1 of the Tax Code is most often used in tax disputes related to the "splitting up" of businesses and the involvement of "one-day" companies [13, p. 40].

In a situation where a separation of an IT company is artificial, the company itself is not subjective. That is, it continues to be a structural unit of another entity, but the shell of the legal entity is only required to comply with conditions for applying tax IT benefits.

The difficulty of finding a legal solution to the problems of "business splitting" and using IT benefits lies in the impossibility of establishing a closed list of criteria for indicating a breach, due to the variety of relations between parties. As a result, in almost every case involving "business splitting", it all comes down to an examination of the actual circumstances.

In a letter dated February 20, 2021, No. SD-4-3/2249@, the Federal Tax Service of Russia also considered the issue of artificially separating an IT company from a group of companies through the prism of "business splitting":

– the establishment of an IT company (the letter considered a creation through reorganization)[7] should be investigated for signs of "business splitting", when the sole purpose of these actions is to obtain the right to apply reduced tax rates;

– in the absence of distortions aimed at creating the appearance of compliance with the conditions for applying reduced tax rates, creating an IT company is a legitimate business goal consistent with the goals of introducing reduced taxation.

On the one hand, the position of the Federal Tax Service of Russia indicates that there is no prohibition on the use of IT benefits by intra-group companies. On the other hand, the difficulty of proving the independence of an IT company is obvious. With regard to disputes about "business splitting", it should be noted that the key factor is not the business goal, but the independence of organizations [14, p. 92].

The functioning of an IT company within a group implies a high level of integration with intra-group customers, relations may be less formal than with external counterparties (at the same time, an IT company will be a real economic entity and corporate control over the intra-group IT company may be significant due to significant financial costs).

4. Abuse of the right to an IT tax benefit

The tax authorities are reviewing the application of tax benefits to ensure that there is no abuse. They are using additional criteria based on an assessment of factual circumstances. The above indicates a potential violation of the principle of certainty in taxation, as outlined in clause 6 of Article 3 of the Tax Code. A.V. Demin notes that significant uncertainty in tax law is unacceptable, not only in terms of predictability of law enforcement but also in the very essence of tax regulation which can only be carried out when it is sufficiently definite, stable, and consistent [15, p. 20].

In practice, the taxpayer is forced to rely only on their own assessment of the facts of economic life. The Ministry of Finance of the Russian Federation, in its capacity, provides explanations on the application of tax legislation of the country when considering requests from taxpayers. However, it does not assess individual economic situations, nor is the Federal Tax Service authorized to do so. The institution of motivated opinion applies only to taxpayers who have switched to tax monitoring. Conducting a desk tax audit of a declaration does not limit the tax authority's right to change its mind based on the results of an on-site audit. In such a situation, taxpayers who have applied for benefits must wait for a pre-audit analysis and, possibly, an on-site tax audit. The depth of the audit covers three years prior to the year when the decision was made to conduct it.

The question arises about ways to reduce uncertainty. Is it possible to apply clause 7 of Article

[7] With the introduction of paragraph 1.15 of Article 284 and paragraph 5 of Article 427 of the Tax Code, which prohibit the use of IT benefits for companies created after July 1st, 2022 as a result of reorganization, and taking into account amendments made in 2024 regarding limited opportunities for reorganization, there is a risk that creating a new legal entity (with transfer of personnel to it) may be considered circumventing the ban on use of IT benefits. At the moment, there is no established practice for applying this approach.

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3 of the Tax Code, which states that all unavoidable doubts, contradictions, and ambiguities in tax legislation are interpreted in favour of the taxpayer? This question is based on, among other things, the examples given of the need to assess the circumstances of interaction between companies within a group. It should be noted that concepts such as "ambiguity", "doubt" and "contradiction" require separate research regarding this topic, as they are not always clearly distinguished in judicial practice [16, p. 150].

We believe that the provisions of clause 7 of Article 3 of the Tax Code are not suitable for the situation under consideration. Firstly, the provisions which establish IT benefits (clause 1.15 of Article 284 of the Tax Code) do not contain irreparable defects. The question of the eligibility to use benefits does not arise from the immediate conditions of their application, but rather from the provisions of Article 54.1 of the Tax Code, which regulates the limitations on the exercise of rights in calculating the tax base and amount of tax. This provision is of a general nature, focusing on countering tax abuse, which, until the inclusion of this article in the text of the Tax Code, was implemented through the concept of bona fide taxpayer developed by the Constitutional Court of the Russian Federation[8] and later the concept of unjustified tax benefits[9].

Secondly, even if we assume that there is a legal justification for applying the principle of bona fide taxpayer in the case of IT benefits, the provision of protection for taxpayers would be limited. The refusal to apply tax benefits based on the artificiality of separating an IT company qualifies the taxpayer's actions as intentional[10], and assesses them through the concept of abuse of law[11]. Such persons belong to dishonest taxpayers who are denied the right to invoke the provisions of clause 7 of Article 3 of the Tax Code[12]. Recognizing this approach as justified, the researchers note that, with a different approach, tax "schemes" "would inevitably be recognized as legitimate, since taxpayers could always interpret tax legislation in their favor and the courts would be obliged to support them." [13] [17].

However, in such a situation, the taxpayer must first prove that the actual circumstances of the business activity do not indicate abuse of the right to a tax benefit. Thus, the presumption of bona fide taxpayer is hardly an effective instrument of legal protection in this situation under consideration.

The concept of abuse of law in the tax sphere is actively used in disputes over business splitting, as has already been mentioned. According to the Supreme Court of Russia, such actions may be "classified as abuse of law"[14]. In the case of an IT tax benefit, a company is separated to fulfill the requirement for a share of income, i.e. the mechanisms for taxpayers to reduce the tax burden are similar, and the same legal qualifications may be expected.

It cannot be said that the concept of abuse of law has been significantly developed for the field of tax law. Abuse of law was described very concisely by A.L. Kononov in his dissenting opinion to the Decision of the Constitutional Court of the Russian Federation dated 14 July 2005, No. 9-P, stating that "abuse implies unfair actions within one's rights, and an offence - beyond its limits".

Thus, the existence of abuse of law in the field of

[8] Resolution of the Constitutional Court of the Russian Federation No. 24-P dated October 12, 1998, definitions of the Constitutional Court of the Russian Federation No. 441-O, No. 442-O dated December 4, 2003, No. 138-O dated July 25, 2001.

[9] Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation dated October 12, 2006 No. 53 "On the assessment by arbitration courts of the justification to receive a tax benefit for a taxpayer."

[10] Letter from the Federal Tax Service of Russia dated August 16, 2017 No. CA-4-7/16152@.

[11] According to the position of the Judicial Board on Economic Disputes (hereinafter referred to as the SCES) of the Supreme Court of the Russian Federation, expressed in Ruling No. 307-ES19-8085 dated September 30, 2019 in case No. A05-13684/2017, the identification of distortions of information about the facts of economic life implies additional tax assessment in such a way as if the taxpayer had not abused the right.

[12] Definition of the Constitutional Court of the Russian Federation dated July 25, 2001 No. 138-O.

[13] Cit. according to the SPS "ConsultantPlus".

[14] Ruling of the Judicial Board for Economic Disputes of the Supreme Court of the Russian Federation dated July 21, 2022 No. 301-AC 22-4481 in case No. A 29-2698/2020.

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tax benefits can be seen in cases where a taxpayer purposely creates the appearance of fulfilling conditions for receiving benefits, while, in the absence of such distortions, preferential conditions should not be applied to that company. In this context, it seems reasonable to conclude that "the problem of abuse of law may be caused by the absence of an explicit intention on the part of the legislator or its designation through evaluative terms[15]" [18].

Considering the above, even if we come to the conclusion that there is some ambiguity in the rules that establish a tax benefit for IT companies (in terms of the legality of their use within intra-group companies), a taxpayer whose actions will be assessed for signs of abuse of law will actually not be able to claim protection under clause 7 of Article 3 of the Tax Code. Distinguishing intentional actions from close intra-group interactions of an IT company with interdependent customers seems difficult.

5. Risks of abuse of the share of unqualified income

Another significant issue is the acceptable limits for an IT company to conduct other activities, the income from which will be taxed on preferential terms if their share does not exceed 30% of the total income.

If the uncertainty in the example above is related to the lack of legal boundaries for applying benefits, then this example indicates a suboptimal choice of legal instrument for establishing it. This is a requirement according to which in order to receive benefits the percentage of income from IT activities must be at least 70%[16] of the total income in the reporting period. Similar instruments are used within the framework of a special tax regime the unified agricultural tax [19, p. 217], when taxing persons in the field of public catering, medical, and educational activities, and other.

The reasons for setting a requirement for IT revenue below 100% are varied. There is some one-time income that should not affect the eligibility to apply for the benefit, but it is impossible to provide a complete list of these income[17]. For example, these include income from the sale of fixed assets (such as obsolete office equipment), in the form of gratuitously received property, from the restoration of unused reserves, etc. In addition, IT companies receive income from their main activities, which, however, are not qualified IT income (from the provision of certain services to telecom operators, marketplaces, etc.).

Therefore, the threshold for qualifying IT income below 100% raises the question of acceptable limits for the use of 30% of total income. The law does not prohibit IT companies from engaging in other activities. Clause 1.15 of Article 284 of the Tax Code only refers to income from an "organization operating in the field of information technology."

The importance of the issue increases proportionally to the scale of an IT company's operations. For example, if the company has a total income of 10 billion rubles a year, other income may account for up to 3 billion, while retaining the right to apply tax benefits, including on that income. Does this mean that a taxpayer has the right to engage in other activities and receive tax savings, or are the 30% criteria set exclusively for one-time and non-core income, but from IT activities?

To develop a legal position, it is necessary to pay attention to a number of aspects. Satellite activities may satisfy the needs of the IT company itself, other companies in the group, or they may not be related to these needs at all. It can also be assumed that the company's activities were carried out long before the IT maneuver. Should these aspects be taken into account in order to assess the legality of using 30% of income, or should we assume that using benefits requires any activity that is not directly related to IT to be transferred to other companies?

When answering this question, it is necessary to refer to the objectives of introducing the regulation. In the literature, one can find the position that "a tax

[15] Cit. according to the SPS "ConsultantPlus".

[16] Initially, the share of income from IT activities should not have been lower than 90%, but from January 1, 2022, the minimum limit was lowered to 70% as a result of amendments to clause 1.15 of Article 284, clause 5 of Article 427 of the Tax Code by Federal Law No. 321-FZ dated July 14, 2022 "On Amendments to part Two of the Tax Code of the Russian Federation".

[17] The provisions of clause 1.15 of Article 284 of the Tax Code directly exclude from the calculation of income only currency exchange rate differences and certain types of subsidies.

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benefit always has a purpose, since it has a regulatory and organizational impact on public relations" [20, p. 35], as well as the thesis that when the goal is achieved, the benefit is subject to cancellation [21, p. 121]. In corporate taxation, it is difficult to give an example of a benefit that would be established without the purpose of stimulating any branch of the economy. The Supreme Court of the Russian Federation emphasizes the need to take into account the goals pursued when establishing a tax benefit[18]. Against the background of this uncertainty, the question arises about the compliance of regulation with the principles of tax law, which "determine the requirements for the establishment, introduction and collection of taxes from the point of view of law" [22, p. 77].

The formal approach, which seems appropriate, allows us to say that the law does not set restrictions for other activities. The Russian Ministry of Finance noted that if the condition on the share of income from IT activities (70%) is met, the reduced rate "applies to the entire tax base."[19] However, another approach cannot be ruled out, in which conducting non-IT activities by an IT company in order to obtain benefits would be considered an abuse of law.

Of course, not all situations require a high level of detail in the application of the rule of law. However, we believe that, in the case of establishing tax benefits, a detailed description of the conditions for their application is justified. In this case, it is appropriate to talk about the presence of a regulatory gap, which, until it is filled by the legislator, we consider necessary to interpret in favor of the taxpayer.

6. Conclusion

Due to the need to phase out imports and ensure IT sovereignty, tax benefits for the IT industry play their stimulating role, encouraging taxpayers to create new companies and expand existing ones. However, the mechanism of legal regulation of tax relations requires improvement in order to clarify the conditions for applying IT benefits. It is also important to create an opportunity for taxpayers applying benefits to receive an opinion from tax authorities on the legality of their application in a specific tax period within a shorter timeframe (than the depth of an on-site tax audit).

It is proposed to formulate a rule according to which, when establishing a tax benefit, the requirement for a certain type of income share assumes that the taxpayer is granted the right to engage in other types of activity with preferential tax conditions extended to them (unless explicitly specified otherwise). Such a rule can be introduced with respect to a specific benefit (i.e., clause 1.15 of Article 284, clause 5 of Article 427 of the Tax Code), or it can be formulated as universal, for example, in the framework of a new Article 56.1 of the Tax Code, which could accumulate a number of general legal approaches to the establishment of tax benefits.

Another solution may be the introduction of a requirement for separate accounting of income from subsidized and other activities. This approach would exclude income from activities not mentioned in the law from preferential taxation.

The study has shown that when applying tax benefits, taxpayers do not have immediate mechanisms to confirm the legality of their applications, especially in cases where such confirmation is associated with the need to examine the array of factual circumstances of the organization's operations. In order to stimulate economic activity in sectors of the economy which are priority for the state, it is advisable to provide organizations and entrepreneurs with the possibility to obtain confirmation of the legality of applying for a tax benefit immediately after submitting a tax return for the relevant tax period. The forms of implementation of this right can be different - from thematic tax audit to receiving targeted, a legally binding clarification. Currently, this opportunity is only available to companies that have switched to tax monitoring (a motivated opinion, earlier closure of the tax period).

The implementation of the proposed measures will increase legal certainty and readiness to apply tax benefits, as the horizon of legal assessment of the behavior of taxpayers applying for benefits will be significantly reduced, which means that the scale of potential risks will decrease. At the

[18] Ruling of the Judicial Board for Economic Disputes of the Supreme Court of the Russian Federation dated October 25, 2023 No. 306-ES23-184 in case No. A57-22856/2021.

[19] Letter of the Ministry of Finance of the Russian Federation dated July 13, 2023 No. 03-03-06/1/65629.

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same time, it is expected that government will be able to achieve greater effect from tax policy measures due to an increase in number of taxpayers willing to implement projects supported by tax incentives in industries.

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