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ВЛИЯНИЕ ИНТЕРНАЦИОНАЛИЗАЦИИ НАЛОГОВОГО ПРАВА НА РОССИЙСКОЕ ПРАВОПРИМЕНЕНИЕ В СФЕРЕ КОРПОРАТИВНОГО НАЛОГООБЛОЖЕНИЯ[1]

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В статье рассматриваются тенденции правового регулирования отношений в сфере корпоративного налогообложения с участием иностранного элемента. Выделены основные вопросы, связанные с реализацией норм, регулирующих налогообложение прибыли юридических лиц: налогообложение выплаты роялти, долгового финансирования и внутригрупповых расходов, применение правил тонкой (недостаточной) капитализации, трансфертное ценообразование. Автор приходит к выводу о росте роли решений судов, особенно высших судебных инстанций. Наиболее актуальными и вызывающими наибольшее число споров с налоговыми органами вопросами являются налогообложение выплаты роялти, долгового финансирования и внутригрупповых расходов.

Ключевые слова: налоговое право, прямые налоги, налог на прибыль, правоприменение, судебная практика

INFLUENCE OF INTERNATIONALIZATION OF TAX LAW ON RUSSIAN TAX LAW ENFORCEMENT IN THE AREA OF CORPORATE TAXATION

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Subject. The influence of internationalization of tax law on Russian tax law enforcement in the area of corporate taxation is considered in the article.

The purpose of the paper is to analyze influence of internationalization of tax law on Russian tax law enforcement in the area of corporate taxation.

Methodology. The author uses methods of theoretical analysis, particularly the theory of integrative legal consciousness, as well as legal methods, including formal legal method and methods of comparative law.

Results, scope of application. The development of Russian tax legislation is influenced by acts of international organizations, primarily the Action Plan aimed at combating base erosion and profit shifting (BEPS).

Trends of regulation of corporate taxation in relationships with participation of a foreign element are considered in the article. The main issues of realization of norms in the area of corporate direct taxation are brought into light, and namely, taxation of royalties, intra-group expenses, thin capitalization rules and transfer pricing. Tax agreements concluded by the Russian Federation do not contain special rules aimed at combating abuses (in contrast, for example, from European anti-avoidance rules).

In recent years Russian tax law introduced institutions that had been established and applied in the tax law of foreign countries. These processes are moving forward and are

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characterized by frequent changes of legislation, which indicates that the concept of deoffshorization and implementation of the BEPS plan is not always elaborated at the stage of adoption of bills.

Conclusions. The author comes to the conclusion that the most relevant and most controversial issues are taxation of payment of royalties, debt financing and intra-group expenses. The practice of applying the CFC rules is just starts forming. In addition, there is a tendency to increase the quality and quantity of information sources used by tax authorities to collect evidence, including the expansion of the practice of information exchange.

Key words: tax law, direct taxes, corporate income tax, law enforcement, judicial practice

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Introduction. The legal regime of taxation of profit and income in the Russian Federation is influenced by many factors, including the internationalization of tax law.

The development of Russian tax legislation is influenced by acts of international organizations, primarily the Action Plan aimed at combating the erosion of the tax base and profit shifting (hereinafter - the BEPS plan). As part of its implementation, the tax legislation of the EU and its member states is also changing. There are also decisions of the European Court of Justice on thin capitalization which do not concern third countries and therefore, they should not be directly applied to Russian rules. At the same time, the integration nature of relations with the EU allows the Russian legislator to adjust legal norms governing certain tax relations in accordance with EU standards, while law enforcement agencies should take into account the practice of the EU Court when resolving the relevant disputes.

Let us highlight several areas of legal regulation of tax relations, which were most affected by international economic integration and foreign tax practice.

1. CFC rules and tax residence of legal entities.

The Federal Law No. 376-FZ of November 24, 2014 "On Amending Part One and Two of the Tax Code of the Russian Federation (regarding the taxation of profits of controlled foreign companies and the income of foreign organizations) introduced two new institutions into the Russian tax system, and namely CFC Institute and the Institute of Corporate Tax Residence. These institutions are aimed at counteracting tax evasion in the Russian Federation and diluting the Russian tax base.

When developing the CFC rules, some OECD recommendations from the BEPS plan are taken into account: a broad definition of the CFC; mechanism of distinguishing between active and passive profit of the CFC; the attribution of the profit of the CFC to the controlling person in accordance with its share; threshold of low level of taxation on the basis of effective rate; the release of a CIC with a small profit margin, etc.

According to Article 25.13 of the Tax Code, a foreign company controlled by a foreign company is recognized as a foreign organization that simultaneously satisfies all of the following conditions:

1) the organization is not recognized as a tax resident of the Russian Federation;

2) the organization's supervisory entity is an organization and (or) an individual recognized as tax residents of the Russian Federation.

The second important achievement of the Russian tax legislator was the reform of the institution of tax residency of organizations and its consolidation taking into account the place of management, carried out simultaneously with fixing in the RF Tax Code the rules governing the

CFC institute. Management test takes into account the close economic and commercial ties of the company with the state, which may be indicated by the presence of management and control bodies, the place of residence of its main shareholders or the main place of business [1. P. 103] .

In accordance with clause 1 of Article 246.2 of the Tax Code, tax residents of the Russian Federation are:

1) Russian organizations;

2) foreign organizations recognized as tax residents of the Russian Federation in accordance with the international treaty of the Russian Federation on taxation issues - for the purposes of applying this international treaty;

3) foreign organizations, the management of which is the Russian Federation, unless otherwise provided by the international treaty of the Russian Federation on taxation.

On the basis of clause 2 of Article 246.2 of the RF Tax Code, the place of management of a foreign organization is the Russian Federation, provided that at least one of the following conditions is observed with respect to the specified foreign organization and its activities:

1) the executive body (executive bodies) of the organization regularly carries out its activities with respect to this organization from the Russian Federation. The regular implementation of activities does not recognize the performance of activities in the Russian Federation in a volume substantially less than in another state (states);

2) the main (managerial) officials of the organization (persons authorized to plan and supervise activities, manage the activities of the enterprise and bear responsibility for this) primarily carry out the management of this foreign organization in the Russian Federation. The management of the organization recognizes the adoption of decisions and the implementation of other actions relating to the issues of the current activities of the organization, which fall within the competence of executive management bodies.

In accordance with clause 8 of article 246.2 of the RF Tax Code, foreign organizations that have a permanent location in a foreign country and operate in the Russian Federation through a separate subdivision have the right to independently recognize themselves as tax residents of the Russian Federation in compliance with the provisions of the Tax Code and other normative legal acts of the Russian Federation. In this case, the specified foreign organization is not recognized as being controlled by a foreign company on the basis of Article 25.13 of the Tax Code.

Thus, foreign organizations are recognized as payers of income tax if they:

- carry out their activities in the Russian Federation through permanent missions and receive income from sources in Russia;

- do not carry out activities in the Russian Federation through permanent missions, but receive income from sources in Russia.

In other words, the criterion for the place of actual management was chosen by the criterion for the recognition of foreign organizations by Russian tax residents. Foreign organizations that are not Russian tax residents are recognized as payers of income tax if they conduct activities in the Russian Federation that result in the formation of a permanent establishment or receive income from sources in the Russian Federation. In accordance with tax legislation and the provisions of the CEDA, the state has the right to tax only a portion of the profits of a foreign organization directly related to its activities through a permanent establishment that can be credited to this permanent establishment.

Thus, according to A.I. Savitsky, "the consistent application of the criterion of non-discrimination to permanent representations of foreign organizations in Russia can significantly change the domestic taxation order by approximating their tax and legal status to residents and eliminating unjustified discrimination" [2. P. 29].

Recognition of a foreign company by a tax resident of the Russian Federation on a voluntary basis may entail a number of problems, for example, attracting the attention of controlling bodies to its activities in previous tax periods. In addition to the risk of establishing a permanent representative office in Russia, the risk of applying transfer pricing rules to concluded

transactions can be noted. At the same time, the legislator does not define the procedure for accounting for accumulated losses and the tax base of assets of a foreign company for the purposes of Russian taxation. All these issues should be taken into account when deciding whether to recognize a tax residency.

Article 246.2 of the Tax Code has undergone several changes. Thus, Federal Law No. 150-FZ of June 8, 2015, "On Amending Part One and Two of the Tax Code of the Russian Federation and Article 3 of the Federal Law" On Amending Part One and Two of the Tax Code of the Russian Federation (regarding the taxation of profits of controlled foreign companies and income of foreign organizations)" amendments were made to the Tax Code of the Russian Federation concerning the taxation of CFCs and symmetrical adjustments in the taxation of controlled transactions.

Comparing the tasks of the CFC rules in the EU and its member states with the CFC rules in the Russian Federation, it can be concluded that the objectives of the CFC rules in the EU are based on the BEPS plan and consist of eliminating the deferral of profit taxation, as well as limiting the artificial placement of passive income in foreign low-tax jurisdiction. At the same time, the main task of the Russian CFC rules is combating tax abuses and deoffshorization of the national economy.

2. National rules aimed at combating tax abuses.

Tax agreements concluded by the Russian Federation do not contain special rules aimed at combating abuses (in contrast to European anti-avoidance rules). However, an important role plays the decision of the RF Supreme Arbitration Court dated October 12, 2006, No. 53 "On Evaluation by Arbitration Courts of the Justification of Receiving a Tax Benefit by the Taxpayer", which is the basis of judicial practice in combating aggressive tax planning. The tax benefit is defined as the reduction in the amount of the tax liability due to a decrease in the tax base, the receipt of tax deduction, application of a lower tax rate, and the right to return or to recover tax from the budget. The submission by the taxpayer to the tax authority of all duly executed documents provided by the legislation on taxes and fees in order to obtain tax benefits is the basis for obtaining it, unless the tax authority has proved that the information contained in these documents is incomplete, unreliable and (or) are contradictory. Thus, the legitimacy of the taxpayer's actions depends on the "validity" or "unreasonableness" of the tax benefit he has received.

A large number of complaints from taxpayers concerns the assessment of the validity of the tax benefit. The Court attaches to economic analysis of decisive importance in assessing the validity of taxpayer's receipt of tax benefits [3. P. 112].

The law enforcer chose the approaches of the business purpose and the prevalence of the content before the form. The business essence of relations and the actual circumstances of economic activity have the advantage over their registration in documents (paragraphs 3, 5, 7 of the Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation No. 53, point 7 of the information letter of the Presidium of the Supreme Arbitration Court of the Russian Federation of December 22, 2005 No. 98). These provisions are equally applicable to both internal and transboundary situations.

The problem of delimiting lawful actions aimed at minimizing taxes, and avoiding paying them for a long time, was also discussed at the level of the Russian legislator. The draft federal law No. 529775-6 "On Amending Part One and Two of the Tax Code of the Russian Federation" was submitted to the State Duma in May 2014. The bill caused criticism of practitioners and researchers [4, 5, 6] and was substantially modified.

The Federal Law of July 18, 2017 No. 163-FZ "On Amending Part One of the Tax Code of the Russian Federation" is aimed at solving the problem of using formally lawful actions for non-payment (incomplete payment) of taxes or obtaining the right to refund them. The general rule prohibiting taxpayers to reduce the tax base and (or) the amount of tax payable as a result of

distortion of information about the facts of economic life (a set of such facts), objects of taxation that are subject to taxation and / or accounting or tax reporting of the taxpayer is fixed.

Instead of the concept of a business purpose, the legislator is already using the concept of the main purpose test. The conditions, under which the taxpayer has the right to reduce the tax base and (or) the amount of the tax payable, are:

1) the main purpose of the transaction (operation) is not non-payment (incomplete payment) and (or) offset (refund) of the amount of tax;

2) the obligation under the transaction (operation) is fulfilled by the party to the agreement concluded with the taxpayer and (or) the person to whom the obligation to execute the transaction (operation) was transferred under a contract or law.

The tax authorities must prove the fact of non-observance of these conditions during the tax control measures.

Article 54 [1] of the Tax Code introduces the concept of "beyond the implementation of the calculation of the tax base rights" and provides that there shall be a decrease in the taxpayer of the tax base, and (or) the amount of tax payable as a result of the distortion of information about the facts of economic life (the set of facts) about the objects tax, to be reflected in the tax and (or) the accounting or tax the taxpayer's financial statements.

After passing this test, the law proposes to further verify compliance with both of two conditions:

the main purpose of the transaction is not the failure (partial payment) and (or) offset (refund) tax amount;

obligations under the transaction (operation) executed person who is a party to the contract concluded with the taxpayer, and (or) a person who has an obligation to execute the transaction (operation) transferred by contract or law.

However, according to V. Zaripov, the text contains at least two serious flaws. Firstly, it is the introduction of the concept of "distortion of facts of economic life" which could be interpreted arbitrarily in any direction. The second innovation is becoming a dangerous presumption of an unjustified tax benefit [7].

The question arises as the ratio of the Tax Code and the Resolution of the Plenum of the Russian Federation № 53: the law applies primarily to issues of transactions with "unscrupulous" counterparts, while the concept of unjustified tax benefit has a much broader application. Thus, the distinction between legitimate and illegitimate embodiments tax optimization by Evidence circumstances unjustified tax benefit is not always possible. The presence or absence of evidence of a taxpayer action confirming their orientation to avoid paying taxes, is indirectly related to the real intentions and the taxpayer's goals, since in reality only the taxpayer can know whether there was his intention to evade taxes in the absence of this the relevant rights and bases.

The doctrine of unjustified tax benefit has all the prerequisites to become an instrument to fight cross-border abuse.

3. Thin capitalization.

There is an interesting dynamics of disputes concerning the application of paragraph 2 of Article 269 of the Tax Code. Thin capitalization cases appeared before the courts in 2004. In 2011 the largest number of them was settled, and namely 47 cases. The same happens with the decisions in which the courts have references to the OECD documents: in 2012 there were already ten cases [8. P. 48-49].

The judicial practice was controversial in years 2012 - 2014. The situation changed dramatically in 2015, when all trials ended in favor of the tax authorities. Although part of the proceedings had been won by taxpayers in the lower courts, higher courts did not support them. In many cases, tax authorities tried to track down the source of funding of foreign affiliated companies or find directions of foreign parent company to provide Russian loan companies through "sister" company, and limited to those that have proven affiliation foreign lender and a Russian borrower.

Respect for the principle of non-discrimination enshrined in Article 24 of the OECD MC and similar articles of DTTs, the application of thin capitalization rules became the subject of much litigation. The case of Coal Company "Northern Kuzbass" [11] became fundamental in resolving similar disputes. The issues of thin capitalization became one of the most important ones in the field of corporate taxation. When considering such disputes the courts formed approaches to the taxation of cross-border transactions. They touched on the topic of discrimination in a slightly different perspective - on the possibility of applying national rules on thin capitalization in the payment of the foreign creditors interest on debt. The Supreme Arbitration Court concluded that the thin capitalization rules do not conflict with the principle of non-discrimination.

The question of application of paragraph 4 of Article 269 of the Tax Code, to situations in which the creditor acted not a foreign company and a Russian company, until recently, remained ambiguous. However, it became a landmark decision in the case of "Novaya Tabachnaya Kompaniya" [12]. The Supreme Court decision pointed out that Article 269 of the Tax Code aims at protecting against tax abuse and does not apply if the abuse is not revealed. Up to this point the tax authorities' frees itself from proving the fact of abuse and do not find out the real meaning of economic relations between parent and subsidiary companies" [9. P. 38].

4. Administrative assistance and the exchange of tax information.

The Russian tax authorities are becoming more active in using the tools of the international exchange of tax information provided also by DTTs. According to the main directions of tax policy of the Russian Federation for 2016 and the planning period of 2017 and 2018 amendments to the Russian legislation on taxes and levies aimed at allowing the automatic exchange of tax information on financial transactions with foreign jurisdictions, should allow to carry out Russian accession to the multilateral agreement on automatic exchange of financial information, providing a single standard reporting of financial transactions for tax purposes. The introduction of this standard will increase the ability of tax authorities to obtain the information necessary to accurately determine the tax liability of national taxpayers.

The important step of Russian integration into the international information exchange process is the signing and ratification by Russia of the Joint Council of Europe and the OECD Convention on mutual administrative assistance in tax matters (hereinafter - the Strasbourg Convention) [13]. The Convention entered into force for Russia on 1 July 2015. Strasbourg Convention covers a wide range of taxes and provides all possible forms of administrative co-operation of States in the establishment and collection of taxes. In addition, the Convention allows signatory states to expand their treaty network for the exchange of information, not only with the new contracting parties, but also with respect to other taxes.

As a growing number of taxpayers involved in cross-border tax relations, the exchange of tax information, has become the main tool for monitoring compliance with taxpayer obligations to pay taxes and fees. Analysis of legal practice shows that requests for information are not usually associated with the payment of a specific tax in a foreign country, but have a broad subject. The Russian tax authorities requesting information on the corporate structure of the taxpayer, the flow of funds on the accounts, the company's activity and its legal status in the foreign jurisdiction.

The requests for information on the fact of payment of taxes rarely appear in court decisions. So, even though the information contained in the request is not subject to disclosure from the text of judicial decisions on the well-known Oriflame case [16] can be judged that the Luxembourg tax authorities have received such a request from the Russian tax authorities. Royalties received by a Luxembourg company from its Russian subsidiary were not taxed in Luxembourg.

5. Conclusions. The foregoing leads to the conclusion that the “deoffshorization” course taken by the Russian legislator is chosen for a longer period, based on the documents of

international organizations and is focused on the fight against abusive tax practice that complies with the latest global trends of legal regulation of direct taxation.

In addition, according to the results of research on the impact of the integration of legal regulation of taxation in the Russian Federation is possible to come to a conclusion about the growth of the role of decisions of the courts, especially the highest courts, on matters of direct taxation. However, we do not criticize this trend: the dynamics of the tax law and the changes in the Russian and foreign tax legislation is too high, which inevitably leads to the emergence of gaps and conflicts of law. The most relevant and cause the greatest number of disputes with the tax authorities issues are royalty payments taxation, debt financing and intercompany expenses. In addition, there is a trend to increase the quality and quantity of information sources used by the tax authorities to gather evidence, including the expansion of the practice of information exchange.

Библиографический список

1. Килинкарова Е.В. Налоговое право зарубежных стран: учеб. для бакалавриата и магистратуры. М., 2015. С. 103.
2. Савицкий А.И. Налоговая дискриминация и налоговые льготы // Налоговед. 2013. № 3. С. 29.
3. Хаванова И.А. О теории экономического анализа в налоговом праве (концептуальные основы) // Журнал российского права. 2015. № 5. С. 111 - 124.
4. Зарипов В.М. Кризис концепции налоговой выгоды // Налоговед. 2015. № 6. С. 19 – 31.
5. Копина А.А. Налоговый контроль в связи с совершением сделок между взаимозависимыми лицами vs получение необоснованной налоговой выгоды // Налоги. 2016. № 9. С. 10 – 17.
6. Сасов К.А. Обоснованность налоговой выгоды: кризис доктрины или крушение права? // Налоговед. 2016. № 11. С. 24 – 33.
7. Зарипов В.М. Налоговая выгода: выше плинтуса [электронный ресурс] // Zakon.ru – первая социальная сеть для юристов – Режим доступа: URL: https://zakon.ru/blog/2017/6/20/nalogovaya_vygoda_vyshe_plintusa (дата обращения 28.06.2017), свободный. – Загл. с экрана. – Яз. рус.
8. Завязочникова М.В. Вопросы налогообложения международных компаний в практике российских арбитражных судов // Налоговед. 2013. № 11. С. 48-49.
9. Владимирова Т.В., Амбрасовская А.А. О применении правил недостаточной капитализации к займам между российскими компаниями // Налоговед. 2016. № 5. С. 38.

References

1. Kilinkarova E.V. Tax law of foreign countries // Moscow, 2015 (In Russ.).
2. Savitskiy A.I. Tax discrimination and tax exemptions // Nalogoved. 2013. Nr 3 (In Russ.).
3. Khavanova I.A. To the theory of economic analysis in tax law // Zhurnal rossiiskogo prava. 2015. Nr. 5. P. 111-124 (In Russ.).
4. Zaripov V.M. The crisis of concept of tax benefit // Nalogoved. 2015. Nr. 6. P. 19-31 (In Russ.).
5. Kopina A.A. Tax control in connection with deals between interdependent persons vs. groundless tax benefit// Nalogi. 2016. Nr. 9 P. 10-17 (In Russ.).
6. Sasov.A. Main aspects of tax policy in the European Union // Nalogoved. 2014. № 2. P. 313 - 317 (In Russ.).

7. Zaripov V.M. To the issue of tax benefit // Zakon.ru: URL: https://zakon.ru/blog/2017/6/20/nalogovaya_vygoda_vyshe_plintusa (In Russ.).

8. Zavyazochnikova M.V. Issues of taxation of international companies in practice of Russian arbitration courts // Nalogoved. 2013. № 11. P. 48-52 (In Russ.).

9. Vladimirova T.V., Ambrasovskaya A.A. To enforcement of thin capitalization rules to loans between Russian companies // Nalogoved. 2014. P. 38-46 (In Russ.).

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