

ACCREDITED INVESTOR: LEGAL STATUS AND PROBLEMS OF TAXATION

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The subject of the research is the legal norms contained in legislation and other legal acts that regulate the grounds for the emergence and the mechanism for implementing the status of an accredited investor, requirements for individuals, as well as certain aspects of taxation of accredited investors. The experience of legal regulation of income from investment activities, used in foreign legislation, is also analyzed in the context of the topic.

The purpose of the article is to confirm the need to revise the requirements for accredited investors, to clarify the legislative provisions of the personal income tax. The reason for this study was legislative changes that caused an ambiguous reaction among the entire legal community in Russia.

The methodology. General scientific methods were applied in the framework of a comparative, logical and statistical study and analysis of law enforcement and judicial practice in the field of taxation of an accredited investors.

The main results. The following issues were investigated. What was the reason for the introduction of the status of an accredited investor in Russian legislation? It was the need firstly to protect the rights of investors, and secondly to regulate and protect the stock market from unconsciously high-risk transactions. What requirements are specified in the law for obtaining this status, what requirements exist in foreign legislation and why does domestic legislation need to be revised? We can divide the requirements for obtaining the status into three general groups: experience, knowledge and risk. Investor is obliged to meet two criteria by European legislation, when only one criterion by Russian legislation. The problem of taxation of qualified investors was raised in the context of the progressive income tax rate. Taxation of qualified investors needs a thorough legislative review in terms of tax deductions.

Conclusions. The ideas for the introduction of the status of an accredited investor, of a progressive personal income tax rate were implemented in Russian legislation from the legislation of foreign countries. Such Russian legal rules needs significant revision. The legislative term "accredited investor" should be introduced in legislation system. It is necessary to clarify the criteria for obtaining a status, as well as to consolidate the necessity for accredited investors to comply with two conditions instead of one. Such an initiative would allow investors themselves to approach investing more consciously and would remove risks from brokers. Tax legislation should be amended in part of tax deductions for persons whose main activity is investment, since the current state of affairs discriminates them against individuals in their rights. The revision of the fixed requirements as well as the clarification of the tax legislation will attract investors (both Russian and foreign) to the Russian stock market, while the economy will receive positive growth, intermediaries-brokers and issuing firms will be provided with protection from unconscious risks.

1. Introduction

Financial legislation is one of the most rapidly and constantly changing. Literally every year, the letter of the law is revised, and new case law enforcement practice appears, which directly depends on the changing state of the economy.

The previous and current years were not exceptions to this approach of lawmakers, and one of the important changes was the introduction of a progressive personal income tax rate in the Tax Code of the Russian Federation. In addition to changes in the tax legislation, the issue of categorization of private investors was not ignored.

Historically, the transition from a flat tax scale was based on the following arguments [1, p. 227]: the ability to pay itself, based on the real level of income of citizens, which determines the true ability to pay [2, p.306]; equality of taxes, based on the concept of imposing the same complexity in paying mandatory payments for all taxpayers [3, p. 147]; a compensatory argument that eliminates social injustice by compensating for the regressiveness of indirect taxes, which usually burden low-income segments of the population [4, p. 42].

In the current conditions, the transition to a progressive tax scale was justified by the need for a differentiated distribution of the tax burden, and according to the plan of the President of the Russian Federation, the additional income from the introduction of such a rate should be used for a socially targeted purpose¹

The growing interest of private individuals in investing in the last two years has become a logical reason for the need for legal regulation of investment activities. With such a growing scale of investment, the transfer of free funds of citizens to the economy required not only legislative changes, but also drew attention to the need to increase the level of economic and legal culture of the population.

The relevance of the topic we have chosen logically follows from the theses indicated above, but in addition to them, there are a number of theoretical issues studied in the course of this article. Since in most scientific works [5, p. 193; 6, p. 115], both Russian and foreign, the topic of the

study of taxation of qualified investors - individuals is not touched upon, most of the developments are devoted to a separate study of the issues identified by us.

Meanwhile, novice investors, which are individuals, find it difficult to assess the risks of investing, and they can lose all their savings. Therefore, by law, they have limited access to exchange instruments that require knowledge and experience. To invest without restrictions, you need the status of a qualified investor. The status shows that a person understands investments, understands the risks, and therefore gets access to complex financial instruments. In order to prove their qualifications, an investor must meet certain criteria.

In this regard, the purpose of this article is to consider and identify the problems of applying by individuals the status of a qualified investor at the present stage of development of the Russian financial market, as well as certain aspects of taxation of individuals who have the status of a qualified investor in the context of the introduction of a progressive personal income tax rate to substantiate the thesis that the change requirements for obtaining the status of a qualified investor provides great opportunities for performing transactions in the financial market for those investors who have significant funds and have sufficient experience and qualifications to consciously perform risky transactions in the market.

2. The concept and history of the term "qualified investor" in Russian legislation

The formation of the term "investor" occurred in the 80s of the last century, although the legal relations themselves, where the investor was a subject, appeared much earlier [7, p. 39, 46]. The reason for this strengthening was the opening of markets, accompanied by deregulation, the technological revolution and automation of production processes, which resulted in an increase in supply. The term itself, according to the great legal encyclopedia [8, p. 119], means the following:: an individual or legal entity that is not a dealer and invests its own, borrowed or borrowed funds in the form of investments and ensures their intended use.

Despite the existence of a definition of the term, its essence remains the subject of scientific discussions, both among economists and among lawyers.

The definition of "investor", despite the broad legislative consolidation (more than 870 acts contain its mention), does not differ in the accuracy of the wording.

Theorists reduce the characterization of the content to a subject that invests in various types of activities [9, p. 33], but the discussion is based on the interpretation of terminology - some justify their position based solely on the basics of civil legislation, classifying investors into universal and stock, others consider the subject of investment relations only through the prism of the stock market, dividing it within.

M. G. Kholkina, adhering to the first approach, understands the investor as a civil law entity that makes investments at its own risk or has the intention to invest its own, borrowed or attracted funds in objects of business and other types of activities in order to make a profit and/or achieve other positive effect in the future without the possibility of independent (direct) participation in the activities of the receiving person for the use of the invested funds (the investment organizer) or third parties associated with the specified person, in accordance with the procedure provided for by the civil legislation of the Russian Federation [10, p. 22,25].

A.V. Maifat has a different opinion, referring to the investor as a subject with a special legal status, because, on the one hand, he is not an entrepreneur, but his status also differs from the usual subject of civil turnover, since he indirectly participates in the entrepreneurial activity of the investment organizer and must take on part of the risks associated with such activities, and on the other hand, the investor is not a consumer [11, p.6].

The broad interpretation of the term "investor" also seems logical from the point of view of modern legal practice: in the decision of the Supreme Court of the Russian Federation of 18.07.2017 N 18-KГ17-83³, the panel indicated that business activity essentially equivalent to the activity of investment, and therefore, the

provisions of the Law "On protection of consumer rights" do not apply to investment relations, the status of the investor includes the consumption, purchase of goods, works and services for their own use, and therefore should be interpreted wider than only the civil law.

Studying an investor as a participant in legal relations that develop in the stock market, the following definitions can be found in the scientific literature::

by an investor in the stock market, Y. M. Mirkin [12, p. 54] suggests understanding "a person who has an excess of money and invests it in securities", A. N. Burenin calls investors persons who purchase securities [13, p.32].

Such a lawyer as R. M. Isaev also divides investors into universal and stock ones, by the former he means persons who make investments and invest in the development of the market of goods, works and services, by investors in the securities market - persons who invest in securities in portfolio investments [14, p.18]. This approach is based not on the subject of legal relations, but on the object. Distinguishing between investors, the scientist asserts that a universal investor, making investments in objects of investment activity, has a much wider range of opportunities, since he does not have the ability to invest in the objects of investment activity. not only makes investments, but also has practical powers to implement them, which a stock investor does not have.

However, according to the criterion of authority and object, the theory of the stock market divides investors into institutional and individual ones. Institutional investors are understood as professional, institutional participants in the securities market, which can be, for example, brokers, credit organizations, whose powers include the right (or even the obligation) to combine and dispose of the assets entrusted to them in order to generate income [15, p.114]. Individual investors manage their own or borrowed funds, and they can act either directly or indirectly., and indirectly through institutional investors.

Despite such a variety of theoretical approaches to the definition of the subject of investment legal relations, in the Federal Law «About the securities market»⁵ there is no legal

definition of "investor". The Law sets out only criteria that allow us to understand who investors are and how they are divided in domestic legislation.

The regulatory act divides investors into qualified and all others - unskilled. At the same time, commercial organizations or individuals can act as qualified investors, and only individuals can act as unqualified investors, based on the analysis of the law.

The concept of "qualified investor" was first reflected in the Financial Market Development Strategy for 2006-2008⁶. One of the goals of this strategy was to promote the formation of retail investors, and the introduction of a new entity was one of the ways to achieve this goal.

The need to introduce the status of a qualified investor was largely borrowed from the experience of foreign countries: Brazil, Mexico, Israel, and the European Union [16; 17, p.19]. The main purpose of introducing the status was to protect the interests of both existing and potential investors, as well as to harmonize the regulation of the stock market, allowing for cross-border operations.

In accordance with international practice, a qualified investor is a person whose experience and qualifications allow him to adequately assess the risks associated with investments in certain stock instruments and independently carry out operations with securities based on such assessments. Qualified investors can be recognized, for example, companies that have licenses of professional participants in the securities market, such as brokerage and dealer companies, management companies, credit organizations and insurance companies, industrial corporations, and also meet certain requirements. Individuals who perform operations on the stock market meet these requirements.

In many respects, the qualified investor model used in domestic legislation was borrowed from the experience of the European Union countries, which is indicated in the explanatory note to the draft law introducing the status.

The main EU document regulating investment activities in the stock market is Directive N 2014/65 / EU of 15.05.2014⁷. In

accordance with the provisions of the Directive, a qualified investor can be recognized as such by virtue of Law or recognition, and the intention to obtain this status must be accompanied by the presence of experience and knowledge.

The criteria for obtaining the status and the basic principle of the categorization procedure (recognition and law) were adopted in Russian legislation, but a full-fledged term, as such, was not introduced.

3. Requirements for obtaining the status of a qualified investor

In the absence of a legally defined term "qualified investor", the criteria specified in Article 51.2 and the procedure for determining them based on the instructions of the Bank of Russia are of particular importance⁸.

The above-mentioned norm for an individual contains the following criteria::

1) the total value of securities, the total value of liabilities held by a person, meets the requirements established by regulatory acts of the Central Bank of the Russian Federation.

2) has experience of working in a Russian and / or foreign organization established by the Bank of Russia's regulatory acts, which has made transactions in securities and / or concluded contracts that are derivative financial instruments;

3) made transactions with securities and (or) entered into agreements that are subject to the following conditions: derivative financial instruments, in the amount, volume and on time established by the Bank of Russia's regulatory acts;

4) the amount of property owned by this person and the procedure for calculating this amount are established by regulatory acts of the Bank of Russia;

5) has an education or qualification certificate established by Bank of Russia regulations.

The provisions mentioned in the article are essentially referential norms and are specified in the Bank of Russia's Instruction No. 3629-U dated 29.04.2015 "On the recognition of Persons as Qualified Investors and the Procedure for Maintaining the Register of Persons recognized as Qualified Investors".

In the Bank's instructions, one of the first

rules is the owner's qualification, according to which "about the total value of the securities held by this person and (or) the total amount of obligations from contracts that are derivative financial instruments and concluded at the expense of this person must be at least 6 million rubles." Under the owner of the Federal Law "On the Securities Market" means the owner or owner on another property right. Nevertheless, when considering the criterion of ownership in the literature for a long time, there was a discussion that ended with the clarification of Article 128 of the Civil Code of the Russian Federation, when the property law regime began to apply only to documentary securities, and non-documentary securities were classified as other property [18, p. 111; 19, p. 155].

An interesting issue in this context is the issue of confirming the status of ownership of financial instruments: neither the Law nor the Instructions of the Bank of Russia contain a clear list of documents confirming ownership. Brokers are required to establish a list of supporting documents performing status verification. Among the list of such documents, the following documents are of legal significance: an account statement opened with an organization that records the rights to securities owned by an individual, and / or a report of an organization that records the total amount of obligations from contracts that are PFI (registrar, depository, specialized registrar), or an extract on the portfolio composition issued by a trustee (in the case of individual trust management), or a broker's report (for contracts that are PFI).

The second rule is the work experience required to obtain the status of a qualified investor. As defined in the Instructions of the Central Bank of the Russian Federation: work experience should be 2 years if the applicant had work experience in an organization with the status of a qualified investor, and 3 years in all other cases.

The next criterion that gives an individual the right to obtain the status of a qualified investor is the experience of making investment transactions in the stock market. The Central Bank's instructions specify the required term and number

of transactions - for the last four quarters, on average, at least 10 times a quarter, but at least once a month, and the total price of such transactions (contracts) should be at least 6 million rubles. This method of obtaining the status raises the most questions: for example, is it possible to obtain the status of a qualified investor by making transactions from different brokers? In this case, how will the aggregate price criterion be confirmed? If this is possible, how should the price be considered: as a set of current assets that have passed through the account, or as a fixed price at the end of the period? However, questions remain open for both practice and theory to this day, since the legislation does not contain any clarifications in this regard.

The next criterion is the availability of property (cash and securities), the amount of which must comply with the Instructions of the Central Bank of the Russian Federation (clause 2.1.4-6 million rubles). Ownership and value of the property are confirmed by: bank statements opened with credit institutions (including accounts, deposits/deposits) and (or) accounts opened with foreign banks; statements from metal accounts or other documents confirming the rights of an individual's claim to the credit institution to pay the monetary equivalent of precious metal at the accounting price of the corresponding amount. precious metal; reports of the trustee or other documents confirming the ownership of securities transferred to the trust management.

The presence of a specialized education is the last criterion considered in the Instructions of the Central Bank of the Russian Federation, which implies the possibility of obtaining the status of a qualified investor. The provisions of the mega-regulator indicate that higher economic education, confirmed by a standard document, certificates and certificates of financial market specialists, actuaries, auditors serve as confirmation of the educational status of the applicant - applicant. However, it is suggested in the literature that even the presence of documented knowledge is not proof that the necessary knowledge is available. skills and awareness of the entire risk of operations conducted on the stock market [20, p. 81, 87].

Analyzing in general the Instructions of the Central Bank of the Russian Federation, as well as the content of Norm 51.2 of the Federal Law "On the Securities Market", the criteria considered by us can be divided into four groups: experience, knowledge, risk, and property. It is noteworthy that both the law and the act of the Bank of the Russian Federation contain an indication of the need to comply with one of the submitted requirements, and not two, as, for example, indicated in the Directive N 2014/65 / EU of 15.05.2014.

Compliance with only one of these criteria, in our opinion, is not objective. On the one hand, such a "simplified" procedure for obtaining investor status directly affects economic development due to capital inflows to the stock market, making more transactions with securities, but on the other hand, it causes concern about the combination of increased interest in investing and the lack of control over the level of awareness of all risks by investment entities.

It seems logical to finalize the provisions of the law and the instructions of the Central Bank of the Russian Federation: it is necessary to introduce mandatory compliance with two of the criteria considered; clarify the procedure for obtaining status from brokers - develop a single regulation; create a single register of qualified investors, which will allow individuals to legally obtain this status and at the same time deprive brokers and management companies of the risks associated with its issuance.

Thus, we can conclude that the division of criteria, as well as the status of an investor itself, have been revised by the legislator through the prism of foreign experience, but the Russian law needs to be significantly improved.

4. Issues arising from taxation of individuals with the status of qualified investors in the context of the progressive personal income tax rate

The discussion concerning the introduction of a progressive tax scale occupies a special place in the development of tax legislation [21, p. 124-126; 22, p.240]. Last year, the Russian President expressed an initiative to introduce a progressive tax rate from 13% to 15% on income exceeding 5

million rubles a year. Such unexpected news (the government measure was not included in the Main Directions of budget, tax and customs tariff policy) and the draft law on amendments to the Tax Code of the Russian Federation developed for its implementation caused a mixed reaction among the entire legal community.

Some legal experts gave a positive assessment, pointing out that the introduction of a progressive scale is evidence of an increase in the level of tax culture [23, p. 31]. A.V. Bryzgalin, adhering to the opposite opinion, has repeatedly expressed critical views [24, p. 20, 22]. According to the scientist, progression is better not to enter, as the sense of it is not so much as it seems, but the spending budget administration will increase, there will be additional incentive for evasion of personal income tax (which will inevitably affect insurance premiums), the achievement of "justice" is more than a relative, but "economic incentives," the progression has directly¹⁰. Sergey also noted that the bill denies taxpayers who receive, for example, only income from operations with securities and other economic activities, the opportunity to apply tax deductions. This essentially socialist approach discriminates against citizens who receive income from various types of entrepreneurial and investment activities" [25, p. 6].

As we can see, the introduction of a progressive tax scale designed to stabilize material inequality, on the contrary, worsens the differentiation of taxpayers, while giving rise to a number of other issues, one of which is the taxation of individuals with the status of qualified investors.

The specifics of personal income tax taxation of income from operations with securities are defined in Article 214.1 of the Tax Code of the Russian Federation [26, p. 3,5]. For tax purposes, the financial result (loss, income) is determined for each of the tax bases, then the total taxable income or loss is calculated. Income from operations with securities is recognized as income from the sale of a security, income from a discount/interest. As for bids, the rate applies to 13% if the total income is less than 5 million rubles, and 15% + 650 thousand rubles if the income exceeds 5 million rubles.

Interesting in this case is the question of the ratio of taxable income and the price of property for

obtaining the status of a qualified investor.

As we noted earlier, one of the criteria for obtaining the status of a qualified investor is the property qualification, which includes securities and cash in the amount of 6 million rubles. Another criterion is the experience of making transactions on operations with securities, provided that transactions were made at least 10 times a quarter, but at least once a month, and the total price of such transactions (contracts) must be at least 6 million rubles.

The tax legislation contains the definition of income for personal income tax and the taxation mechanism itself [27, p. 234, 268], but the analysis of the Federal Law "On the Securities Market" does not allow us to draw a similar conclusion about the mechanism for recognizing the amounts received as income. And this can lead to the following, so far unsolvable situation: if we assume that citizen A, a candidate for the status of a qualified investor, had a number of transactions through the brokerage account, which in total is 6 million, but the actual "net profit" from operations was less than the one under consideration 1) can the person be considered a legitimate applicant for the status of a qualified investor?; 2) how will income from securities transactions be taxed in this case?

In this context, it is important to consider the mechanism of tax deductions. Previously, until 2021, standard, social and professional tax deductions were applied to income from operations with securities; with innovations, the investment tax deduction remained for income from operations with securities [28, p.75,78].

At the same time, considering the mechanism of investment tax deductions, the following rather ambiguous situation is crystallized. The taxpayer has the right to claim a deduction in the following cases:: 1) holding of securities for more than three years; 2) in the amount of funds deposited by the taxpayer in the tax period for the following purposes: individual investment account; 3) in the amount of the positive financial result received on operations accounted for on an individual investment account.

At the same time, analyzing the economic and legal nature of an individual investment

account [29, p.156], it can be reasonably assumed that a qualified investor cannot simultaneously be the owner of an IC, respectively, some of the provisions on deduction are not applicable for him.

Taking into account the absence of other deductions, it turns out that qualified investors remain somewhat discriminated against, since some of the preferences, or rather even the rights available to ordinary taxpayers, do not apply to them.

This state of affairs seems unfair, especially if we take into account the requirements that are required to obtain the status of a qualified investor.

5. ConclusionS.

The emergence of the institute of qualified investors is a natural consequence of the development of the global economy. Despite the fact that qualified investors have existed in Russia for quite a long time, they have not become prominent figures in the securities market. One of the reasons for this is the lack of real endowment of qualified investors with opportunities corresponding to their status. In this regard, it is necessary to: This is a clear consolidation in the legislation of the concept of "qualified investor", the essential features of which should be put precisely the experience gained as a result of repeatedly made transactions with securities on the stock market. According to the authors, a qualified investor should be recognized as a person who has independent experience in entering into transactions with securities and(or) financial instruments on the securities market, and is able, by virtue of the acquired experience and knowledge, to adequately assess the risks associated with investing in certain stock instruments.

According to the statistics of the tax service, published on the official website of the department, last year 2020 was marked by an increase in tax revenues to the federal budget. Personal income tax, in the statistics under consideration, accounted for a quarter of all tax revenues, which is significantly high for the Russian tax system, although it cannot be compared with the practice of the European Union, where income tax occupies a leading, budget-forming role and differs in the progression of tax rates. Such practical experience of world states served as the foundation for making changes to both

the tax legislation and the tax legislation, as well as in the Federal Law "On the Securities Market". However, such implementation, when considered in symbiosis, naturally led to a number of issues that are still unsolvable either in theory or practice, related to the taxation of individuals who have the status of qualified investors.

As a result of the analysis of the evolution of the term "investor", the requirements for obtaining the status of "qualified investor", as well as recent changes in the tax legislation regarding personal income tax, we can conclude that it is necessary to adjust the norms of the Federal Law "On the Securities Market", which correspond to the current stage of development of the digital economy in Russia. An obvious positive consequence of this need may be an increase in the interest of individuals (residents and non-residents) to invest in the Russian stock market, which will undoubtedly have a beneficial effect on the economy.

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