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The Implementation of BEPS Actions in the Russian Federation

Abstract: The author comes to the conclusion that the development of legal regulation on issues of international cooperation in the area of taxation and the exchange of tax information allows us to positively characterize the process of using the best modern tax practices by the Russian Federation.
The main directions of implementation of the BEPS Action Plan in the Russian Federation are considered in the article. The author highlights areas of legal regulation of tax relations, most affected by international economic integration and foreign tax practice. These are CFC rules and tax residence of legal entities, national anti-abusive rules (foremost of which is Article 54.1 of the Russian Tax Code which can be characterized as a new Russian GAAR), thin capitalization rules, administrative assistance and the exchange of tax information. The role of the OECD acts in Russian tax law is brought into light and an analysis of implementation of certain BEPS measures in the Russian Federation is provided. The aim of the article is to show and analyze the ways and perspective of implementation of the BEPS Action Plan in the Russian Federation. The author uses methods of theoretical analysis, particularly the theory of integrative legal consciousness, as well as legal methods, including formal legal method and comparative law. The legal regime of taxation of profit and income in the Russian Federation is influenced by many factors, including the internationalization of tax law.
Keywords: tax law, direct taxes, corporate income tax, personal income tax, BEPS, anti-avoidance measures

1. Introduction

The aim of the article is to show and analyze the ways and perspective of implementation of the BEPS Action Plan in the Russian Federation and in particular the direction it follows.

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

The legal regime of taxation on profit and income in the Russian Federation is influenced by many factors, including the internationalization of tax law. The implementation of OECD regulations, on the one hand, and integration associations on the other, predetermines the direction of development of national tax policy. Recent changes in Russian tax legislation are largely due to the implementation of measures laid down by OECD acts, primarily the Action Plan on Base Erosion and Profit Shifting (hereinafter - BEPS plan).[1] Russia is an integral part of the world community, and general problems in the field of taxation affect the Russian tax regime: according to Part 4 of Art. 15 of the Constitution of the Russian Federation, international treaties of the Russian Federation and the fundamental principles and norms of international law are an integral part of the legal system. The norms of supranational law and the norms enshrined in OECD acts affect the possibility of improving the Russian tax regime through the implementation of measures of these acts or through incorporation. The consolidation in the Tax Code of the Russian Federation (hereinafter - the Tax Code)[2] of the rules for taxation of controlled foreign companies, the rules of fine (insufficient) capitalization, the concept of beneficial owner, criteria for tax residence of legal entities, ratification of the Convention on Mutual Administrative Assistance in Tax Matters, are milestones of Russian tax policy at the present stage. On 7 June 2017, the Russian Federation joined the OECD Multilateral Convention on the implementation of measures relating to tax agreements in order to counteract the erosion of the tax base and withdraw profits from taxation,[3] which contains mandatory provisions reflected in the final report of the BEPS Action plan. On 1 January 2018, Federal Law No. 340-FZ of 27 November 2017, entered into force, aimed at implementing the Convention on Mutual Administrative Assistance in Tax Matters. Problems of international taxation and BEPS issues are discussed broadly in international literature. The research on these interactions in Russia is rather limited so far. Such scholars, as Matchekhin, Ponomareva, Solovieva, Vinnitsky and Shackmametiev can be mentioned. In recent studies Matchekhin (2011, 2016, 2018) reveals a lack of clarity in relation to content, hierarchy, way of application of instruments contained in Russian tax treaties.[4] Polezharova (2016) notices that when

1 OECD Action Plan on Base Erosion and Profit Shifting, OECD Publishing, http://dx.doi.org/10.1787/9789264202719-en (access: 12.09.2018).

2 The Tax Code of the Russian Federation, Part One No. 146-FZ Of July 31, 1998. Part Two No.117-FZ of August 5, 2000.

3 Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting // OECD, http://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf (access: 2.10.2018).

4 See: V. Matchekhin, Using of the OECD Commemtaries in tax disputes by the Russian courts: the modern practice, "Tax Expert" 2011, no. 9, p. 32-39; V. Matchekhin, Obraschenie rossyskih sudov k Kommentariam OESR v nalogovyh sporach: sovremennaya praktika, "Tax Expert" 2016, no. 3, p. 61-69; V. Matchekhin, K. Tokareva, Razvitie rossiyskoy sudebnoy praktiki po primeneniyu

implementing foreign best practice recommendations on tackling tax avoidance, it is not possible to do this automatically because of differences in legislative basics and history of regulation between countries. The author comes to the conclusion that the development of legal regulation on issues of international cooperation in the area of taxation and the exchange of tax information, allows us to positively characterize the process of using the best modern tax practices by the Russian Federation.[5]

2. Recent Amendments to Russian Tax Legislation Affected by the Internationalization of Tax Law

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

2.1. CFC Rules and Tax Residence of Legal Entities

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

When developing the CFC rules, some OECD recommendations from the BEPS plan are taken into account, for example 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 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:

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

Kommentariev k Modelnoy konvencii OESR pri rassmotrenii nalogoych sporov, "Taxes" 2019, no. 2, p. 15-20.

5 L. Polezharova, Mezhdunarodnoe nalogooblozhenie: sovremennaya teoriya i metodika, Moscow 2016, p. 39.

indicated by the presence of management and control bodies, the place of residence of its main shareholders or the main place of business.[6]

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

- Russian organizations;
- 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;
- foreign organizations, the management of which is in 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 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:

- 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);
- 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 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:

6 I. Khavanova, To the theory of economic analysis in tax law, "The journal of Russian Law" 2015, no. 5, p. 103.

– 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 as Russian tax residents. According to A.I. Savitsky, "the consistent application of the criterion of non-discrimination to permanent establishments 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".[7]

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 jurisdictions. At the same time, the main task of the Russian CFC rules is combating tax abuses and deoffshorization of the national economy.

2.2. National Anti-Abuse Rules

Tax agreements concluded by the Russian Federation do not contain special anti-abuse rules (in contrast to European anti-avoidance rules). However the Decision of the Supreme Arbitration Court of the Russian Federation dated 12 October 2006, No. 53 "On Evaluation by Arbitration Courts of the Justification of Receiving a Tax Benefit by the Taxpayer" 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 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.

The law enforcer chose the approaches of the business purpose and "substance over form" concept. The substance of relations and the actual circumstances of economic activity have the advantage over their registration in documents

7 A. Savitskiy, Tax discrimination and tax exemptions, "Tax Expert" 2013, no. 3, p. 26.

(paragraphs 3, 5, 7 of the Ruling of the Plenum of the Supreme Arbitration Court of the Russian Federation No. 53).[8] 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 Part Two of the Tax Code of the Russian Federation"[9] was submitted to the State Duma in May 2014. The bill caused criticism among practitioners and researchers[10] and was substantially modified.

The Federal Law of 18 July 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.

Introduction to the Tax Code of Article 54.1 complies with international practice and the recommendations of the BEPS plan, and was also a necessary measure in the fight against tax evasion.

Instead of the concept of a business purpose, the legislator is already using the concept of the principal purpose test.

Article 54[1] of the Tax Code provides that there shall be a decrease in the taxpayer's 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 of tax in the taxpayer's financial statements.

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

- the principal purpose of the transaction is not the failure (partial payment) and/or offset (refund) tax amount;
- obligations under the transaction (operation) executed by a person who is a party to the contract concluded with the taxpayer, and/or by a person who has an obligation to execute the transaction (operation) transferred by contract or law.

8 Ruling No. 53 of the Plenum of the Supreme Arbitration Court of 12 October 2006 "Concerning the Evaluation by Arbitration Courts of the Legitimacy of the Receipt of a Tax Benefit by a Taxpayer".

9 Draft Federal Law No. 529775-6 "Concerning the Introduction of Amendments to Parts One and Two of the Tax Code of the Russian Federation".

10 See K. Sasov, The justification of tax benefit: a doctrinal crisis or a legal collapse?, "Tax Expert" 2016, no. 11, p. 24-33; V. Zaripov, The crisis of concept of tax benefit, "Tax Expert" 2015, no. 6, p. 19-31.

The question arises as to the ratio of the Tax Code and the Resolution of the Plenum of the Russian Federation No. 53: the law applies primarily to issues of transactions with "unscrupulous" counterparts, while the concept of unjustified tax benefit has a much broader application.[11] 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's 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 himself can know whether there was an intention to evade taxes in the absence of the relevant rights and bases.

The doctrine of unjustified tax benefit has all the prerequisites to become an instrument to fight cross-border abuse and can be mentioned as the Russian GAAR.

2.3. Thin Capitalization Rules

Due to 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 "Severny Kuzbass"[12] became fundamental in resolving similar disputes. The issue of thin capitalization became one of the most important issues 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 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".[13] 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' free themselves from proving the fact of abuse and do not find out the real meaning of economic relations between parent and subsidiary companies.

11 The Ruling of the Plenum of the Supreme Arbitration Court of the Russian Federation of 12 October 2006 No. 53 "Concerning the Evaluation by Arbitration Courts of the Legitimacy of the Receipt of a Tax Benefit by a Taxpayer".

12 The Ruling of the Presidium of the Supreme Arbitration Court of the Russian Federation of 15 November 2011, No. 8654/11.

13 The Ruling of the Supreme Court of the Russian Federation of 18 March 2016, No. 305-KG15-14263.

2.4. 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. 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.[14] The Convention entered into force for Russia on 1 July 2015. The 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 new contracting parties, but also with respect to other taxes.

As a growing number of taxpayers engage 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 cover a much broader area.

Requests for information on the facts 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 in the well-known Oriflame case[15] it 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.

3. The Role of OECD Acts in Russian Tax Law

At present, the Russian tax law is evaluating the place of the OECD Model Convention and the Commentaries, and it can be stated that they are being recognized as sources of regulation and interpretation of tax law. There was a steady

14 Convention developed jointly by the Council of Europe and the OECD, became available to be signed by the Member States of both organizations on 25 January 1988.

15 The Ruling of the Supreme Court of the Russian Federation of 14 January 2016, No. 305-KG15-11546.

practice of addressing the Commentaries in disputes about the use of international treaties, primarily the DTTs. At the same time, a single position on the substantiation of the application of Comments has not been formed, despite the existing acts of the Supreme Arbitration Court of the Russian Federation and the Supreme Court of the Russian Federation, which give a definite assessment to this document. The stage of categorical non-recognition of the Commentaries, as noted by Matchekhin, was replaced by the use of this document by the courts in different situations.[16] Thus, the Supreme Court of the Russian Federation in 2018 repeatedly pointed out that the Commentaries are a framework document establishing general principles and approaches to the elimination of double taxation, and also according to Article 32 of the Vienna Convention are one of the means of interpreting international agreements on the elimination of double taxation concluded in accordance with the Model Convention, which is reflected in the judicial practice of the arbitration courts of the Russian Federation.

The OECD Model is not the only document which influences the Russian legal system. Signed documents include the BEPS plan. The most attention in the official acts to the BEPS plan is given in the Main Directions of the Tax Policy of the Russian Federation for 2016 and the planning period of 2017 and 2018. Thus, based on the results of the final development of the OECD/G20 Recommendations on key provisions for changing the procedure for taxing corporate borrowing (interest expenses), a decision will be made on the need to make appropriate changes to the legislation of the Russian Federation on taxes and fees. It also points to the relationship between the BEPS plan and the Russian tax legislation in terms of improving the rules for the taxation of CFC profits and transfer pricing rules. The main directions of the tax policy of the Russian Federation emphasize that in the planning period of 2017 and 2018, a number of measures are expected to be taken in line with the goals of deoffshorization of the Russian economy.

4. Implementation of Certain BEPS Actions in the Russian Federation

The implementation of BEPS Actions in the Russian Federation is particularly active. The Russian Federation is interested in adapting its tax legislation to the current state of business. The main directions of implementation of the BEPS plan can be identified as follows:

– Action 1 (addressing the tax challenges of the digital economy): in 2016, the Tax Code was supplemented by the rules for taxing services rendered electronically by foreign organizations (Article 174.2 of the Tax Code), and these services are defined for the purposes of chapter 21 "Value Added Tax";

16 V. Matchekhin, Using of the OECD Commemtaries in tax disputes by the Russian courts: the modern practice, "Tax Expert" 2016, no. 3, p. 68.

- Action 3 (designing effective controlled foreign company (CFC) rules): when developing the Russian rules for CFC, the recommendations of the BEPS plan have already been taken into account;
- Action 4 (limiting base erosion involving interest deductions and other financial payments): a thin-capitalization mechanism has been implemented and is in operation;
- Action 6 (preventing the granting of treaty benefits in inappropriate circumstances): based on the new model of the OECD tax agreement, the Model Agreement between the Russian Federation and foreign countries on the avoidance of double taxation will be amended;
- Actions 8, 9, 10 (aligning transfer pricing outcomes with value creation) - clarified transfer pricing rules in accordance with the OECD recommendations;
- Action 13 (transfer pricing documentation and country-by-country reporting): on January 26, 2017, the FTS of Russia signed a multilateral Agreement of the competent authorities on the automatic exchange of country reports (CbC MCAA). In addition, Federal Law No. 340-FZ of the Tax Code of the Russian Federation of 27 November 2017 is supplemented by regulations on the automatic exchange of financial information and country reports with foreign countries. The Tax Code is supplemented by chapters 20.1 "Automatic exchange of financial information with foreign states (territories)" and chapter 20.2 "International automatic exchange of country reports in accordance with international treaties of the Russian Federation";
- Action 14 (making dispute resolution mechanisms more effective) - participation in meetings of the OECD Forum on mutual agreement procedures;
- Action 15 (multilateral convention to implement tax treaty related measures to prevent BEPS): the Russian Federation signed MLI and prepared it for ratification.

5. Conclusions

In recent years, the institutions established and applied in the tax laws of foreign countries have been introduced into Russian tax law. These legislative innovations are held in the global trend of combating corporate tax evasion, which is expressed primarily in the BEPS project. Participation in this project provides the Russian Federation with opportunities for the development of certain norms aimed at combating base erosion and the implementation of world experience in combating abusive tax practices into national legislation. However, these processes are characterized by frequent changes in legislation, which indicates that the concept

of deoffshorization and the implementation of the BEPS plan is not always worked out in detail in the draft laws at the time of their adoption.

The development of legal regulation on issues of international cooperation in the area of taxation and the exchange of tax information allows us to positively characterize the process of using the best modern tax practices by the Russian Federation. We believe that the development of a unified integrated approach to combating abusive tax practices will not only incorporate into the Tax Code developments and mechanisms of foreign and international tax law, but will also create a qualitatively new approach to the implementation of international program documents at the level of Russian tax legislation.

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