



## LT Digest

### Be in the know

#### Court practice

##### **Another case on treating controlled debt as capital under thin capitalisation rules considered by Supreme Court**

A tax inspectorate denied the application of a lower withholding tax (WHT) rate to interest classified as dividends under the thin capitalisation rules, payable to an Austrian sister company, citing the failure to comply with the minimum direct holding requirement as per the tax treaty with Austria.

Thus, Article 10 of the tax treaty with Austria provides for the following prerequisites for applying a lower tax rate to dividends:

- The beneficial owner of the dividends must hold directly at least 10 percent of the capital of the company paying the dividends
- Such holding must exceed USD 100,000

In the tax inspectorate's opinion sustained by courts of three instances, a direct holding means a direct participation in the capital of a company.

As the company that controls the lender has only indirect interest in the Russian taxpayer and the loan in question was received from a foreign sister company, the direct holding requirement was not complied with.

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The court of cassation noted that treating a loan as capital to apply a lower tax rate to dividends is reserved solely for bona fide taxpayers, while the company's continuous failure to apply thin capitalisation rules amounts to abuse of rights.

The Supreme Court reaffirmed the possibility of treating the loan as capital for tax treaty purposes in the situation under review and made the following important conclusions:

- The five-percent withholding tax rate can be applied if the amounts payable to the Austrian resident qualify as income from the participation in the Russian company
- A debt owed to a foreign sister company that holds no interest in the Russian taxpayer still qualifies as dividends to the extent that the foreign parent company, holding an indirect interest in the taxpayer, could influence the lending decision of its related party
- Notwithstanding the courts' conclusions, the mere fact that the parent company that controls the lender is not considered participating in the company from the corporate law perspective cannot disqualify the company from applying a lower tax rate
- Any different approach adopted by the courts actually deprives the foreign investor of the right to apply the lower tax rate solely on account of having no formal corporate (shareholding) relationship with the Russian company
- According to Subparagraph 15, Paragraph 2 of Commentaries on Article 10 of the OECD Model Convention, "when a loan or other contribution to the company does not, strictly speaking, come as

capital under company law but when on the basis of internal law or practice ("thin capitalisation", or assimilation of a loan to share capital), the income derived in respect thereof is treated as dividend under Article 10, the value of such loan or contribution is also to be taken as "capital"

- The tax inspectorate failed to prove that treating a direct holding as capital under provisions of Items 2 and 4, Article 269 of the Russian Tax Code is inconsistent with the terms, subject-matter, and purposes of the tax treaty with Austria

At the same time, given that the lower-instance courts had not tested the taxpayer's and the tax inspectorate's arguments regarding the sufficiency of the parent company's participation in the taxpayer in the relevant tax periods or the compliance with other prerequisites of the applicability of Subparagraph "a", Paragraph 2, Article 10 of the tax treaty with Austria, the case was remitted for retrial.

Taking into account the Supreme Court's position in the case, the following conclusions can be made:

- A controlled debt can be reclassified into capital based on both the minimum investment and direct holding requirements of a tax treaty
- In respect of a loan from a foreign sister company, the tax treaty between Russia and the jurisdiction of the lender's controlling owner shall apply
- It should be noted that the possibility of treating a controlled debt as capital has been reaffirmed by the Russian Supreme Court before, which evidences the consistency of the Court's approach.

[Electronic Justice: commercial courts files](#)

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## Legislative initiatives

### President of Russia signs package of federal laws

- Federal Law No. [59-FZ](#) of 3 April 2018, enabling the execution of direct contracts between homeowners and utility service providers
- Federal Law No. [61-FZ](#) of 3 April 2018, banning the placement of ads on utility bills
- Federal Laws No. [95-FZ](#), [104-FZ](#) of 23 April 2018, granting lower social contribution rates to producers of animated audiovisual materials (for more details, please refer to LT of 1 December 2017)
- Federal Law No. [112-FZ](#) of 23 April 2018, obliging auditors to report suspicious deals to the authorities
- Federal No. [106-FZ](#) of 23 April 2018, streamlining the regulation of transactions involving bearer instruments.

*Official Internet Portal for Legal Information*

### Russian State Duma considers package of bills

The Russian State Duma has considered the following bills:

- Bill No. [319150-7](#) that proposes classifying communication installations as public-private partnership facilities passed the first reading
- Bills No. [325651-7](#), introducing a tax on added

income from the extraction of hydrocarbons, and No. [325232-7](#), setting forth the procedures for payment of import duties following the implementation of the added income tax, passed the first reading

- Bill No. [372830-7](#), regulating the organic production, passed the first reading.

*Official website of the Russian State Duma*

### Karelia introduces profit tax deduction on investment

The deduction will be allowed to companies or their branches located in Karelia and engaged in specific types of business, namely:

- Production of dietary supplements
- Pharmaceutical production

The deduction will amount to 50 percent of fixed asset investments.

To calculate the investment deduction cap, the rate of profit tax payable to the regional budget will amount to 8.5 percent.

The law does not provide for carrying forward the unused deduction.

To remind, profit tax deduction on investment was

introduced by Federal Law No. 335-FZ of 27 November 2017.

Apart from Karelia, the deduction was introduced by the Khanty-Mansi Autonomous District (Yugra) (for more details, please refer to LT Digest of [4-31 December 2017](#)).

[Official Internet Portal for Legal Information](#)

### **Russian Ministry of Finance to introduce bill repealing transfer pricing control of domestic transactions**

Control will be exercised only where a party to the transaction applies beneficial profit tax and MET rates (participants of special economic zones, regional investment projects, special investment contracts, and advanced development territories).

Furthermore, the Ministry [plans](#) to extend the existing moratorium on the establishment of consolidated taxpayer groups for approximately five years.

[Vedomosti](#)

### **Russian Ministry of Labour to test implementation of paperless technologies**

The pilot will cover such major players as Russian Railways, Gazprombank, AVTOVAZ, ROSBANK, Mechel, Severstal Management, Rostelecom, and Yandex.

The Ministry has approved a list of documents that will be drawn up electronically, including employment contracts, business trip orders, orders requiring employees' familiarisation with vacation schedule, vacation start notices, etc.

The test will run from 23 March through 1 October 2018.

[Official website of the Russian Ministry of Economic Development](#)

### **Russian Federal Tax Service (FTS) releases public declaration of goals and objectives for 2018**

The following priorities have been set for 2018:

- To prepare proposals on the optimisation of the taxation system, aimed at fostering a sustainable economic growth and fair competition
- To formalise the list and set up a common regulatory framework for non-tax payments
- To establish a legal framework to regulate the international automatic exchange of tax information
- To conduct the second tax amnesty campaign
- To improve the business environment transparency and predictability

- To improve the administration of tax and customs duties and the national track and trace system
- To perform a comprehensive analysis of how the consolidated group of taxpayers was utilised as an instrument in 2012-2017 and prepare improvement proposals
- To simplify the procedures and reduce the timelines for security issuance and introduce new types of bonds: irredeemable and structural
- To implement additional remedies to protect the rights of investors and customers of financial services
- To define the status of digital technologies applied in the financial industry, including the regulation of ICOs
- To liberalise the currency regulations and the sanctions for currency violations

[Official Ministry of Finance website](#)

### **Requirements for Russian high-tech (innovation) sector securities clarified**

In particular, the issuer's maximum turnover required to classify securities as high-tech (innovation) sector instruments was raised from RUB 10 to 25 billion.

[Official Internet Portal for Legal Information](#)

### **Eurasian Economic Commission Council approves new limits for duty-free import of goods into EAEU**

Individuals will be able to import duty-free any items transported other than by air in checked or carry-on baggage worth up to EUR 1,500 and weighing up to 50 kg in 2018, up to EUR 1,000 in 2019, up to EUR 750 and 35 kg in 2020, and up to EUR 500 and 25 kg from 2021 onwards.

The changes have not affected goods brought into the EAEU by car in one's personal luggage: goods worth up to EUR 10,000 weighing up to 50 kg will be exempt from duties.

The document also lists the categories of goods not treated as personal use items and the used goods that foreigners can import into the EAEU duty-free for the period of their stay.

The national laws of the EAEU member states may envisage stricter cost, weight, and quantity requirements for duty(tax)-free imports of personal items. These norms will apply to the personal use items sold in the relevant member state.

[Garant: legislative tracking](#)

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## **Clarifications from government bodies**

### **Russian Ministry of Finance clarifies tax treatment of assignment of claim against subsidiary to parent company and its settlement by way of increasing subsidiary's paid-in capital**

A parent company acquired from a third party the right of claim under a loan agreement with its subsidiary at a discount.

The parent company further increased the subsidiary's

paid-in capital by the amount of such loan, which resulted in an offset of the debt against the acquired rights.

The transaction actually constituted a forgiveness of the subsidiary's debt, bought out from a third party, which was structured as an offset through a capital contribution.

According to the Ministry, at the time when the right of

claim was settled through the offset, the parent company should have accounted for its income in the form of the debt receivable and, simultaneously, for its expense incurred to purchase the claim.

The acquisition of the right of claim at a discount causes the parent company to generate taxable profits in the amount of such discount at the time of the offset.

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## Media review

### Tax-free shopping pilot outlook

According to the Russian Ministry of Industry and Trade, the tax-free shopping pilot will run in the 2018 FIFA World Cup host cities.

So far, the project covers 15 retail locations in four Russian regions, but the list is soon to be expanded.

Tax-free shopping is being finalised for launch in the stores of Moscow, Moscow Region, St. Petersburg, Sochi, and in the Vnukovo, Sheremetyevo, Domodedovo, Pulkovo, and Sochi airports.

The Ministry has approved a logo for the tax-free shopping pilot to be displayed in store windows, in brochures, and on banners in the airports.

The geography of the pilot will soon be expanded to include the 2018 FIFA World Cup venues: Volgograd, Saransk, Rostov-on-Don, Kaliningrad, Kazan, Samara, Nizhniy Novgorod, and Yekaterinburg.

More participants are expected to join at the second stage of the pilot once it goes paperless in October 2018.

[Official website of the Russian Ministry of Industry and Trade](#)

### First results of application of Article 54.1 of Russian Tax Code assessed by tax authorities

The Russian tax officials conducted a workshop on the application of Article 54.1 of the Russian Tax Code, aimed at combatting the aggressive tax optimisation.

The workshop participants noted that the Article is applied on a pin-point rather than on a large-scale basis. During the seven months that it has been applicable, only 24 relevant tax audit reports were filed with the Central Administration of the Federal Tax Service (FTS); six of them have been reviewed so far and four sustained.

The preliminary results of the Control and Supervision Activities Reform, a high-priority project the FTS participates in, were also assessed at the workshop.

In 2017, the tax authorities:

- developed a risk map that included the key scenarios of how the controlled entities might behave, their identification and quantification criteria
- prepared the input data underlying the federal risk management system for tax audit purposes
- designed the procedures for selecting the taxpayers for further audits, using the risk management system
- released quarterly analytics of judicial practices

The participants also discussed the CFC-related regulatory practice and the establishment of a centre of

competence on cross-border transactions based on the FTS's Transfer Pricing Division.

[Consultant Plus](#)

competence on cross-border transactions based on the FTS's Transfer Pricing Division.

[Official Russian Federal Tax Service website](#)

### Eurasian Economic Commission Council approves pilots of track&trace systems in EAEU

On 30 March 2018, the members of the EEC Council discussed the architecture of the goods traceability system in the EAEU.

They agreed to carry out the labelling and track&trace pilots for same-category goods based on the EAEU digital commodity platform and projects for monitoring transit freights by automotive and rail transport using navigation seals (intellectual trackers).

The EEC Council approved the concept of the Eurasian technology transfer network, a business networking and technology exchange platform.

The platform will bring together industrial producers, research institutes, higher educational facilities, innovations and technologies centres, technology transfer hubs, technoparks, business incubators, and small businesses committed to introducing and adapting of the existing knowledge and R&D results.

[Official Russian Federal Tax Service website](#)

### Implementation of EAEU's common digital agenda and single financial market expected by 2025

The Presidents of the EAEU member states resolved on implementing the common digital agenda by 2025, Chairman of the Eurasian Economic Commission Panel Tigran Sarkisyan said at the conference of the Association of Russian Banks.

The first stage of the project started with the implementation of the digital traceability system.

New initiatives can be proposed both at the country level and by the business community. The projects will be overseen by a special project management office that was established within the Eurasian Economic Commission.

Furthermore, the EAEU Agreement envisages the establishment of a single financial market by 2025.

The governments, national central banks of the member states, and the Eurasian Commission will join efforts to develop the concept of the single financial market according to the tasks assigned by the Presidents of the EAEU countries. The document will set forth such single market principles, legal framework, terms, timelines, mechanisms, and instruments.

[Official Eurasian Economic Committee website](#)

## Tobacco labelling to be postponed

The Russian Ministry of Health proposes postponing the launch of the mandatory labelling of tobacco products

for a year.

[Rossiyskaya Gazeta](#)

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## International taxation news

### OECD's Global Forum issues tax transparency compliance ratings for nine jurisdictions

Eight of these reports assess the countries against the updated standards, which incorporate beneficial ownership information of all legal entities.

[Estonia](#), [France](#), [Monaco](#), and [New Zealand](#) received an overall rating of "Compliant"; [the Bahamas](#), [Belgium](#), and [Hungary](#) were rated "Largely Compliant"; [Ghana](#) was rated "Partially Compliant".

Progress for [Jamaica](#) was recognised through a Supplementary Report, which assigned the country a "Largely Compliant" rating.

[Official OECD website](#)

### OECD updates list of activated bilateral CRS relationships and releases second edition of CRS Implementation Handbook

On 5 April, the OECD released an update on the countries that newly joined the automatic exchange of CRS information under the CRS MCAA. The list of all bilateral exchange relationships is now available at the

[OECD website](#). The next update is expected in May. The list of Russia's exchange relationships was also updated after the agreement with Austria was activated on 15 March 2018.

The OECD also released [the second edition of the Common Reporting Standard Implementation Handbook](#) ("CRS Handbook") meant to assist the government officials and financial institutions in the CRS implementation and offering a practical overview of the Standard to both the financial sector and the public at large.

The changes reflected in this second edition of the Handbook provide additional and more up-to-date guidance on certain areas related to the effective implementation of the Standard, data protection, IT and administrative infrastructure, as well as compliance measures. More clarity has been provided in the section on trusts as to the identification of controlling persons. This edition also includes all frequently asked questions in relation to the Common Reporting Standard that have so far been issued by the OECD.

[Official OECD website](#)

# Deloitte publications

## **The Russian State Duma to consider a bill on reciprocal measures against the USA and other foreign states**

A bill enabling the Russian Government to implement reciprocal (counter) measures in response to the hostile actions of the USA and other foreign states towards Russia was submitted to the Russian State Duma on 13 April 2018.

For more details, please refer to Legislative Tracking in Focus of 17 April 20178.

## **Streamlining non-tax charges: incorporation in the Tax Code or a separate law?**

In their effort to put together a uniform list of non-tax charges, the Russian Ministry of Economic Development and Russian Ministry of Finance developed a draft law that would regulate the mandatory payments charged on legal entities and individual entrepreneurs and bring consistency to the non-tax charges framework.

The legislative initiative is meant to improve the business environment and improve transparency of non-tax payments administration. Including the non-tax charges into the Tax Code is another option currently on the table. The draft law that is going through the public hearings now will introduce a number of important developments.

For details, please refer to Legislative Tracking in Focus of [19 February 2018](#).

## **The Customs Code of the Eurasian Economic Union (EEU) enters into force**

The EEU Customs Code (the "Code") entered into force on 1 January 2018 and replaced the Customs Code of the Customs Union.

The Code contains quite a few references to the resolutions of the Eurasian Economic Committee (the "EEC"), thus expanding its authority. Some of the EEC resolutions were enacted together with the Code (e.g. those that regulate the automatic release of goods and introduce the form of application for release of goods prior to filing of customs declaration).

The new Code is intended to considerably simplify the customs formalities and improve the efficiency of cooperation between the customs authorities of the EEU member states, in particular, due to the improvement of electronic document flow systems and implementation of unified customs regulations. At the same time, closer cooperation between the customs authorities of the EEU member states will allow them to analyse the information available (e.g. on customs values of identical/similar goods imported into different EEU member states) and to increase control over the intra-EEU transactions (e.g. via track&trace mechanisms).

For details, please refer to Legislative Tracking in Focus of [6 February 2018](#).

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We hope that you will find this edition interesting and informative. Should you have any questions on this subject, please do not hesitate to contact us.

Best regards,  
**Deloitte CIS Partners**

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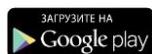


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## TaxSmart app



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