



LT Digest

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Court Practice

Supreme Court revisits deductibility of severance pay

The Supreme Court of the Russian Federation reviewed two cases where the tax authorities challenge the deductibility of severance payments made upon termination of labour contracts (Cases No. [A40-213762/2014](#) and No. [A40-7941/2015](#)).

The Court noted that payments made based on labour contract termination side-letters can be acknowledged deductible, provided their economic substance is proved (similar conclusions were earlier made while reviewing Case No. [A40-94960/2015](#)).

The Court also made several new and important conclusions concerning the economic substance of such payments:

- To acknowledge the economic substance of a severance payment, it suffices to establish achieving a concrete objective, that is termination of a particular employee's employment, while keeping the balance of interests between the employer and the employee, where the compensation payments are made to prevent conflicts at termination of employment and are not intended for employee's personal gain;
- The amounts so paid may differ from the regulatory redundancy/liquidation compensations, as employee's consent to termination is factored in;

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- The amounts so paid can be disputed only if they are considerable and/or obviously incommensurate with the regular termination pay;
- The tax authorities have the right to dispute the economic substance of the payment made, provided they can prove the taxpayer's lack of business/commercial intent while terminating employment, while not assessing the feasibility of the taxpayer's decision.

In light of the above, the Supreme Court decided one of the cases in favour of the taxpayer, sending the other one for reconsideration (severance payments in both cases were within the one to five monthly salaries' range).

It is worth noting that after the first, landmark decision of the Supreme Court (Case No. [A40-94960/2015](#)), court practice has been contradictory: courts maintain the position that severance payments cannot be treated as deductible because by definition they are not aimed at profit generation (cf. the decisions on Cases No. [A05-12521/2015](#), [A40-148068/2015](#), and [A40-204168/2016](#)), or denied deductibility finding the amounts unjustified, including because they exceeded the regulatory compensation prescribed by the Russian Labour Code (decisions on Cases No. [A40-94960/2015](#), [A40-240457/2015](#), and [A40-124026/2016](#)).

The updated position of the Supreme Court gives hope that the negative trend has been turned around. At the same time, taxpayers will have to thoroughly prepare their positions to prove the economic substance of the payments made.

Electronic Justice: commercial courts files

Constitution Court upheld tax authorities in collecting tax from de-facto head of company

Ruling No. [396-O](#) of the Constitution Court of the Russian Federation dated 28 February 2017 has been released, whereby the Court found no breaches of constitutional provisions in judicial collection of tax underpaid as a result of tax evasion from the de-facto head of the taxpayer.

The de-facto head of the company turned to the CC for protection of his constitutional rights, as he gained no personal benefit from the tax underpaid by the company.

Earlier on, the court proved that the de-facto head of the company, and not the nominal director, was guilty in premeditated tax evasion through a brassplate company.

The court established that the owner was de-factor controlling the company's operations, while not formally being a director.

The CC overruled the complaint, citing the equality of protection for the state, the municipal, and other forms of property, in the case under consideration protecting the state's property rights in its capacity of an aggrieved party's.

The ruling confirmed the legitimacy of collecting the taxes underpaid by tax-evading companies from mala fide managers and beneficiaries.

[Official FTS website](#)

blocking online liquor stores' websites without a court order.

[Official website of the Russian State Duma](#)

Russian State Duma to consider draft law calling for additional employee guarantees in case of employer's bankruptcy

The draft proposes obliging employers to make monthly contributions of at least 1/10 of the minimum monthly wage per each FTE to a special escrow account. The contributions shall be paid until the total accumulated amount reaches a two months' salary.

If the employer goes bankrupt, the accumulated funds will be used to pay off the salary claims on a priority basis.

This is not the first legislative initiative proposing additional guarantees to employees.

Thus, several draft laws were submitted to the Russian State Duma last year, including a draft law on establishing payroll guarantee funds (No. [1039252-6](#)) and a draft law on introduction of additional social security against loss of pay by employees due to employer's insolvency/bankruptcy (No. [1012488-6](#)).

However, both initiatives were rejected.

[Official website of the Russian State Duma](#)

Draft law on regulation of irregular working hours submitted to State Duma

The draft calls for the following:

- To clarify that irregular working hours shall mean the

Legislative initiatives

Russian President signs a set of federal laws

The President of the Russian Federation has signed a package of federal laws, namely:

- Federal Law No. [58-FZ](#) of 3 April 2017, enabling the sanctioned individuals to abandon the Russian tax residency, and specifying the procedure for taxation of interest income from traded bonds held by individuals (for more details, please refer to LT Digest of [22 March 2017](#));
- Federal Law No. [59-FZ](#) of 3 April 2017 on the protection of national payment systems (for more details, please refer to LT of [9 November 2016](#) and LT Digest of [22 March 2017](#));
- Federal Law No. [48-FZ](#) of 28 March 2017 on delegating the regulation of customs duties to the Russian Ministry of Finance;
- Federal Law No. [35-FZ](#) of 28 March 2017, banning the establishment of legal entities in Russia by foreign or international non-governmental organisations;
- Federal Law No. [41-FZ](#) of 28 March 2017, specifying the requirements to the charter of a credit institution.

Official Internet Portal for Legal Information

Draft law on streamlining regulation of distribution and production of alcohol and ethanol-containing products adopted by Russian State Duma in first reading

Apart from other initiatives, the draft provides for

working regime when an employee may have to work overtime not only if ordered so by the employer, but also subject to his/her consent;

- To stipulate that pregnant women, employees under 18 y.o. and employees with special health needs may not be required to work irregular hours;
- To oblige employers to set forth in the collective agreements or local policies not only the positions with irregular working hours, but also the potential situations when employees can be required to work overtime, as well as how such overtime is accounted for;
- To stipulate that the total overtime under the irregular hours regime may not exceed 120 hours a year; if exceeded, such overtime will have to be compensated according to the overtime rules;
- To oblige employers to ensure a precise recording of employees' overtime;
- The overtime limits and the requirement to record overtime will not apply to top managers, their deputies, and chief accountants;
- The employees working irregular hours shall be entitled to an additional paid annual leave of 3 to 15 calendar days (the exact number of days will be determined by dividing the total overtime hours during the year by eight hours).

The draft law is aimed at preventing employers from abusing the overtime regime and at securing adequate employee guarantees.

[Official website of the Russian State Duma](#)

Russian State Duma to consider draft law obliging auditors to notify authorities on suspicious deals

The draft proposes obliging the audit firms and independent auditors to notify the federal executive authorities of any deals or financial transactions of the audited companies that may be related to money laundering and terrorism financing activities.

A draft law that proposes entitling the tax authorities to access information and documents that constitute audit secrecy is already pending with the Russian State Duma (for more details, please see LT of [17 October 2017](#)).

[Official website of the Russian State Duma](#)

Refined draft law on tax free shopping for foreigners

The following amendments are proposed:

- Certain terms and definitions are corrected: for instance, the term "VAT refund" was replaced with the "reimbursement of the tax amount";
- The Russian Government is authorised to approve the list of goods that will not be tax-free;
- Tax-free eligibility criteria for retailers will be

established by the Russian Government;

- Refund eligibility criteria amended: spending of RUB 10,000 in one store within one calendar day vs. spending of RUB 10,000 for one purchase in one store in the previous version;
- The draft specifies the procedure for exchanging the receipt data among retailers, customs, and tax authorities;
- The amendments also clarify certain provisions governing the deduction of VAT paid by retailers on sales to foreign visitors, if such visitors obtain a tax refund when crossing the EAEU border. In particular, immaterial errors in tax receipts may not lead to denying the VAT refund.

[Federal draft legislation portal](#)

Rospatent prepares amendments to draft law on taxation of intangible assets and R&D

Rospatent, the country's intellectual property rights watchdog, prepared amendments to Draft Law No. 34564-7 on correcting the procedure for taxation of intangible assets and R&D.

The amendments suggest that:

- The income tax rate be reduced to 5 percent for profit received from the rights to R&D results, paid from abroad; the procedure will not apply to brand identity elements; separate accounting will be required to claim the reduced rate;
- Accelerated amortisation rate up to x3 be introduced for own intangible assets;
- Subitem 26 Item 2 Article 149 of the Tax Code be amended, exempting from VAT the sale/assignment of rights to intellectual property under commercial concession contracts, expanding the list of exempt intellectual property types with plant/animal selective breeding results, scientific research, works of art and literary works;
- Subitem 51 Item 1 Article 251 of the Tax Code be amended, exempting from income tax the rights to intellectual property created while performing a government contract, arising with the Supplier under such contract in accordance with its provisions, and expanding the list of exempt intellectual property rights with plant/animal selective breeding results;
- The list of qualifying R&D expenses be expanded with the costs of acquisition of exclusive rights to software, databases, integral circuits topology, and plant/animal selective breeding results;
- The period of lower social security contributions be extended till 2023 for the companies whose activities are focused around the practical implementation of R&D, the rights to which are owned by such companies' founders – scientific or educational organisations.

[Official Rospatent website](#)

Clarifications from government bodies

Russian Ministry of Finance clarifies capital contribution requirement for applicability of lower tax rate on dividends envisaged by DTT with Spain

According to the Double Tax Treaty between Russia and Spain, the dividends payable by a Russian entity may be taxed in Russia at a lower rate of 5 percent, subject to the following conditions:

- The beneficial owner of the dividends is a company (other than a partnership) that made a capital contribution to the dividend payer of at least EUR 100,000 or its equivalent in any other currency;
- Such dividends are also exempt from tax in the other signatory state.

According to the Ministry, to comply with the capital contribution requirement, the Spanish beneficial owner of the dividends must make a contribution of at least

EUR 100,000 directly to the capital of the Russian entity.

The above-mentioned clarifications have the following important corollaries:

- The 5 percent rate may not be justified by any other type of investment, e.g., buying the Russian company's shares in the secondary market or receiving such shares as a capital contribution
- The 5 percent rate may not be applied if a "look-through" approach is used, i.e. when the beneficial owner of income is a company that has no direct interest in the Russian entity.

Although the letter refers to a particular DTT (with Spain), the regulator is likely to apply the same approach to other DTTs that use similar wording.

[*Garant: Prime*](#)

Media review

President of Russia supports initiative to boost domestic regional aviation through lowering VAT

The President of Russia Vladimir Putin has welcomed the initiative by Renova Group to stimulate direct connections between the regions by offering lower VAT rates.

The President tasked the Russian Ministry of Finance and the Ministry of Transport with following up on the proposal.

[*Kommersant*](#)

Federal Tax Service underscores need to reform subsidiary liability principles

The regulator believes that the principles of subsidiary liability need to be reformed to protect the interests of lenders from mala fide owners and managers of

companies and do away with non-competitive advantages.

The regulator noted that mala fide taxpayers often sieve their assets out or transfer business ownership to affiliated parties to initiate bankruptcy afterwards and write off debt. In most cases, the assets are transferred at the direction and to the benefit of the companies controlled (most often, indirectly) by the debtor's beneficiary.

The regulator believes that in such cases not the manager of the debtor, but the person initiating tax evasion, that is, the de-facto manager and beneficiary of the debtor, should be held liable.

[*Official FTS website*](#)

International legislation news

OECD publishes overview of hi-tech solutions to counter tax evasion

The overview covers 21 countries, including Austria, Germany, Finland, France, and Argentina.

The document covers EDF solutions, enabling electronic invoicing and cash registers with fiscal data storage devices.

Each solution is analysed in detail, citing the pros and the cons and illustrating the implementation results.

[*Official OECD website*](#)

Deloitte publications

Bridging the digital gap: how tax fits into cryptocurrencies and blockchain

Today, the world is on the brink of a major tax revolution: as cryptocurrencies and distributed ledger technologies such as blockchain evolve, they push the traditional financial systems from the physical world to online.

Kseniya Osipova, Consultant from the Legal Services for Tech Projects Team, comments on an interesting [article](#) from The International Tax Review, highlighting the key tax implications of the emerging technology.

Overview of key provisions of deoffshorisation law

The Russian economy deoffshorisation agenda dictates the new taxation rules for foreign corporations and unincorporated entities.

This [issue](#) of digest offers an update on the key provisions of the deoffshorisation law from Deloitte's specialists.

New rules for pollution charges

Russian Government Resolution No. [255](#) of 3 March 2017 sets forth the new rules for calculating and collecting the environmental pollution charges. The rules apply effective 1 January 2016, except for certain provisions that will come into force as of 1 January 2019 and 1 January 2020.

LT in Focus of [20 March 2017](#) offers a snapshot of the new rules, clarifications from the Federal Agency for Natural Resources Management (Rosprirodnadzor), and comments from Deloitte's specialists.

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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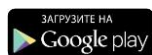


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