

# Legislative Tracking



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**10 May 2016**

**Official website of the Federal Tax Service**

[https://www.nalog.ru/rn77/service/complaint\\_decision/6055214/](https://www.nalog.ru/rn77/service/complaint_decision/6055214/)

## **Determining the actual beneficiary of sublicense payments made in favour of a foreign company**

The Federal Tax Service published Decision No. SA-4-9/1907@ of 9 February 2016 in response to a taxpayer's appeal against the decision of a multiregional tax inspectorate on the results of a field tax audit.

The taxpayer made sublicense payments in favour of a Swiss company for the use of trademarks and production rights; in return, the Swiss company made licence payments to the rights holder, a Japanese company. Insofar as the double tax agreement (DTA) between Russian and Switzerland stipulates that royalties are subject to taxation in the state in which the beneficiary is incorporated, the Russian taxpayer did not withhold profit tax when making sublicense payments in favour of the Swiss company.

The tax inspectorate concluded that profit tax should have been withheld because the Swiss company is not the beneficiary of the royalties. In reaching this conclusion, the tax inspectorate noted that the Japanese and Swiss companies, the taxpayer and other organisations in the commercial group are related parties, and that the Japanese company holds the rights to the trademarks under which cars and components are sold and has the exclusive right to control confidential technical information and data (expertise) necessary for the production and assembly of cars and components. Considering these circumstances, the tax inspectorate concluded that the Swiss company performs exclusively intermediary functions in the interests of the Japanese company, transferring funds generated in Russia through car sales to the Japanese company and not performing any other roles or bearing any risks. The tax inspectorate furthermore concluded that the beneficiary of the royalties is the Japanese company, and thus the provisions of the DTA between Russia and Japan envisaging taxation at a rate of 10 percent should apply to the disputed payments.

The Federal Tax Service, however, decided in favour of the taxpayer, noting the following circumstances:

- The Swiss company develops expertise and trademarks (namely, determination of strategies and development of solutions for the European market, technical adaptation of models to the needs of the European and Russian markets, quality control for regional production etc.);

- The Swiss company bears associated risks (namely, risk of substandard production quality, risk of violation of the trademark legal framework and currency risk);
- The flow-through nature of the payments was not proven.

Considering these circumstances, the Federal Tax Service concluded that the Swiss company is the beneficiary of the sublicense payments, and thus the exemption of the disputed payments from taxation under the DTA between Russia and Switzerland is legally justified.

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