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BENEFICIAL OWNERSHIP FOR PURPOSES OF APPLYING OF DOUBLE TAX TREATIES: THE VIEW FROM RUSSIAN COURTS

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Abstract

The topic of taxation is one which finds few enthusiasts outside the field of tax specialists. Yet, public indignation when large companies are discovered to be avoiding large amounts of tax is common — especially when set alongside matters such as rising prices, salaries which do not match inflation, and cuts to public services due to reduced sums of money in the public purse to pay for essential infrastructure and services. Accordingly, the basis on which such large companies — and affluent persons can avoid (not evade) paying taxes becomes interesting. The question as to how to secure better tax income stream from such companies and persons becomes a matter to which States increasingly pay attention. To this end, the existing international system of double tax treaties provides a mechanism whereby dividend payments can avoid tax liability when they are cunningly manipulated with a number of financial entities linked together. The concept of "beneficial ownership" has been developed internationally as a tool to leverage income tax revenue out of such tax avoidance schemes. The tax code of the Russian Federation now incorporates provision regarding such beneficial ownership — yet its implementation (both in Russia and abroad)

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is in its infancy, There are ambiguities and anomalies. This paper explores this concept of beneficial ownership — historically, in theory and in practice — and signposts directions for the taxation law and practice to develop.

Keywords

Beneficial ownership, tax, taxation, Russian Federation

CONTENTS

1. INTRODUCTION

The concept of "beneficial ownership" is a new and unexplored concept in both theory and practice yet it is provided for in the national tax legislation of the Russian Federation — which has a big importance for international taxation involving subjects of the Russian Federation. The story of this concept starts in the middle of 20th century. In Russian Federation, studying of concept of the "beneficial ownership" starts after dissolution of USSR only. In present time there a few researches of the concept of the "beneficial ownership" in Russian tax science. Attention to this team is increased after year 2015 when the concept of the "beneficial ownership" was implemented in national legislation.

The Russian Federation is developing this in practice now and the courts and their positions will play a big role in the process of interpreting and implementing this concept in practice. In this paper author aims:

— to study the developing of concept of the "beneficial ownership" in Russian legislation;

— to show the role of Russian companies in withholding taxes in deals with foreign companies and in applying of concept of the "beneficial ownership" in practice;

— to review court positions on this topic related with "beneficial ownership" based on those few cases that so far exist.

2. DOUBLE TAX TREATIES AS LEGAL INSTRUMENT FOR COORDINATION OF TAX POLICIES OF STATES

The concept of "beneficial ownership" in respect to international taxation was first mentioned in the protocol to the 1966 double tax treaty between the United Kingdom and the USA. So, the birth of the concept of "beneficial ownership" was in the states of the common law system. This is one of the reasons why there were no definition of this concept in 1966.

This concept has developed over the years. OECD's Model Tax Convention on Income and on Capital issued by OECD (OECD's Model Convention) uses this concept for now. Firstly, "beneficial ownership" concept was related with agents or nominees. Concept was expanded on conduit companies following the Conduit Companies Report of year 1986. Conduit companies are the companies which are interposed in a state — party of double tax treaty to forward passive income to company (people) which are not interposed in state — party of double tax treaty.[2]

Double tax treaties are necessary instruments for the coordination of tax policies of different countries. The right of a state to impose taxes on its territory is an inseparable part of sovereignty, so called "fiscal sovereignty".[3]

The right of a state to impose taxation on an exact person or legal entity is related with the concept of identifying a "tax resident".

Traditionally, tax residents were considered only physical persons, who have a link with the territory of a state as regards the matter of taxation. The legal status of a tax resident is not connected with their status of citizenship. A foreigner may be a tax resident of another state,

[2] See Jain S., Prebble J., Bunting K. Conduit companies, beneficial ownership, and the test of substantive business activity in claims for relief under double tax treaties. eJournal of Tax Research. 2013. Vol. 11. No 3. Pp. 386–433.

[3] Terra B., Wattel P. European Tax Law. 5th ed. Hague, 2008. Pp. 8–9.

if he satisfies the requirements of the tax legislation of that state, just as a citizen of that state may under certain circumstances not be tax resident.

Usually, to become tax resident in most countries it is sufficient for a physical person to just to be on territory of state for some period of time during a tax period. For example, under Russian tax legislation, a physical person present in the territory of Russia forat least 183 days in a prior 12 month period becomes a tax resident. The tax resident shall bear a total tax burden to the state of tax residence as regards all of his income — irrespective of whichever state where that income was earned — so called "worldwide income".

This does not mean that a person who is not a tax resident of a state shall not pay taxes from their income to this state at all if their residency on the territory of the state is less than the tax eligibility period. Tax is still levied, but on a different basis. The tax rate for non-tax residents is usually higher than for tax residents.

The taxation of the income of legal entities was traditionally linked with their place of juridical registration. Due to this the institute of tax residence of legal entities for some time was not implemented in the Tax Code in Russian Federation.

Since 2015 the rules of tax residence for legal entities was added to the Russian Tax Code. Along with legal entities, which are registered in Russian Federation, other foreign legal entities shall also be considered as tax residents of Russian Federation: These include:

— foreign legal entities which shall be considered as tax residents of Russian Federation under double tax treaties in which one of the parties is the Russian Federation;

— foreign legal entities, which have place of effective management in the Russian Federation.

The territory of the Russian Federation shall be considered as a place of effective management if the executive bodies of the legal entities or the main managing person are acting from within the territory of Russian Federation irrespective of their place of registration de-jure.[4]

[4] Shashkova A. V. (2018) Corporations and the State: Emerging of the Problem of Corporate Liability. Opción, 34 (Special No 14) Pp. 432–458.

The tax legislation of the Russian Federation provides foreign legal entities the opportunity for self-recognition as a tax resident of Russian Federation in special cases — notably with regard to participation in oil and gas development projects and international transportations projects.

The institute of tax residence is regulated firstly by national legislation. Each state determines the conditions for the application of tax resident status to legal or physical persons by its own will. Such an approach leads to competition between fiscal jurisdictions and provides opportunities for multi-taxation when a legal entity or physical person may be recognised as a tax resident of several states — or when income received by a non-resident in one state is obliged to pay tax in this state as well as on the basis of it being a source of income in the place where they are a tax resident.

To balance the fiscal interests of different states and private interests of taxpayers in cross-border economic activity double tax treaties between different states are concluded.[5]

Generally, double taxation under the definition of the OECD's arises if all of the following conditions are met:

— imposition of taxes shall be made in two (or more) states;

— imposition of taxes shall be made in respect of the same subject matter;

— impositions of taxes shall be made for an identical period;

— impositions of taxes shall be made on the same taxpayer;

— taxes which are imposed shall be comparable.[6]

Only, if these conditions mentioned above are all present is there is a legal basis for the determination of double-taxation. So, these conditions are also conditions for the application of a double tax treaty (if one exists between two states) to exact business transactions.

For the purposes of the regulation of double taxation, all types of income are divided into two groups: "passive" and "active". We can

[5] Kudryashova E. V. Cross-border interest rate swaps and their treatment for regulatory and tax purposes. Kutafin University Law Review. 2018. T. 5 No 1. Pp. 198–208.

[6] http://www.oecd.org/tax/treaties/model-tax-convention-on-income-and-on-capital-2017-full-version-g2g972ee-en.htm.

see the definition of "passive income" in the OECD's glossary of tax terms: As to "passive income — this is income in respect of which, broadly speaking, the recipient does not participate in the business activity giving rise to the income, e.g. dividends, interest, rental income, royalties, etc."[7] There is no similar definition though for "active income" in OECD's glossary of tax terms, so, it can be given based on "negative definition" of "passive income", as income in respect of participation of the recipient in the business activity.

Usually income from business activity by double tax treaties shall be due in the state of tax residence of the recipient of the income. Passive income may be obliged in both states, but usually in double tax treaties for state-source of such income there is a lower rate than in national legislation.

As an example, the Tax Code of the Russian Federation provides that the dividend income paid to foreign companies by Russian companies shall be due in the Russian Federation with a tax rate of 15 %. In double tax treaties concluded by the Russian Federation there is instead a tax rate for dividend income between 5 % to 10 %.

At the moment, most states use a Model Tax Convention on Income and on Capital issued by the OECD (further Convention). The structure of Convention consists seven chapters: Scope of convention, definitions, taxation of income, taxation of capital, methods for elimination of double taxation, special provisions and final provisions.

All kinds of income are divided in Convention into twenty categories: income from immovable property, business profits, international shipping and air transport, associated enterprises, dividend, royalties, capital gains, income from employment, director's fees, entertainers and sportspersons, pensions, government service, students, and other income. As can be seen, we first see identification of the kinds of income of enterprises, and then physical persons.[8]

Within the Model Tax Convention comments by OECD are provided to each article. These comments have significant influence on states' tax policies, fights with the erosion of tax bases and on the development

[7] http://www.oecd.org/ctp/glossaryoftaxterms.htm.

[8] https://read.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-2017-full-version_g2g972ee-en#page1.

of national legislation in this matter. For example, comments of the OECD to Article 10 "Dividends" clarify the key position that the profit of a company is not the profit of shareholders, so the distribution of a company's profit as dividends among shareholders shall be considered as income from capital. Due to this position it is obvious that the taxation of dividends are not double-taxation of company's profit, because there are different subjects of taxation — the company pays tax on the income from business activity, shareholders — tax on income from capital, which they provide to company for using.

The concept of "beneficial ownership" is also is mentioned in the comments of the OECD to Article 10 "Dividends" of Convention.

The main purpose of a double tax treaty is to protect business actors from double taxation and protect free transfers of goods, services, capital and labour force. Opportunities of reducing the total tax burden for multinational companies lead to the possibility of aggressive tax planning with a goal of tax avoidance. Multinational companies use the net of double tax treaties to spread production and profits between fiscal jurisdictions in ways to secure a minimal total tax burden.

Tax avoidance should not be confused with tax evasion. Tax avoidance means that taxpayer uses tax legislation with maximal effectiveness to reduce tax payments. Tax avoidance is distinguished legally in two ways:

Firstly, using provisions of law which allow the reduction of tax obligations or using the lack of provisions in the law to partly avoid taxation. Tax evasion, on the other hand, is always made in an illegal form, as kind of criminal action.[9]

So, using of lack of legal provisions in double tax treaties is a way of tax avoidance in an aggressive manner when the taxpayer artificially makes conditions for receiving tax benefits which in a normal way stimulates good taxpayers. Despite the legal character of tax avoidance it is very harmful for the financial stability of states. To combat aggressive tax avoidance the OECD works out recommendations and new concepts which are implemented in bilateral and multilateral tax treaties and in

[9] Nwocha M. E. Tax Evasion and the law in Nigeria. Problemy zakonnosty. 2017. No 139. Pp. 286–295.

national legislation acts. In fact more close coordinations of states in fiscal affairs and exchange of relevant financial information between states are developed as a result.[10]

One such concept that helps states to arrest such activities is to encourage multinational companies shareholders "is the concept of beneficial ownership" Due to gradual developing of Russian national tax legislation related with transnational business activity this concept was implemented in Russian legislation in year 2015. This has been described succinctly as follows*:*

Legal ownership of an asset means that the legal person or individual ("Person") claiming legal ownership is regarded to be the legal owner under the (civil) laws of the country in which the Person and/or the asset is located. Under the civil laws of most countries, legal ownership will be assumed for a Person who has "possession" of the asset. "Possession" of the asset means either physical possession or official registration of the asset in the name of a Person. Initially, a legal owner also has full economic ownership of the asset. To be "Beneficial Owner" of an asset, it is understood that one should at least be the legal owner of the asset. A legal owner can transfer (part of) the risk associated to the asset to another Person. This risk transfer is a transfer of (part of the) economic ownership. It is clear that being merely the legal owner ("agent" or "nominee") of an asset, after having transferred the full economic ownership of the asset, is not sufficient to be regarded as the Beneficial Owner. It can be questioned whether the full economic risk can be transferred.[11]

The first mention of the "beneficial ownership" concept in Russian practice is to be found in the 1977 in double tax treaty between Spain and USSR. Command economy in Soviet Union meant specific tax system and government monopoly on foreign trading. Disputes of

[10] Kudryshova E. V., Mirzaev R. M. On the issue of tax harmonisation processes within regional economic integration. Kutafin University Law Review. 2019. V. 6. No 1. Pp. 91–107.

[11] Commentary on: OECD Model tax convention: Revised proposals concerning the meaning of "Beneficial Owner" in articles 10, 11 and 12. 19 October 2012 to 15 December 2012 — MLL van Bladel, see https://www.oecd.org/ctp/treaties/BENOWNMLL_vanBladel.pdf.

taxpayers with government based on double tax treaties could not come up because of absence of relevant relations. That's why concept of the "beneficial ownership" was not studied in theory and practice and was not reflected in national legislation in soviet time.

Issues of international taxation become more actual for Russian Federation after dissolution of USSR and transformation of economic and tax systems. As of today, there are already eighty four double tax treaties concluded by the Russian Federation with such countries as: USA, the United Kingdom, China, Germany, Cyprus, France and others and in many of them concept of the "beneficial ownership" is mentioned.

It was taken years for Russian Federation to develop national tax legislation for implementation of actual concept of the "beneficial ownership" based on actual Recommendations of OECD and theory concepts.

3. LEGAL REGULATION OF DOUBLE TAXATION BY NATIONAL LEGISLATION OF RUSSIAN FEDERATION

Since the dissolution of USSR concept of beneficial ownership in Russia developed and amplified with constant growth of its importance. The three stages could be identified once we analyse the development of legal regulation in Russian Federation:

— first stage: 1991–2001 — an absence of any special regulation on avoiding of double taxation in national legislation, direct acting of double tax treaties;

— second stage: 2002–2014 — implementation of double taxation regulations in the Tax Code of Russia. Formal rules for applying of double tax treaties;

— third stage: 2015 — present time — implementation of "beneficial ownership" concept in national tax legislation of Russian Federation.

At the first stage questions of double taxation were regulated by the Law of Russian Federation "About corporate profit tax". According to these old rules withholding taxes from foreign contractors shall be calculated and paid by Russian companies. Such companies are called in Tax Code as "tax agents". Withholding taxes shall be calculated in matter of income paid by tax agents to foreign companies only for "passive

income", such as dividend, royalty, interest, without any conditions or exemptions. Foreign companies by themselves had to request the Russian government for the application of double tax treaties in a year after the withholding of relevant tax and return to them amount of tax withhold. The right to request for this return of tax withheld was expired after a one year period. So, at this stage the Russian government and foreign taxpayers were going into direct legal relationships in the process of applying double tax treaty. Regulations in law did not consist of any of rules for a foreign company about any order of providing arequest for the application of double tax treaty nor about any list of documents for proving of right on applying of double tax treaty.

With the acceptance of the Tax Code, strict rules for implementing double tax treaties were applied. Foreign companies no longer had to directly communicate with the Government. The application of double tax treaties from the year 2002 was the burden of tax agents. "Passive income" which shall be obliged in Russian Federation was writren down in the Tax Code in more detail: dividends, interest, royalty, financial operations, sales of real estate, rent income, income from international transportation, claim income, etc. The List of "passive income" which shall becomes the subject of duty under corporate profit tax in Russia was not limited. Tax inspectors and courts were able to treat any income as "passive" regardless of character of income. On the other hand, it is directly written in the Tax Code that income from sales of works, services and goods shall be not subject at all to profit tax in the Russian Federation.

In the years 2002–2014 the rules for applying of double tax treaties were very formal.

Only two conditions were enough to qualify for exemption from taxation in the Russian Federation for a lower tax rate:

— acting (as ratified by Federal Council) on the basis of double tax treaty between the Russian Federation and a state in which the foreign company has the status of tax resident;

— documental confirmation of tax residence of foreign company issued by authorised body of state.

In the Tax Code of Russian Federation there are no explanations about what is to be understand by "documental confirmation of tax

residence." By common practice such documents are issued by a fiscal body of state as a "certificate of tax residence." The specific fiscal body which is authorised for confirmation of such tax resident status is usually mentioned in the text of a relevant double tax treaty or empowered to issue such conformation by national legislation. In the Russian Federation at the current time, it is the Federal Tax Service.

All documents issued by foreign state body as to confirmation of tax residence has to be legalised in the proper way. Proper legalisation means consul legalistion. At the same time, most states at the present time are partners of the Hague Convention on the cancellation of legalisation requirements for foreign official documents (made in Hague on October, 5 of year 1961). Under this Convention the placing of an apostille on document shall be considered as legalisation in the proper way. In the Russian Federation the authorised body for placing an apostille is the Ministry of Justice. In double tax treaties parties may agree about the acceptance of documents on confirmation of tax residency without apostille.

The Federal Tax Service and the courts in Russia have a very formal approach about apostille on documents confirming tax residence. They do not accept such documents without apostille if conditions about the cancellation of apostille exists in treaties not directly related to issues of double taxation, for example, in treaties about mutual help in civil, criminal and other legal relations.

The Russian Federation has currently agreed about cancellation of apostille on documents confirming tax residence with the following states: Armenia, Kazakhstan, Belorussia, Turkmenistan, Uzbekistan, Kyrgyzstan, Germany, Belgium and others.

The legal relation about the application of double tax treaty benefits from year 2002 becomes more complex. The main responsibility for fulfilling all formalities related with the application of double tax treaty rests with the Russian company — the participant of the deal with a foreign company — which shall act as tax agent. The process of applying the double tax treaty can be simplified using the following steps:

— The legal fact of income appearing to a foreign company from Russian company.

— Determination by the Russian company of the kind of income — passive or not?

— If the income is passive — checking if there is an acting double tax treaty between Russian Federation and the state of tax residency of foreign company.

— If there is an acting double tax treaty — requesting confirmation of the tax resident's status.

— Identification of income shall be paid to the foreign company with the exact kind of income in the double tax treaty.

— Applying the reduced tax rate or exemption to the income of foreign company.;

— Payment to foreign company with consideration of tax withheld.

— The payment of tax withheld to the budget of the Russian Federation no later than the day after payment to the foreign company.

— By end of the quarter providing to Federal Tax Service the reporting form about income paid to foreign companies for the quarter ended.

The reporting form consists of data about all payments to the foreign contractors for the previous quarter without any exemptions. Common court practice in Russian Federation confirms that the absence of tax withheld in deals with foreign companies (even if income is "active") is not a basis for not providing the reporting form about income paid to foreign companies. Still, money sanctions in Russian Federation for non provision of this reporting form are very small. Far more serious fines may be charged to tax agents for not withholding tax in the absence of documents confirming the tax resident's status of a foreign provider in another state.

By direct legislative rules these documents shall be received by the tax agent before payment to a foreign contractor. Still courts are flexible enough in this matter and free tax agents from responsibility if the tax agent receives documents on tax residency after payment and from the content of these documents it is possible to establish that confirmation correlates to the tax period in which payment was done.

The tax agent is not obliged to provide documents on the confirmation of tax residence status of his foreign contractors to the Federal Tax Service after each payment or by end of some period.

Providing documents related to payments to a foreign company shall be made only upon the official request of tax inspectors during a desk or field tax audit. There is a separate responsibility and liability for the non-fulfillment of official requests from tax inspectors.

One more thing about the responsibility for non-withholding of tax is related to the position of the Plenum of the Supreme Arbitration Court of Russian Federation which stipulated in its Resolution in y 2013 a new position about duties of tax agent.

Previously, a tax agent was not considered as a subject of tax obligation related with payment to foreign company. Only a foreign company shall be considered as a taxpayer, and a Russian company shall only act as an agent between the foreign taxpayer and the budget of the Russian Federation. So, in the case of non-withholding of tax, the Russian company shall not bear a tax burden in lieu of the foreign company — only responsibility for non-fulfilling the tax agent's obligations (20 % from tax amount not withhold). By the position of the Plenum of the Supreme Arbitration Court of Russian Federation a foreign provider is not a tax resident of Russian Federation and not under the control of Russian tax bodies. Thus the Federal Tax Service has no powers to force a foreign company to pay tax in Russia if the tax agent avoids his duties of tax withholding. This may lead to easy breaking of rules of the tax legislation in the Russian Federation and foreign companies avoiding taxation in Russian Federation by collusion with Russian companies. So, the Resolution of the Plenum of the Supreme Arbitration Court stipulates that in the case of a Russian company avoiding its duties as a tax agent and not withholding tax from income paid to foreign company, such a Russian company shall pay the tax not withheld by itself.

It is an effective measure to fight tax avoidance using of lacunae or gaps in Russian tax legislation, but it does not directly correlate with the provisions of the Tax Code of the Russian Federation. For six years passed there is no any clarifications in Tax Code on this matter were done.. The Plenum of Supreme Arbitration Court had not just interpreted legislation, but in fact created new legislation rule, which is not directly set in Tax Code.

The tightening of tax legislation and court tax practice is a normal practice for the Russian Federation after the world financial crisis with the background of foreign sanctions and the reduction of oil and gas prices. To secure budget funds and increase efficiency of collecting of taxes new concepts to help in the fight with tax avoidance recommended by OECD were implemented in the tax legislation of Russian Federation. One of them is, as mentioned before, "beneficial ownership".

4. CONCEPT OF "BENEFICIAL OWNERSHIP" IN RUSSIAN COURT PRACTICE

To understand the necessity of "beneficial ownership" the concept for international taxation, it is necessary to review the most common and well-known (including to courts) scheme of tax avoidance. This is the one usually used by Russian companies to enjoy benefits from using double tax treaties without real economic purposes in transactions with a foreign company — a tax resident of a state, by double tax treaty with which the Russian company tries to receive tax benefits.

The most popular scheme is used by Russian companies to secure their assets and minimise tax burden is related to linking of companies in offshore states, and the first foreign company in this link shall be a tax resident of a state with which Russian Federation has double tax treaty.

To implement this scheme in reality in respect of dividend income (the most popular kind of income for tax avoidance) the foreign company-shareholder of a Russian company is registered in Cyprus. The Russian Federation has a double tax treaty with Cyprus by which tax rate on dividend income shall be 5 % (on the condition that the shareholder has a major share in the Russian company) instead of the 15 % rate required under the Tax Code. After receiving the dividend income the Cyprus company pays a minimal registration fee in the budget of Cyprus and transfers the dividend income to its shareholder which is usually a tax resident of the British Virgin Islands. The Russian Federation has no double tax treaty with the British Virgin Islands and in case of direct payment of dividend income to such company, taxation in Russian Federation shall be made by tax rate 15 %. The company in the

British Virgin Islands distributes dividend income to real shareholders in the next link

By this scheme as real receiver of dividend income shall be considered not a Cyprus company, but an unidentified person (legal entity or physical person) who really manages the dividend income and enjoys all benefits related with this income. An artificial company-shareholder in Cyprus is needed only for applying reduced tax rate on the dividend income by double tax treaty between the Russian Federation and Cyprus.

There are three different situations when such scheme may occur:

— real shareholders are Russian physical persons or legal entities who want to stay anonymous and save tax payments by applying of reduced tax rate (usually 5 %) by double tax treaty instead of the tax rate set by Russian tax legislation — 13 %;

— real shareholder is a tax resident of the state which does not have a double tax treaty with Russian Federation. In this case the tax rate of 15 % shall be applied to dividend income by Russian tax legislation;

— real shareholder is a tax resident of the state which has double tax treaty with Russian Federation, but tax rate by this double tax treaty is higher than by double tax treaty between Russian Federation and Cyprus. The third situation is very rare in practice.

Each situation causes great economic harm to the Russian Federation as public funds of Russia are deprived of income.[12] Also, the implementation of such schemes in business practice are harmful for good taxpayers who have a higher tax burden than not so socially responsible businessmen. As a result such fundamental principles as equality and justice of taxation are broken.

For such cases the concept of "beneficial ownership" is needed. There were attempts to implement it in the national tax legislation of the Russian Federation since year 2009, but finally relevant provisions were implemented in the Tax Code only from 2015.

[12] Kudryashova E. V. (2014) State Planning and Budgeting in the Russian Federation. In: Joyce P., Bryson J. M., Holzer M. (eds) Developments in Strategic and Public Management: Studies in the US and Europe. Palgrave Macmillan, London. https://doi.org/10.1057/9781137336972_10.

The principle of this scheme is this: If a tax resident, a receiver of income is an artificial structure which is not managed income and it is obvious that it is another person who enjoys benefits from theincome received, taxation shall be made considering the tax residence this very person.

This concept for tax purposes should not be confused with the concept of a beneficial owner in civil law. In all cases of business activity the final beneficiary will be a physical person always, because legal entity is a "fiction" which was made by physical persons (directly or through other legal entities) to manage their capital.[13]

Due to this all dividend income is an income of physical persons, payment for the provision of their capital. By the concept of "beneficial ownership" the beneficial owner is not an obligatory physical person. It can be legal entity also which manages income and "decide about economical fate of income received." Applying the approach that beneficial owner must be a physical person (the final link in chain of shareholders) is harmful for good taxpayers legal entities which in this case may lose all benefits by double tax treaty without any obvious reasons.

Such approach will be harmful for the prior goal of the concept of "beneficial ownership" — to provide equality and justice of international taxation within of freedom of movement of goods, capital, works and services.

In Russian legislation the concept of "beneficial ownership" set as an "actual right on income" shall be treated in meaning the "right on managing income and deciding of economic fate of income." It is a very vague definition for such a sensitive sphere of legislation as tax. There is an opinion in Russian legal science that such a vague approach to the establishment of beneficial owner of an income may lead to the position that no such person exists.[14] In other opinions in Russian legal science there is the opinion that the beneficial owner is the person who receives benefits from income and benefits from a reduced taxation

[13] See The Puppet masters (how the corrupt use legal structures to hide stolen assets and what to do about it). The World Bank, 2011. P. 18.

[14] Brook B. Y. Perspectivy codificacii conspecii beneficiarnogo sobstvennika v rossijskom nalogovom zakonodatelstve. Zakon. 2014. No 8. Pp. 43–57.

(tax exemption).[15] The OECD's comment to the Model Tax Convention is based on a "right to use and enjoy" which shall not be limited by contractual or legal obligations.[16] As it was mentioned before, concept of the "beneficial ownership" was birthed in common law system, where court practice is important in creating of law. It is worry of society that concept of "beneficial ownership" is not have official definition in legislation and shall be treated by court practice.[17]

Through these definitions we may see some uncertainty in understanding the "beneficial ownership" concept which may lead to an ambiguous interpretation in Russian practice. Moreover, Russian tax legislation setss obligation on tax agents to establish who is the beneficial owner of income paid, and tax agent shall prove it by evidence to be provided to tax agents by a foreign company. With the setting of this obligation Russian tax legislation does not provide any details about how "actual right on income" shall be proved.

Presence of some evidences before payment with the certificate of tax residency before payment as of now is another condition for applying a double tax treaty. By literal reading of the new provisions we may see that the absence of some evidences of "actual right on income" on the date of payment is enough for rejecting a possibility of applying of double tax treaty without any investigation, but the presence of such evidences is not enough to be free from the charges of tax inspectors who will collect their own evidences.

In practice due to such vague regulations there are many different approaches in collecting of evidences on "actual right on income" by Russian companies. Some companies request from foreign partners just formal letters with confirmation that the foreign partner really manages the income received. Other companies collect dozens of documents from contracts up to bank documents of a foreign partner. The Ministry of Finance of Russian Federation tries to give official explanations that

[15] See: Khavanova I. A. Mezdunarodnye nalogovye dogovory Rossijskoy Federacii ob izbejanii dvoinogo nalogooblojenia.

[16] https://read.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-2017-full-version_g2g972ee-en#page629.

[17] See Baker P. Beneficial ownership: after Indofood. URL: http://taxbar.com/wp-content/uploads/2016/01/Beneficial_Ownership_PB.pdf.

vague provisions about possible evidences of "actual right on income" actually help tax agents allowing them to find the best suitable evidences in a specific case, still the main idea from their advice is "the more — the better."

In practice tax inspectors try to challenge in courts only obvious tax avoidance schemes usually conducted with the participation of Cyprus companies. In this case the formal letter that a foreign partner really manages income received will be not accepted as evidence even in court, which will instead pay more attention to evidences collected by tax inspectors through the exchange of financial information with Cyprus fiscal bodies.

Practice shifts the burden of proof from the tax bodies to the tax agent, who shall know the beneficial owner of income paid. Even in the reporting form on income paid to foreign companies by tax agents there shall be added information about the beneficial owner of income in the following ways — and the tax agent can choose which

— tax agent knows that foreign partner has "actual right on income";

— foreign partner provides information about absence of "actual right on income" and the tax agent knows which third party has it;

— foreign partner provides information about the absence of an "actual right on income" and the tax agent does not know which third party has it;

— tax agent knows that foreign partner has no "actual right on income" and knows that some third party has "actual right on income";

— tax agent has common information about deals with financial instruments (a special case);

— tax agent does not know who has "actual right on income".

From the literal reading of the provisions of the Tax Code it is clear that only the first option may be the basis for applying a double tax treaty with the state in which the foreign partner is a tax resident. At the same time in case of a third option it is possible for a tax agent to apply a double tax treaty (if one exists) with the state of the actual beneficial owner's tax residence if tax agent has enough evidences.

Due to the net of agreements with other states (including Cyprus) the Federal Tax Service of Russian Federation may receive enough evidences from tax bodies of other states in respect of the international

exchange of financial information. It allowed the Federal Tax Service easy enough wins in courts cases versus Russian companies which build structures of dividends payments using the link of Cyprus to the British Virgin Islands.

Court cases in the matter of "beneficial ownership" in Russian Federation are reviewed by Arbitration Courts under the rules of the Arbitral Procedural Court. Arbitration Courts in the Russian Federation review cases related with business activities of entrepreneurs and legal entities. By the procedural rules, the burden of proof in tax disputes is upon the Federal Tax Service. In cases related with the concept of "beneficial ownership" only "negative proof" by Federal Tax Service is sufficient.

By court position, the Federal Tax Service shall only prove that the foreign company — receiver of income — has no "actual right on that income" and cannot establish an exact beneficial owner. In such a case, it is enough to reject applying a double tax treaty and instead apply tax rates according to Russian Tax Code.

At the same time. the tax agent, according to literal provisions of theTax Code and court practice, has to prove exactly who is the beneficial owner of the income paid, especially if he wants to apply a double tax treaty with the state in which the beneficial owner is a tax resident.

Such position is in contradiction with the Arbitration Procedural Code of Russian Federation and the principle of justice of taxation. Tax bodies in any event have more powers to establish exactly who the beneficial owner of income are and which exact taxation shall be applied. Such court practice shifts the balance in respect of the fiscal goals of state. At the same time, it is a common tendancy in world practice, because the same position may be found in the case reviewed by the Court of European Union "*T. Danmark, Y. Denmark vs. Ministry of Taxation of Denmark*".[18]

In rare court practice related with "beneficial ownership" there there do not appear to be any cases where courts have used this position. The Federal Tax Service has in such deals sufficient evidences, so all

[18] http://curia.europa.eu/juris/document/document.jsf?text=&docid=211047&pageindex=0&doclang=en.

court cases are obviously not in favour of taxpayer. Still, some negative tendencies for Russian companies in respect of payments to foreign companies may be found in court positions.

5. CONCLUSION

Russian national legislation about international taxation has developed seriously for the 29 years of modern economic history of the Russian Federation since the dissolution of the USSR. With the significant influence of world practice and, notably the OECD recommendations, modern new concepts for the fight against tax avoidance were implemented. One of them is the concept of "beneficial ownership" which serves as a barrier for artificial structures of a group of companies with the purpose of using a net of double tax treaties to minimise tax burden.

Set against the background of the world financial crisis, sanctions on Russian economic and low prices and oil and gas, the Russian government makes efforts to secure public funds of the Russian Federation and increase the effectiveness of tax collections. It leads to some strict practices in tax bodies and courts and an increase in the proof burdens on Russian companies — tax agents — in deals with a foreign company. Still, court positions about implementing the concept of "beneficial ownership" are in trend with world court practice which also tough enough.

— We can point to certain specific features developed in the Russian context for the concept of the "beneficial ownership": concept of the "beneficial ownership" in Russian legislation has meaning of "actual right on income". It is very vague definition. Role of court practice is increasing in treating of this concept.

— Russian court practice on the concept of the "beneficial ownership" is mostly in favor of tax bodies. Tax bodies effectively use all their powers to collect evidences including international exchange of financial information.

— Main burden of correct withholding of taxes from foreign companies is on the Russian companies — tax agents. Tax agent shall provide evidences to tax bodies and to court on "actual right of income".

Still, Tax Code does not stipulate form or content of evidences needed. It means that accepting of evidences collected by taxpayer depends on discretion of court.

— Tax bodies shall not prove who is exactly beneficial owner of the income, it is needed to be proved only that direct contractor of Russian company is not beneficial owner. It means that tax bodies shall not establish exact fiscal jurisdiction of beneficial owner and recalculate withholding taxes according to it.

Specifics mentioned above shows that concept of the "beneficial ownership" is developing now in Russian theory and practice. As for now, it take heavy burden for Russian companies to comply with this concept. Still, next developing and updating of this concept within the Russian internal context can be made in court practice.

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