

client alert

TAX | RUSSIA |

JUNE 2015

RECENT CHANGES TO TAX LEGISLATION

TAX CODE

Federal Laws No. 113-FZ dated 2 May 2015, No. 146-FZ dated 8 June 2015 and No. 150-FZ 8 June 2015 have introduced numerous amendments to the Tax Code of the RF (the "TC RF") which will come into force from 1 January 2016 subject to certain exemptions.

The main changes are as follows:

Part I of the TC RF:

- The rules for symmetrical adjustments based on audits of tax authorities and for voluntary symmetrical adjustments are established;
- Tax residency rules have been amended, in particular, (i) the place of the board of directors' meetings is excluded from the list of criteria for determining tax residency, (ii) residence criteria (accounting maintenance, records management, etc.) are classified as additional ones;
- Amendments to CFC rules, in particular:
 - non-applicability of CFC rules to active foreign companies (the passive income in profits of active companies should not be more than 20%);
 - active companies are not required to be registered in countries with which there is a valid double tax treaty; etc.

Profit Tax

- The value of amortized assets which will be put into operation starting from 1 January 2016 is increased up to a maximum of 100,000 roubles (currently 40,000 roubles);
- Russian legal entities in order to be exempted from profit tax monthly advance payments should have income not exceeding 15 million roubles per quarter on average for the last four quarters (the limitation under the current legislation is 10 million roubles).

Personal Income Tax (“PIT”)

- The date for PIT purposes of actual receipt of income in the form of material benefit from the acquisition of securities is the date of payment for such securities, provided the payment for the securities is made after the individual has received ownership of the securities acquired;
- The date for PIT purposes of actual receipt of income in the form of material benefit from saving interest on loans is the last day of each month during the period for which the loan has been provided;
- Tax agents must transfer PIT withheld no later than the day following the date the respective income was paid to the respective individual (subject to certain exemptions);
- Tax agents must, in addition to annual PIT reports, file PIT reports for 3, 6 and 9 months no later than the last day of the month following the reporting period (currently only annual reports must be filed by tax agents);
- Income (except monetary funds) received due to the liquidation of a foreign legal entity (including a CFCs) is exempt from PIT, provided the conditions established by the law are met (in particular, the liquidation should be finalized before 1.01.2017, subject to certain exceptions);
- The rules are established for offset of tax paid outside of Russia by an individual if such offset is provided by a double tax treaty signed and ratified with the Russian Federation.

FEDERAL LAW OF THE RUSSIAN FEDERATION NO. 140-FZ DATED 8 JUNE 2015 ON AMNESTY OF CAPITALS OF INDIVIDUALS

The main provisions of the law are the following:

- According to the law, individuals can voluntarily submit a special declaration to the tax authorities *from 1 July 2015 till 31 December 2015* (the “**Declaration**”) related, in particular, to property, bank accounts in foreign banks and controlled foreign companies.
- In respect of violations related to the acquisition, use or disposal of property and/or CFCs and/or to open foreign accounts, in respect of which information was included in the declaration, **the law provides for relief** (subject to certain conditions established by Article 8 of the law) for the declaring person and persons outlined in the declaration, provided such *actions* of the declaring person and/or nominal owner of the property were *committed before 1 January 2015*, from:
 - *criminal liability* in respect of crimes under Article 193, Parts 1 and 2 of Article 194, Articles 198, 199, 199.1 and 199.2 of the Criminal Code of the Russian Federation, provided related information is included in the Declaration;
 - *administrative liability* under Articles 15.1, 15.3-15.6, 15.11 and 15.25 of the Code of administrative offences of the Russian Federation in respect of violations of legislation of the Russian Federation (including currency regulation), provided related information is included in the Declaration; and
 - *tax liability*, provided related information is included in the Declaration.
- If a legal entity was used to acquire, use or dispose of property and/or CFCs and/ or to open foreign accounts, information in respect of which was included in the declaration, then the above mentioned relief from criminal and administrative liability also applies to persons performing management and administrative functions in such a legal entity.
- Transfer of property from a nominal to an actual owner of the property is not taxable (subject to certain conditions established by Article 8 of the law).

SUNDRY ISSUES

There are several drafts related to certain amendments to the TC RF. The drafts on key amendments include:

The draft of the concept of an unjustified tax benefit

A draft of the law related to the introduction of the concept of an unjustified tax to the TC RF has passed its first reading in the State Duma.

According to the draft, purchasers are prohibited from deducting expenses for profit tax purposes and offsetting respective input VAT in case the main aim of a transaction is tax evasion.

We believe that the draft of the concept does not make the concept of an unjustified tax benefit introduced by Plenum of The High Arbitrazh Court of the Russian Federation No. 53 of 12 October 2006 clearer, in particular, the minimum and obligatory actions for a purchaser are not defined, etc.

The draft of amendments to Russian thin capitalization rules

The draft of the law related to amendments of thin capitalization rules has been adopted in its first reading in the State Duma. The most significant amendments include:

- Based on the amended definition of controlled debt, thin capitalization rules will apply to the following types of debt of Russian legal entities:
 - a debt to a foreign entity which is affiliated with the borrower according to sub-points 1, 2 and 9 of point 2 of Article 105.1 of the TC RF (the “**FE**”), provided the FE has a direct or indirect share in the capital of the borrower;
 - a debt to a Russian or a foreign entity affiliated to the FE based on the above mentioned provisions of Article 105.1 of the TC RF;
 - a debt to an entity, provided the FE or an entity affiliated to the FE acts as a surety or guarantor or otherwise guarantees the fulfillment of the debt obligation of the Russian borrower (subject to certain exceptions).
- Thin capitalization rules will not apply, provided the following conditions are met simultaneously:
 - the debt is owed to an independent bank; and
 - the above mentioned foreign entity or an entity affiliated to said foreign entity has no accounts/deposits in said bank, otherwise (i) said funds cannot be used as collateral for the debt obligation, (ii) the availability of the funds in said accounts/deposits should not be a precondition for the provision of the loan to the borrower and (iii) the amounts of the funds on said accounts/deposits and the related terms and period do not correspond to the amount, terms and period of the loan provided to the borrower.
- The debt arising due to the issuance of a Eurobond is not subject to thin capitalization rules.
- The debt-equity ratio should not exceed 3:1 (12.5:1 for banks and leasing companies), i.e. the same requirements are provided under the current legislation, however, a leasing company is considered a company in which not less than 90% of taxable income in the reporting (tax) period is from leasing activity.

Court practice related to permanent establishment

There are a number of recent negative tax litigations related to a permanent establishment issue (including the creation of a permanent establishment, in particular due to activity of a preliminary and auxiliary nature in favour of third parties, and the creation of a permanent establishment through a dependent agent) not in favour of taxpayers, in particular, Decision of the Arbitrazh Court of Moscow Region dated 6 February 2015 in respect of case #A40-155695/12, Decision of the Arbitrazh Court of Moscow Region dated 4 June 2015 in respect of case #A40-138879/14. It is advisable to analyze the activity and related contracts to avoid a risk of creation by a foreign company of a permanent establishment in Russia with subsequent related tax consequences. We are ready to carry out a tax audit (or a limited tax audit) followed by a memorandum with our recommendations to avoid/minimize such risks, if required.

CONTACTS

DAVID LASFARGUE
lasfargue@gide.com

TATIANA KIRGETOVA
kirgetova@gide.com

You can also find this legal update on our website in the News & Insights section: gide.com

This newsletter is a free, periodical electronic publication edited by the law firm Gide Loyrette Nouel (the "Law Firm"), and published for Gide's clients and business associates. The newsletter is strictly limited to personal use by its addressees and is intended to provide non-exhaustive, general legal information. The newsletter is not intended to be and should not be construed as providing legal advice. The addressee is solely liable for any use of the information contained herein and the Law Firm shall not be held responsible for any damages, direct, indirect or otherwise, arising from the use of the information by the addressee. In accordance with the French Data Protection Act, you may request access to, rectification of, or deletion of your personal data processed by our Communications department (privacy@gide.com).