2016: Tax Avoidance Revisited: The Russian Federation
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Issues of aggressive tax planning and circumvention of tax laws are highly relevant for the Russian Federation. This is confirmed by a large number of tax disputes in which these issues are raised as well as by the active work on the development of GAAR and the introduction of SAARs.

I. The Meaning of Avoidance and Aggressive Tax Planning and the BEPS Initiative

Nowadays legal concepts such as tax avoidance, tax planning/aggressive tax planning are not defined in the Russian tax legislation. In general, both of them refer to the phenomenon that in Russian legal reality has been called “tax optimization”, i.e., actions which reduce the tax burden of a particular subject of taxation and that are not formally prohibited by the law.

There is a clear distinction between tax evasion, which is a criminal offense, in Russian legislation\(^1\), and the legitimate fulfillment of tax obligations. Russian tax legislation does not contain legal definition of “tax avoidance”. However, it is noted in Russian judicial doctrine and such actions of taxpayers are labeled as “non-bona fide”, i.e. formally, they are within the scope of the legal field, but entail non-payment of tax or payment of tax in a smaller size. Tax Code of Russian Federation contain two principles that correspond to this idea. They are principles of guiltlessness\(^2\) and good faith (bonafide)\(^3\) of the taxpayer. According to the ruling of the Constitutional Court of the Russian Federation, responsibility for non-payment of taxes cannot be established in cases when a taxpayer uses legal ways to reduce the amount of tax payments\(^4\).

Situations of “tax avoidance” in Russian case law are connected with tax incentives, which the taxpayer can receive. Since 2006 such “tax avoidance behavior” of a taxpayer, when “tax avoidance” is covered by formally legal behavior, has been labeled as “obtaining of “unjustified tax benefit”. Here is the list of exact situations that indicate unjustified use of tax benefits:

- reduction of the tax base;
- obtaining of tax deduction;

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\(^1\) See art. 198 and 199 of Criminal Code of Russian Federation
\(^2\) See art. 108 par. 6 of Tax Code of Russian Federation
\(^3\) See art. 3 par. 7 of Tax Code of Russian Federation
- obtaining of tax benefits;
- use of a lower tax rate;
- obtaining the right to return (offset) or a tax refund from the budget.

The Higher Arbitration Tribunal of Russian Federation in its Resolution of the Plenum described terms when all abovementioned tax benefits should be treated as mala fide⁵. Burden of proof of bad faith of a taxpayer lies on the tax authorities. Each particular fact of unjustified use of tax benefits is individual and tax authorities must corroborate it in the course of a tax audit by appropriate evidences. Tax authorities regularly issue clarifications about methods of identification and detection of the use of unjustified tax benefit⁶. Furthermore, it can be noted that at the present moment we have stable practice of the development of out-of-court and pre-court methods, which involve taxpayers and tax authorities. Pre-court procedure is a requirement in resolving tax disputes, so many of them do not reach courts at all – number of court hearings decreases by 17% each year⁷. However, decisions in such pre-court procedures also do not give definition of “tax avoidance” – tax authorities use adjudgements ruled in similar cases to prove their position, and they have no opportunity to interpret them. Decisions are published through e-service⁸.

Disputes on obtaining unjustified tax benefit can be divided into four categories:
1. Creation of “scheme” aimed at increasing the value of goods for the artificially high amounts of tax deductions of VAT and the increase in expenses, deductible for Corporate income tax purposes, in situations with real economic and financial transactions the acquisition of goods;
2. Use of organizations (in some cases, directly or indirectly controlled by the taxpayer) which do not perform real financial and/or economic activities, aimed at overrating the amounts of tax deductions of VAT and the increase in expenses, deductible for corporate income tax by signing agreements with such organizations;
3. “Splitting” of business aimed at the opportunity to apply preferential tax treatment;
4. Carrying on business activities that formally are within the scope of tax legislation, but actually do not have business purpose, except unjustified tax benefit itself⁹.

Aggressive tax planning in Russia has the same meaning as it was announced by the OECD – strategies that exploit gaps in the architecture of the international tax

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⁵ Resolution of the Plenum of the Higher Arbitration Tribunal of 12 October 2006 No. 53.
⁸ https://www.nalog.ru/rn77/service/complaint_decision/
system to artificially shift profits to places where there is little or no economic activity or taxation\textsuperscript{10}. As it was pointed out above, there is no special legislation or case law in Russia that would clarify the meaning of “tax planning” or “aggressive tax planning”. Since Russia, as a member of G20, was one of the active participants of BEPS initiative and does not have its own precise rulings about “tax avoidance” and “tax planning/aggressive tax planning”, it is necessary to prepare and put into execution such rulings. So-called “deoffshorization” plan, which was announced in 2012, contains several instruments that will conduce Russian tax legislation in accordance with international standards. According to that plan, in January 2015 Russian Tax Code was amended with CFC rules and rules about tax residence in Russia of foreign companies which will be discussed further. These national measures of tax control also supported by strengthening the work of the Federal Tax Service in exchange of information for tax purposes.

According to the “Main directions of tax policy for 2016 and the planning period of 2017 and 2018”\textsuperscript{11} (hereinafter – Main directions of tax policy) actions of taxpayers for obtaining unjustified tax benefits are defined as “the abuse of rules of tax legislation in order to minimize taxes” and one of the goals of the tax policy is to deal with such abusive actions. The Main directions of tax policy finds that an important task of tax policy is to work on tightening measures aimed at countering the creation and use of abusive schemes aimed at tax evasion and illegal tax refunds from the budget. One of the measures to react abusive schemes in taxation is a clear legal consolidation of mechanisms that restrict the use of so-called “fly-by-night companies” (shelf companies) and tax schemes involving offshore companies. Said Main directions of tax policy indicates that there is a need to develop Tax Code amendments in so far as they relate to the legal mechanism of struggle against tax abusive actions such as use of “unjustified tax benefits”, and to set direct prohibition of the abuse of tax rights.

II. The Reaction to Avoidance and Aggressive Tax Planning in the BEPS Context

Unlike some other countries, such as the UK, India and Australia, Russia has not yet enacted a tax law establishing the General Anti-Avoidance Rule (GAAR). It means that there is no separate definition of the GAAR and its tests. However, Russian tax authorities are entitled to the right to refuse taxpayers in tax preferences, privileges, and other tax benefits in connection with the fact that they are obtained by virtue of the artificial creation of conditions for their obtaining.

\textsuperscript{10} [http://www.oecd.org/tax/aggressive/]
This entitlement is based on the general provisions of the Tax Code and the interpretation given to these provisions by the Higher Arbitration Tribunal of the Russian Federation\textsuperscript{12}. In fact, it is a set of rules and they can be compared to the GAAR mainly because they are composed as a broad rules based on general principles to counter potential avoidance of taxation in general, in a form which cannot be predicted in advance.

The main idea of this set of rules elaborated by the Tribunal is similar to the idea of GAAR operating in other jurisdictions: an artificial arrangement or artificial series of arrangements which have been put into place for the essential purpose of avoiding taxation and lead to a tax benefit shall be ignored. Consequently, tax authorities shall treat these arrangements for tax purposes by reference to their economic substance.

Considering some general provisions of the Tax Code, taking into account the before-mentioned Ruling of the Tribunal, as well as the current case law on tax disputes, we can designate some features which should be assessed in order to conclude that a taxpayer has received an unjustified tax benefit:

- tax benefit may be deemed unjustified if business operations reported by a taxpayer are not economically justified or there is no business purpose behind them;
- tax benefit shall not be regarded as justified if it was received without connection with the taxpayer’s genuine business activity; however, this does not mean that the taxpayer must conduct his affairs in the least tax efficient way.

The following circumstances may also indicate that tax benefit is unjustified:

- the taxpayer could not have actually executed transactions taking into account available time, location of assets, availability of the requisite management, manpower and necessary business assets;
- the taxpayer takes into account only business operations, which are connected with the tax benefit and omits other business operations which he would have normally take into account; and
- achieving a tax benefit was the sole purpose behind executing a transaction.

These features and circumstances suggest that such elements (tests) as “the obtaining of a tax advantage as the essential aim of the transactions concerned”\textsuperscript{13}, “complementary business purpose test”\textsuperscript{14}, “subjective element, consisting of the intention to obtain a tax advantage”\textsuperscript{15} are present in Russian GAAR and that they are its key elements.

\textsuperscript{12} Resolution of the Plenum of the Higher Arbitration Tribunal of the Russian Federation № 53 dated October 12, 2006 «On arbitration courts assessing the validity of the taxpayer receiving tax benefits».
\textsuperscript{13} This element is separately indicated in paragraph 9 of Resolution No 53.
\textsuperscript{14} This element is separately indicated in paragraph 3 of Resolution No 53.
\textsuperscript{15} This element is not indicated separately in Resolution No 53, but systemic interpretation of its provisions leads to the conclusion that the tax advantages, which are the subject to the GAAR tests, should be obtained intentionally. The use of tax benefits presumes the existence of an intention.
“Main objective test” is not explicitly defined in any Russian tax legislation or in any act of abstract judicial interpretation of the tax law (as Resolution No 53). Nevertheless, we can say it is also an element of the Russian GAAR.

The result of the application of “main objective test” is an answer to the question whether an accrual of a tax advantage is contrary to the purpose of the tax law provisions. If we take a look at the typical logic of judicial acts, where the issue of receiving of unjustified tax benefits arises, we can find that typically tax authority or court refers to the tax law, which applies in the case, then indicates, what is the difference between the application of this tax law by a taxpayer and its meaning and especially its purpose. This means that in general the “main objective test” is used and, furthermore, it is the methodological basis for the use of other tests (elements) of the GAAR.

“The principle of proportionality” means that there should be some limits of use of the GAAR and they should protect taxpayers rights where a tax authority measures in application of the GAAR go too far. Unfortunately, this principle is not clearly traced in case law. In particular, additional taxation through using the GAAR even can lead to bankruptcy and it is not uncommon.

Comparing described Russian GAAR with the legal provisions enshrined in the EC Recommendation C-(2012) 8806 of December 6, 2012, we may conclude that the approach of the Russian Federation is very similar, but is less developed in terms of formal definition and details. 

Described GAAR and its tests are not fixed by the legislator, but formed in legal practice. From this perspective it may be argued that the GAAR is understood and applied by the courts. With regard to the tax authorities, they are eager to apply the GAAR, because other more effective tools to counter circumvention of the tax law are not available.

The boundaries of the application of the GAAR constantly refine by resolving tax disputes that have precedential value.

However, the academic and professional community discussed the bills\(^ {16}\)\(^ {17}\), which could become law and remove eclectic and uncertain approach currently practiced. Abovementioned Main directions of tax policy highlights the same idea that such rule should have high status which can be guaranteed only if it would be stipulated in the federal law. In particular, the State Duma is considering a bill that proposed to supplement the Tax Code with principles for delineation of good conduct of the taxpayers and abuse of their rights\(^ {17}\). These amendments can continue the development of the Russian GAAR.

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III. Transfer Pricing Rules, GAARs, Specific Anti-Avoidance Rules (SAARs) and Linking Rules

New Russian transfer pricing rules (further – TP rules) provided for in Section V.1 of the Tax Code (effective as from January 1, 2012) seem to be obviously designed to prevent and combat tax avoidance through artificial profit shifting schemes for purposes of Corporate income tax, Personal income tax (for individual entrepreneurs and similar taxpayers), Mineral resources tax and VAT.

Anti-avoidance nature of the new Russian TP rules from the cross-border taxation perspective is confirmed, e.g. by equating all transactions with participation of an offshore person (person registered, domiciled or resided in the “black list” territory or state) to the category “transactions between related persons” subject to TP tax control. All transactions with commodities of world trading are also regarded as “controlled transactions” despite the parties thereto are not related to each other. There is also no threshold on the sum of transaction between related Russian and alien party in order to be regarded as “controlled transaction”, whereas 1 billion RUR threshold applies when all related parties of a transaction are Russian residents.

From the inter-state taxation perspective, anti-avoidance nature of the Russian TP rules is supported by the special tax audit procedure regarding controlled transactions, which is performed by the Federal tax service itself. Notion “controlled transaction” is designed in such a manner to cover predominantly schemes between related Russian parties where at least one of the parties applies special tax regimes, applies 0% tax rate on Corporate income tax, is exempt from Corporate income taxation, applies other tax incentives and reliefs. Besides, TP rules (arm’s length principle, TP methods) are used as a general methodology to assess taxable base in certain cases for the purposes of Personal income tax, Corporate income tax and VAT where transactions under question are not regarded as “controlled transactions” from the TP perspective.

Although TP rules have been introduced in the Russian Tax Code since January 1 1999, there are few outstanding TP cases, which may be regarded as “show trials” forming a trend or well-established case law.

According to the Legal database statistic, there are at least 5,000 cases tried by the Federal Arbitration Tribunals (courts of cassation instance) and more than 400 cases heard by the Higher Arbitration Tribunal and Supreme Court of the Russian Federation, which have reference to Art. 40 of the Tax Code governing the old TP rules which have been applying to transactions, income and (or) expenses on which had been acknowledged since January 1, 1999 until December 31, 2011.

By contrast, there are only 135 cases that have been tried by the Federal Arbitration Tribunals and 8 cases that have been heard by the Higher Arbitration Tribunal or

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19 Local and regional tax authorities are not authorized to perform special TP tax audit.
Supreme Court of the Russian Federation since January 1, 2012, which have reference to Section V.1 of the Tax Code governing the new TP rules.

However, only the minor part of this case law concerns real TP disputes, the vast majority of rulings refers to TP rules’ articles occasionally as additional argument in favor or against of certain conclusions, e.g. in proving “unjustified tax benefit”. Moreover, there has been still no established case law concerning new TP rules, as these cases have not reached cassation instances or the Supreme Court of the Russian Federation yet.

Notwithstanding the above, there may be outlined some remarkable cases tried under the old TP rules. One of them is “Mazda” case No. A40-4381/2013 decided in favor of the tax authorities. According to the facts of the case, the Russian authorized distributor of Mazda (Mazda Motor Rus, LLC) purchased Mazda cars in 2009 from related company Mazda Motor Logistic Europe B.V. (Netherlands), both being 100% subsidiaries of Mazda Motor Corporation (Japan). Tax authorities denied Mazda Motor Rus, LLC with 1,362 mln. RUR (approx. $ 31 mln. as of the end of 2009) losses in the tax year 2009 due to excessive purchase prices of the cars. The case has run two circles of hearings and at the second circle it was tried by all three instances in favor of the tax authorities which applied Resale price method. Application of the Comparable uncontrolled price (CUP) method was denied by arbitration tribunals since there have been no comparable cars or transactions imported in Russia due to the fact that the Russian subsidiary of Mazda was the exclusive distributor. Finally, Mazda Motor Rus, LLC filed an appeal to the Supreme Court of the RF on the decision of the Arbitration Tribunal of the Moscow District 16.06.2015, however the appeal was denied and the next appeal on the latter Court’s decision is pending now.

Another similar case – is “Suzuki” case No. A40-111951/12 decided at the first circle in favor of the taxpayer and now pending new hearing at the Arbitration Tribunal of Moscow (court of first instance). According to the case the Russian exclusive importer of Suzuki cars, bikes and equipment Suzuki Motor Rus, LLC was charged for additional 28 mln. RUR for the tax year 2010 and denied with losses for the tax year 2009 in amount of 382 mln. RUR. Tax authorities claimed that purchase prices from Itochu Corporation (100% shareholder, Japan) were overcharged and the distributor sold cars lower than the cost price (due to marketing program of customers’ attraction). The tax authorities applied Resale price method and argued that CUP method may have not been applied due to exclusivity of distributor at the Russian market and incomparability of other cars and other distributors with Suzuki. The arbitration tribunals of first and appeal instances upheld the taxpayer and ruled that tax authorities failed to prove non-arm’s length prices. However, the Federal Arbitration Tribunal of Moscow District by Decision on 16.09.2013 has canceled these rulings and referred the case for the new

21 The Higher Arbitration Tribunal of the Russian Federation ceased to be the highest instance for economical disputes since August 5, 2014 and was replaced by the Supreme Court of the Russian Federation.
hearing at the court of first instance in order to reassess facts and findings. The case has been still pending and, considering the Mazda case, will be likely decided in favor of the tax authorities.

Russia follows best international practices in combating profit shifting to low tax jurisdictions and tax deferral on the national level and has introduced CFC rules in the Tax Code since January 1, 2015 (see Chapter 3.4. of the Tax Code and amendments to the other chapters on Corporate income tax and Personal income tax).

The main elements of CFC taxation regime comprise: (1) CFC concept; (2) controlling person (further – CP) concept; (3) substance and form of the control; (4) mechanism of CFC taxation and (5) determination of CFC’s and CP’s taxable profit.

Russian concept of CFC includes both corporate and non-corporate bodies, e.g. trusts and other “structures without legal personality”, provided they are not Russian tax residents. Controlling person may be a natural or a legal person both being only Russian tax residents. Generally, control over a CFC is determined through the legal control – direct or indirect participation (holding shares (interest)) in a CFC:

1) 25% (50% - until 2016) of shares held by at least one CP individually;

2) 10% of shares per a CP individually (including spouse and underage) provided at least 50% of CFC’s shares are held by Russian tax residents collectively.

However, should the abovementioned requirements on legal control not met, the control over CFC may be determined through an influence or capability to decisively influence on decisions on after-tax profit distribution due to specific of relationships of the parties thereto.

The Russian Tax Code imputes CFC’s profit in taxable base of its CP, thus, one may say it is a “deemed dividends” mechanism. The Russian CFC concept implies that CFC’s taxable income includes passive and active (less than 80% of total income) income both from offshore and non-offshore jurisdictions.

Russian Tax Code provides for different CFC’s profit computation:

1) under personal laws of a CFC, provided financial statements are subject to statutory audit and a tax treaty with the country of CFC is available;

2) otherwise – under specific chapters of the Russian Tax Code. There are, however, number of exemptions of CFC’s profit under Art. 25.13-1 of the Tax Code and “de minimis” rule.

CP’s taxable profit comprises profit of CFC in proportion of interest share on the date of decision to distribute profit or at the end of accounting period of CFC. CFC’s profit may be reduced by profits accounted by other CPs where participation is indirect.

CFC’s profit is determined either upon results of accounting period of the CFC or on 31 December. CFC’s profit is included in a CP’s profit on 31 December of the year, following the year when the accounting period of the CFC ends.

Number of exemptions regarding active income of CFCs have been introduced during 2015.
CFC’s profit tax in Russia (to be paid by its CP) is reduced by foreign tax or Russian tax already withheld on this profit as well as by the Russian tax on CFC’s PE profit. Certain types of CFC’s profit are exempt under Tax Code; dividends and distributions are deductible from CFC’s profit as well.

It is noteworthy that according to the Federal Tax Service the “deoffshorization campaign”, including notification on CFCs runs weak.

The other national SAAR are Russian thin capitalization rules (see Art. 269(2–4)) which have been introduced in the Tax Code since January 1, 2001 and designed to combat tax avoidance by limiting excessive interest payments and requalifying them into dividends subject to withholding tax.

Generally, Art. 269 of the Tax Code governs peculiarities of interest deduction for Corporate income tax purposes, and the basic rule (Art. 269(1)) is designed to align a taxpayer’s interest under a contract (controlled transaction) with arm’s length interest. In doing so Art. 269(1.1., 1.2.) provides for allowed intervals of interest rates:

1) debt in RUR: 0 % – 180 % of the key rate of the Russian Central Bank (debt in the 2015 tax year); 75 % - 125 % of the key rate of the Russian Central Bank (debt since the 2016 tax year), provided all related parties are Russian residents;

2) debt in RUR: 75 % – 180 % of the key rate of the Russian Central Bank (debt in the 2015 tax year); 75 % - 125 % of the key rate of the Russian Central Bank (debt since the 2016 tax year) – in other cases;

3) debt in EURO: EUROIBOR + 4 per cent point - EUROIBOR + 7 per cent point;

4) debt in Chinese Yuan: SHIBOR + 4 per cent point - SHIBOR + 7 per cent point;

5) debt in pounds sterling: LIBOR + 4 per cent point - LIBOR + 7 per cent point;

6) debt in Swiss franc or Japanese Yen: LIBOR + 2 per cent point - LIBOR + 5 per cent point;

7) debt in other currencies: LIBOR in USD + 4 per cent point – LIBOR in USD + 7 per cent point.

Interest accrued under non-controlled transactions is regarded as arm’s length interest, if otherwise is not proved for by the tax authorities.

Russian thin capitalization rules (further – thin cap rules) are obviously designed as national SAAR targeted at limiting deduction of interest paid abroad and interests paid domestically in certain cases. These rules are unlikely dealing with setting an arm’s length interest rate; however, some may argue the contrary. The thin cap rules apply to a “Russian company”23 having (1) unpaid debt claim before: (i) a foreign company owning directly or indirectly 20 % of share capital; or (ii) a Russian company regarded as “affiliated” company of the foreign company referred to above; or (2) having unpaid debt claim [before any other third persons, including banks], provided such “affiliated” Russian company and/or foreign company referred to above are guarantors, warrantors

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23 Thus, it is arguable, whether thin cap rules apply to permanent establishments of foreign companies.
or otherwise are obliged to ensure debt obligations of the Russian taxpayer. Debt-to-equity ratio is set as 3:1 (12.5:1 for banks and leasing companies). Russian taxpayers conforming to the abovementioned requirements shall determine allowed interest each quarter and at the end of the tax year by applying the capitalization coefficient to the interest accrued under the contract. According to Art. 269(4) of the Tax Code the excessive interest sum is equated to “dividends paid to the foreign company” and is subject to withholding tax.

These rules have been criticized by taxpayers and academics under different reasons, including conflict with the “non-discrimination” clause of DTCs, ambiguity of thin cap rules with regard to loans between Russian company and “affiliated” foreign (sister) company not owning shares of the first mentioned company, application of the rules to the arm’s length loans from non-related banks, etc. These rules shall have been clarified recently by the bill № 675906-6, however, the final text of the bill avoided all proposals.

Russia predominantly focuses on SAARs rather than GAAR in its tax law and has introduced some other special measures, e.g.:

- Obligatory notification of tax authorities by tax residents on participation in all foreign companies where a share exceeds 10 %, and on establishing or control over structures without legal personality, e.g. trusts, partnerships, estates, etc. (Art. 23(3.1.) of the Tax Code);
- The Ministry of finance “black list” of jurisdictions – for limiting the application of 0 % tax rate on Corporate income tax with regard to dividends paid by residents of such offshore jurisdiction;
- The Federal tax service “black list” of jurisdictions – for purposes of CFC rules;
- National “beneficial owner” concept – for purposes of DTCs application (see Art. 7 and 312 of the Tax Code);
- Obligatory disclosure of beneficiaries – Russian companies paying income on securities, which are accounted at foreign nominal shareholders, to persons

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24 Prior to November 15 2011, there was a well-established case law of the Arbitration tribunals having been resolving conflict of Art. 269(2-4) of the Tax Code and Art. 24(4) of the DTCs in favor of the latter and overriding national thin cap rules. However, since the case of “Severny Kukbass” No. А27-7455/2010 has been heard by the Presidium of the Higher Arbitration Tribunal in favor of the tax authorities and overrided the “non-discrimination” clause by reference to anti-avoidance nature of domestic thin cap rules (and Art. 9 of the OECD Model and Commentaries thereto), all subsequent case law has turned in the opposite direction.

25 Art. 269(2) of the Tax Code literally does not permit to apply thin cap rules to loans between Russian company and its foreign sister company. However, since the “Naryamnarmelegaz” case No. А40-1164/11 the subsequent case law has been showing the contrary (see also case “Pirelli Tire Services” No. N А40-58049/12 et seq.). The foreign sister company is usually regarded as proof of a covert form of control of the foreign parent company over the Russian taxpayer, a fortiori the loan was granted from the parent’s resources.

26 Some researchers argue that thin cap rules shall apply to bank loans under arm’s length conditions, although the loan is ensured by a foreign parent or Russian related company guarantee. There are no safe harbor rules or possibility to prove that debt-to-equity ratio 3:1 is not relevant and arm’s length standard should apply. However, should a loan be granted between two Russian companies the requalification of excessive part of interest into dividends will not work.

(beneficiaries) which are not disclosed to the Russian companies shall withhold Personal income tax or Corporate income tax at increased tax rate 30 % (Art. 214.6, 224(6), 284(4.2.) of the Tax Code);

- National “PE” concept, including dependent agent;
- Limitation of application of Simplified tax system (Chapter 26.2 of the Tax Code) for foreign companies;
- Limitation of economical double taxation relief for foreign companies with regard to taxation of dividends (Art. 275 of the Tax Code), etc.

One more legislative innovation that may be attributed to the national SAARs is the national “tax residence” concept for the purposes of Corporate income tax. Since January 1, 2015 a foreign company may be regarded as the Russian tax resident company, provided the place of management is the Russian Federation, if otherwise is not prescribed by a DTC. Art. 246.2(2) of the Tax Code provides for two alternative requisites to qualify a foreign company as a Russian tax resident:

1. executive body (executive bodies) of a company regularly carries on his activity regarding the company from the Russian Federation; or
2. principal managing officers of a company (authorized to forecast and control the activities, manage activities of an enterprise and bear responsibility therefor) predominantly carry on managing activities of the company in the Russian Federation. Should any of the mentioned conditions were met both in Russia and in any other foreign state, the Russian Federation shall be regarded as the place of management if, at least, one of the following conditions are fulfilled:
   (i) bookkeeping and management accounting is performed in Russia;
   (ii) office work is held in Russia;
   (iii) operational personnel management is performed in Russia.

Consistent application of the new tax residence concept shall result in crucial expansion of the Russian taxable base and recognition of all offshore and transit-jurisdictions’ companies (e.g. Cypriot, Swiss, Dutch, Luxemburg and alike companies) created by Russian persons and actually managed from Russia as Russian tax residents with the appropriate tax consequences.

Some SAAR may also be found in tax treaties. Double taxation conventions concluded by the Russian Federation do not usually include LOB rules. However, LOB rules are provided for in DTCs with Australia, Brazil, Chile, Estonia, Indonesia, Israel, Lithuania, Singapore, Spain (Protocol 1998), the UK, the USA. Recently LOB rules were introduced in new treaties with Belgium (2015), China (2014), Malta (2013), and Protocols to DTCs with Singapore (2015), Cyprus (2010) and Luxemburg (2011).

Despite all “LOB” rules are devoted to limitation of certain treaty benefits, they are designed in a different manner. Some DTCs refer to abusive aims of treaty benefits claimed by a resident (person) and limit all or certain benefits in such instances (see, e.g.
DTCs with Chile, Estonia, Singapore, and Lithuania). The other DTCs introduce objective tests to be observed by a person in order to qualify for a benefit (see, e.g. DTCs with Brazil, the USA and Protocol to DTC with Spain), for instance shareholding threshold (50% and more) for non-residents, etc.

With regard to some other BEPS measures and actions to be taken, one may say there has been no “linking rules” concept introduced yet.

**IV. Application of GAARs, TP Rules and SAARs**

There is no legally established hierarchy of the GAAR, SAARs and TP rules. But the Russian judicial doctrine relies on principle *Lex specialis derogat generali* and *Lex posteriori* principle as well. In most cases, they should be applicable to the interaction of the GAAR, TP rules, SAARs and linking rules.

While SAARs and TP rules are promulgated to counter a specific abusive behavior, GAARs are used to support SAARs and to cover transactions that are not covered by SAARs. Under normal circumstances, where specific SAAR is applicable, GAAR will not be invoked.

Currently, there is no case law or administrative practice of using such SAARs like brand new CFC and TP rules. Having mentioned the above, these conclusions are tentative.

However, if we consider the ratio of Russian GAAR (in the form in which it is formed in case law) with SAARs, which have already received their practical application, it is possible to obtain an indirect confirmation of the reliability of the initial output of the existing hierarchy between these regulations.

In particular, if we take a look at the previously mentioned case No A40-111951/12 where the transfer pricing rules (which were in force before the adoption of 227-FZ of 18.07.2011) have been applied and analyze how the court relates these rules with the GAAR then it is possible to make the following conclusions:

First, the basis of the judgment is the application of transfer pricing rules, correlating them with the facts of the case.

Second, the GAAR is also mentioned in the case, but as an abstract principle, which serves to indicate the purpose for which transfer pricing rules are. With this approach, the GAAR does not replace SAARs and TP rules, but only helps to use them more accurate and subtle.

A similar relationship can be found in some other cases on the application of the 'old' transfer pricing rules, as well as in cases of recognition of interest on loans as dividends (applying ‘thin capitalization’ rules).

But definitely more specific and accurate approach is to be developed in order to avoid too broad or too narrow interpretation of SAARs, which may prevent their implementation not in accordance with the intended use.
With regard to the procedures for the application of certain SAARs, in general, they all are implemented within the overall administrative and judicial procedures. However, TP rules have certain characteristics. They can be applied only on the results of a special tax audit carried out by the central office of the Federal Tax Service. Currently we are not aware of one such effective tax audit. But in the meantime there is no reason to believe that the marked feature in the application of the TP rules will have an impact on the ratio of the GAAR and TP rules (or other SAARs), indicated above.