

BRICS LEGAL FORUM 2018
Streamlining the Tax Treaty Mutual Agreement Procedure (MAP)
and Tax Arbitration in Cross-Border Tax Disputes
Between BRICS Member States
(A Russian Perspective)

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1. Tax Treaty Disputes: The Current Landscape

1.1. The years 2011 – 2017 were marked in Russia by the quite dynamic development of the judicial doctrines connected with the cross-border taxation situations. Though we should recognize that the statistics of cross-border tax disputes (in particular, in regard to the cases on interpretation and application of tax treaties) have not been so far summarized in a systemic way for public purposes, the RF Supreme Court and the Federal Tax Service of the RF undoubtedly keep their own records. The result of this work is the topical reviews of the court decisions and case-law summaries that are periodically sent to lower courts or tax authorities. The disputes which are considered at the higher court instances attract, as a rule, the attention of experts, are analyzed in academic and practical literature.

Among the cross-border tax disputes, which are regularly considered in the Russian Commercial Courts the following categories may be mentioned:

(1) - on the application of the thin capitalization rules (it is important to stress that the maximum growth in the number of cases of this category was in 2011-2016 period);¹

(2) - on the application of the beneficial owner concept (the increase of the disputes of this category is expected due to the introduction in 2015 of the special regulation in this sphere in Articles 7 and 312 of the RF Tax Code);²

(3) - on the recognition of the Permanent establishment (PE) of a foreign company (including that of an agent type) which appeared in the Russian jurisdiction, in particular, in connection with “Oriflame” precedent;³

(4) - on the cross-border taxation regimes of certain categories of passive incomes (dividends, interest, royalties) and disputes concerning the interpretation of other distributive articles (Arts 6 – 9, 13 - 21) of tax treaties;

(5) - the procedural aspects of the application of international tax treaties, in particular, on the procedure of confirming residence or/and confirming the right to offset amount of taxes paid

¹ Vinnitskiy D. V. Chapter 5: Non-Discrimination in Tax Treaties – Art. 24(4) and (5) OECD MC: A Russian Approach to Tax Treaty Interpretation, in the book: Non-Discrimination in Tax Treaties: Selected Issues from a Global Perspective, Edited by Guglielmo Maisto, Pasquale Pistone, Dennis Weber, IBFD, 2016. P. 133 – 167.

² In Letter № CA-4-7/9270 of 17 May 2017 (In Russian), the Russian Federal Tax Service explained its approach to interpreting the concept of the beneficial ownership of income in applying tax treaty provisions. The position taken by the tax authorities is in line with the court practice of 2014 - 2017.

³ On 14 January 2016 the RF Supreme Court ruled in favour of the tax authorities in a controversial case involving the qualification of a legally separate Russian entity as a permanent establishment of its foreign affiliate (case № 305-KG15-11546, In Russian).

abroad (i. e. tax credit procedure), the procedures of submitting to court the documents, received in regard to the regime of tax information exchange between tax authorities, etc.;

(6) - on the application of transfer pricing rules (Chapter 14-14.6 of the RFTC); however, it seems that in the framework of these disputes the issues of the interpretation of domestic norms are the key ones.

1.2. In the recent period (in particular, in 2016 – 2017) the RF Supreme Court and Cassation Commercial Courts considered significant cross-border tax disputes mostly connected:

- with the application of the low rate in regard to passive incomes (20 cases),
- with the re-qualification of interest into dividends on the basis of applying thin capitalization rules (12 cases),
- the confirmation of residence status (12 cases).

In the official database, it is possible to identify also several disputes connected with the exchange of information and the limitations on benefits in regard to a tax treaty (LOB), however, in principle they are not common yet and are quite isolated.

In 2014 – 2015, selected issues of cross-border taxation (on residence of natural persons and domestic thin capitalization rules) were considered in the RF Constitutional Court; though the grounds for the constitutional jurisdiction in this sphere seem quite disputable.

1.3. Undoubtedly, the number of cross-border tax disputes in Russia, in general, is gradually increasing. In particular, it is an important sign that in 2017 the RF Supreme Court approved the following quite important rulings directly devoted to cross-border tax disputes:

- “The review of case-law connected with the protection of foreign investors”, approved by the Presidium of the RF Supreme Court Presidium of 12 July 2017;⁴
- “The review of case-law connected with the application of certain provisions of section V.1 and Article 269 of RF Tax Code”, approved by the Presidium of the RF Supreme Court of 16 February 2017.⁵

1.4. It should be noted that the justifications of the final decisions of the domestic courts on the cross-border tax disputes do not always correspond to the essence of the respective disputes and the legal issues which caused it. For instance, not in all the decisions on cross-border tax disputes, where the respective tax treaties were applied, they (the treaties) have been analyzed in the context of the OECD / UN Model Convention and the relevant commentaries to the Model. Besides, not in all cases the experts analyzing the decisions made could identify the interpretation methods applied by the court and the extent of their corresponding to the fundamental rules of interpretation of international treaties on the whole (also those following from the Vienna Convention on International Treaty Law).

1.5. The realization of the BEPS Action Plan has undoubtedly affected the system of solving cross-border tax disputes in Russia. Many recommendations following from the provisions of the BEPS Action Plan have been consistently implemented in the Russian domestic tax legislation:

- (1) - the modernization of transfer pricing rules;
- (2) - the introduction of special provisions against tax treaty abuse and rules on limitations of benefits into the RF Tax Treaty and bilateral tax treaties;

⁴ http://vsrf.ru/Show_pdf.php?Id=11489 (In Russian).

⁵ http://www.vsrfr.ru/Show_pdf.php?Id=11274 (In Russian).