Korpus Prava

#3 / Autumn, 2018

Analytics

Tax & Law Journal for Top Executives

Welcome Home

Co-publisher

МГЮА

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МОСКОВСКАЯ ГОСУДАРСТВЕННАЯ ЮРИДИЧЕСКАЯ АКАДЕМИЯ
МГЮА

Dear readers,

We are pleased to present the autumn issue of our corporate magazine “Korpus Prava.Analytics”.

The latest issue that you are reading now includes quite a big number of articles on various topics.

The main topic that we have touched upon is redomiciliation, since on August 03, 2018 the Russian parliament adopted a number of legislative acts regulating the possibility of conducting the procedure of redomiciliation of foreign companies to the Russian Federation in exchange for granting tax advantages. At first glance, the logic is simple and straightforward – if a foreign business failed to be ultimately de-offshorized,

that business needs to be made offshore but in Russia. See the main aspects of innovations and general information about the redomiciliation institution in this issue.

Our senior lawyer of Korpus Prava Private Wealth practice has spoken in detail about inheritance of pension savings: required documents, the filing procedure, payment deadlines. You are welcome to familiarize yourself with this article if the topic is relevant for you.

Absolutely everyone seems to have heard about the General Data Protection Regulation since this innovation has startled almost all industries in the EU, Russia and all other countries of the world. The article of the lawyer Irina Otrokhova describes the key points of the

regulation. Be careful as the amounts of fines for violations are striking.

According to the law which comes into force on January 1, 2019, it will be possible for tax authorities to obtain information about taxpayers from auditors. The final version of the law contains not just the possibility of filing the request but also specific conditions required to be fulfilled. So far, it seems that the law is somewhat unfinished and will not work properly. But the details can be found in the article of our auditor, deputy director Svetlana Sviridenkova.

I hope the materials will be relevant and useful to you. You are always welcome to contact us with your suggestions or questions which we will try to deal with in our subsequent articles. I thank

everyone who took the time to leave their feedback.

Have a nice read!

Artem Paleev
Managing Partner
Korpus Prava


a hot stove

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SUCCESSION OF PENSION SAVINGS OF CITIZENS

Tatyana Frolova

Leading Lawyer

Korpus Prava Private Wealth

The reform of the pension system is currently one of the most burning issues discussed in our society. Because time, rather than finances, is constant.

Our government has been stirring up the pension system for decades. Currently, this is one of the most complicated areas in our legislation. It is deemed impossible to calculate the future pension by the ordinary economist, the lawyer or the accountant, it goes without saying, sometimes it seems that employees of the Pension Fund themselves don't absolutely understand how and what the size of pension depends on, and needless to say, to explain of which parts it is composed. Scores, indices, funded and insurance parts — all these concepts form in

a confusing way those minor payments which our government “makes pensioners happy” by.

The insurance part of the pension is the basic form of state pension provision. The pension is guaranteed by the state, but its size depends on the situation that will be in the country at the beginning of payments, first of all — on the ratio of the number of working citizens and pensioners and on the situation with the state budget.

The funded part is the funds of mandatory pension savings, which are managed by professional market participants for the benefit of the future pensioner.

The concept of the “funded part of pension” first appeared in the Russian pension legislation in 2001, when the

law On Labor Pensions in the Russian Federation was adopted. This law came into force on January 1, 2002 and marked an attempt to reform the pension system in Russia. Within the meaning of the law, a part of the employer's pension contributions was meant to form the funded part of the pension, however, since 2014, the funded system has been "frozen".

In general, it is incorrect to talk about freezing of a pension. We are talking about the fact that in 2014, the entire amount of insurance contributions has been going to the accumulation of the insurance pension, and funded pension is not financed. This procedure for the accumulation of a future pension has been extended to the next 2019. At the same time, all the funds of pension

savings, which were already formed at the end of 2013, do not disappear and do not get lost. They are invested and will be paid to citizens when they reach the pension age.

Thus, within the period from 2002 to 2014, working citizens formed a certain amount of funds, which, in theory, are invested and generate income. But, even if you expect highly-profitable investment of funds, which represent the funded part of pension savings, however, we can assume that for 12 years, even with small deductions, there are certain tidy amounts on the individual personal account of citizens.

In addition to the funded part of the pension, which has formed from the contributions of the employer, citizens who are not used to rely only on the

state, have the opportunity to voluntarily pay additional insurance contributions to the funded pension, including under the Program of State Co-financing of Pensions. Thus, the amount that is stored on the personal account of the future pensioner can be quite significant.

In 2018, the government decided to raise the pension age, which means that on the one hand, citizens have the opportunity to accumulate more funds for payment of pensions, but on the other hand, the statistics, unfortunately, is inexorable, not all citizens will be able to retire for reasons beyond anyone's control.

There is a question, what happens to pension savings of citizens in case of their premature death? And more

specifically, in case of death before retirement.

According to the pension legislation, in case of death of the citizen who had the funds of pension savings before allotment of payments on the account of these funds, pension savings are paid to successors of the deceased person.

This payment is made either by the Pension Fund or by the Non-state Pension Fund, depending on where the pension savings were formed.

While alive, a citizen can leave a statement to specify who will be his successor. And it is possible to specify any person, not necessarily included in the circle of heirs. To determine the successors, it is necessarily to apply to the Pension State Fund of the Russian Federation (or Non-State Pension Fund,

if pension savings are accumulated therein) and specify their successors and in what proportion the savings will be distributed between them.

If the citizen has not applied for the disposal of pension savings in case of death, the payment will be made to the successors under the law of the first category: to parents, children, spouse, and if there are no such relatives, the payment will be made to the successors of the second category — grandparents, grandchildren, brothers (sisters), according to the general rules of succession under the law.

Pension savings to relatives of the same category are paid in equal shares. The successors of the second category have the right to receive pension savings if there are no relatives of the first category.

If a pensioner dies, who together with the pension has received a fixed-term pension payment fixed on the account of pension savings accumulated on a voluntary basis, including under the Program of State Co-financing of Pensions, the balance of pension savings is also paid to the successors.

The Pension Fund notes that pension savings can be paid to successors if the death of the citizen has occurred:

- Prior to fixing of payment on account of pension savings or prior to recalculation of its size taking into account additional pension savings (except for the maternal (family) capital funds intended for accumulation of the future pension);
- After fixing of fix-term pension payment. In this case, the successors

have the right to receive the unpaid balance of pension savings (except for maternal (family) capital funds intended for accumulation of the future pension);

- After one-time payment of pension savings has been fixed but has not yet been paid. It can be received by the family members of the deceased pensioner (subject to joint residence therewith), as well as the disabled dependents (regardless of whether they lived together with the deceased person or not) for 4 months from the date of death of the citizen. If there no such, the amount of one-time payment is included in the inheritance and inherited on a common basis.

IF PAYMENT OF THE FUNDED PENSION HAS BEEN FIXED TO THE CITIZEN (FOR AN UNLIMITED TERM), IN THE EVENT OF HIS DEATH, THE FUNDS OF PENSION SAVINGS WILL NOT BE PAID TO THE SUCCESSORS

To receive the pension savings of a deceased citizen, his/her successors should apply to the Pension Fund or Non-

State Pension Fund with the following documents:

- Passport (birth certificate);
- Document confirming the identity and powers of the legal representative, if the successor is a minor child;
- Documents confirming family relationship with the deceased insured person (birth certificate, marriage certificate, adoption certificate, other documents confirming the degree of relationship with the deceased insured person), if the successor is specified in the statement of the insured person, the documents confirming the family relationship do not need to be submitted.

- Death certificate of the insured person (if any);
- Insurance certificate of compulsory pension insurance (insurance certificate of state pension insurance) of the deceased insured person or the document issued by the territorial body of the Fund, which indicates the insurance number of the individual personal account of the deceased insured person.

It is possible to apply to the Pension Fund of the Russian Federation in person, either by mail or through an authorized representative.

If the successor sends tan application by mail, the originals of the above documents do not need to be attached, it is enough to attach their notarized copies.

When submitting an application through a representative, his powers shall be registered in the power of attorney certified by the notary.

Payment of pension savings to the successors of the deceased insured person shall be made either through the post office or by transfer of funds to the banking account of the successor.

Term of payment shall be no later than the 20th of the month following the month of the decision on payment. The decision on payment shall be made within the seventh month from the date of death of the citizen. The Pension Fund of the Russian Federation shall send a copy of the decision on payment (refusal to pay) to the successor no later than 5 business days after adoption of the decision.

If the successor has missed the 6-month period of application for payment of pension savings of the deceased insured person, this period can be re-set only by a court decision!

GDPR CAPTURES THE WORLD

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In January 2012, the European Commission set out plans for data protection reform across the European Union in order to make Europe "fit for the digital age". Almost four years later, agreement was reached on what that involved and how it will be enforced. GDPR was issued in 2016 and came into force on May 25, 2018 and has effected not only European Area.

The General Data Protection Regulation (EU) 2016/679 ("GDPR") is a regulation in European Union law on data protection and privacy for all individuals within the European Union (EU) and the European Economic Area (EEA). It also addresses the export of personal data outside the EU and EEA areas. The GDPR aims primarily to give control to individuals over their personal data and to simplify the regulatory

environment for international business by unifying the regulation within the EU.

Let's look through the key points of the GDPR:

- "Personal data" means any information relating to an identified or identifiable natural person ("data subject");
- GDPR applies to the processing of personal data wholly or partly by automated means and to the processing other than by automated means of personal data which form part of a filing system or are intended to form a filing system;
- GDPR applies to the processing of personal data in the context of activities of an establishment of a controller or a processor in the Union, regardless of whether the

processing takes place in the Union or not. The Regulation applies to the processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union, where the processing activities are related to: the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or the monitoring of their behavior as far as their behavior takes place within the Union;

- Personal data shall be processed: lawfully, fairy, and in transparent manner in relation to the data subject; in a manner that ensures appropriate security of the personal data;

- Personal data shall be collected: for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes;
- Personal data shall be adequate, relevant and limited to what is necessary in relation to the purpose for which they are processed; accurate and, where necessary, kept up to date; kept no longer than is necessary for the purposes for which they are processed;
- Processing shall be arranged on the grounds of the data subject's consent or other lawful grounds indicated in Article 6 of the GDPR;
- The consent must be: freely given, specific, informed and unambiguous indication of the data subject's

> wishes by which he or she, by statement or by clear affirmative action, signifies agreement to the processing of personal data relating to him or her.

It's worth paying attention to the rights of the data subject. GDPR has greatly expanded this category. The following rights are provided for data subjects in the GDPR:

- Right to be informed;
- Right of access;
- Right to rectification;
- Right to erasure;
- Right to restrict processing;
- Right to data portability;
- Right to object;

- Right not to be subjected automated individual decision making, including profiling, where the decision will have legal or other significant effects;
- Right to a remedy.

As the GDPR has already came into force most controllers and processors had already taken actions to be in compliant with GDPR. However, a large number of companies outside the Union are still pending the GDPR procedures and wondering if they are regulated by GDPR or not. At first, they have to determine their status under GDPR as a "controller" and/or "processor". In accordance with the GDPR "controller" means the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes

and means of the processing of personal data. “Processor” means a natural or legal person, public authority, agency or other body which process personal data on behalf of the controller. Secondly, they have to determine if they are processing the personal data of data subjects who are in the Union. If these requirements are met the following minimum measures must be taken:

- Appointment of a Data Protection Officer who will inform and advise the controller or the processor and the employees who carry out processing of their obligations, monitor compliance with GDPR, cooperate with supervisory authority;
- Development of the consent, which must reflect that it is freely given

and the data subject (e. g. client or employee) is "informed". Consent must contain the right to withdraw it at any time;

- Implementation of the appropriate technical and organizational measures to ensure a level of security appropriate to the risk;
- Development of the Codes of Conduct reflecting the data protection policy of the company;
- Development of the agreements which have to be signed between data controllers and data processors, and third parties participating in data processing procedure (outsources);
- Organize staff training.

Companies regulated under GDPR must take measures in short terms as the

penalties are pretty substantial: they can result in up 4% of sales up to a maximum of 20 million EUR. To comply with GDPR in short terms companies may outsource the GDPR matters to third parties or educate themselves via different educational programs and obtaining legal advice.

COUNTRY-BY-COUNTRY REPORTS OF INTER-NATIONAL GROUPS OF COMPANIES: THE BEPS PLAN IN RUSSIAN

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The Organization for Economic Co-operation and Development, or the OECD approved a global response plan with the Base Erosion and Profit Shifting, or the BEPS in 2013. Steps from eighth to tenth of the Plan include the development of transfer pricing[1] rules in terms of intangible assets, transfer of risk and capital, as well as other high-risk transactions. Since then, for five years now, Russia has been actively fighting the Base Erosion and Profit Shifting, trying to translate the principles attached by the OECD to local legislation.

The BEPS plan in relation to the observance of the principles of market prices for transfer transactions for taxation purposes includes a three-step

1. Transfer pricing is the pricing of transactions between related parties, which, for various reasons, have an impact on each other's business results.

control system that is distributed both locally and internationally (fig. 1).

The Master File includes high-level global information about business processes within international groups of companies and their transfer pricing policies.

The Local File is a detailed report on controlled transactions made by individual resident companies

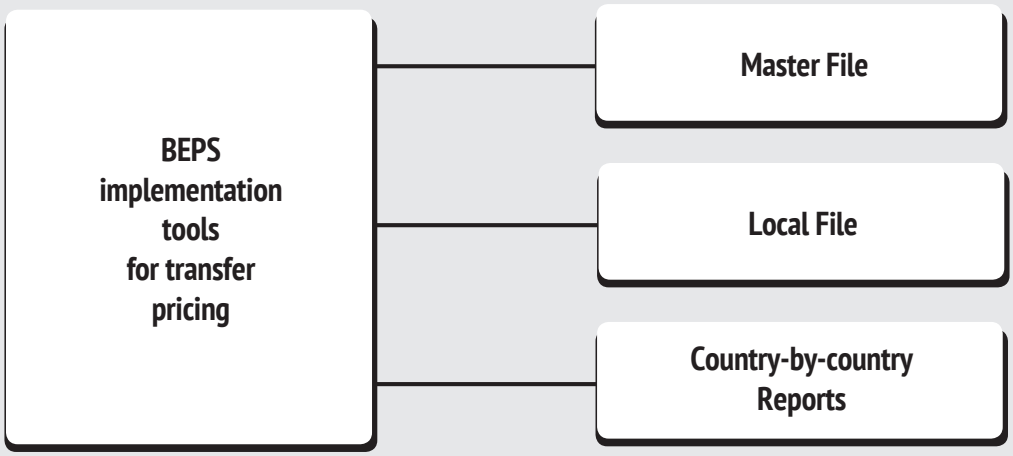

Fig. 1.

of a particular country, on the prices of transfer transactions, and also contains the results of functional, economic and financial analysis, justifying the applied prices for transactions.

The Country-by-country report is a formal instrument of control over some international groups of companies, which involves submission of special annual reports to the controlling authorities.

At the time of the initial approval of the BEPS plan, Russia already had domestic legislation on controlling pricing for transactions between related parties[2], which, however, did not provide for any tools for the international exchange of data on transfer transactions[3]. In fact, this legislation covered the second level of control which

2. Section V.I of the Tax Code of the Russian Federation.
3. Article 105.15 of the Tax Code of the Russian Federation.

is a local file. Trying to ensure the most effective collection of information, the Ministry of Finance of Russia has issued recommendations on the preparation of transfer documentation[4].

Since 2018, new norms have been introduced in Russian tax legislation that shall ensure the implementation of steps eighth to tenth of the BEPS plan in terms of the Master File and Country-by-country reports. For these purposes, the Tax Code has been supplemented with Chapter 14.4-1 Presentation of Documentation for International Groups of Companies.

The law introduced the concept of the international group of companies.

4. Recommendations on the preparation of transfer documentation were formulated in Letter of the Federal Tax Service of Russia of August 30, 2012 No. OA-4-13 / 14433 @ On Preparation and Submission of Documentation for Tax Control Purposes.

In order for a taxpayer to be recognized as a member of such group, it is not enough just to have interdependent counterparties abroad. For this, all conditions of recognition of the group as an international group of companies shall be fulfilled:

1. The Group prepares consolidated financial statements in accordance with Russian law or at the request of stock exchanges.
2. The group includes at least one organization or structure without forming a legal entity that is recognized as a tax resident of Russia or that operates in Russia through a permanent representative office, and at least one organization or structure without forming a legal entity that is not recognized as a tax resident of Russia or recognized

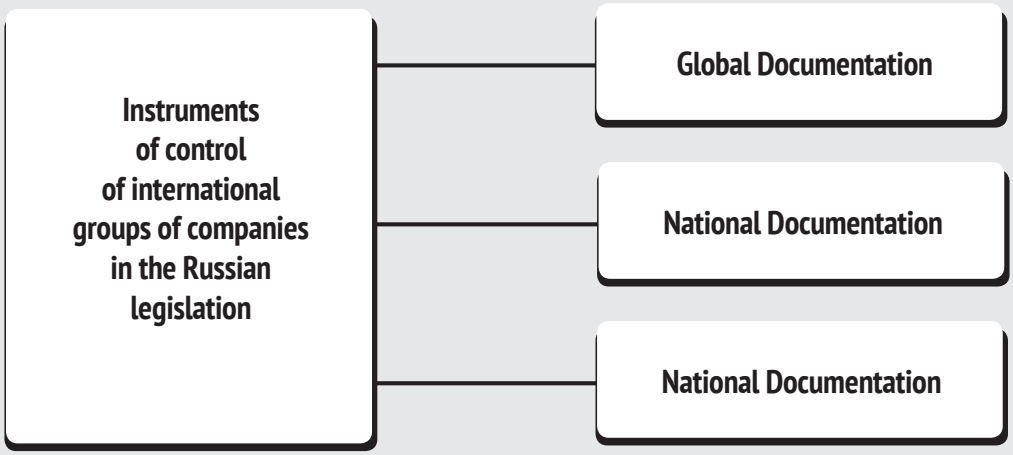

Fig. 2.

as such, but subject to taxation in respect of business activities through a permanent establishment abroad[5].

The Russian legislator has tried to put the basis of the BEPS plan into new norms, therefore, he has kept the idea of dividing the institutions of control into three levels (fig. 2).

5. Clause 1 of Article 105.16-1 of the Tax Code of the Russian Federation.

Global documentation, as well as the Master File from the original document, shall include information about the international group of companies, describe its business processes and describe the essential facts of economic life. The global documentation describes the underlying principles of distribution of functions, risks and assets in a group of companies and contains the results of a brief functional analysis of intragroup transactions[6]. This part of the country-by-country report is submitted by the parent company of the group.

Questions directly relating to specific members of the group shall be contained in the national documentation. It analyzes the results of transactions in the context of individual counterparties

6. Article 105.16-4 of the Tax Code of the Russian Federation.

and concludes that the pricing rules for transactions are in accordance with local legislation. The law expressly provided that this level of documentation corresponds to the documentation that was previously prepared in accordance with Section 105.15 of the Tax Code[7].

The Country-by-country report is an additional document to the already familiar to Russian taxpayers notification of controlled transactions[8]. The Country-by-country report, in contrast to the notification, shall contain information not only about controlled transactions, but also other financial and other relevant information about its activities. The information specified

7. Article 105.16-5 of the Tax Code of the Russian Federation.
8. The notification is completed and submitted by taxpayers who have made controlled transactions until May 20 of the year following the reporting year, in accordance with Article 105.16 of the Tax Code of the Russian Federation.

in the Country-by-country report will form the source of automatic information exchange regarding transfer pricing between OECD member countries.

The country-by-country report includes the following information for the reporting period:

- The total amount of taxpayer income, including breakdown to the amount of income from transactions with members of this international group of companies and the amount of income from transactions with other persons, including associated organizations;
- The amount of profit (loss) before taxation for the reporting period;
- The amounts of calculated and paid corporate income tax;

- The amount of capital at the end of the reporting period;
- The amount of accumulated profit at the end of the reporting period;
- Information on the number of employees;
- The value of tangible assets at the date of the end of the reporting period;
- A full range of information about each member of an international group, including the state (territory), in accordance with the law of which such member is established, the state (territory) of tax residency and the main activities of each member of an international group of companies[9].

9. Clause 1 of Article 105.16-6 of the Tax Code of the Russian Federation.

In addition, the Russian legislator has actually divided the country-by-country report into two levels, one of which is mandatory for all organizations, and the second is only for those who do not meet specially established criteria.

The first level is the notification of participation in the international group of companies. It shall be represented by all taxpayers who are members of international groups of companies, except for foreign organizations that receive income from sources in Russia without a permanent representative office[10].

The country-by-country report shall, first of all, be filed by taxpayers, about which the parent company did not file the country-by-country report. The second condition that shows the need

10. Article 105.16-2 of the Tax Code of the Russian Federation.

to submit a country-by-country report is the amount of revenue for a group of companies. The report is submitted if such revenue exceeds 50 billion rubles (for groups parent company of which is located in Russia) or another amount established by the legislation of the incorporation of the parent company[11] (page 58).

The terms and methods of filing documents that the law requires to prepare for the purposes of controlling transfer pricing are given in the table below.

The obligation to submit a notice of participation in the international group of companies, of a global documentation and a country-by-country report has already arisen in relation

11. Clause 6 of Article 105.16-3 of the Tax Code of the Russian Federation.

to the 2017 reporting period. For violation of the rules for filing a notice of participation in the international group of companies, a fine has been set at the amount of 50,000 rubles[12], a country-by-country report at the amount of another 100,000 rubles[13], global documentation also at the amount of 100,000 ruble[14] Until 2020, there is a moratorium on attracting taxpayers to these types of tax liability. This means that taxpayers shall not be held accountable for not submitting reports for 2017, 2018 and 2019[15].

12. Article 129.9 of the Tax Code of the Russian Federation.
13. Article 129.10 of the Tax Code of the Russian Federation.
14. Clause 2 of Article 129.11 of the Tax Code of the Russian Federation.
15. Clause 7 of Article 2 of the Federal Law of 27.11.2017 No. 340-FZ On Amendments to Part One of the Tax Code of the Russian Federation in Connection with Implementation of the International Automatic Exchange of Information and Documentation on International Groups of Companies.

Document type	Submission method	Filing period
Notification to controlled transactions	Hard copy or soft copy	May 20 of the year following the reporting
Notice of participation in the international group of companies	Soft copy	8 months from the end of the reporting period for the parent company of such the international group of companies
Global documentation	Hard copy or soft copy	3 months from the date of receipt of the request from the tax authority
National documentation	Hard copy or soft copy	30 days from the date of receipt of the request from the tax authority
Country-by-country report	Soft copy	12 months from the end of the reporting period

But the responsibility for violation of the deadlines for submission of national documentation has been already in force. Apparently, assuming that taxpayers are already used to preparing transfer documentation, the legislator did not wait, and imposed a penalty for not submitting national documentation (that is, former transfer documentation in accordance with article 105.15 of the Tax Code), in the amount of 100,000 rubles already from 2018, that is, from the report for 2017[16]. And taxpayers who have decided to save on its preparation can only hope that the Federal Tax Service will ignore them.

The feelings of the business community, which can be observed now everywhere, can be described in the

16. Clause 1 of Article 129.11 of the Tax Code of the Russian Federation.

words of Chatsky: "I saw it- I did not believe my eyes![17]" Although the only way to submit notice of participation in the international group of companies is electronic, the Federal Tax Service developed the format of this document only by March 2018. The developers of software products for business have not yet provided taxpayers with the opportunity to submit notifications, despite the fact that for most groups the deadline for their submission expired in early September. Nobody seems to remember the country-by-country report. Russian participants of the international groups of companies, even realizing that there are still three years left to join the procedure of exchanging country-by-country information without

17. A. S. Griboedov, Woe from Wit.

fines, already feel like violators. It is worth admitting that at present the BEPS plan in terms of transfer pricing can be considered implemented in Russian law only on paper. A

VAGUE DESCRIPTION OF A VAGUE IDEA

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Despite the fact that the ‘beneficial owner of income’ institution was introduced into the Tax Code of the Russian Federation only in 2015, international double taxation agreements previously provided for the possibility to use the benefits of double taxation agreements (including reduced rates) only for the persons/entities:

- Having the actual right to such income (interest, dividends, royalties);
- Whose/which main purpose or one of the main purposes of establishment or existence was not the receipt of benefits under the agreement.

The concept of beneficial owner of income has been around for quite some time and has been successfully applied in

other countries (including in Switzerland, Austria, Germany, the Netherlands, etc.). In this regard, it is impossible to blame the regulatory authorities, the courts and our legislator for ‘inventing’ something new while trying to make life difficult for taxpayers by refusing to apply benefits or preferences in some cases with the sole purpose of replenishing the budget with new taxes. As a matter of fact, they drew our attention to the method of applying preferences of tax agreements in bad time letting their foreign colleagues tread this thorny path.

In April 2018, the Federal Tax Service issued a letter making it possible to monitor the major directions of judicial practice development as well as the approach of the tax authority in forming evidentiary basis on disputes related to improper use of preferential provisions

stipulated in international double taxation agreements by taxpayers and tax agents[1].

Thus, taxpayers must substantiate their need to make transactions in a certain form as well as the involvement of foreign companies in the business structure and provide evidence of reasonableness of the choice made and its economic feasibility.

The companies serving only the interests of their own group and parties affiliated with it enjoy advantages of international double taxation agreements in cases where their income is not economically feasible.

In practice, new approaches have emerged both to the list of criteria

1. Decision of the Moscow Arbitration Court dated 08.05.2015 on the case No. A40-12815/15.

indicating the company's 'conduity' and to the assessment of the evidence provided by taxpayers of the fact that that the company receiving income was the actual beneficiary.

A foreign company is recognized as a technical company with signs of 'conduity' if:

- The activities of the foreign company have no signs of a separate part of the business (business goal);
- There are no operations that cause economic activity;
- The payments are of 'transit' nature;
- The activities of the foreign company are not associated with financial and other risks that are normal for business activities;

- The company does not receive benefits from the income disposal (use);
- The company's employees exercise virtually no control and management functions concerning the company[2].

In addition to the circumstances of creating a foreign company, analysing the available material, immaterial, labour resources, investigating cash flows from the point of view of the 'transit' nature of payments and exercising powers on independent management of the income received, special attention is paid to assessing the financial and economic activities of a foreign company and the nature of such activities. The lack of business activities by the foreign

2. Decision of the Perm Territory Arbitration Court dated 31.07.2018 on the case No. A50-9233/2018.

company is one of the signs of the technical nature of such company.

In this case, the activities carried out only in the form of investments and financing of the group (holding) companies or interdependent affiliated companies is not indicative of independent business activities.

Conclusions about the lack of independent business activities by a foreign company are also confirmed by the following circumstances:

- The main profit of a foreign organization which is the income recipient is formed mainly by income transferred from the Russian Federation;
- The primary activities of the company are mostly associated with redirection of income further

down the chain to the founders or companies in the group;

- The activities which are not related to receipt of dividends are not carried out;
- The company has no significant financial, commercial risks; there are no payments characteristic of normal economic activities or the volume of operating expenses is insignificant and the company bears only administrative expenses due to formal fulfillment of requirements of the country of incorporation.

Thus, each of the evidence of a foreign organization's activities submitted by taxpayers should indicate that the company carries out independent business activities, uses the income received to create an economic profit

center in a foreign jurisdiction or to attract foreign capital to the Russian economy.

The position formed by the courts on the case of Neftservisholding, LLC[3] и Auction Company 'Soyuzpushnina', LLC[4] is noteworthy. The position of the courts comes down to the fact that the following types of income are considered insignificant:

- Income from provision of information and consulting services;
- Income in the form of foreign exchange gain from purchase and sale of foreign currency;

3. Decree of the Ural District Arbitration Court dated 16.07.2018 No. Ф09-3559/18 on the case No. A50-29761/2017.
4. Decree of the Moscow District Arbitration Court dated 05.04.2018 No. Ф05-3523/2018 on the case No. A40-73573/2017.

- One-time purchase of preferred shares;
- Ownership of shares and interest in affiliated companies.

Acquisition of shares of various companies is not recognized as confirmation of investment activities in the event that a foreign company does not participate in the activities of the acquired companies, they do not carry out any actual activities, they do not generate any income and the acquisition of shares was formal. The establishment of subsidiaries does not indicate the actual implementation of independent business activities if decisions to establish the subsidiaries are actually not made by the foreign organization. Minutes of the meeting of the board of directors are not recognized as evidence

of active investment and business activities of a foreign company if they lack specific business goals and objectives related to commercial activities of this foreign company, and only general issues are specified.

Bearing of expenses by a foreign organization should also not be formal but only ensuring the registration and maintenance of the office in a foreign jurisdiction.

The case of Shakhta Polosukhinskaya, OJSC[5] provides that insignificant expenses for salary payments and social benefits indicate the absence of personnel of a foreign company that could allow the company to efficiently manage its assets; provision

5. Decree of the West Siberian District Arbitration Court No. Ф04-2998/2018 dated 07.08.2018 on the case No. A27-27287/2016.

of invoices for accounting services is also not indicative of vigorous activities due to the fact that these expenses are necessary expenses for maintaining the formal existence of the organization.

In the light of the above, all Russian companies engaged in money transactions with foreign counterparties should be prepared for close attention and audit by the inspection bodies in enjoying the benefits of tax agreements. The key points that inspection bodies pay attention to in such cases and the arguments on which they base their reasons are reflected in the court cases considered. Therefore, in order to at least somehow minimize the risks considered, we recommend studying the information on them to avoid similar mistakes.

In addition, to minimize the risks considered, it seems appropriate to

adhere to the requirements necessary for recognition of the foreign company acting as the counterparty of a Russian organization as beneficial owner of income. Of course, these recommendations cannot be considered exhaustive and completely eliminating this risk. However, the implementation of such recommendations is a mandatory minimum, the absence of which will unequivocally put the mentioned operations involving foreign companies in jeopardy. A

ALL COVERED WITH BENEFITS...

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On August 3, 2018, the Russian Parliament adopted a number of legislative acts regulating the possibility of conducting the redomiciliation procedure of foreign companies in the Russian Federation in exchange for providing tax advantages. As follows from the initial explanations to the bills, these acts regulate the creation of special administrative areas in the Russian Federation (offshore zones) in the territory of Kaliningrad Region (Oktyabrsky Island) and Primorsky Territory (Russky Island) in order to increase investment attractiveness for foreign investors.

In particular, the following main legislative acts have been adopted:

- Federal Law of 03.08.2018 No. 290-ФЗ On International Companies;

- Federal Law of 03.08.2018 No. 291-ФЗ On Special Administrative Regions in the Territories of Kaliningrad Region and Primorsky Territory;
- Other acts providing for changes in civil, tax legislation, and legislation on currency regulation.

At first, the logic of the legislator is simple and uncomplicated — if you finally failed to de-offshorize foreign business, then you need to make this business offshore, but in Russia. Let's try to understand the main aspects of the adopted innovations.

Who can register a company in the Islands?

A company can be registered in special administrative districts — Russky Island

in Primorsky Territory and Oktyabrsky Island in Kaliningrad Region — by foreign organizations that have received the status of the international company subject to certain conditions.

What is the international company?

The international company is a foreign legal entity that is a commercial corporate organization that has decided to change its personal law.

The status of the international company is granted to a foreign legal entity simultaneously with the entry of information into the United State Register of Legal Entities under the following conditions:

- Conducting activities of the company in several states (including the Russian Federation);
- Investment in the territory of the Russian Federation of the amount not less than 50 million rubles;
- Company registration in the Member State of Financial Action Task Force on Money Laundering or Moneyval;
- Conclusion of the agreement on implementation of activities as a member of a special administrative region.

What is meant by investments in the territory of the Russian Federation?

The investments in the territory of the Russian Federation mean:

- Capital investments (carried out in accordance with the Federal Law of 25.02.1999 No. 39-ФЗ On Investment Activity in the Russian Federation, Carried Out in the Form of Capital Investments);
- Investments in the authorized capital, fund or contributions to the property of business entities that are Russian legal entities.

The agreement on implementation of activities in the territory of a special administrative region

This is the agreement concluded between a participant in a special administrative region and the management company, which establishes the types of activities of a participant in a special administrative region, the conditions for carrying out such activities, the rights, duties and responsibilities of the parties.

Management Company

The management company is a Russian legal entity, which is created in a special administrative region and is entrusted with the functions of ensuring the

functioning of a special administrative region.

What is an international holding company?

An international holding company is an international company that simultaneously meets the following conditions:

- An international company is registered in order to redomicile a foreign organization in the territory of the Russian Federation;
- The foreign organization was registered in accordance with its personal law in the period up to 01.01.2018;
- An international company, no later than 15 days from the date of its

registration, submitted to the tax authority at the place of registration the following documents and information:

- Financial statements of a foreign organization for the last financial year that ended before the date of registration;
- Positive audit report;
- Information about the controlling persons of the international company.

What are the tax benefits for international holding companies?

Based on the amendments to the Tax Code of the Russian Federation,

international holding companies for the period up to 2029 receive the following tax benefits:

1. 0% — on income in the form of dividends received by an international holding company, provided that:
    - On the day of the decision to pay dividends, the international holding company continuously holds the ownership for not less than one year at least 15% in the authorized capital of the organization that pays dividends;
    - The dividend paying company is not offshore.
2. 5% — on income in the form of dividends received by foreign persons from international holding companies (provided that at the

date of payment of dividends the international holding company is public).

3. 0% — on income from the sale of shares or interests in Russian or foreign organizations that are received by an international holding company, subject to the following conditions:

   - Such shares (interests) as of the date of their sale belong to the international holding company for at least a year and constitute at least 15%;
   - Such shares (interests) shall not constitute the authorized capital of organizations, more than 50% of assets of which consist of Russian real estate;

- Such shares were not included in the authorized capital of the international holding company (or acquired as a result of reorganization) during the year before or after the date of registration of such a company as an international one;
- In the case of the sale of shares of foreign companies — such foreign companies shall not be offshore.

4. The profit of the international holding company shall be exempt from taxation and shall not be taken into account when calculating the profit of its controlling entity.
5. The international holding company will not have to take into account in its tax base the profit of its controlled companies.

The registration procedure (redomiciliation) of the international company

Filing an application for conclusion of a contract on implementation of activities

A foreign company intending to become a member of a special administrative region submits an application to the management company for the conclusion of the agreement on the implementation of activities. The application shall indicate:

- Full company name of the applicant;
- Activities planned for implementation;

- The period for which the applicant intends to conclude the agreement on the implementation of activities;
- Contact information (telephone, fax, e-mail address, name of the contact person).

The application shall be signed by a person who has the right to act on behalf of the applicant without a power of attorney.

Document submission

The procedure for redomiciliation of a foreign company shall be carried out by entering the relevant information into the Unified State Register of Legal Entities in a special manner prescribed by law. Information about the international company during its registration in the order of

redomiciliation, reorganization and liquidation of the international company, as well as other information provided for by federal laws, shall be entered into the unified state register of legal entities by the registering authority on the basis of documents sent by the management company.

For the purpose of state registration of an international company in the manner of redomiciling, a foreign legal entity shall submit to the management company the following documents:

1. Application for state registration of the international company in the prescribed form.
2. A document confirming the state registration (creation) of a foreign company.

3. A copy of the articles of association (constituent document) of the foreign legal entity with all the amendments and additions made to it.
4. The decision of the competent management body of the foreign company to change its personal law and approve the articles of association of the international company.
5. Approved articles of association of the international company.
6. A copy of the annual financial statement for the last completed reporting year with a copy of the audit report (if any).
7. A document confirming the authority of the person authorized to act on behalf of the foreign company without a power of attorney.

8. The decision of the competent management body of the foreign company on the determination of the person performing the functions of the sole executive body of the international company.
9. Information about the beneficial owners of a foreign legal entity.
10. The assurance of a foreign legal entity of the absence of circumstances preventing the state registration of the international company.
11. Documents required for registration of the issue of shares of the international company to be placed in connection with its state registration in the organizational and legal form of a joint stock

company (according to the approved list).

12. If the name of the international company indicates that it is a public joint-stock company, documents confirming that the company's shares are listed on the stock exchange, as well as documents necessary for registration of the international company's prospectus.
13. Documents confirming compliance with the requirements for international companies (carrying out activities in several states, filing an application to conclude the agreement on carrying out activities, having obligations to make investments in the Russian Federation).

Consideration of documents by the Management Company

The management company reviews the documents within a period not exceeding two working days and decides whether to send the documents to the registering authority or the Bank of Russia (if the international company is registered as a joint stock company) or to refuse to send the documents to the appropriate authority (organization). The management company informs the applicant about the decision no later than one working day from the date of the adoption of the relevant decision.

State registration of the international company

In case of making a decision on sending documents for registration, the management company shall take the said actions no later than on the working day following the day of making such a decision.

The state registration of the international company is carried out by the registering authority within a period not exceeding three working days from the date of receipt of documents from the management company.

A foreign legal entity is subject to exclusion from the register of foreign legal entities in the state of its initial personal law within six months from the date the information on the registration of an international company is registered

in the Unified State Register of Legal Entities, if the longer term is not established by the legislation of the state of the original personal law of the legal entity.

Consideration of the application for the conclusion of the agreement on the implementation of activities

According to the results of consideration of the application, the management company decides on the conclusion of the agreement on the implementation of activities or on the refusal to conclude the agreement on the implementation of activities. In the case of a decision to conclude the agreement on the implementation of activities, the management company shall send the

draft of such agreement to the applicant within 5 working days from the date of the adoption of this decision. A model agreement on the implementation of activities in accordance with which an agreement on the implementation of activities can be concluded shall be approved by the authorized body.

Termination of the status of the international company

The status of the international company can be lost both voluntarily and by force. The status of the international company can be lost voluntary on the basis of the application that the international company can submit to the management company at any time after the date of its registration.

The status of the international company can be terminated by force:

- Based on the notification of the management company for non-compliance with the requirements;
- In case of joining as a result of reorganization of a legal entity registered outside the territory of a special administrative region.

When the international company is reorganized in the form of a merger, division and separation, the status of the international company does not pass to legal entities created as a result of such reorganization.

After the termination of the status of the international company, such a business entity continues to exist in the appropriate legal form (LLC, JSC, PJSC) on a general basis.

At first, the adopted package of legislation provides for significant tax privileges for foreign companies that have decided to move to the Russian islands. But only time will tell whether these privileges will be enough to finally complete the process of de-offshorization of Russian foreign business. A

REDOMICILIATION. NOVEL RUSSIAN LEGISLATION STATING THE CHANGE OF PERSONAL LAW OF THE LEGAL ENTITY

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Redomiciliation, being relatively undeveloped on a global scale, at the same time represents an actual topic that has been developed under private international law practice and doctrine.

In modern world business conditions, this institute is often embedded in business schemes whose goal is to search the favorable framework of the law for a legal entity.

"Redomiciliation" should be understood as the change of personal law of the legal entity and, as a consequence, of applicable law.

Personal law of the legal entity is one of the major law categories that provides ability to identify legal entity status, including in cross-border cases.

The personal law determining boils down to three conflict principles defined by the doctrine and practice of private international law:

- Place of incorporation;
- Place of residence;
- Place of business.

Doctrine of incorporation states the rule of Law application of the government where and under whose legislation legal entity was incorporated (Great Britain, Netherlands, Switzerland, Czech Republic, Russia, Canada, USA, Cyprus, Bahamas, etc.).

Doctrine of residence means that will be chosen legislation of that country where the executive body's (-ies') place is (France, Greece, Austria, Turkey, Estonia, Poland, Egypt, Georgia, etc.).

Under place of business doctrine, Law of country where real and main business activity exists will be exercised (often works as an additional conflict principle in relation to the principle of residence, for example, the relevant provisions are taken into account in the Egyptian and Estonian legislation).

In virtue of considered conflict principles, the possibility of correct determination of the applicable law to a legal entity appears, and, as a result, the possibility to understand whether the usage of redomiciliation provisions is possible in accordance with personal law. That is, to correctly define the current personal law means to find the correct answer to the question: "is it legally possible to conduct redomiciliation procedures

for a particular legal entity", because redomiciliation is permissible only if there is a legally established possibility of its implementation in accordance with the "initial" and "receiving" countries.

As noted above, the redomiciliation procedures are not globally developed, but Lawmakers tend to provide for the possibility of redomiciliation in the legislation or its prohibition (there are countries haven't such procedure and special proscription in their legal orders, but practice presents cases of interpretation of the provisions absence by public authorities/registration bodies as a proscription and rejection to applicants).

Most often, the institute of redomiciliation is established under

classic offshore or favorable tax regime jurisdictions legislation. In such countries, the processes of redomiciliation are often set in the general laws of the company and their activities, the so-called "Company Acts".

The "transferring mechanisms" for companies moving between offshore states have become more popular in the context of stricter sanctions procedures, as well as improving tax legislation and enhancing the principle of transparency through the world.

As for the legislation of the Russian Federation, until recent changes of the personal law of a legal entity was not regulated by law, the institute of redomiciliation was not provided for as such.

As for today, amendments have been made to the Civil Code and

a number of other regulatory acts relating to the change of the personal law of a legal entity (Tax Code of the Russian Federation, the Federal Law "On Currency Regulation", the Federal Law "On Special Administrative Regions in the Kaliningrad Region and Primorsky Krai", the Federal Law "On the Development of Small and Medium-Sized Business in the Russian Federation", etc.).

Thus, Article 1202 "Personal law of a legal entity" of the Civil Code of the Russian Federation provides that the Personal Law of a legal entity is the law of the country where a legal entity is established (incorporated), unless otherwise provided by the Federal Law "On Amendments to the Federal Law "On the Introduction into effect of the Part One of the Civil Code of the Russian Federation" and Article 1202 of the third

part of the Civil Code of the Russian Federation" and the Federal Law "On international companies".

As one can see, the changes are related to the emergence and entry into force of the Federal Law of 03.08.2018 "On international companies". This Law determines the legal status of a business entity with the status of an international company registered in the Uniform State Register of Legal Entities in connection with redomiciliation novels and amendments, including the rights and obligations of participants in such a legal entity, features of its activities, reorganization and liquidation.

In accordance with the new Federal Law, a foreign legal entity that is a commercial corporate organization and has decided to change its personal law in

the manner prescribed by such personal law may become an international company.

The international company status may be presented to a foreign legal entity under certain conditions established by the Federal Law of 03.08.2018 No. 290-ФЗ "On International Companies" in Article 2. (see Table No. 1 "Conditions for getting the status of an international company").

A specific condition for obtaining the status of an international company (which is not characteristic of the classical redomiciliation institute) is the investment condition. Under Article 2 of the Federal Law the condition for assuming obligations to make investments in the territory of the Russian Federation is established,

Table No. 1. "Conditions for getting the status of an international company"

The international company status is granted (simultaneously with the state registration in the Unified State Register) to a foreign legal entity that:			
Through its directly or indirectly captive entities or through branches or representative offices (other separate subdivisions) carries out business activities in the territory of several governments, including in the territory of the RF	Filed an application to conclude an agreement on the implementation of activities as a member of a special administrative region, determined in accordance with the Federal Law "On Special Administrative Regions in the Territories of the Kaliningrad Region and the Primorsky Territory"	Made commitments to make investments in the territory of the RF, including on the basis of a statement of intent to investin the territory of the RF, a special investment contract, a concession agreement, an agreement on public-private (municipal-private) partnership or other kind of agreement	Registered (incorporated) in a government that is a member or observer of the FATF and / or a member of the Council of Europe Committee of Experts on the MONEYVAL.

and the Law specifies in a referral manner what exactly is meant by "making investments in the territory of the Russian Federation" (see Table No. 2 "International companies' investments").

In accordance with Federal Law No. 39-FZ of February 25, 1999 "On investment activity in the Russian Federation carried out in the form of

Table No. 2. "International companies' investments"

Investments in fixed assets, including the costs of new construction, reconstruction and technical re-equipment of existing enterprises, the acquisition of machinery, equipment, tools, inventory, design and survey work and other costs	Investment in share capital, fund or contributions to the property of business entities that are russian legal entities

capital investments", investments are funds, securities, other property, including property rights, other rights, having a monetary value, invested in objects of entrepreneurial and (or) other activities in order to gain profit and (or) achieve a different beneficial effect. The legislator also established the minimum sum of investments required to obtain the status of an international company — 50 000 000 rubles. The obligation of a foreign legal entity to invest in the territory of the Russian Federation extends to legal entities under its control, provided that such persons filed an application for state registration in the Russian Federation. In addition, the Law gives the international company the right to entrust the fulfillment of the following obligation to invest in any entity from

the group to which foreign legal entity belongs.

An international company may have civil rights and bear civil obligations necessary to carry out any activities not prohibited by federal laws.

The law directly defines the absence of legal succession relations in connection with the state registration between a foreign legal entity and an international company.

In the context of the law, this does not mean the "disappearance" of the rights and obligations, on the contrary, since the date of state registration of an international company, it has all such rights and obligations, including:

- Real (property) rights and other rights to real and personal property (bona), including those located

outside the territory of the Russian Federation;

- Partnership and participation rights in other organizations, including those related to the receipt of dividends and other income or payments;
- Rights to securities and other financial instruments, including those related to the receipt of income and other payments;
- Exclusive rights;
- Rights, duties and responsibilities arising from contracts, including from agreements on the creation of legal entities and corporate agreements concluded by a foreign legal entity prior to state registration of an international company, as well

as those arising from unilateral transactions or as a result of unjust enrichment, injury, or from other non-contractual grounds;

- Rights arising from previously issued licenses and other permits, approval documents issued by state authorities;
- Right to bring suit or action that appeared prior to international company state registration.

The Federal Law "On International Companies" establishes a special procedure for state registration of international companies, which is implemented into the existing registration procedure established by the Federal Law "On State Registration of Legal Entities and Individual

Entrepreneurs" (see Fig. No. 1 "Features of International Company State Registration").

Summarizing the above, it is worth noting that the central and essential

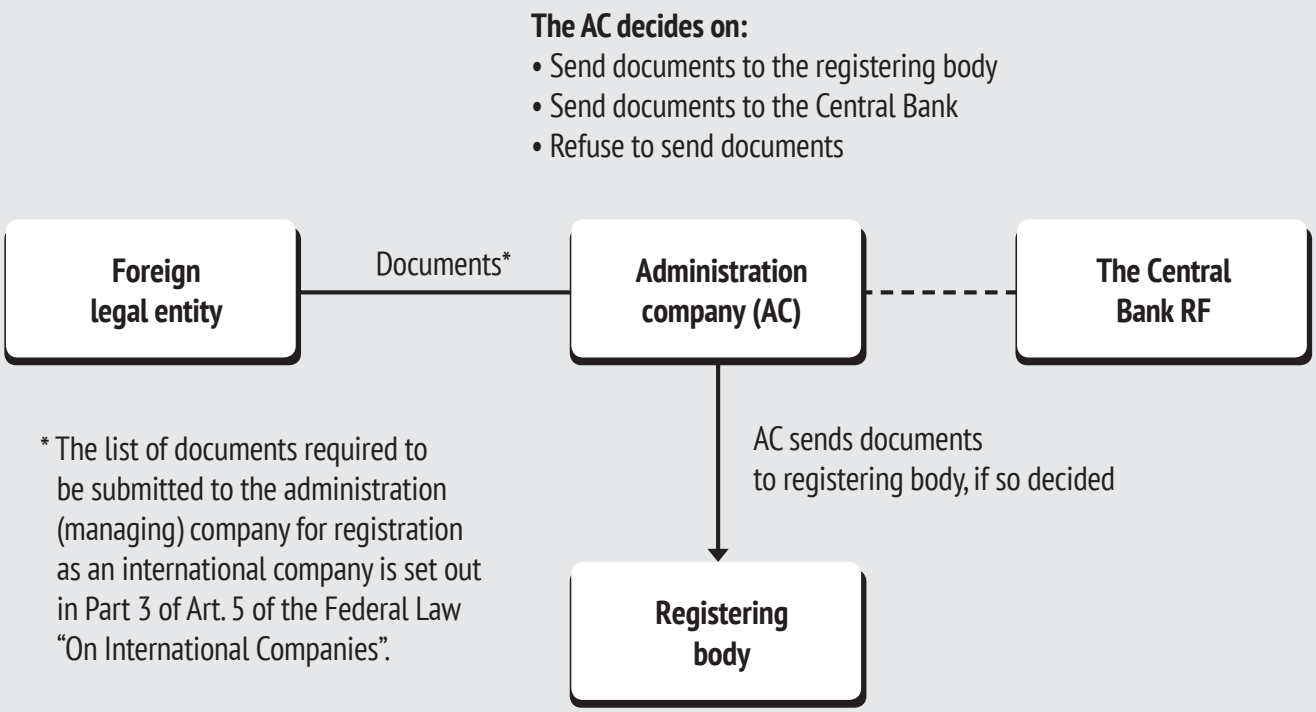

Fig. 1. Features of International Company State Registration

characteristic of redomiciliation is the change of the personal law of a legal entity and the applicable law (including Russian law stipulates that, from the moment of state registration, the personal law of an international company becomes Russian law, which means applying to an international company, it's internal and external relations of the legislation of the Russian Federation). However, "the Russian redomiciliation" has its own specifics, because Russia, as the host country, makes the requirement to make investments in its territory. The emergence of such a new category as an "international company" and the legislation amendments in Russian legislation, including changes in personal law, are unambiguously

a reason for reflection on the possibility of implementing elements of the classical institution of redomiciliation into the legislation of the Russian Federation. A

EVERY BARBER KNOWS THAT

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Despite the protests of the business and the audit community, Federal Law No. 231-FZ dated 29 July 2018 (the Law) amending Part One of the Tax Code will come into force on 1 January 2019. According to this Law, the tax authorities will have the opportunity to obtain information about taxpayers from audit organizations and individual auditors (auditors).

Now, for the purposes of tax control, the tax authorities will be able to collect, keep and use the documents (information) received from the auditors related to the provision of professional services.

The text of the Law has undergone significant changes in comparison with the original draft law of one year ago. In particular, the final version of the

Law contains not only the possibility of making a request, but also specific conditions that must be fulfilled.

Inspections at the request of the Russian tax authority

The Law provides for the possibility of the tax authority to request and receive information about the taxpayer from auditors in the event that the information has been requested from the taxpayer and has not been provided within the time limits provided by the legislation.

At the same time, there are two cases in which the tax authority can send a request for information to the auditor:

- Conducting field tax audit;
- Verification of completeness of calculation and payment of taxes

in connection with transactions between related parties.

The basis for request of documents from the auditor is the decision of the Head (Deputy Head) of the federal executive authority authorized for control and supervision in the field of taxes and fees (Federal Tax Service) when conducting tax audit.

In the initial version of the draft law, the decision of the Head (Deputy Head) of the higher tax authority could also be the grounds, but during the consideration it has been excluded.

The Law lists the mandatory information that must be contained in the request of the tax authority to the auditor:

- Reference details of the decision on inspection;

- Subject of inspection and period for which it is conducted;
- Date of sending of the request on documents (information) to the taxpayer and term for the required documents (information) to be submitted;
- Information on the fact of failure to submit documents (information) by the audited taxpayer within the prescribed period, on receipt of a notification on the impossibility of submitting the requested documents (information) or on refusal to submit the requested documents (information);
- Name of the audit organization (surname, name, patronymic of the

individual auditor), state registration number;

- Reference details or other information that enables the auditor to identify the requested documents (information).

The requested documents (information) shall be submitted by the auditor to the tax authority within ten days from the date of receipt of the relevant request.

Requests from foreign states

In addition to these cases, information can be requested from the auditor upon receipt of requests from foreign states.

In this case, the grounds will be the request of the authorized authority of a foreign state in the cases provided

by international treaties of the Russian Federation.

The request of the tax authority made to the auditor on grounds of the request received from a foreign state shall contain:

- Reference details of the request of the competent authority of a foreign state (territory);
- Information if the request of the competent authority of a foreign state (territory) contains prohibition on informing the person in respect of whom the request has been received, on the transfer of information relating thereto;
- Name of the audit organization (surname, name, patronymic of the individual auditor), state registration number;

- Reference details or other information that enables the auditor to identify the requested documents (information).

Please note that the request of a foreign state can contain prohibition on the notification of the taxpayer on the transfer of documents (information).

That is, when requesting documents (information) on grounds of the decision of the Russian competent authority, the auditor may inform (and most likely will inform) the taxpayer about the fact of providing documents (information) to the tax authority. Upon receipt of the request for documents (information) on grounds of the decision of a foreign competent authority containing prohibition on informing the taxpayer, the auditor is obliged to keep the transfer

of documents (information) upon the received request secret.

However, there is no prohibition on informing the taxpayer about the fact of receiving the request, only on the provision of documents (information).

Auditor's responsibility

In August 2018, the Ministry of Finance of the Russian Federation issued an Information Statement to the said Law, which directly indicates the auditor's obligation to keep the audit secret, which includes any information and documents received and (or) drawn up by the audit organization and its employees as well as the individual auditor and employees with whom they have concluded employment contracts, when providing

audit and related services, and other services related to audit activities.

At the same time, it has been noted that conferring the tax authorities the right on access to audit secrets is aimed at identifying tax offenses, prevention from tax evasion and financial fraud, and ensuring the fulfillment of the relevant international obligations of the Russian Federation.

That is, the audit secret is kept, and an exception is made for the tax authorities.

Failure by the auditor to submit information about the taxpayer to the tax authority within the prescribed period, refusal of the auditor to submit documents with information about the taxpayer at the request of the tax authority or submission of documents

with misleading information shall entail a fine from the auditor in the amount of 10 thousand rubles.

For repeated failure to provide information or documents, the auditor faces a fine of 20 thousand rubles.

Questions remained undetermined

The wording of the Law implies the provision of the information and documents "available" to the auditor. Unfortunately, no explanation has been provided regarding the main issue: whether the auditor is responsible in case of absence of the requested information or documents.

The audit involves the selective risk-oriented audit of accounting and reporting, but not total inspection

of tax accounting. That is, the auditor may just have not got documents the tax authorities are interested in. At the same time, each auditor sets the extent of documentation independently based on his/her own professional judgment.

Subject to absence of the auditor's obligation to document all the documents of the taxpayer (which is impossible), in most cases, the auditor will not just be able to fulfill the requirements of the legislation on the provision of documents to the tax authority.

In addition, it remains a mystery how the tax authority will learn about conducting of the initiative audit and services related to the audit, and even more the name of the auditor and his OGRN (Primary State Registration Number).

Subject to the large number of outstanding issues, explanations on the application of the new Law and, probably, amendments thereto, shall be issued in the coming year. For the time being, the Law is quite live and is unlikely to be able to work in this form in a proper way. A

BRINGING HIDDEN BENEFICIARY TO SUBSIDIARY RESPONSIBILITY

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The next stage of development has begun in the Russian Bankruptcy Law: a new chapter III.2 has been introduced into the Bankruptcy Law, which regulates the issues of bringing the debtor's manager and other controlling persons to subsidiary and other responsibilities. In addition, in order to correctly apply the norms contained in this chapter, Resolution of the Plenum of the Supreme Court of the Russian Federation No. 53 was adopted.

This Resolution of the Plenum has answered many issues raised by the legal community; however, some of them have remained open.

One of these issues is the determination of the status of the person controlling the debtor .

So, the ability to determine the actions of the debtor by the controlling person can be achieved:

- By virtue of being with the debtor (by director or members of the debtor's governing bodies) in relation to filiation or property, official position;
- By virtue of the presence of the authority to make transactions on behalf of the debtor, based on a power of attorney, regulatory legal act or other special powers;
- By virtue of official position;
- Otherwise, including by coercing the head or members of the debtor's governing bodies or exercising a decisive influence on the head or members of the governing bodies of the debtor in another way.

To simplify the proof of the status of the person controlling the debtor in paragraph 4 of Art. 61.10 of the Federal Law of October 26, 2002 No. 127-FZ On Insolvency (Bankruptcy) rebuttable presumptions were established. Until it is proven otherwise, it is considered that the person controlled the debtor, if that person:

- He was the head of the debtor or the managing organization of the debtor, a member of the executive body of the debtor, the liquidator of the debtor, a member of the liquidation commission;
- Had the right, independently or together with interested parties, to dispose of fifty or more percent of the voting shares of the joint-stock company, or more than half

of the share capital of the limited (additional) liability company, or more than half of votes in the general meeting of participants of the legal entity, or had the right to appoint (elect) the head of the debtor;

- Benefited from illegal or inequitable conduct of the persons referred to in paragraph 1 of article 53.1 of the Civil Code of the Russian Federation.

If a person does not belong to the governing bodies of the debtor, does not own interest/shares of the debtor, then in practice it is very difficult to prove that he has the status of the person controlling the debtor.

The behavior of the person controlling the debtor can be either open (the beneficiary of the debtor) or closed (hides the impact on the debtor).

In case of open behavior, the status of the person controlling the debtor is easier to prove through the use of testimony, correspondence, and media reports.

So, in the case of bringing S. V. Pugachev to subsidiary responsibility for the obligations of International Industrial Bank, CJSC, the existence of actual control over the debtor was established due to the combination of circumstances:

- The existence of the system of approval and decision-making in the bank, in which, without the consent of S.V. Pugachev could not have made any decision in the bank;
- The existence of the office of S. V. Pugachev at the bank office.

However, such evidence cannot be presented to the court if the person controlling the debtor is hidden. Moreover, there are no criteria in the legislation that allow determining the hidden beneficiary to bring him to subsidiary responsibility.

In this regard, Definition of the Judicial Panel on Economic Disputes of the Supreme Court of the Russian Federation of February 15, 2018 No. 302-ЭС14-1472 (4, 5, 7) in case No. A33-1677/20139, in which the Supreme Court of the Russian Federation, among other things, gave explanations regarding the conduct of the person controlling the debtor and the debtor and signs of control by the hidden controlling person listed below, is of crucial importance for bringing the debtor's beneficiaries to

subsidiary liability in bankruptcy and for applying the piercing corporate veil:

- The actions of these subjects are synchronous in the absence of objective economic reasons;
- Actions are contrary to the economic interests of the debtor and at the same time lead to a significant increase of the property of the person brought to justice;
- These actions could not take place in any other circumstances, except in the presence of subordination of one to the other, etc.

Thus, the aforementioned Definition discloses another presumption of the status of the person controlling the debtor which is benefiting by from illegal or inequitable conduct a person brought

to subsidiary responsibility of the economic benefits.

Paragraph 7 of Resolution No. 53 states that a person, who has gained substantial (relative to the scale of the debtor's activity) benefit in the form of increasing or saving assets, which could not have been formed if the actions of the debtor's manager were in compliance with the law, including the principle of good faith, can be recognized as the controlling person. In particular, it is assumed that the person controlling the debtor is a third party who received a substantial debtor's asset (including the chain of consecutive transactions), who left the latter's possession on the transaction made by the debtor's head to the detriment of the interests of the organization and its creditors (on consciously unfavorable conditions

for the debtor or with a person who is knowingly unable to perform the obligation (by a shadow company, etc.) or with the use of a document flow that does not reflect actual business operations , etc.).

Disproving this presumption of the status of the person controlling the debtor, a person brought to subsidiary liability has the right to prove his good faith by confirming, among other things, the paid acquisition of a debtor's asset on terms and conditions under which similar transactions are usually made in comparable circumstances.

Also in clause 7 of Resolution No. 53 it is assumed that the controlling person is the beneficiary, taking significant advantages from such a system of business organization, which is aimed at the redistribution (including through

inaccurate document flow) of the total income received from the implementation of this activity by persons united by common interest (for example, a single production and (or) sales cycle), in favor of a number of these persons with simultaneous accumulation on the debtor's side main debt load. In this case, in order to refute the presumption, the beneficiary shall prove that his income-generating operations have been reflected in accordance with their real economic meaning, and the benefits obtained by him are due to reasonable economic reasons.

In addition, the Supreme Court of the Russian Federation determined that in the absence of direct evidence of giving by the controlling person of instructions, the totality of substantial indirect evidence that is based on the

analysis of the person controlling the debtor and the debtor's behavior shall be taken into account by the courts. If the interested persons were able to provide the court with substantial indirect evidence, which together make it possible to recognize convincing arguments about the emergence of a relationship of actual control and subordination, by virtue of art. 65 of Arbitration Procedure Code of the Russian Federation the burden of proof of the reverse shifts to the person brought to justice.

It is hoped that the legal positions reflected in the Definition will push the courts to a more careful study of indirect evidence and the rejection of a formal approach to determining the status of the person controlling the debtor. A

«SHOULD BUT NOT OBLIGED»

Roman Moskovskikh

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In the early 2000s, the so-called mandatory offer to purchase the remaining shares was introduced in the USA and many countries in Europe and Asia. According to this procedure, a potential investor who wants to purchase a significant block of shares of a joint stock company on the open securities market shall offer the other shareholders of this company to repurchase their shares at a market price (for different countries the percentage definition of a "significant block of shares" is different: in the US it is 35% + 1 share; in some Asian countries it is 50% + 1 share).

Due to the imperative norms of the Russian legislation, there are special corporate relations, which are implemented in the procedures and forms established by the norms of

corporate law, between the subjects of the mandatory offer — the acquirer of 30 percent or more of the shares and the other shareholders of the public company. In this regard, the legal protection of legal rights and interests of addressees of a mandatory offer can be implemented only by means provided by law, which is due to the balance of interests of majority and minority corporations, the action of special corporate law norms that do not provide for the possibility of recovering damages in the event of non-direction of a mandatory offer.

A mandatory offer is a public offer addressed to shareholders — owners of shares of the respective categories (types), on the acquisition of their shares in an open company.

Mandatory proposal is addressed to anyone who responds to it. It is intended to protect the interests not of individual groups, but of all shareholders of the company. If the increase in corporate control rights on the part of the person who acquired a large block of shares does not meet the economic interests of minority shareholders, they have the opportunity to leave the company and return their investments through the acceptance of a public offer.

A person who has acquired more than 30 percent of the total number of shares of a public company within 35 days from the date of making the corresponding credit entry on the personal account shall send to shareholders — owners of the remaining shares of the respective categories (types) and holders of issued securities convertible into such shares,

a public offer on the acquisition of such securities from them (mandatory offer)[1].

At the same time, the legislator provides for certain thresholds of ownership, crossing over which changes the number of shares that a shareholder can vote (who has not fulfilled the obligation to make a mandatory offer to repurchase securities) — 30 percent, 50 percent and 75 percent, respectively.

Overcoming the threshold of 30 percent, but not reaching 50 percent, the shareholder, before sending the mandatory proposal, can vote only 30 percent of the shares.

Overcoming the threshold of 50, but not reaching 75 percent, the shareholder, before sending the mandatory proposal, can vote only 50 percent of the shares.

1. Clause 1 of Art. 84.2. of Federal Law On JSCs.

A similar scheme applies when the 75 percent ownership threshold is exceeded.

The sequence of actions is as follows.

The conflict of interests between the shareholders and the investor occurs when the acquirer of shares does not fulfill the obligation to send a mandatory offer to the company if the number of securities acquired by him exceeds 30 percent of the company's voting shares.

When the majority shareholder evades the direction of the mandatory offer, the minority shareholders cannot force him to buy back, since the Law does not provide for this. The purpose of the norm of art. 84.2 of the Law on Joint-Stock Companies consists in providing legal protection to minority shareholders in connection with the transfer of control over decision-making by authorized bodies of the joint-stock company to

№	Action name
1.	Market valuation of securities to be acquired[2]
2.	Receiving a bank guarantee for the amount of the estimated cost of the shares to be repurchased, which meets the requirements (paragraph 5 of Article 84.1 of the Law On JSCs)
3.	Preparation of the text of the mandatory proposal
4.	Sending a mandatory offer to the Bank of Russia
5.	Sending a mandatory offer to the Company. It is carried out, no later than 15 days after the submission of the mandatory offer to the Bank of Russia, provided that the Bank of Russia does not send an order to eliminate the shortcomings of the voluntary offer[3]
6.	Disclosure by the joint-stock company of reports on material facts in the News Feed and the Internet (in terms of receiving a proposal). It is carried out no later than 1 day (in the news feed) and 2 days (on the Internet) from the moment the offer is received
7.	Company actions after receiving the offer: • Adoption of recommendations by the board of directors of the joint stock company regarding the offer received (paragraph 2 of clause 1 of article 84.3 of the Law On JSCs) • Publication / submission to shareholders of a voluntary offer (in the same manner as established for convening a general meeting)
8.	Submission by the shareholders of Share Sale Applications within the framework of a mandatory offer (submission of applications to the Registrar)

another independent person. Protecting the interests of minority shareholders is the legal uncertainty that the change of control over the company entails, in the form of a possible change in the strategy and main directions in the activity of the company. It follows from this that the obligation to submit a public offer is due to the increasing possibilities (change) of corporate control from the acquirer of a large block of shares in the form of a potential change in the strategy and main directions in the company's activities. But the acquirer of a large

2. The purchase price of shares shall be the same for all their owners. In addition, the price shall be justified. The price shall not be lower than the market value determined by the appraiser (paragraph 2, clause 4, article 84.2 of the Law On JSCs). The market value of one share is estimated without taking into account the size of the block in which it is located (paragraph 2 of clause 4 of article 84.2 of the Law On JSCs).
3. Clause 1 of Article 84.9 of the Law On JSCs.

block of shares can cause any changes in the company's activities only by voting (taking appropriate corporate decisions) at general meetings of shareholders.

When the majority shareholder fails the submission of the mandatory offer, the minority shareholders cannot force him to repurchase, since the Law does not provide for this. The purpose of the norm of art. 84.2 of the Law On Joint-Stock Companies consists in providing legal protection to minority shareholders in connection with the transfer of control over decision-making by authorized bodies of the joint-stock company to another independent person. Protecting the interests of minority shareholders is in the legal uncertainty that the change of control over the company entails, in the form of a possible change in the strategy and main directions in the

activity of the company. It follows that the obligation to submit a public offer is due to the increasing possibilities (change) of corporate control from the acquirer of a large block of shares in the form of a potential change in the strategy and main directions in the company's activities. But the acquirer of a large block of shares can cause any changes in the company's activities only by voting (taking appropriate corporate decisions) at general meetings of shareholders.

At the same time, with regard to a shareholder who has not sent a public offer, the Law explicitly provides for restrictions on the exercise of his company management rights (when voting at the general meeting of shareholders shares acquired by him are not taken into account). These restrictions block the growth of corporate

control and deprive the acquirer of the opportunity to change the strategy and main directions in the activities of the company. However, the remaining shares owned by this person and its affiliates shall not be counted as voting shares and not be taken into account when determining the quorum.

Thus, the actual acquisition of a large block of shares and the failure to submit a public offer, if there are restrictions under the Law for exercising shareholder rights (hereinafter referred to as the "blocking mechanism") and, accordingly, in the absence of an opportunity to change control over the company, cannot violate the rights of other shareholders. In these conditions, forcing the acquirer to submit a public offer imposes unreasonable obligations on the person who acquired the shares.

Resolution of the Arbitration Court of Moscow District of 03.06.2016 in case No. A40-159967/2015 states:

"In the case of failure of submission of the mandatory offer to repurchase shares, the rights of other shareholders cannot be violated, since the restriction established by law directly preserves the status quo, and therefore the claimant's requirement to oblige the defendant to send a mandatory offer cannot be attributed to methods of restoring any right violated (resolution of the Arbitration Court of Moscow District of 03.06.2016 in case No. A40-159967/2015)".

As a legal consequence of failure of this obligation by a person who acquired more than 30% of the total number of shares of an open company, the Law On Joint-Stock Companies

provides for limiting the number of shares by which such a person and his affiliated persons are entitled to vote before the date of submitting the mandatory offer (Part 6 of Art. 84.2 of the Law On JSCs). In addition, the law provides for administrative liability in the form of a fine for a violation by the person who has acquired more than 30% of shares of OJSC, of the rules for their acquisition (Article 15.28 of the Administrative Code of the Russian Federation).

To sum up, we can say that the problem of the lack of adequate means of forcing the offender to abide by the rules on the mandatory offer has become a genuine heel of Achilles of chapter XI.1 of the Law On JSCs. Judicial practice without any doubt comes from the fact that the only consequence of non-

fulfillment of the obligation to submit a mandatory offer is the restriction on the number of shares that their buyer and his affiliates are entitled to vote before the date of the mandatory offer (cl. 6 of Article 84.2 of the Law On JSCs) and other consequences of non-fulfillment of the obligation, including the possibility of shareholders presenting the requirement of the obligation to send the offer, the current legislation does not provide, and therefore such requirements of shareholders are not subject to satisfaction. A

About the Company

Korpus Prava was established in 2003 in Moscow, Russia. Together with our offices in Russia, Cyprus, Malta, Latvia and Hong Kong we offer clients a truly international service. Our highly qualified and friendly staff is available to provide to the clients a flexible, reliable and efficient service.

The mission of the Company is to raise the business value of the client and bring down risks.

Korpus Prava offers services in:

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- Transformation of financial statements to IFRS
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- Intellectual property
- Financial Consulting

The company is mentioned in the rankings of the leading international directory “Legal 500” that is completely and comprehensively overtaking the global scope of legal services.

Korpus Prava was nominated as the best legal firm in Russia according

to the authoritative magazine “The Lawyer”; it takes one of the leading positions amongst Top 50 legal firms in Cyprus, and it has also been recognised as the best international legal firm for tax planning in Cyprus. Korpus Prava Private Wealth Practice has taken fifth place in Private Banking and Private Wealth sector in Russia, in the category of Succession Planning Advice and Trusts according to the annual rankings of Private Banking Russia Survey 2016 of the prestigious magazine “Euromoney” (as of February, 2016).

Korpus Prava is a member of Cyprus Fiduciary Association (CFA) and Franco-Russian Chamber of Commerce and Industry (CCIFR). It takes part in the development of business community,

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Our certified specialists conduct seminars and consultations for accountants and the representatives of company financial services; they act as experts, and they are published in popular financial publications.

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