

In Focus

Analyzing important tax amendments

Tax & Legal



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Autumn tax amendments: withholding tax

As we continue to update you on the changes introduced by a recent [major tax package](#), this publication highlights the changes in the treatment of withholding tax:

- the law introduces a new type of passive income — intragroup service fees;
- secondary adjustments made under transfer pricing rules in controlled transactions with non-residents will be treated as dividends;
- there will be a transitional period when the taxpayers will still be able to claim benefits offered by the suspended tax treaties.



New type of passive income — intragroup service fees

The list of passive incomes set forth in Paragraph 1, Article 309 of the Russian Tax Code was updated to include income received by a foreign entity from rendering services/performing works in Russia to a related party.

Services/works will be deemed to be rendered/performed in Russia if the buyer operates in Russia. This will be determined with reference to its place of incorporation or registered seat of its permanent establishment (if the latter was the service/works recipient).

In other words, intragroup service/works fees paid by Russian taxpayers to foreign related parties will be considered as passive income and subject to withholding tax at a rate of 15 percent.

It is noteworthy that this is not the first time intragroup service fees are treated as passive income (dividends and other income). Below are some examples:

- Case No. [A51-3822/2022](#): payments under container rental agreements were reclassified into gratuitous transfers of funds (Other income);
- Case No. [A40-28820/2023](#): advisory services fees were reclassified into dividends;

- Case No. [A40-168206/2024](#): agency services fees were treated as Other income.

In all of these cases, the tax authorities originally challenged the service itself: having proved that the service was not effectively provided, they reclassified the fees paid to foreign counterparties into passive income.

According to the new law, any payments of intra-group service/works fees to foreign related parties will be considered as passive income, regardless of whether such services were effectively performed.

The amendments enter into force on 1 January 2024 with no transitional period — as we understand, the tax will also be withheld from payments made after 1 January 2024 in relation to the services provided before 1 January 2024.

At the same time, we believe that tax treaties (if not suspended) in most cases will protect against payment of the new “intra-group services tax”, since service fees will most likely be considered as the foreign person’s business income (i.e., active income), or Other income.



Secondary adjustments under transfer pricing rules

The adjustment of price in a controlled transaction will be treated as dividends and subject to withholding tax, if the following criteria are met:

- the transaction is made between related parties;
- one of the parties to the transaction is not a Russian resident;
- the price effectively used in the transaction differs from the arm’s length value;
- such difference has resulted in a tax base adjustment (voluntary or following a tax audit);
- as a result of the adjustment, the party to the transaction that is not a Russian tax resident generated income in the amount of the adjustment.

Withholding tax will be calculated at the rate set for dividends — at 15 percent — yet, the amount of tax can be reduced by claiming tax treaty benefits.

Income treated as dividends will be considered as received by the foreign person on the last day of the calendar year the transaction was made in.

The assessment of withholding tax can only be avoided if the foreign person returns the income equal to the voluntary adjustment amount to the taxpayer that made such adjustment — by transferring the respective amount to the taxpayer’s Russian account no later than the tax due date for the period in which the controlled transaction was carried out.

If the date was missed, the assessment of at-source tax can be avoided, if:

- the income is returned to the taxpayer’s Russian account before the decision to audit the taxes paid on controlled transactions was made;
- when calculating the corporate/personal income tax base, the taxpayer factored in the foreign person’s imputed use-of-money interest calculated with reference to 1/300 of the key rate of the Central Bank of Russia.

We have given a detailed overview of the adjustment mechanism in our previous [LT in Focus](#).



Mitigating the adverse consequences of tax treaties' suspension

To remind, on 8 August 2023, the President of the Russian Federation signed a [decree](#) suspending certain provisions of tax treaties with the unfriendly states.

The details can be found in one of our previous [publications](#).

Simultaneously, the President instructed the Government to ensure that measures are taken to mitigate the impact of such suspension on the Russian economy.

Finally, these measures were taken – albeit in respect of a rather limited scope of payments to non-related parties.

They include the continuation of exemptions/beneficial rates previously available under the now-suspended tax treaties.

This relief will apply to the following types of payments:

- interest income payable to export credit agencies and banks under agreements that establish or modify debt obligations and were signed before the treaty suspension;
- income from leasing aircraft (including auxiliary power units and/or aircraft engines), registered or subject to registration in the Russian State Register of Aircrafts under contracts signed before 5 March 2022;
- income from the use/licensing of rights to use intellectual property on TV channels in terrestrial, satellite, cable and/or other broadcasts;
- income from the use/licensing of rights to use copyright/related rights (any work of literature, art or science, including computer programs, cinematographic films, phonograms, tape recordings or other media used in radio and TV broadcasts or other means of presenting and disseminating information), any patent, drawing, model, diagram, secret formula, technology or information regarding industrial, commercial or scientific experience (know-how);
- income from leasing or subleasing ships under contracts with foreign lessors (charterers) signed prior to the treaty suspension*;

- income from the sale of ships registered in the Russian Maritime Register of Shipping and based in Russia*;
- income from the international shipping services under contracts signed with foreign organizations prior to the treaty suspension*.

Benefits will apply if the Russian payer and the foreign payee **are not related**, the foreign payee's tax residency certificate** is produced, and beneficial ownership of income is confirmed.

An "industry-specific" benefit is also introduced in the form of a zero tax rate for income received by foreign organizations under agreements for the settlement of insurance and/or other claims arising from agreements for leasing of aircraft, including auxiliary power units and/or aircraft engines, signed with foreign organizations.

The benefit will be subject to the following prerequisites:

- the leasing agreements were signed before 5 March 2022;
- the aircrafts are registered or subject to registration with the Russian State Register of Aircraft;
- agreements for the settlement of insurance and/or other claims provide for the transfer of ownership of such aircraft (auxiliary power units and/or aircraft engines) to a Russian organization;
- the foreign recipient of income and the Russian company to which the ownership of the aircraft is transferred are not related;
- the foreign recipient of income and the Russian company being the lessee under leasing agreements are not related;
- the foreign recipient of income produced a tax residency certificate confirming its permanent seat in a country that Russia has a tax treaty with (even if suspended, as we understand) and confirmed its beneficial ownership of income.

The relief described above will apply retrospectively from 8 August 2023 to 31 December 2025.

**Interestingly, with respect to the last three reliefs, a foreign person will be eligible for the exemption only if such exemption was claimed under the then-effective tax treaties (applies to exemption only, not to lower tax rates). However, as we understand, the difference is not that relevant, since the exemption was the only benefit granted by most tax treaties for such types of income.*

*** Foreign banks that receive interest income will not be required to produce a certificate of tax residence, if their location can be confirmed using records from the publicly available information sources.*

Perhaps, of all amendments, the introduction of withholding tax on intragroup service/works fees came as the biggest surprise.

Historically, it were the services attributable to shareholding activities or lacking substance that were exposed to the highest risk of reclassification into dividends; with the new amendments, however, the tax will be charged on any fees for services/works payable to foreign related parties.

And while recipients from the friendly states are likely to be safeguarded by tax treaties, those from the unfriendly states will hardly be able to avoid the tax.

Considering the changes, we recommend:

- notifying your related parties that intragroup services/works will be subject to withholding tax;
- considering a gross-up clause providing that the service/works fees will be increased for the amount of withholding tax;
- if possible, finalizing settlements on the already provided services by 1 January 2024;
- if the services are purchased from the friendly states, making sure that the existing tax treaties exempt the related parties from tax.

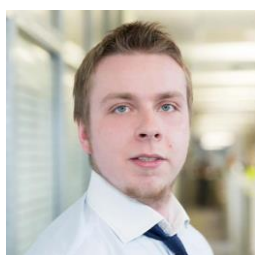
We will be happy to answer your questions regarding the amendments and assist you with analyzing their implications.

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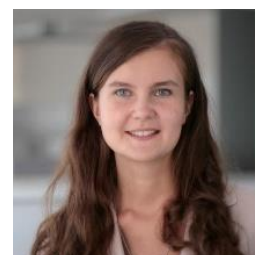
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