

## **AMENDMENTS TO CUSHION PENALTIES FOR TAX CRIMES COMING INTO EFFECT AT THE BEGINNING OF 2010**

February 2, 2010

To Our Clients and Friends:

A set of amendments gathered in Federal Law No. 383 on Amending Part I of the Russian Tax Code and Certain Other Legislative Acts, dated December 29, 2009 (“**Law No. 383-FZ**”), has recently been introduced in Russian tax, criminal and certain other legislation<sup>1</sup> in order to ease the statutory provisions on criminal prosecution and penalties for tax crimes. The new amendments cover both substantive and procedural matters. However, regardless of the large number of high-profile tax fraud cases in recent years, the amendments aid only first-time offenders and minor non-payers, rather than provide relief to major fraudulent tax-evaders.

### **LEGAL FRAMEWORK**

Generally under Russian law, a tax violation may only be deemed a crime if the amount in question is above the threshold set forth in the Criminal Code; otherwise, criminal liability may not apply. This does not mean that a company and its relevant officers cannot be subject to liability for tax and administrative violations, pursuant to the Tax Code and Administrative Offences Code. Violations that qualify as crimes are subdivided into major or large-scale crimes (the financial thresholds differentiating between the two are also provided for in the Criminal Code). Criminal liability is more severe for large-scale tax crimes.

There are four categories of tax crimes set forth in the Criminal Code, including: (i) tax evasion by individuals; (ii) tax evasion by companies; (iii) nonperformance of a tax agent’s obligations; and (iv) concealment of money or property that is subject to collection for payment of taxes.

Under Russian law, only individuals may be held liable for tax crimes. If a criminal investigation is initiated with respect to a Russian corporation, usually its general director and chief accountant may become subject to criminal liability for the respective tax crime. However, pursuant to Ruling No. 64 of the Russian Supreme Arbitration Court Plenum, dated December 28, 2006, any person who commits a tax crime (e.g., tax evasion by a company),

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<sup>1</sup> Law No. 383-FZ, discussed in this article, amends the Russian Tax Code, Criminal Code, Criminal Procedural Code and Federal Law No. 1026-1 on the Militia, dated April 18, 1991.

aids the general director, chief accountant or other officer of a company in the commission of a tax crime, or facilitates the taxpayer by giving advice, instructions, etc., may be held liable for a tax crime.

For tax evasion by an individual, a person can be ordered to pay a fine of up to 500,000 rubles,<sup>2</sup> arrested<sup>3</sup> for up to six months or imprisoned for up to three years. A person found guilty of tax evasion by a company or nonperformance of a tax agent's obligations may be subject to a fine of up to 500,000 rubles, or imprisonment for up to six years with possible disqualification for up to three years. A person found guilty of concealment of money or property that is subject to collection for payment of taxes may be subject to a fine up to 500,000 rubles, or imprisonment for up to five years, with possible disqualification for up to three years.

### **HIGHLIGHTS OF THE AMENDMENTS**

Under Law No. 383-FZ, the thresholds of tax crimes have been substantially raised.

Under the new rules, a tax violation by an individual is deemed "major" if the aggregate underpayment for three consecutive financial years exceeds 600,000 rubles (previously 100,000 rubles), provided that such underpayment constitutes 10% of the total tax liability, or if the amount due simply exceeds 1,800,000 rubles (previously 300,000 rubles). The violation is deemed to be "large-scale" if the aggregate underpayment for three consecutive financial years exceeds 3,000,000 rubles (previously 500,000 rubles), provided that such underpayment constitutes 20% of the total tax liability, or if the amount due simply exceeds 9,000,000 rubles (previously 1,500,000 rubles).

A tax violation by a company, or a violation relating to nonperformance of a tax agent's obligations, is deemed "major" if the aggregate underpayment for three consecutive financial years exceeds 2,000,000 rubles (previously 500,000 rubles), provided that such underpayment constitutes 10% of the total tax liability of the taxpayer, or if the amount due simply exceeds 6,000,000 rubles (previously 1,500,000 rubles). The violation is deemed to be "large-scale" if the aggregate underpayment for three consecutive financial years exceeds 10,000,000 rubles (previously 2,500,000 rubles), provided that such underpayment constitutes 20% of the total

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<sup>2</sup> Alternatively, the fine can be three times the perpetrator's annual income, which, one would think, is imposed if the maximum amount of 500,000 rubles would not be a sufficiently high punishment if the perpetrator has a very high income. The current exchange rate is 30.39 rubles = 1 USD.

<sup>3</sup> The term "arrest" refers to a specific type of penalty under the Russian legal system which is separate from "imprisonment," in that an arrest cannot exceed a six-month period.

tax liability, or if the amount due simply exceeds 30,000,000 rubles (previously 7,500,000 rubles).

There is an important new concept introduced by Law No. 383-FZ. A taxpayer or a tax agent can be released from responsibility if the crime is committed for the first time and if, prior to completion of a pre-trial investigation, such person has fully discharged the underpayment, late payment interest and fine. In that event, the prosecution is terminated. Also, as a recent development of criminal procedural legislation, a person charged with any tax crime can only be taken into custody if such person does not have any definite place of residence, or if such person has already violated the measure of restraint or has fled from prosecution. It is not yet clear whether this new provision will be applied in practice.

The new law resolves previous practical uncertainties in some areas of procedure. For example, it has been clarified that the enforcement of the decisions of the tax authorities must be suspended immediately after the prosecuting agency becomes involved. The tax authorities and internal affairs authorities are now mutually obliged both to exchange information about tax crimes, and to share the decisions issued regarding these crimes. Before materials are transferred to the police, the taxpayer must be warned in the request for tax payment that this may occur.

It is also worth noting that beginning in 2010, prosecuting bodies and the courts are expressly bound by previous decisions made as a result of civil, administrative or *arbitrazh* (i.e., commercial litigation) proceedings when considering tax crime cases. Previously, these bodies did not have such an obligation.

It would appear that as a result of these developments, fewer tax violations will be viewed as tax crimes. If the new amendments are properly implemented, it is also possible to expect some positive impact on taxpayers' certainty and the practice of prosecution from the implementation of procedural developments.

Please contact any of the authors or your regular Debevoise contact with any questions on this or other matters which you may have.

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