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«Dispute Resolution in International Economic and Tax Law and Mediation»

Resolution of cross-border tax disputes

while recognition of income and expenses of permanent establishments

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Income

Determination of income of a permanent establishment in accordance with the Tax Code of the Russian Federation:

- Operating revenue;
- Passive income, including property income.

Where the business activities of a foreign organization in the territory of the Russian Federation give rise to a permanent establishment in the territory of the Russian Federation in accordance with this Code or the provisions of an international agreement of the Russian Federation on taxation matters, the income of such permanent establishment which is taxable in the Russian Federation shall be determined with account taken of functions performed in the Russian Federation, assets used and economic (commercial) risks assumed. (subpara. 1 Art. 307(9) of the Tax Code of the Russian Federation)

The circumstances referred to in this clause shall be taken into consideration for the purpose of apportioning income and expenses between a foreign organization and its permanent establishment in the Russian Federation. (subpara. 2 Art. 307(9) of the Tax Code of the Russian Federation)

Expense

Determination of expense of a permanent establishment in accordance with the Tax Code of the Russian Federation:

- Operating expenses;
- Expenses associated with obtaining of passive income.

General requirements for expenses (Article 252 of the Tax Code of the Russian Federation):

- Economically justified;
- Documented.

Certain DTT may provide for a different procedure for including certain types of costs as expenses of a permanent establishment (for example, the Russia-Germany DTT establishes rules for advertising costs).

Russian Double Tax Treaties

Russia's DTTs use both the OECD approach and the UN approach

OECD	UN
OECD Model does not support "force of attraction" rule (for example in treaties with Malta, India, Canada and other)	UN Model has limited "force of attraction" rule (for example in treaties with Argentina, Kazakhstan, Mexico, Thailand, Philippines and other)
Separate entity method	Apportioning method
TP rules and "arm's length principle"	Establishing of apportioning methodology
Functions/Risks/Assets	Revenue/Number of employees/Assets

Case law

STRABAG AG case N A40-72298/13

Triable issue: Interest payments as expenses of PE in Russia.

Court's finding: To understand if such payments are deductible there must be examination of the following factors of PE:

1. It has duly completed functions
2. It uses its own assets
3. It bears the economic (commercial) risks

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Thanks for your time!