

Commentary on the Russian Constitutional Court Resolution No. 2-П of 21 January 2025 in Uspekh in Case

on the transferor's tax consequences when paying
the share actual value by real estate

On 21 January 2025, the Constitutional Court of the Russian Federation (hereinafter referred to as the "Russian Constitutional Court") published [Resolution](#) No. 2-П on the emergence and taxation of income for a business entity that transfers real estate as payment of the share actual value (hereinafter referred to as "SAV") to an individual who is no longer a member of such entity.

The reason for the consideration of the case by the Russian Constitutional Court was the appeal of the Supreme Court of the Russian Federation (hereinafter referred to as the "Russian Supreme Court"), which is handling the case of Uspekhi N Limited Liability Company (Case No. [A40-244851/2022](#)) (hereinafter referred to as the "Uspekhi N Case").



The substance of the matter

The background of the Uspekhi N Case suggests that the company using a simplified taxation system (hereinafter referred to as the "STS") paid the SAV to the leaving member who owned 99% of the shares in the company's authorized capital. The payment was made by two real estate assets.



The tax authority considered that the company incurred income that was taxable when applying the STS in connection with the transfer of the real estate as the SAV. The tax authority determined the income amount as the value of the real estate assets (RUB 54,991,000) minus the nominal value of the member's share (RUB 9,900) and the residual value of the property (RUB 15,002). Note that the share market value, according to the appraiser's report, was RUB 56,174,000.

The courts of three instances, which upheld the tax authority's position, came to the conclusion that when real estate is transferred to pay the SAV, the company's financial result is formed as the difference between the actual value of the member's share and the value of the disposed property, determined according to the company's tax records.

At the same time, in the absence of special regulation, the courts considered it possible to agree with the tax authority's calculation, according to which the excess value of the real estate over the member's initial contribution and its residual value was included in the company's income.

The company disagreed with the courts and filed a cassation appeal to the Russian Supreme Court.

Considering the cassation appeal, the Russian Supreme Court questioned the Russian Constitutional Court on the compliance of the interrelated provisions of sub-clause 5 of clause 3 of Article 39, clause 1 of Article 41, clauses 1 and 2 of Article 248, clauses 1 and 2 of Article 249, clause 1 of Article 346.15 of the Russian Tax Code with the Constitution of the Russian Federation to the extent that those allow the inclusion of the value of property transferred as payment of the SAV to a leaving member in the tax base within the STS.

Position of the Russian Constitutional Court

The Russian Constitutional Court agreed that the current legislation does not contain either provisions that expressly indicate the emergence of income or the rules for calculating such income. Due to this, the basic principles of taxation are violated, such as the legal certainty and the economic basis of the tax.

The Russian Constitutional Court declared that the interrelated provisions of sub-clause 5 of clause 3 of Article 39, clause 1 of Article 41, clauses 1 and 2 of Article 248 of the Russian Tax Code, clauses 1 and 2 of Article 249 of the Russian Tax Code, clause 1 of Article 346.15 of the Russian Tax Code do not comply with the Constitution of the Russian Federation to the extent that they allow for different resolution of the issue of the emergence of taxable income for a business entity applying the STS and the amount of such income.

The federal legislator is instructed to amend the current regulation to eliminate the identified legal uncertainty.

Before the amendments are made, the income of a business entity for tax purposes is defined as the actual (market) value of a share, determined in the prescribed manner at the time after its transfer from a leaving member to the company.

Commentary by VERBA LEGAL

First of all, let us note that the approach of the Russian Constitutional Court formulated in the resolution is relevant not only for taxpayers using an STS, but also for taxpayers using a general taxation system (hereinafter referred to as the "**GTS**"), since both define income according to the general rules of Chapter 25 of the Russian Tax Code.

⊗ In our opinion, the position of the Russian Constitutional Court contains numerous contradictions and inconsistent conclusions.

Resolution No. 2-П begins with an analysis of Article 57 of the Constitution of the Russian Federation. On the one hand, the Russian Constitutional Court notes that, according to the Constitution of the Russian Federation, everyone must pay legally established taxes only. Tax liability should be understood as an obligation to pay taxes in an amount no greater than that established by law, which defines all the essential elements of the tax liability, including the taxable item, the tax base, the tax calculation and the payment procedures.

On the other hand, the constitutional requirement that taxes must be established by law does not prevent the Russian Constitutional Court from concluding that, in terms of uncertain legal regulation, any economic benefit received during a company's business activities may be taxable (i.e. regardless of the fact that the law does not directly imply a corresponding obligation of an individual to pay taxes).



This position seems dangerous to us as we assess its practical significance: it can be used to protect the fiscal interests of the budget in any controversial situation.

Further, the Russian Constitutional Court concludes that the current tax legislation does not directly answer the question of whether the party paying the SAV earns income and how to determine the amount of such income, which violates the principle of formal certainty of the tax legislation.

On the one hand, the Russian Constitutional Court rightly remarks that, in performing the obligation to pay the SAV, the business entity, unlike the leaving member, does not pursue the goal of deriving income from its business activity, and does not derive an indisputable economic benefit. The share transferred to the company by the leaving member, while being in the company's possession, is a mere nominal value, denoting a set of certain rights and obligations that may subsequently be granted to other persons.

And it would be great to finish the reasoning here, concluding that the company earns no income, but...

After this, the Russian Constitutional Court makes a sharp turn in the opposite direction and notes that, despite the absence of deriving an indisputable economic benefit and the obvious reduction in the company's assets as a result of the payment of the SAV, the member's exercise of the right to leave the company and the company's corresponding obligation to pay the SAV bring each participant in the legal relationship to an economic result.

The methodology proposed by the tax authority to determine the company's economic benefit based on the value of the property transferred as payment of the SAV, in the opinion of the Russian Constitutional Court, is not based on the provisions of the law. Therefore, the Russian Constitutional Court proposes another methodology, also not based on the provisions of the law, and concludes that the economic benefit should be determined based on the share market value (according to the accounting statements or the report of an independent appraiser), which the company received from the leaving member, determined after settlements with the latter (i.e. presumably after the real estate transferred to the member in payment of the SAV is no longer an asset of the company).

As we understand the calculation methodology proposed by the Russian Constitutional Court, the income of the company paying the SAV by real estate is determined as follows.

For example, a company has a member with a 50% share, and the company's net assets are RUB 10 million. The member exercises their right to leave the company, and they are paid the SAV by property, which costs RUB 5 million. After the member has left, the company's net assets are RUB 5 million (RUB 10 million minus RUB 5 million). The leaving member transfers the share to the company's balance sheet. Since it is a 50% share, and the remaining net assets are RUB 5 million, this means that the actual (market) value of the share received by the company is RUB 2.5 million, which is recognized as the company's income.

At the same time, such position seems to be absurd, as it leads to the fact that when issuing property of RUB 5 million and receiving a consideration of RUB 2.5 million, the company, according to the Russian Constitutional Court, technically earns some economic benefit (although the company actually overpaid, and economically it incurred losses, rather than earned income).

Furthermore, it is not entirely clear what tax consequences are there for the company that paid tax on the market value of the share upon receipt from the leaving member, if

1. the share is subsequently redeemed;
2. the share is subsequently sold to third parties (in particular, it is not clear whether the company will be able to deduct expenses in the form of the value from which the tax was paid).

That being said, it can be assumed that the Russian Constitutional Court refers to the emergence of income for the company only if the market value of the share received from the leaving member exceeds the value of the property transferred to pay the SAV. Therefore, only the excess value (if any) is taxable.

Please note that the Russian Constitutional Court's position is not relevant to situations where, for example, real estate is transferred to a member as payment of the liquidation surplus or dividends. This is due to the fact that a business entity does not get any consideration (including nominal one) from its members as a result of such transfer, which distinguishes the distribution of property during liquidation and the payment of dividends from the situation covered by the resolution.

Consequently, the transfer of real estate as a liquidation surplus or as payment of dividends does not result in the transferor's obligation to report the income from the sale of the real estate.

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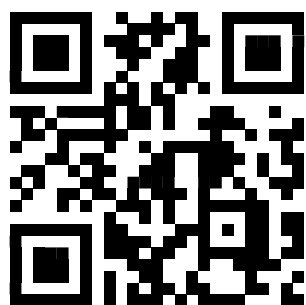
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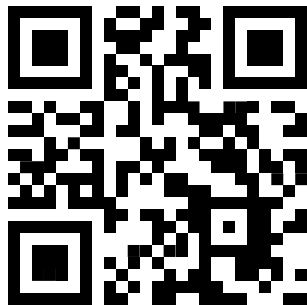
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