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Tax planning in intellectual property and countering tax risks

Abstract: It is impossible to imagine a modern society without using objects of intellectual activity, including business activities. The main goal of an entrepreneur is to make a profit, so he is interested in minimising costs. One way to reduce costs is tax planning. The study aims to analyse tax planning in intellectual property and counteract tax risks. During the study, analytical, comparative and deductive methods were used. The study used regulations on intellectual property and scientific articles by experts in taxation. The article discusses the specifics of tax planning in intellectual property. The article pays special attention to tax risks in intellectual property and their minimisation. The author concludes that intellectual property is becoming an increasingly significant asset for a modern entrepreneur. In the coming years, the role of intellectual property will become the main factor determining socio-economic growth. That is why entrepreneurs and organisations must use tax planning in intellectual property right now, including taking measures to minimise tax risks.

Keywords: tax law, intellectual property law, tax planning, tax risks, international tax planning.



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Налоговое планирование в области интеллектуальной собственности и противодействие налоговым рискам

Аннотация: Современное общество невозможно представить без использования объектов интеллектуальной деятельности, в том числе и в предпринимательской деятельности. Основной целью предпринимателя является получения прибыли, поэтому он заинтересован в минимизации расходов. Одним из способов уменьшить издержки – налоговое планирование. Целью исследования является анализ налогового планирования в области интеллектуальной собственности и противодействие налоговым рискам. В ходе исследования были применены такие методы как аналитический, сравнительный и дедуктивный. В ходе исследования были использованы нормативные акты в области интеллектуальной собственности и научные статьи специалистов в области налогообложения. В статье рассматриваются особенности налогового

планирования в сфере интеллектуальной собственности. Отдельное внимание в статье обращено на налоговые риски в области интеллектуальной собственности и их минимизации. Автор приходит к выводу, что интеллектуальная собственность для современного предпринимателя становится все более важным и значимым активом. В ближайшие годы роль интеллектуальной станет основным фактором, который определяет социально-экономический рост. Именно поэтому для предпринимателей и организаций актуально уже сейчас использовать налоговое планирование в сфере интеллектуальной собственности, в том числе предпринимать меры по минимизации налоговых рисков.

Ключевые слова: налоговое право, право интеллектуальной собственности, налоговое планирование, налоговые риски, международное налоговое планирование.



Abbreviations:

ITP is international tax planning,

VAT is value added tax.

Introduction

It is impossible to imagine a modern society without using objects of intellectual activity, including entrepreneurial activities. The main goal of an entrepreneur is to make a profit, so he is interested in minimising costs. One way to reduce costs is tax planning.

The study aims to analyse tax planning in intellectual property and counteract tax risks.

Based on the purpose of the study, the following tasks were developed:

- define tax planning concept;
- analyse the characteristics of intellectual property as a tax planning tool;
- identify tax risks in intellectual property;
- identify ways to minimise tax risks in intellectual property.

During the study, analytical, comparative, and deductive methods were used.

The study used regulations on intellectual property and scientific articles by experts in taxation.

Results

Definition of tax planning

There is no legally fixed concept of “tax planning” in Russian legislation. The existing doctrinal definitions can be divided into two groups:

- (1) consideration of tax planning as tax minimisation;
- (2) consideration of tax planning as tax optimisation (*Samsonov, 2021*).

The concepts of “tax minimisation” and “tax optimisation” are not identical (*Druzhdina, 2021*). Tax optimisation aims to reduce the taxpayer’s tax costs, while tax minimisation aims to increase the taxpayer’s profits after tax payments and all financial resources.

Thus, after analysing the doctrinal definitions, it is possible to deduce the definition of tax planning as legitimate actions of a taxpayer aimed at optimising tax payments and minimising possible tax losses.

Intellectual property as a tax planning tool

In Russian legislation, the “intellectual property” concept is fixed as the results of intellectual activity and equivalent means of individualising legal entities, goods, works, services and enterprises provided with legal protection.

From the point of view of tax planning, intellectual property has an important advantage over goods, services and works. Conducting an assessment and determining intellectual property valuation is a much more difficult task. The most important difficulty in evaluating intellectual property objects lies in quantifying the results of commercial use of a particular object under development at the stage of industrial development or operation.

Tax risks in intellectual property

There are always tax risks for the taxpayer if there is a tax benefit. Tax risks for intellectual property rights holders may include the following aspects:

- (1) Risks of taxation of income from intellectual property. The problem lies in determining the classification of the results of intellectual activity. Thus, in sub-clause 26 of clause 2 of article 149 of the Tax Code of the Russian Federation, the exercise of rights to use the results of intellectual activity is exempt from VAT. However, this legal norm applies only to those intellectual property objects listed in this article: exclusive rights to inventions, utility models, industrial designs, computer programs, databases, integrated circuit topologies, production secrets (know-how) and rights to use the specified results of intellectual activity based on a license agreement. Therefore, VAT on intellectual property objects not mentioned in the article (for example, trademark rights) is worth calculating in a general manner.
- (2) Risks concerning the valuation of intellectual property. As mentioned earlier, estimating the value of intellectual property is difficult due to a possible incorrect assessment and, consequently, incorrect payment of taxes (*Arkhypsova & Grebennik, 2020*).
- (3) Risks associated with paying royalties by a foreign copyright holder. So, in paragraph 13 of the Review of the Practice of Court Resolution of Disputes related to the protection of foreign investors (*2017*), a case is given when the trademarks of a Russian company were sold to a Cypriot company for 8 thousand euros, after which a license agreement was concluded with a royalty amount of 25,225 British pounds per month. However, the tax authority has determined that the Cyprus company is not the actual recipient of income, and the provisions of the double taxation agreement cannot be applied.

Ways to minimise tax risks in intellectual property

After analysing the tax risks possible for copyright holders, the following ways of minimising them were formulated:

- (1) Conducting a correct assessment of the intellectual property object to form a correct classification. According to the Methodological Recommendations for Determining the Market Value of Intellectual Property (*2002*), when assessing intellectual property’s market

value, the appraiser must use (or justify the refusal to use) profitable, comparative and costly approaches to valuation. At the same time, the appraiser can independently determine specific assessment methods within each approach.

- (2) The development of international tax planning (ITP). ITP is a set of legitimate actions a taxpayer takes to optimise tax payments and minimise possible tax losses within the global market. ITP involves using offshore and low-tax jurisdictions, trusts and foundations, and various organisational and legal forms.

Conclusion

Thus, intellectual property is becoming an increasingly important asset for a modern entrepreneur (*Sidorina, 2020*). In the coming years, intellectual property will become the main factor determining socio-economic growth (*Korotkovskaya, 2018*). That is why it is important for entrepreneurs and organisations to use tax planning in intellectual property right now, including taking measures to minimise tax risks.



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