FIRST SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 14902/04
by OAO NEFTYANAYA KOMPANIYA YUKOS
against Russia

The European Court of Human Rights (First Section), sitting on 29 January 2009 as a Chamber composed of:

Christos Rozakis, *President*,
Nina Vajić,

Khanlar Hajiyev,
Dean Spielmann,
Sverre Erik Jebens,
Giorgio Malinverni, *judges*,
Valeriy Musin, ad hoc *judge*,
and Søren Nielsen, *Section Registrar*,

Having regard to the above application lodged on 23 April 2004,

Having regard to the decision to grant priority to the above application under Rule 41 of the Rules of Court.

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant company,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, OAO Neftyanaya kompaniya YUKOS, was a publicly-traded private open joint-stock company incorporated under the laws of Russia. It was registered in Nefteyugansk, Tyumen Region, and at the relevant time was managed by its subsidiary, OOO "YUKOS" Moskva, registered in Moscow. It was represented before the Court by Mr J.P. Gardner, a lawyer practising in London.

2. The Russian Government ("the Government") were represented by Mr P. Laptev and Mrs V. Milinchuk, former Representatives of the Russian Federation at the European Court of Human Rights.

A. The circumstances of the case

3. The facts of the case, as submitted by the parties, may be summarised as follows.

4. The applicant was a holding company established by the Russian Government in 1993 to own and control a number of stand-alone entities specialised in oil production. The company

remained fully State-owned until 1995-1996 when, through a series of tenders and auctions, it was privatised.

1. Proceedings in respect of the applicant company's tax liability for the year 2000

(a) Tax assessment 2000

(i) Original tax inspection

5. Between 13 November 2002 and 4 March 2003 the Tax Inspectorate of the town of Nefteyugansk ("the Tax Office") conducted a tax inspection of the applicant company.

6. As a result of the inspection, on 28 April 2003 the Tax Office drew up a report indicating a number of relatively minor errors in the company's tax returns and served it on the company.

7. Following the company's objections, on 9 June 2003 the Tax Office adopted a decision in which it found the company liable for having filed incomplete returns in respect of certain taxes.

8. The decision of the Tax Office was accepted and complied with by the company on 7 July 2003.

(ii) Additional tax inspection

9. On 8 December 2003 the Tax Ministry ("the Ministry"), acting as a reviewing body within the meaning of Section 87 (3) of the Tax Code, carried out an additional tax inspection of the applicant company.

10. On 29 December 2003 the Ministry issued a report indicating that the applicant company had a large tax liability for the year 2000. The report was detailed and came to over 70 pages. It also had 284 supporting documents in annex. The date of the notification of the report is unclear.

11. The Ministry established that in 2000 the applicant company had carried out its activities through a network of 22 trading companies registered in low-tax areas of Russia (the Republic of Mordoviya, the town of Sarov in the Nizhniy Novgorod Region, the Republic of Kalmykiya, the town of Trekhgornyy in the Chelyabinsk Region, the town of Lesnoy in the Sverdlovsk Region and the Evenk Autonomous District). For all legal purposes, these entities were set up as entirely independent from the applicant, though their sole activity consisted of commissioning the applicant company to buy crude oil on their behalf from the company's own oil-producing subsidiaries and either putting it up for sale on the domestic market or abroad, or first handing it over to the company's own oil-processing plants and then selling it. There were no real cash transactions between the applicant company, its oil-processing and oil-producing subsidiaries and the trading entities, and the company's own promissory notes and mutual offsetting were used instead. All the money thus accumulated from the sales was then transferred unilaterally to the "Fund for Financial Support of the Production Development of OAO Neftyanaya kompaniya YUKOS", a commercial entity founded, owned and run by the applicant company. Since at all relevant times the applicant company took part in all the transactions of the trading companies, but acted as the companies' agent and never as an owner of the goods produced and processed by its own subsidiaries and the reward for its services paid by the trading entities was negligible, the company's real turnover was never reflected in any tax documents and, consequently, on its tax returns. In addition, the trading companies were in fact sham entities, as they were neither present nor operated at the place of their registration. In addition, they had no assets and no employees of their own.

12. The Ministry found it established, among other things, that:

(a) the actual movement of the traded oil was from the company's production sites to its own processing or storage facilities;

(b) the applicant company acted as an exporter of goods for the purpose of customs clearance, even though the goods had formally been owned and sold by sham companies;

(c) the applicant company through the use of various techniques indirectly established and, at all relevant times *de facto*, controlled and owned the sham entities;

(d) the entirety of the accounting of the companies was carried out by the same two entities, OOO "YUKOS" FBC and OOO "YUKOS" Invest, both dependant on or belonging to the applicant company;

(e) the network of sham companies was officially managed by OOO "YUKOS" RM, all official correspondence, including tax documents, being sent from the postal address of OOO "YUKOS" Moskva, the applicant company's managing subsidiary;

(f) the sham companies and the applicant subsidiaries' companies entered into transactions with lowered prices for the purpose of reducing the taxable base of their operations;

(g) all revenues perceived by the sham companies were thereafter unilaterally transferred to the applicant company;

(h) the statements by the owners and directors of the sham entities, who confessed that they had signed the documents they had been required to sign by the officials of the applicant company, had never conducted any independent activity on behalf of their companies;

(i) and, lastly, that the sham companies received tax benefits unlawfully.

13. Having regard to all this, the Ministry decided that the activities of the sham companies served the purpose of screening the real business activity of the applicant company, that the transactions of these companies were sham and that it had been the applicant company, and not the sham entities, which conducted the transactions and became the owner of the traded goods. In view of the above, and also since neither the sham entities nor the applicant company qualified for the tax exemptions, the report concluded that the company, having acted in bad faith, failed properly to reflect these operations in its tax declarations thus avoiding the payment of value-added tax, motorway tax, corporate property tax, housing and socio-cultural tax, tax in respect of sales of fuels and lubricants and profit tax.

14. The report referred, *inter alia*, to Articles 7 (3), 38, 39 (1) and 41 of the Tax Code, section 3 of Law No. 1992-1 of the Russian Federation (RF) of 6 December 1991 "On Value Added Tax", sections 4 and 5 (2) of RF Law No. 1759-1 of 18 October 1991 "On motorway funds in the Russian Federation", section 21 ("Ch") of RF Law No. 2118-1 of 27 December 1991 "On the basics of the tax system", Article 209 (1-2) of the Civil Code, section 2 of RF Law No. 2030-1 of 13 December 1991 "On corporate property tax", section 2 (1-2) of RF Law No. 2116-1 of 27 December 1991 "On corporate profit tax", Decision No. 138-O of the Constitutional Court of Russia of 25 July 2001 and Article 56 of the Tax Code.

15. On 12 January 2004 the applicant company filed its detailed thirty-page objections to the report. The company admitted that for a very short period of time it had partly owned three out

of twenty two organisations mentioned in the report, but denied its involvement in the ownership and management of the remaining nineteen companies. They maintained the position about the lack of their involvement in the companies in question throughout the proceedings.

16. During a meeting between the representatives of the Ministry and the company on 27 January 2004, the applicant's counsel were given an opportunity to state orally their arguments against the report.

17. Having considered the company's objections, on 14 April 2004 the Ministry adopted a decision establishing that the applicant had a large outstanding tax liability for the year 2000. As the applicant had failed properly to declare the above-mentioned operations in its tax declarations and to pay corresponding taxes, in accordance with Article 122 (3) of the Tax Code the Ministry found that the company had underreported its tax liability for 2000 and ordered it to pay 47,989,241,953 Russian roubles (RUB) (approximately 1,394,748,234 euros, (EUR)) in tax arrears, RUB 32,190,599,501.40 (approximately EUR 935,580,142) in default interest and RUB 19,195,696,780 as a 40 percent penalty (approximately EUR 557,899,293), totalling RUB 99,375,538,234.40 (approximately EUR 2,888,227,669). The arguments contained in the decision were identical to those of the report of 29 December 2003. In addition, the decision responded in detail to each of the counter-arguments advanced by the company in its objections of 12 January 2004.

18. The decision was served on the applicant company on 15 April 2004.

19. The company was given until 16 April 2004 to pay voluntarily the amounts due.

20. The applicant company alleged that it had requested the Ministry to clarify the report of 29 December 2003 and that the Ministry had failed to respond to this request.

(iii) Institution of proceedings by the Ministry

21. Under a rule which made it unnecessary to wait until the end of the grace period if there was evidence that the dispute between the tax authority and the taxpayer was insolvable, the Ministry did not wait until 16 April 2004.

22. On 14 April 2004 it applied to the Moscow City Commercial Court (“the City Court”) and requested the court to seize the applicant company's assets as a security for the claim.

23. By decision of 15 April 2004 the City Court initiated proceedings and prohibited the applicant company from disposing of its assets pending the outcome of litigation. The injunction did not concern goods produced by the company and related cash transactions.

24. By the same decision the court fixed the date of the preliminary hearing for 7 May 2004 and invited the applicant company to respond to the Ministry's claims.

25. On 23 April 2004 the applicant company filed a motion in which it argued that the City Court had no territorial jurisdiction over the company's legal seat and requested that the case be referred a court in Nefteyugansk, where it was registered.

26. On 6 May 2004 the Ministry filed a motion inviting the court to call the applicant company's managing subsidiary OOO “YUKOS” Moskva as a co-defendant in the case.

(iv) Hearing of 7 May 2004

27. At the hearing the City Court examined and rejected the applicant company's motion of 23 April 2004. Having regard to the fact that the applicant company was operated by its own subsidiary OOO "YUKOS" Moskva, registered and located in Moscow, the court established that the applicant company's real headquarters were in Moscow and not in Nefteyugansk. In view of the above, the court concluded that it was competent to deal with the case.

28. On 17 May 2004 the applicant company appealed against this decision. The appeal was examined and rejected by the Appeals Division of the Moscow City Commercial Court ("the Appeal Court") on 3 June 2004.

29. The City Court also examined and granted the Ministry's motion of 6 May 2004. The court ordered OOO "YUKOS" Moskva to join the proceedings as a co-defendant and adjourned the hearing until 14 May 2004.

30. At the hearing of 7 May 2004 the applicant company lodged with the City Court a separate action against the tax assessment of 14 April 2004, seeking to have the assessment decision declared unlawful. The applicant company's brief came to 42 pages and had 22 supporting documents in annex. This action was examined separately and rejected as unsubstantiated by the City Court on 27 August 2004. The judgment of 27 August 2004 was upheld on appeal on 23 November 2004. On 30 December 2005 the Circuit Court upheld the decisions of the lower courts.

(v) Hearing of 14 May 2004

31. In the meantime the tax assessment case continued. On 14 May 2004 the City Court rejected the applicant company's request to adjourn the proceedings, having found that the applicant's counterclaim did not require such adjournment of the proceedings concerning the Ministry's action.

32. OOO "YUKOS" Moskva also requested that the hearing be adjourned as it was allegedly not ready to participate in the proceedings.

33. This request was rejected by the court as unfounded on the same date.

34. At the hearing the respondent companies also requested the City Court to vary their procedural status to that of interested parties.

35. The court rejected this request and, on the applicant company's motion, ordered the Ministry to disclose its evidence.

36. The court then decided that the merits of the case would be heard on 21 May 2004.

37. On 17 May 2004 the Ministry invited the applicant company to examine the evidence in the case file at its premises. A team of at least five lawyers representing the applicant company made use of this invitation on 18, 19 and 20 May 2004.

38. According to the applicant company, the supporting material underlying the case was first provided to the company on 17 May 2004, when the Ministry filed approximately 24,000 pages of documents. Allegedly, on 18 May 2004 the Ministry disclosed approximately 45,000 further pages, and a further 2,000 pages on the eve of the hearing before the City Court, i.e. on 20 May 2004.

(vi) First-instance judgment

39. The hearings on the merits of the case commenced on 21 May and lasted until 26 May 2004.

40. On 26 May 2004, at the end of the hearings, the City Court gave its judgment in which, for the most part, it reached the same findings and came to the same conclusions as in the Ministry's decision of 14 April 2004. Having confirmed the factual findings of the decision of 14 April 2004 in respect of the relations and transactions between the sham companies and the applicant company, the court then reasoned as follows:

"... Under section 3 of RF Law N. 1992-1 of 6 December 1991 'On value-added tax', part 2 of Section 5 and section 4 of RF Law No. 1759-1 of 18 October 1991 'On motorway funds in the Russian Federation', subpart 'ch' of section 21 of RF Law No. 2118-1 of 27 December 1991 'On the basics of the tax system', the sale of goods (works and services) give rise to an obligation to pay value-added tax, motorway users' tax, tax on the sale of oil and oil products, tax on maintenance of the housing fund and objects of socio-cultural sphere.

Under part 1 of Article 38 of the Tax Code, the objects of taxation may be the sale of goods (works and services), assets, profit, value of the sold goods (works and services) or other objects having value, quantity or physical characteristics on the presence of which the tax legislation bases the obligation to pay tax.

Under part 1 of Article 39 of the Tax Code, sales are defined as the transfer of property rights in respect of goods. Under subpart 1 and 2 of Article 209 of the Civil Code (taking into account Article 11 of the Tax Code) the owner of goods in the person who has the rights of ownership, use and disposal of his property, that is, the one who has the right to carry out at his own discretion in respect of this property any actions which are not against the law and other legal acts and do not breach the rights and protected interests of other persons ...

The court established that the owner of the oil sold under contracts concluded with organisations registered in low-tax territories had been OAO Yukos. The respondents' arguments about the unlawfulness of the use of the notion of *de facto* owner (*фактический собственник*) on the basis that, according to Article 10 (3) and Article 8 (1) part 3 of the Civil Code ... there existed a presumption of good faith on the part of parties involved in civil-law transactions and that therefore the persons indicated as owners in the respective contracts should be regarded as the owners, are baseless, because the above-mentioned organisations never acquired any property rights in respect of oil and oil products (*поскольку прав владения, пользования и распоряжения нефтью и нефтепродуктами у данных организаций не возникало*).

OAO NK Yukos was therefore under an obligation to pay [the taxes], which has not been complied with in good time.

Article 41 of the Tax Code establishes that profit is an economic gain in monetary form or in kind, which is taken into account if it is possible to evaluate it and in so far as it can be assessed. Under subparts 1 and 2 of section 2 of RF Law No. 2116-1 of 27 December 1991 'On profit tax of enterprises and organisations' which was then in force, the object of taxation is the gross profit of the enterprise, decreased (or increased) in accordance with the provisions of the present section. The gross profit is the total of revenues (receipts) from the sale of products (works and services), main assets (including land parcels), other property of the enterprise and the profit derived from operations other than sales, decreased by the sum of expenses in respect of these operations. Since it follows from the case file that the economic profit from the sale of oil and oil

products was perceived by OAO NK Yukos, it was incumbent on [the applicant company] to comply with the obligation to pay profit tax.

Section 2 of RF Law No. 2030-1 of 13 December 1991 'On corporate property tax' taxes the main assets, non-material assets, reserves and receipts which are indicated on the taxpayer's balance sheet. It follows that the obligation to pay property tax was incumbent on the person who was legally responsible for reflecting the main assets, non-material assets, reserves and receipts on its balance sheet. Since it follows from the materials of the case that OAO NK Yukos was under such an obligation, this taxpayer was also under an obligation to pay property tax.

The court does not accept the respondent's arguments that the tax authorities lacked the power to levy taxes from OAO NK Yukos in respect of the sums ... perceived by other organisations. The power of the tax authorities to bring proceedings in courts to ensure the payment of taxes to the budget in cases of bad faith taxpayers is confirmed by decision No. 138-O of the Constitutional Court of the Russian Federation, dated 25 July 2001. At the same time the bad faith of taxpayer OAO NK Yukos and the fact that the proceeds from operations with oil and oil products is confirmed by the materials of the case file.

The court has also established that the use of tax benefits by organisations which were dependent from OAO NK Yukos and participated in the tax evasion scheme set up by that company was unlawful.

Pursuant to Article 56 of the Tax Code, tax benefits are recognised as preferences provided for in the tax legislation for certain groups of taxpayers, in comparison to other taxpayers, including the possibility of not paying a tax or of paying it at a lower rate.

The court believes that tax payers must use their right to such benefits in good faith.

Meanwhile, it follows from the materials of the case that the taxpayers [concerned] used their right in bad faith.

The entities registered on the territory of the Republic of Mordoviya (OOO Yu-Mordoviya ..., ZAO Yukos-M ..., OAO Alta-Treyd ..., OOO Ratmir ..., OOO Mars XXII ...) applied benefits governed by Law of the Republic of Mordoviya No. 9-Z of 9 March 1999 'On conditions for the efficient use of the socio-economic potential of the Republic of Mordoviya', which set out a special taxation procedure for entities with the purpose of creating beneficial conditions for attracting capital to the territory of the Republic of Mordoviya, developing the securities market and creating additional jobs. Under section 2 of that law, the special taxation procedure applies in respect of entities (including foreign entities, operating through permanent representative offices established in the territory of the Republic of Mordoviya), established after the entry into force of the law (with the exception of entities conducting leasing business, banks and other credit institutions) and whose business conforms to one of the following conditions: export operations, with the resulting quarterly earnings totalling at least at fifteen percent of the whole of the entity's earnings; wholesale trading of combustibles and lubricants and other kinds of hydrocarbons with the resulting quarterly earning totalling at least at seventy percent of the whole of the entity's earnings; and other conditions enumerated in that law. Pursuant to sections 3 and 4 of the Law, the Government of the Republic of Mordoviya passed resolutions on the application of the special taxation procedure in respect of the mentioned entities and, consequently, on the application of the following tax rates: at the rate of zero percent in respect of profit tax in so far as it is credited to the republican and local budgets of the Republic of Mordoviya; at the rate of zero per cent on motorway users' tax in so far as it is credited to the Territorial Road Fund of the Republic of Mordoviya; and at the rate of zero percent on corporate

property tax. Moreover, the above-mentioned entities were exempted from payment of tax on maintenance of the housing fund and socio-cultural facilities by local government resolutions.

However, the special taxation procedure is provided for [by this law] for the purposes of creating favourable conditions to attract capital to the territory of the Republic of Mordoviya, develop the securities market and create additional jobs. The entities which used those benefits did not actually carry out their activities on the territory of this subject of the Russian Federation, did not attract capital, did not facilitate the strengthening of the Republic's socio-economic potential, but, on the contrary, inflicted material damage through non-payment of taxes to the budget of the Republic, the local budget and the federal budget. Thus, the use of the tax benefits in respect of these entities was not aimed at improving the economy of the Republic of Mordoviya but pursued the aim of evading taxes on the production, refining and sales operations of in respect of oil and oil products by OAO NK Yukos and is, as a consequence, unlawful.

The entity registered on the territory of the Republic of Kalmykiya (OOO Sibirskaya Transportnaya Kompaniya ...) did not pay profit tax, property tax, motorway users' tax, tax on the acquisition of vehicles and other taxes in accordance with Law No. 12-P-3 of the Republic of Kalmykiya of 12 March 1999 'On tax benefits to enterprises investing in the economy of the Republic of Kalmykiya', which establishes advantages in respect of taxes and duties for the categories of taxpayers that invest into the economy of the Republic of Kalmykiya and are registered as such enterprises with the Ministry of Investment Policy of the Republic of Kalmykiya. Moreover, the entity in question was exempt from payment of local taxes and payment of profit tax to the consolidated budget.

At the same time, it follows from the presumption of good faith of taxpayers (Decisions No. 138-O of the Constitutional Court of 25 July 2001, No. 4-O of 10 January 2002 and No. 108-O of 14 May 2002, Rulings of the Presidium of the Supreme Commercial Court no. 9408/00 dated 18 September 2001, no. 7374/01 of 18 June 2002, No. 6294/01 of 5 November 2002 and no. 11259/02 of 17 December 2002 and letter no. C5-5/уп-342 of the Deputy President of the Supreme Commercial Court of 17 April 2002) that, for the application of tax advantages to become lawful, the amount of the advantages provided and the sum of investments made by the entity should be commensurate. Since the amounts of benefits declared for tax purposes by the above-mentioned entities and the sums of investment made are obviously not commensurate, application of the advantages is unlawful. The application of tax advantages by the given entity is not aimed at improving the economy of the Republic of Kalmykiya but pursues the aim of tax evasion by OAO NK Yukos in respect of the operations of production, refining and sales of oil and oil products and, consequently, is unlawful.

The entity registered in the closed administrative territorial formation (ZATO) town of Sarov in the Nizhniy Novgorod Region (OOO Yuksar ...) concluded a tax agreement on the provision of tax concessions with the Sarov municipal administration. The granting of additional tax advantages on the territory of the Sarov ZATO (Federal Nuclear Centre) in 2000 was regulated by the norms of Articles 21 and 56 of the Tax Code, section 58 of Law no. 227-FZ of 31 December 1999 'On the federal budget for the year 2000', section 5 of Law No. 3297-1 'On closed administrative territorial formations' of 14 July 1992, Item 2 of Paragraph 30 of Decree No. 222 of the Russian Government of 13 March 2000 'On measures for implementation of the Federal Law 'On the Federal Budget for 2000' and Regulations 'On the investment zone of the town of Sarov', approved by a Resolution of the Sarov Duma on 30 December 1999. According to the tax agreement, the Sarov administration confers advantages in respect of taxes payable into the Sarov budget to the entity in question in the form of a reduction in the share of taxes and other compulsory payments to the budget, to twenty-five percent of the sums due in value-added tax, property tax, tax on the sale of fuel and lubricants, motorway users' tax, tax on vehicle

owners, tax on the acquisition of vehicles, profit tax, tax on operations with securities and excise duties; in exchange, the entity undertakes to participate in investment projects (programmes) implemented in the Sarov investment zone or with its participation, aimed at raising additional budget receipts and solving the problems of Sarov's socioeconomic development by transferring quarterly at least one percent of the sum of the tax advantages.

At the same time, according to Paragraph 1 of section 5 of the Federal Law No. 3297-1 'On closed administrative territorial formations' of 17 July 1992, additional benefits on taxes and duties are granted by the appropriate local government authorities to entities registered as taxpayers with the authorities of the closed administrative territorial formations in compliance with the mentioned law. Entities possessing at least ninety percent of capital assets and at least seventy percent of their activities on the territories of the closed administrative territorial formations (including the requirement that persons who permanently reside on the territory of the formation in question must constitute at least seventy percent of the average number of employees on the payroll and at least seventy percent of the labour remuneration fund must be paid to employees who permanently reside on the territory of the formation in question) enjoy the right to obtain the benefits in question. Given that OOO Yuksar did not actually carry out any activity on the territory of Sarov, was not actually present on the territory of Sarov and that there were no assets and production facilities necessary for the procurement and storage of oil on the territory of Sarov, Nizhniy Novgorod Region, the given entity applied the tax advantages unlawfully.

Thus, the use of tax advantages by the given entity is not aimed at improving the economy of the Sarov ZATO but pursued the aimed of tax evasion by OAO NK Yukos in respect of its obligation to pay taxes on operations of production, refining and sales of oil and oil products and is, consequently, unlawful.

Entities registered in the Trekhgornyy ZATO in the Chelyabinsk Region (OOO Kverkus ..., OOO Muskron ..., OOO Nortex ..., OOO Greis ... and OOO Virtus ...) concluded tax agreements with the administration of the town of Trekhgornyy, according to which entities were granted advantages in respect of profit tax, tax on maintenance of the housing fund and socio-cultural facilities, property tax, land tax, tax on the sale of fuel and lubricants, motorway users' tax, tax on vehicle users, and tax on the acquisition of vehicles, on condition that the entities would remit the sum of five percent from the amount of tax advantages conferred for the implementation of the town's socioeconomic programmes to the Trekhgornyy administration's account. Reasoning from the contents and sense of tax agreements, it follows that their purpose was the implementation of the particularly important socioeconomic task of developing the educational, medical service and housing spheres in the Trekhgornyy ZATO. At the same time, the sums which were transferred to the budget by the taxpayers in question were many times less than the sums of the declared tax advantages (the sum of investments is around 0.006 percent of the sum of the advantages for each taxpayer). Thus, the investments made by the taxpayers did not influence the development of Trekhgornyy's economy. On the contrary, since the above-mentioned organisations did not in fact carry out any activities, were never located on the territory of Trekhgornyy, had no assets and production facilities necessary to buy and store oil on the territory of Trekhgornyy, the application of tax advantages by the above-mentioned organisations is contrary to part 1 of section 5 of RF Law No. 3297-1 of 17 July 1992 'On closed administrative territorial formations'.

The organisations registered in the Lesnoy ZATO in the Sverdlovsk Region (OOO Mitra ..., OOO Vald-oyl ..., OOO Bizness-oyl ...) concluded tax agreements on the granting of a targeted tax concession under which organisations were granted the concession in respect of profit tax, land tax, tax on the sales of fuel and lubricants, motorway users' tax, vehicle users' tax, tax on the

acquisition of vehicles, tax on maintenance of the housing fund and socio-cultural facilities and property tax, whilst the organisations [in question] were under an obligation to transfer to the account of the Lesnoy municipal administration sums in the amount of five percent of the sums of the granted tax concessions, but no less than 6,000 roubles quarterly, for implementation of the town's socioeconomic programmes. [However], the sums received from the taxpayers are many times less than the sums of the declared tax advantages. Accordingly, the investments made by the taxpayers did not influence the development of the economy of the town of Lesnoy because the above-mentioned organisations never carried out any activities on the territory of Lesnoy, were never in fact located on the territory of Lesnoy and had no assets and production facilities required to sell and store oil on the territory of Lesnoy, the application of the tax advantages in respect of the above-mentioned organisations is contrary to part 1 of section 5 of RF Law No. 3297-1 of 17 July 1992 'On closed administrative territorial formations'.

The organisation registered in the Evenk Autonomous District (OOO Petroleum-Treiding) without in fact carrying out any activity on the territory of the district in question and without in fact being located on the territory of the Evenk Autonomous District, abused its right granted by Law No. 108 of the Evenk Autonomous District of 24 September 1998 'On specific features of the tax system in the Evenk Autonomous District'. The mentioned organisation was registered in the given district solely for the purpose of acquiring the right to the tax concession that could be granted in the Evenk Autonomous District. The use of the tax benefits by the organisation in question is not aimed at strengthening of economy of the Evenk Autonomous District, but is rather aimed at tax evasion by OAO NK Yukos in respect of operations of extraction, processing and sales of oil and oil products and is thus unlawful.

Thus, the use of tax concessions by the above-mentioned organisations is not aimed at strengthening of the economy of the regions in which they were registered but is aimed at evading the taxes due in respect of the operations of extraction, processing and sales of oil and oil products by OAO NK Yukos and is thus unlawful. ...”

41. The first-instance judgment also responded to the applicant company's submissions. As regards the argument that the Ministry's calculations were erroneous in that they led to double taxation and the failure to take account of the right to a refund of value-added tax (VAT) for export operations, the court noted that, contrary to the company's allegations, both the revenues and expenses of the sham entities had been taken into account by the Ministry so as to avoid double taxation. In addition, under Law No. 1992-1 of 6 December 1991 “On value-added tax”, in order to claim a refund of the value-added tax paid during export operations a tax payer had to justify the claim in accordance with a special procedure and the applicant company had failed to apply for a refund either in 2000 or at any later date. As to the argument that the Ministry's claim was time-barred, the court refuted it with reference to Article 113 of the Tax Code and Decision No. 138-O of the Constitutional Court of 21 July 2001. The court held that the rules on limitation periods were inapplicable in the case at issue as the applicant had acted in bad faith. In response to the company's argument that the interdependency within the meaning of Article 20 of the Tax Code was only relevant for the purposes of price correction under Article 40 of the Code, the court observed that the interdependency of the sham companies and the applicant company was one of the circumstances on the basis of which the tax authorities had proved the tax offence committed by the applicant company in bad faith.

42. Accordingly, by the judgment of 26 May 2004 the court upheld the decision of 14 April 2004, albeit slightly reducing the payable amounts by reference to the Ministry's failure to prove the relations of the applicant company with one of the entities mentioned in the decision of 14 April 2004. The court ordered the applicant company to pay RUB 47,989,073,311 (approximately EUR 1,375,080,541) in taxes, RUB 32,190,430,314 (approximately EUR

922,385,687) in default interest and RUB 19,195,606,923 (approximately EUR 550,031,575) in penalties, totalling RUB 99,375,110,548 (approximately EUR 2,847,497,802) and ordered its managing subsidiary OOO "YUKOS" Moskva to comply with this decision. The judgment could be appealed against by the parties within a thirty-day time-limit.

43. At the hearings of 21 to 26 May 2004 the applicant company and its managing subsidiary were represented by eight counsel. The reasoned copy of the judgment of 26 May 2004 was produced and became available to the parties on 28 May 2004.

(vii) Appeal proceedings

44. On 1 June 2004 OOO "YUKOS" Moskva filed an appeal against the judgment of 26 May 2004.

45. The Ministry appealed against the judgment on 2 June 2004.

46. On 4 June 2004 the Appeal Court listed the appeals of OOO "YUKOS" Moskva and the Ministry to be heard on 18 June 2004.

47. On 17 June 2004 the applicant company filed its appeal against the judgment of 26 May 2004. The brief came to 115 pages and contained 41 documents in annex. The company complained, in particular, that the time for filing an appeal had been unlawfully abridged, in breach of its rights to fair and adversarial proceedings, that the first-instance judgment was ungrounded and unlawful, that the evidence in the case was unlawful, that the first instance court had erred in interpretation and application of the domestic law in that it had lacked legal authority to "assign" the tax liabilities of one company to another and that the court's interpretation of legislation on tax concessions had been erroneous. The company also argued that the lower court had wrongly assessed the evidence in the case and had come to wrong factual conclusions in respect of the relationships between the applicant and sham companies, that in any event some of the operations of the sham companies had been unrelated to the alleged tax evasion and that the respective sums should not be "assigned" to the applicant company, and also that the case should have been tried in the town of Nefteyugansk, where the company was registered.

48. The appeal hearing in the case lasted from 18 until 29 June 2004.

49. At the beginning of the hearing of 18 June 2004 the applicant company requested the Appeal Court to adjourn the proceedings. The company considered that the hearing had been fixed for too early a date, before the expiry of the statutory time-limit for lodging appeals.

50. The court refused this request as unfounded.

51. At the hearings of 21 and 28 June 2004 the applicant company filed four supplements to its appeal. The company and its managing subsidiary were represented by ten counsel.

52. Under Article 268 of the Code of Commercial Court Procedure the court fully re-examined the case presented by the Ministry rather than simply reviewing the first-instance judgment.

53. At the end of the hearing of 29 June 2004 the court delivered its judgment, in which it reached largely similar findings and came to the same conclusions as the first-instance judgment. The court rejected the company's appeals as unfounded and decided to change the first instance judgment in part. In particular, it declared the Ministry's claims in respect of the VAT partly

unfounded, reduced the amount of the VAT arrears by RUB 22,939,931 (approximately EUR 649,336) and quashed the corresponding penalty of RUB 10,334,226 (approximately EUR 292,520).

54. The court judgment, in its relevant parts, read as follows:

"... The parties declared under part 5 of Article 268 of the Code of Commercial Courts procedure that there was a need to check the lawfulness and grounds of the first instance judgment and to hold a repeated hearing of the case in full.

The Appeal Court has checked the lawfulness and grounds of the first instance judgment pursuant to ... Article 268 ... of the Code of Commercial Courts procedure. ...

The Appeal Court does not accept the arguments of the respondents about the erroneous interpretation and application of the norms of the substantive law by the first instance court and about the factual incorrectness of the court's conclusions.

[the court went on reviewing and confirming all factual findings made by the Ministry and the first instance court in respect of the tax evasion scheme set up by the applicant company]

... Having in mind the stated circumstances, the Appeal Court established that the *de facto* owner of the oil was [the applicant]. The acquisition and transfer for processing of the oil and the sales of the oil in reality was carried out by [the applicant] as the owner, which is proved by the control of [the applicant company] over all operations, the actual movement of the oil from the extracting entities to processing entities or oil facilities controlled by [the applicant company], which is proved by the materials of the case.

...

The [applicant company's] ownership of the oil is confirmed by the interdependence of the contracting parties, by the control that [the applicant company] had over them, by the registration of the contracting parties on the territories with low-tax regime, by the lack of activities by these entities at their place of registration, by the fact that the accounting of these was carried by OOO Yukos-Invest or OOO Yukos-FBC, companies officially dependant on [the applicant company], by the fact that the accounting of these entities was filed from the addresses of [the applicant company] and OOO Yukos-Moskva, by the fact that the bank accounts were opened in the same banks owned by [the applicant company], by the presence and character of commercial relations between [the applicant company] and the dependent entities, and by the use of promissory notes and mutual offsetting between them.

...

Under the legislation then in force, such as section 3 of RF Law N. 1992-1 of 6 December 1991 'On value-added tax', part 2 of Section 5 and section 4 of RF Law No. 1759-1 of 18 October 1991 'On motorway funds in the Russian Federation', subpart 'ch' of section 21 of RF Law No. 2118-1 of 27 December 1991 'On the basics of the tax system', the sale of goods (works and services) give rise to an obligation to pay value-added tax, motorway users' tax, tax on the sale of oil and oil products, tax on maintenance of the housing fund and objects of socio-cultural sphere.

Under part 1 of Article 39 of the Tax Code, sales are defined as the transfer of property rights in respect of goods. Under subpart 1 and 2 of Article 209 of the Civil Code (taking into account Article 11 of the Tax Code) the owner of goods in the person who has the rights of ownership,

use and disposal of his property, that is, the one who has the right to carry out at his own discretion in respect of this property any actions which are not against the law and other legal acts and do not breach the rights and protected interests of other persons...

It follows that the person who in fact had the rights ownership, use and disposal of his property and who, in view of these rights, actually, at his discretion exercises in respect of his property any actions, including transfers of property to other persons ... is the owner of this property.

Therefore, OAO NK Yukos, being a *de facto* owner of the oil, was under an obligation to pay [the taxes], which has not been complied with in good time.

As it was established, Article 41 of the Tax Code establishes that profit is an economic gain in monetary form or in kind, which is taken into account if it is possible to evaluate it and in so far as it can be assessed, and determined in accordance with chapters 'Taxes in respect of the profits of natural persons', 'Taxes in respect of the profits of organisations', 'Taxes in respect of the capital profits' of the Tax Code of the Russian Federation. Under subparts 1 and 2 of section 2 of RF Law No. 2116-1 of 27 December 1991 'On profit tax of enterprises and organisations' which was then in force, the object of taxation is the gross profit of the enterprise, decreased (or increased) in accordance with the provisions of the present section. The gross profit is the total of revenues (receipts) from the sale of products (works and services), main assets (including land parcels), other property of the enterprise and the profit derived from operations other than sales, decreased by the sum of expenses in respect of these operations. The court established that the economic profit from the sale of oil and oil products was perceived by OAO NK Yukos, it was incumbent on [the applicant company] to comply with the obligation to pay profit tax.

Section 2 of RF Law No. 2030-1 of 13 December 1991 'On corporate property tax' taxes the main assets, non-material assets, reserves and receipts which are indicated on the taxpayer's balance sheet. It follows that the obligation to pay property tax was incumbent on the person who was legally responsible for reflecting the main assets, non-material assets, reserves and receipts on its balance sheet. Since it follows from the materials of the on-site tax inspection that OAO NK Yukos was under such an obligation, this taxpayer was also under an obligation to pay property tax.

The Constitutional Court of the RF in its decision of 25.07.2001 n. 138-0 stated that it followed from the meaning of the norm contained in part 7 of Article 3 of the Tax Code of the RF that there is a presumption of good faith of taxpayers. In order to refute it and establish the bad faith of the taxpayer, the tax authorities have the right – in order to strike a balance between the public and private interests – to carry out necessary checks and bring subsequent claims in commercial courts which would guarantee the payment of taxes to the budget.

In view of the above, the tax authorities ... have the right to carry out checks with a view to establishing the *de facto* owner of the sold property and the *de facto* recipient of the economic profit and also with a view to establishing his bad faith expressed in the application of the tax evasion scheme. At the same time, the tax authorities establish the *de facto* owner with regard to the actual relations between the parties to the transaction irrespective of whether the persons had been declared as owners of the property in the documents submitted during the tax inspections.

The circumstances indicating that OAO NK Yukos in fact had the rights of ownership, use and disposal of its oil and oil products and, at its discretion carried out in this connection any actions, including the sale, the transfer for processing etc. through specially registered organisations dependant on OAO NK Yukos is confirmed by the materials of the case.

...

In view of the above, the court does not accept the respondents' arguments about the unlawfulness and the lack of factual basis of the decision to levy additional taxes from OAO NK Yukos as the *de facto* owner of the oil and oil products.

The respondent's argument that OAO NK Yukos had not perceived any economic profit from the application of benefits by the entities mentioned in the decision of the Ministry contradicts the materials of the case. The court had established that OAO NK Yukos received economic profit in the form of unilateral transfers of cash. OAO NK Yukos has created the Fund for Financial Support of the Production Development of OAO NK Yukos [to this effect].

...

The argument of OAO NK Yukos that the Ministry is levying taxes in respect of transactions "within the same owner" is unsupported, since the calculations of additional taxes (except for the property tax in respect of which [this is inapplicable]) take into account also the expenses connected with the acquisition of the oil and oil products.

The court does not accept the respondent's arguments that the tax authorities lacked the power to levy taxes from OAO NK Yukos in respect of the sums ... perceived by other organisations. The power of the tax authorities to bring proceedings in courts to ensure the payment of taxes to the budget in cases of bad faith taxpayers is confirmed by decision No. 138-O of the Constitutional Court of the Russian Federation, dated 25 July 2001. At the same time the bad faith of taxpayer OAO NK Yukos and the fact that the proceeds from operations with oil and oil products is confirmed by the materials of the case file.

The circumstances of the transactions of acquisition and sales of the oil and oil products taken in their entirety established by the Appeal Court indicate the presence of bad faith in the actions of OAO NK Yukos which was expressed in intentional actions aimed at tax evasion by the application of unlawful schemes. In accordance with part 2 of Article 110 of the Tax Code of the RF the tax offence is considered intentional, if the person who has committed it knew about the unlawful character of the actions (inactions), wished them or conscientiously admitted the possibility of harmful consequences of such actions (inactions) taking place.

Since OAO NK Yukos intentionally committed action aimed at the tax evasion, and its officers were aware of the unlawful character of such actions, wished or knowingly admitted the possibility of harmful consequences due to such actions, OAO NK Yukos has to be held liable under part 3 of Article 122 of the Tax Code of the RF for the non-payment or incomplete payment of taxes due to the lowering of the taxable base or incorrect calculation of the tax or other unlawful actions (inactions) committed intentionally, in the form of a fine in the amount of 40 percent of the unpaid taxes.

...

Having repeatedly examined the case and checked the lawfulness and grounds of the first instance judgment in full, having examined the evidence and having heard the arguments of the parties, the Appeal Court came to the conclusion that the decision of the Ministry dated 14.04.2004 ... is in compliance with the Tax Code as well as with Federal laws and other laws on taxes ...

The claims for payment of taxes, interest surcharges and fines made in the decision of the Ministry of 14.04.2004 ... are grounded, lawful and confirmed by the primary documents of the materials of the inspection submitted to the court to justify them. ...”

55. The appeal judgment also responded to the applicant company's other arguments. As regards the alleged breaches of the procedure and the lack of time for the preparation of the defence at first instance, the court noted that it had checked this allegation and that there had been no violation of procedure at first instance and that in any event the applicant company had had ample opportunities to study the evidence relied on by the Ministry both at the Ministry's premises and in court. As regards the argument that the evidence used by the Ministry was inadmissible, the court noted that the materials of the case had been collected in full compliance with the requirements of the domestic legislation. The court also agreed with the first instance court in that the three years statutory time-limit had been inapplicable in the applicant's case since the company had been acting in bad faith.

56. The first instance judgment, as upheld on appeal, came into force on 29 June 2004.

57. The applicant company had two months from the date of the delivery of the appeal judgment to challenge it in third-instance cassation proceedings (*кассация*).

(viii) Cassation proceedings

58. On 7 July 2004 the applicant company filed a cassation appeal against the judgments of 26 May and of 29 June 2004 with the Federal Commercial Court of the Moscow Circuit (“the Circuit Court”). The applicant company's brief came to 77 pages and had 6 documents in annex. The arguments in the brief were largely similar to those raised by the applicant company on appeal, namely that the judgment was unlawful and unfounded, that the entities mentioned in the report ought to have taken part in the proceedings, that the trial court had had insufficient evidence to conclude that the applicant company and other entities were interrelated, that the evidence used by the trial court was unlawful, that the trial proceedings had not been adversarial and that the principle of equality of arms had been breached. In addition, the company alleged that it had had insufficient time to study the evidence and had been unable to contest the evidence in the case, that the Ministry had unlawfully applied to a court before the applicant company had an opportunity to comply with the decision of 14 April 2004 voluntarily, that the entities mentioned in the report had in fact been eligible for the tax exemptions, that the rules governing tax exemption had been wrongly interpreted, that the Ministry's claims had been time-barred, that the company had had insufficient time for the preparation of the appeal, and that the case ought to have been examined by a court in Nefteyugansk.

59. A copy of the reasoned version of the appeal judgment of 29 June 2004 was attached to the brief.

60. It appears that on an unspecified date the Ministry, too, also challenged the judgments of 26 May and 29 June 2004.

61. On 17 September 2004 the Circuit Court examined the cassation appeals and upheld in substance the judgments of 26 May and 29 June 2004.

62. In respect of the applicant company's allegations of unfairness in the appeal proceedings, the court noted that both defendant companies had had ample opportunities to avail themselves of their right to bring appeals within the statutory time-limit, as the appeal decision was not taken until 29 June 2004, which was more than thirty days from the date of the delivery of the

judgment of 26 May 2004. Furthermore, the court observed that the evidence presented by the Ministry and examined by the lower courts was lawful and admissible, and that it had been fully available to the defendant companies before the commencement of the trial hearings. The court also noted that on 14 May 2004 the City Court specifically ordered the Ministry to disclose all the evidence in the case, that this order has been complied with by the Ministry and that, despite the fact that the evidence was voluminous, the applicant company had had sufficient time to examine and challenge it repeatedly throughout the proceedings between May and July 2004.

63. As regards the applicant company's complaint that the Ministry had brought proceedings before the expiry of the time-limit for voluntary compliance with the decision of 14 April 2004, the court noted that the Ministry and lower courts had acted in compliance with Article 213 of the Commercial Court Procedure Code, as there were irreconcilable differences between the parties and, throughout the proceedings, the applicant company had had insufficient cash to satisfy the Ministry's claims.

64. In respect of the applicant company's argument that the case should have been tried by a court in Nefteyugansk, the court noted that the City Court had had jurisdiction over the case under Article 54 of the Civil Code and decision no. 6/8 of the Plenary Session of the Supreme Court and Supreme Commercial Court of 1 July 1996.

65. On the merits of the case, the court noted that the lower courts had reached reasoned conclusions that the applicant company was the effective owner of all goods traded by the sham companies registered in low-tax areas, that the transactions of these entities were in fact those of the applicant, that neither the company nor the sham entities were eligible for the tax exemptions and that the applicant company had perceived the entirety of the resulting profits. The court upheld the lower courts' conclusion that, acting in bad faith, the applicant company had failed properly to declare its transactions for the year 2000 and to return corresponding taxes, including value-added tax, profit tax, motorway users' tax, property tax, tax on maintenance of the residential fund and socio-cultural facilities and tax on the sale of fuel and lubricants.

66. The court noted some arithmetical mistakes in the appeal judgment of 29 June 2004, increasing the penalty by RUB 1,158,254.40 (approximately EUR 32,613) and reducing the default interest by RUB 22,939,931 (approximately EUR 645,917) accordingly.

(ix) Constitutional review

67. On an unspecified date the applicant company lodged a complaint against the domestic courts' decisions in its case with the Constitutional Court.

68. By decision of 18 January 2005 the Constitutional Court declared the complaint inadmissible for lack of jurisdiction.

(x) Supervisory review

69. Simultaneously to bringing the cassation appeal, on 7 July 2004 the applicant company also challenged the judgments of 26 May and 29 June 2004 by way of supervisory review before the Supreme Commercial Court of Russia.

70. On 31 December 2004 the applicant company's case was accepted for examination by the Supreme Commercial Court.

71. By a decision of 13 January 2005 the Supreme Commercial Court, sitting with a bench of three judges, decided to relinquish jurisdiction in favour of the Presidium of the Supreme Commercial Court. Addressing one of the applicant company's arguments, the court noted that the lower courts had decided that the three-year statutory time-bar was inapplicable in the case at issue since the applicant company had been acting in bad faith. It further noted that such an interpretation of the rules on the time-limits was not in line with the existing legislation and case-law and that therefore the issue should be resolved by the Presidium of the Supreme Commercial Court.

72. On 19 April 2005 the Presidium of the Supreme Commercial Court referred the above-mentioned issue to the Constitutional Court and adjourned the examination of the applicant company's supervisory review appeal pending a ruling by the Constitutional Court.

73. By a decision of 14 July 2005 the Constitutional Court upheld Article 113 of the Tax Code as compatible with the Constitution, having ruled that the legal provisions on the statutory time-limits ought to be applied in all cases without exception and irrespective of the applicant's conduct. The court further mentioned that:

"... the provisions of Article 113 of the Tax Code of the Russian Federation in their constitutional and legal sense and in the present legal context do not exclude that the court may have a possibility in cases where the taxpayer impedes the tax supervision and the carrying out of the tax inspections to excuse the tax authorities' failure to bring the proceedings on time ..."

"... In their constitutional and legal sense in the context of the present legal regulation... [these provisions] mean that the running of the statutory time-bar in respect of a person prosecuted for tax offences stops on the date of the production of the tax audit report in which the supported facts of the tax offences revealed during the inspection are mentioned and in which there are reference to the relevant articles of the Tax Code or - in cases where there was no need in producing such a report - from the moment on which the respective decision of the tax authority holding a taxpayer liable of a tax offence was taken. ..."

74. The case was then returned to the Presidium of the Supreme Commercial Court.

75. On 4 October 2005 the Presidium of the Supreme Commercial Court examined and rejected the company's appeal. In respect of the company's argument that the Ministry's claims were time-barred, the court noted that the Ministry's tax audit report in the applicant's case had been completed on 29 December 2003 that is within the statutory three-year time-limit and that thus the case was not time-barred.

(b) Enforcement measures relating to the 2000 Tax Assessment

76. Simultaneously with the determination of the case before the courts in respect of the applicant company's tax liability for the year 2000, the parties also took part in various enforcement proceedings.

(i) Attachment of the applicant's property

77. On 15 April 2004 the City Court accepted the Ministry's action in respect of 2000 for consideration and attached the applicant company's assets, excluding goods produced by the company and related cash transactions, as a security for the claims. The court also issued writs of execution in this respect (see paragraph 22).

78. By a decision of 16 April 2004 the bailiffs instituted enforcement proceedings in connection with the attachment.

79. On the same day they executed the attachment order by informing the applicant company and the holder of its corporate register, ZAO 'M-Reestr', of the decision of 15 April 2004.

80. According to the Government, the applicant company impeded the execution of the writs issued by the court by hiding its corporate register from the bailiffs. In particular, they alleged that a few hours prior to the bailiffs' visit, the applicant company had cancelled its contracts with ZAO 'M-Reestr'. The register was then dispatched by ordinary post to a location in Russia so that, over the next weeks, it could not be physically found and the execution writs could not be enforced.

81. On 22 April 2004 the applicant company filed a court request to have the attachment of the entirety of its assets replaced by the attachment of the shares in OAO Sibirskaya neftyanaya kompaniya ("the Sibneft company", a major Russian oil company which had attempted unsuccessfully to merge with the applicant company in 2003), which belonged to the applicant company and was allegedly worth three times as much as the then liability. The applicant company also alleged that the attachment order adversely affected its proper functioning and invited the authorities to opt for less intrusive measures, insisting on the lack of any risk of asset-stripping.

82. By a decision of 23 April 2004 the City Court examined and rejected this request as unfounded. The court found no evidence that the interim measures affected any of the company's production activities.

83. On 17 May 2004 the applicant company appealed against the decision of 23 April 2004.

84. The outcome of court proceedings in respect of the applicant company's appeal of 17 May 2004 is unclear.

85. On 23 April 2004 the City Court also examined the applicant company's request for an injunction order against the attachment and rejected it. The court noted that the attachment did not interfere with the company's day-to-day operations and it was a reasonable measure aimed at securing the Ministry's claims.

86. On 2 July 2004 the Appeal Court rejected the company's appeal and upheld the judgment.

87. It does not appear that the applicant company brought cassation proceedings in this respect.

(ii) Enforcement of the Tax Ministry's decision of 14 April 2004

88. In the meantime, on 7 May 2004 the applicant company applied to the City Court with a separate action against the tax assessment of 14 April 2004, seeking its invalidation (see paragraph 30 above). The company also requested interim measures in this connection.

89. Following the applicant's request for interim measures, on 19 May 2004 the City Court stayed the enforcement of the Tax Ministry's decision of 14 April 2004, having noted that the Ministry could have enforced the decision in the part relating to taxes and default interests even without waiting for the outcome of the Ministry's claim (Article 46 of the Code of Commercial Court Procedure). The court decided however that this might be detrimental for the applicant company and stayed the decision of 14 April 2004 accordingly.

90. On 27 May 2004 the applicant company made a public announcement that:

"... it [was] under an injunction prohibiting it from selling any of its property, including the shares owned by the company. Until the injunction is lifted, the Company is unable to sell its assets in order to obtain liquid funds. Consequently, if the Tax Ministry's efforts continue, we are very likely to enter a state of bankruptcy before the end of 2004".

91. It appears that the City Court's decision of 19 May 2004 to stay the enforcement was appealed against by the Ministry. Having examined the Ministry's arguments at the hearing of 23 June 2004, the Appeal Court quashed the first-instance decision of 19 May 2004 as unlawful and rejected the applicant company's request for interim measures as unfounded.

92. It does not appear that the applicant company appealed against this decision before the Circuit Court.

(iii) Enforcement of the judgments concerning the 2000 Tax Assessment

93. As already mentioned earlier (paragraphs 40-57), by a judgment of 26 May 2004 the City Court found in favour of the Tax Ministry upholding the Tax Assessment of 14 April 2004. The Tax Assessment was upheld by the Appeal Court with minor reductions and became enforceable on 29 June 2004.

94. On 30 June 2004 the Appeal Court issued the writ of enforcement in this respect. The applicant company was to pay RUB 47,958,133,380 (approximately EUR 1,358,914,565) in reassessed taxes, RUB 32,190,430,314 (approximately EUR 912,129,842) in interest surcharges and RUB 19,185,272,697 (approximately EUR 543,623,045) in penalties.

95. On 30 June 2004 the bailiffs instituted enforcement proceedings based on the above judgment, seized the applicant company's assets and gave it five days to pay. The applicant company was informed that it would be liable to pay enforcement fees of seven percent, totalling at RUB 6,953,375,547 (approximately EUR 197,026,920), in the event of failure to honour the debt voluntarily.

96. On 7 July 2004 the applicant company challenged the bailiffs' decision of 30 June 2004.

97. It argued that the decision to open enforcement proceedings had been unlawful as it was in breach of the rules of bailiffs' territorial competence as the enforcement ought to have taken place in Nefteyugansk and not in Moscow, that the five-day term for voluntary compliance with the court decisions had been too short and that the seizure had made such compliance impossible.

98. On 30 July 2004 the City Court examined and rejected these claims as groundless. The court ruled that the bailiffs had acted lawfully and that the seizure of the company's assets did not interfere with its ability or inability to honour its debts.

99. It does not appear that the company brought appeal proceedings against this judgment.

100. In the meantime, on 1 July 2004 the bailiffs decided to seize 24 subsidiary companies belonging to the applicant company.

101. The applicant appealed against the decision in court.

102. By a first-instance judgment of 17 September 2004 the appeal was rejected as unfounded. The judgment was produced on 20 September 2004.

103. The applicant did not appeal against the judgment before the Appeal Court, though it did bring further appeal proceedings before the Circuit Court.

104. On 2 February 2005 the judgment was upheld by the Circuit Court.

105. In addition to the above attempts to stay the enforcement of the judgments concerning the 2000 Tax Assessment, the applicant company, by a letter of 5 July 2004, also suggested to the bailiffs that it repay its debts by using Sibneft stock allegedly worth 4,050,000,000 United States dollars (USD), citing its vertically integrated structure as a possible reason for seeking to find the least intrusive solution as well as the need to honour its contractual debts.

106. On 14 July 2004 the applicant company filed an action against the bailiffs on account of their alleged failure to respond to the company's offer of 5 July 2004.

107. On 17 August 2004 the City Court rejected this action, having noted that the failure to respond was lawful and within the scope of the bailiffs' discretion. The court established that some of the steps undertaken by the applicant company during the unsuccessful merger with the Sibneft company had been contested in different set of proceedings as unlawful. In addition, the applicant company's ownership of the Sibneft shares had been contested by third parties in two different sets of proceedings. On the basis of these findings, the court concluded that the bailiff did not breach the law by ignoring the company's offer.

108. It does not appear that the applicant company appealed against the judgment.

109. As set out above (paragraph 58), on 7 July 2004 the applicant company filed a cassation appeal against the court judgments on the 2000 Tax Assessment and at the same time it moved to stay the enforcement proceedings. It argued that the company's assets were highly valuable, but that it had insufficient cash to honour the debts immediately and that the seizure of assets made any voluntary settlement impossible. The company also argued that the enforcement of the court judgments in the case would irreparably damage its business as a reversal of the enforcement would be impossible.

110. By decision of 16 July 2004 the Appeal Court accepted the cassation appeal and, having examined the motion to stay the enforcement, rejected it as unsubstantiated and unfounded, as the circumstances referred to by the applicant were irrelevant for the domestic law. The court noted that it would be possible to reverse the enforcement as the plaintiff was the Treasury.

111. This decision was upheld by the Circuit Court on 4 August 2004.

112. On 8 October 2004 the applicant company announced that it would comply with the City Court's judgment of 1 March 2004, which had cancelled the issue of additional shares in the applicant company, used for the purpose of acquiring Sibneft. The applicant company, acting in compliance with the court order, instructed the registrar to return its 57.5 percent stake in Sibneft to its former owners.

(iv) Seven percent enforcement fee

113. By decision of 9 July 2004 the bailiffs levied an enforcement fee of seven percent in respect of the company's failure to comply with the execution writs of 30 June 2004 (see

paragraph 95 above). The applicant company was to pay RUB 6,848,291,175.45 (approximately EUR 190,481,640)

114. On 19 July 2004 the applicant company challenged this decision in court.

115. By decision of 3 August 2004 the City Court examined the company's action and quashed the decision of 9 July 2004 as disproportionate and unjustified. The court decided that the enforcement fee could only be levied if the respondent had acted in bad faith and found that the bailiffs had failed to examine this question. The court also noted that seven percent was the highest possible rate and that the bailiffs' decision failed to explain why the fee could not be lower. Among other things, the court referred to section 3 of the Ruling of the Constitutional Court No. 13-P of 30 July 2001.

116. Following an appeal by the Ministry, on 27 August 2004 the Appeal Court quashed the decision of 3 August 2004 as erroneous and held that the bailiffs' actions were lawful and justified. The court noted that the applicant company had failed to demonstrate that it had taken any steps to meet the liabilities. It further noted that the cash in the company's accounts was only seized in certain specified amounts and that, over those amounts, the company was free to function as usual. As regards the company's proposal to proffer the Sibneft shares as payment, the court noted that this could not be accepted, because the company's property rights in respect of these shares had been questioned by a third party in a parallel set of proceedings. In addition, the court noted that the applicant company had failed to use a remedy provided in Article 324 of the Commercial Procedure Code.

117. The Circuit Court upheld the appeal decision on 6 December 2004.

(v) Overall debt in respect of 2000

118. Overall, in respect of 2000, the applicant company was ordered to pay RUB 99,333,836,391 (approximately EUR 2,814,667,452)

(vi) Seizure of shares of the applicant company's subsidiary companies

119. On 14 July 2004 the bailiffs seized the shares of OAO Yuganskneftegas, one of the applicant company's principal production subsidiaries. The decision referred to the applicant company's inability to meet its liabilities.

120. The applicant company appealed against this decision in court. With reference to section 59 of the Enforcement Proceedings Act, it argued that the bailiffs ought firstly to claim assets which were not involved in the production process, secondly those goods and other values which were not related to the production process and, thirdly, immovable objects, raw material and other main assets relating to the production cycle. In addition, the applicant company referred to Ruling No. 4 of the Plenary Supreme Commercial Court “On certain questions arising out of seizure and enforcement actions in respect of corporate shares”, dated 3 March 1999, which suggested in respect of those companies which had been privatised by the State as parts of bigger holding groups through the transfer of controlling blocks of shares that the production cycle of the respective production unit should be preserved as much as possible. The company further claimed that the above ruling was applicable to the case at issue, that OAO Yuganskneftegas was a major production unit and that the bailiffs had produced no evidence that the assets and goods and other values not involved in the production process were insufficient. In addition, it reiterated its offer of the shares in Sibneft.

121. On 6 August 2004 the City Court examined and allowed the applicant company's challenge of this seizure.

122. At the hearing the Ministry and bailiffs referred to sections 9 (5) and 51 (1-4) of the Enforcement Proceedings Act and Government Decree No. 934 "On seizure of securities" of 12 August 1998. They argued that, under the applicable domestic law, the seizure should be made first in respect of the cash-flow and then, under section 46 (5) of the Enforcement Proceedings, it would be open to the bailiffs to assess and seize the assets depending on their liquidity. They countered the company's arguments by saying that their references were invalid as they related to the other stage of enforcement stage (the collection of debt and not the seizure as such). Furthermore, they argued that Ruling No. 4 of the Plenary Supreme Commercial Court was inapplicable since, in the case of Yuganskneftegas, the State had transferred only 38 percent of the shares and not a controlling block. With regard to the offer of Sibneft stock, the Ministry and bailiffs argued that the applicant company's rights in respect of these shares had been contested in separate sets of court proceedings and it was therefore risky to accept them as a payment. Lastly, they informed the court that the applicant company had recently hidden the registry records of its three major subsidiaries, OAO Yuganskneftegas, OAO Samaraneftegas and OAO Tomskneft, which, in their view, demonstrated the risk of possible asset-stripping by the applicant company.

123. Having examined the parties' submissions, the court upheld the applicant company's arguments. It noted that the company's references to the applicable domestic law were correct. With regard to the non-controlling block argument, the court noted that at the time of transfer of the shares, 25 percent of shares were privileged and non-voting. For the remaining 75 percent of the voting stock, the 38 percent transferred by the State constituted the controlling block. The court concluded that the decision of 14 July 2004 was unlawful and quashed it.

124. On 9 August 2004 the Ministry challenged the decision of 6 August 2004 on appeal.

125. On 18 August 2004 the Appeal Court quashed the decision, finding that the first-instance court had erred both in law and fact. In particular, the court confirmed that it was up to the bailiffs to choose the most liquid assets and dispose of them with a view to honouring the company's huge debt. It also noted that Ruling No. 4 of the Plenary Supreme Commercial Court was inapplicable to the case at issue, as 25 percent of the Yuganskneftgas shares had become privileged by a decision of 2001, and not through privatisation.

126. Following an appeal by the applicant company, on 25 October 2004 the Circuit Court upheld the decision of 18 August 2004.

127. The applicant company's attempts to bring supervisory review proceedings against this decision proved unsuccessful.

128. The respective complaint was rejected by decision of the Supreme Commercial Court dated 17 December 2004.

129. In addition to seizing the shares of OAO Yuganskneftegaz (see paragraphs 119-128 above), on 14 July 2004 the bailiffs also seized the shares of OAO Tomskneft-VNK and OAO Samaraneftegas, the applicant company's two other principal production units.

130. The company's complaint against the seizure of OAO Tomskneft-VNK proved unsuccessful.

131. The City Court rejected an appeal as unfounded on 13 August 2004.

132. The applicant company did not contest the judgment in cassation before the Appeal Court.

133. On 5 November 2004 the Circuit Court rejected the company's cassation appeal in respect of the judgment of 13 August 2004. The court noted that the seizure was intended to protect the creditor's claims and that there was no indication that the seizure impeded the production cycle or otherwise disturbed the normal functioning of the company.

134. The company also unsuccessfully complained about the seizure of its shares in OAO Samaraneftegaz.

135. The City Court, acting as a first instance court, dismissed the appeal on 2 September 2004.

136. The applicant company failed to appeal the judgment before the Appeal Court, though did pursue the cassation proceedings.

137. On 18 January 2005 the Circuit Court upheld the judgment.

138. On an unspecified date the applicant company also offered to settle the debt in fifteen monthly instalments.

139. On 12 August 2004 the City Court examined the applicant's request to re-pay the 2000 Tax Assessment award in instalments and rejected it as unfounded. The court noted, among other things, that the tax debt had resulted from intentional tax evasion by the applicant company and that the conduct of the debtor in court and during the enforcement proceedings demonstrated that they did not intend to pay the debts voluntarily.

140. It does not appear that the company brought any appeal proceedings in respect of this judgment.

141. On 23 August 2004 the applicant company announced that “to date the Company has voluntarily paid over USD 700 million of 2000 tax charge. Approximately another USD 800 million has been taken from the Company through the collection process”.

2. Proceedings in respect of the applicant company's tax liability for the year 2001

(a) Tax Assessment 2001

(i) Proceedings before the Ministry

142. By a decision of 2 September 2004 the Ministry issued a tax assessment for the year 2001 (“the 2001 Tax Assessment”). This time the applicant company had to pay RUB 50,759,436,900 (approximately EUR 1,424,746,313) in tax arrears and RUB 28,520,204,254 (approximately EUR 800,522,195) in default interest and RUB 40,607,549,520 in penalties (approximately EUR 1,139,797,051). Since the applicant company had recently been found guilty of a similar offence, the penalty was doubled.

(ii) The applicant company's request for court injunction

143. On 14 September 2004 the applicant company brought a court appeal against the decision of 2 September 2004 and requested an injunction against the immediate enforcement of this decision.

144. On 5 October 2004 the City Court turned down the request for an injunction and on 13 October 2004 it issued execution writs in respect of the Ministry's decision of 2 September 2004. The court referred to Information Letter No. 83 of the Supreme Commercial Court of 13 August 2004 which recommended that requests for interim measures in such situations be granted only if an applicant could demonstrate some security for a creditor's future claims. The court noted that, in the present case, the applicant company clearly had insufficient cash to satisfy the creditor's claims and dismissed the claims accordingly.

145. It appears that the judgment of 5 October 2004 was upheld by the Appeal Court on 3 December 2004 and by the Circuit Court on 29 March 2005.

(b) Enforcement measures relating to the 2001 Tax Assessment

(i) Enforcement of additional taxes and interest surcharges

146. As the 2001 Tax Assessment was similar to the 2000 Tax Assessment, the Ministry decided to enforce it directly in the part relating to additional taxes and interest surcharges, without taking the matter to the courts. The applicant company was to pay the amounts due by 4 September 2004.

147. On 9 September 2004 the bailiffs instituted enforcement proceedings in connection with the decision of 2 September 2004. The company was to pay RUB 50,759,436,900 (approximately EUR 1,424,746,313) in tax arrears and RUB 28,520,204,254 (approximately EUR 800,522,195) in default interest.

148. It appears that the 2001 Tax Assessment in part relating to additional taxes and interest surcharges was upheld by the City Court on 11 October 2004. The judgment of 11 October 2004 was upheld on appeal on 16 February 2005. The Circuit Court upheld the decisions of the lower courts on 9 December 2005.

149. The applicant's request for an injunction pending these proceedings was unsuccessful. The City Court rejected it in its judgment of 5 October 2004. The refusal was upheld by the Appeal Court on 3 December 2004 and by the Circuit Court on 29 March 2005.

(ii) Enforcement of penalties

150. In so far as the 2001 Tax Assessment related to penalties, the Ministry applied to the City Court to recover them on 3 September 2004.

151. It appears that on 11 October 2004 the action was examined and granted by the City Court. The judgment in the case was produced on 15 October 2004.

152. According to the applicant company, its appeal against the judgment of 11 October 2004 was rejected by the Appeal Court on 18 November 2004. It appears that the Circuit Court upheld these two decisions on 15 November 2005.

153. On 19 November 2004 the bailiffs instituted enforcement proceedings in respect of the Tax Assessment 2001 in part relating to penalties. The company was to pay RUB 40,607,549,520 in penalties (approximately EUR 1,139,797,051).

(iii) Seven percent enforcement fee in respect of additional taxes and interest surcharges

154. On 20 September 2004 the bailiffs decided to impose a seven percent enforcement fee in respect of the company's failure to abide by the 2001 Tax Assessment in the part relating to taxes and interest surcharges. The applicant company was to pay RUB 5,549,574,880.78 (approximately EUR 155,693,193)

155. The resolution was served on the applicant company on 1 October 2004.

156. On 29 October 2004 the City Court examined and dismissed the challenge of the decision of 20 September 2004 as groundless.

157. It does appear that the company pursued appeal proceedings.

158. On 1 December 2004 the company appealed in cassation against the judgment of 29 October 2004.

159. The appeal was rejected by the Circuit Court on 3 March 2004.

(iv) Seven percent enforcement fee in respect of penalties

160. On 9 December 2004 the bailiff decided to impose a seven percent enforcement fee in respect the company's failure to abide by the 2001 Tax Assessment in the part relating to penalties. The company was to pay a seven percent enforcement fee of RUB 7,102,488,295 or approximately EUR 190,077,377.

161. On 23 December 2004 the company challenged this decision in court.

162. On 3 February 2005 the City Court dismissed the action.

163. The applicant company failed to appeal the judgment of 3 February 2005.

164. The Circuit Court upheld the judgment of 3 February 2005 on 16 June 2005.

(iv) Overall debt in respect of 2001

165. Overall, in respect of 2001 the applicant company was ordered to pay RUB 132,539,253,849.78 (approximately EUR 3,710,836,129).

3. Proceedings in respect of the applicant company's tax liability for the year 2002

(a) Tax Assessment 2002

166. On 29 October 2004 the Ministry produced an audit report in respect of the applicant company's activities for the year 2002. The report was received by the company on 1 November 2004.

167. On 16 November 2004 the Ministry took a decision to levy further tax liabilities, this time in respect of the year 2002 ("the 2002 Tax Assessment"). The applicant company was to pay RUB 90,286,552,485 (approximately EUR 2,425,825,387) in taxes, RUB 31,485,110,355.58 (approximately EUR 845,944,140) in default interest and RUB 72,040,907,796 (approximately EUR 1,935,600,133) in penalties.

168. The decision established the use of the same scheme of tax evasion (in respect of profit tax, value-added tax, corporate property tax and motorway users' tax) as in the decisions concerning the years 2000 and 2001. It mentioned that the company had carried out its activities through OOO Ratmir, OOO Alta-Treid, ZAO Yukos-M, OOO Yu-Mordoviya, OOO Ratibor, OOO Petroleum treyding, OOO Evoyl, OOO Fargoyl, most of which had also been used by the company in previous years. The entities in question, acting in breach of Article 575 of the Civil Code, which prohibits grants and gifts between independently functioning commercial entities, transferred the entirety of their profits unilaterally to a fund owned and controlled by the applicant company. The decision mentioned that the transfers had been wrongly reflected in the applicant company's financial accounting, that the company had failed to explain the origin of these funds and failed to take these sums into account for tax purposes. Accordingly, the applicant company failed to pay taxes in respect of these amounts.

169. The decision mentioned several other mistakes in the company's tax declarations. In particular, the tax in respect of the company's securities transactions was wrongly calculated, there were many general mistakes in the company's financial accounting, there were some mistakes in the company's request for reimbursement of the VAT on export operations (on one occasion the company failed to submit the required sales contract; it also mentioned one contract but received the money on the basis of a different contract; on some occasions the company failed to submit documents proving customs clearance, indicated wrongly calculated sums, made multiple mistakes in VAT export documents). There were further multiple mistakes in tax deductions in respect of the internal VAT.

170. The decision also established that the company had used sham entities to lower its group taxes, that the entities and the company's subsidiaries had entered into transactions with reduced prices, that on some occasions the company had declared the extracted oil as "hydrocarbon liquid" in order to lower the applicable price even further, that there were no cash transactions between the entities and subsidiaries and that the company's own promissory notes and mutual offsetting had been used instead and that the whole set-up, which had no economic purpose other than tax evasion, had resulted in massive tax evasion by the applicant company. The decision also noted that use of tax concessions in the Republic of Mordoviya and the Evenk Autonomous District by the sham entities had been unlawful, because they had failed to qualify for the exemptions and also because they had been sham companies. The decision was very detailed in respect of the composition and all activities of the sham entities: the Ministry analysed the entirety of their activities month by month.

171. The applicant company had until 17 November 2004 to meet the debts voluntarily.

(b) Enforcement measures relating to the 2002 Tax Assessment

(i) Enforcement of additional taxes and interest surcharges

172. By decision of 18 November 2004 bailiffs proceeded to enforcement of the decision of 16 November 2004 in so far as it related to additional taxes and interest surcharges.

173. It appears that the City Court examined and, in the most part, rejected the applicant company's appeal on 23 December 2004 for similar reasons as those mentioned in relation to the tax assessment for 2000. The court declared the Ministry's conclusions partly unfounded and reduced the company's tax liability by RUB 325,628,742 (approximately EUR 8,752,543), its default interest payments by RUB 98,515,758 (approximately EUR 2,647,995) and the penalty by RUB 851,419,688 (approximately EUR 22,885,227).

174. This decision was upheld by the Appeal Court on 5 March 2005 and the Circuit Court on 30 June 2005.

175. On 28 December 2004 the applicant company also appealed against the Ministry's decision in respect of the year 2002 in so far as it had ordered that the tax debts be collected directly.

176. It appears that on 7 February 2005 the City Court examined and rejected the claim as unfounded. The judgment was upheld on appeal on 4 April 2005. The Circuit Court upheld the decisions of the lower courts on 15 June 2005.

(ii) Enforcement of penalties

177. In so far as the 2002 Tax Assessment related to penalties, the Ministry applied to the City Court on 22 November 2004.

178. On an unspecified date the City Court granted the Ministry's action.

179. On 28 March 2005 the company appealed against the judgment.

180. The outcome of these proceedings is unclear.

(iii) Seven percent enforcement fee in respect of additional taxes and interest surcharges

181. On 9 December 2004 the bailiffs decided to impose a seven percent enforcement fee in respect of the company's failure to comply voluntarily with the 2002 Tax Assessment in the part relating to additional taxes and surcharge interests.

182. On 23 December 2004 the company appealed against this decision in court.

183. On 3 February 2005 the City Court judgment dismissed the appeal.

184. It does not appear that the company submitted an appeal in cassation against that judgment.

(iv) Overall debt in respect of 2002

185. Overall in respect of the year 2002 (excluding seven percent enforcement fee), the applicant company was ordered to pay RUB 192,537,006,448.58 (approximately EUR 4,344,549,434).

(v) Written information report communicated by ZAO PricewaterhouseCoopers Audit to the applicant company's management in respect of the year 2002

186. In their observations of 15 April 2005 the Government submitted a copy of a report communicated to the applicant company's management by its auditor ZAO

PricewaterhouseCoopers Audit. The applicant company did not comment on the contents of the report.

187. In contrast to "ordinary" audit reports, which were made public, the internal information report was produced exclusively for the information of the company's management.

188. The report noted specifically that the company's "Fund for Financial Support of the Production Development of OAO Neftyanaya kompaniya YUKOS" was in breach of the domestic law in that the relevant legislation disallowed unilateral transfers and gifts between commercial entities. It also noted that the company's accounting policy in respect of the operations involving promissory notes had been incompatible with the legislation in force and provided a distorted view of the company's activities.

4. Proceedings in respect of the applicant company's tax liability for the year 2003

(a) Tax Assessment 2003

189. By a decision of 6 December 2004 the Ministry levied tax liabilities for the year 2003 ("the 2003 Tax Assessment"), consisting of RUB 86,228,187,852 (approximately EUR 2,327,114,103) in taxes, RUB 15,235,930,657.66 (approximately EUR 411,185,136) in default interest and RUB 68,939,326,976.4 (approximately EUR 1,860,524,778) in penalties.

190. The decision established that the company was guilty of having evaded taxes (in particular, value-added tax, profit tax and advertising tax) by using the same arrangement as in previous years. The decision mentioned the following entities registered either in the Republic of Mordoviya or the Evenk Autonomous District: OOO Yu-Mordoviya, ZAO Yukos-M, OOO Alta-Treyd, OOO Ratmir, OOO Energotreyd, OOO Makro-Treyd, OOO Fargoyl, and OOO Evoyl. It was alleged that the entities were sham and that they had made unilateral transfers to the applicant company, in breach of Article 575 of the Civil Code, that the company had failed to reflect the transferred amounts as its profits, to account for them and to pay taxes in this connection and that the company had used lowered prices to avoid the payment of taxes. The decision made a detailed contract-by-contract analysis of the transactions of the sham entities.

191. The decision also mentioned that some of the company's expenses were unjustifiably deducted from the company's taxable income, that the company failed to account for some of its operations with promissory notes, that there were some mistakes in calculation of the company's VAT in operations and that the company had evaded payment of advertising tax in Moscow.

192. The applicant company had one day to comply with the decision, until 7 December 2004.

(b) Enforcement measures relating to the 2003 Tax Assessment

(i) Enforcement of additional taxes and interest surcharges

193. On 9 December 2004 the bailiffs proceeded to enforcement of the decision of 6 December 2004 in so far as it related to taxes and interest surcharges.

194. It appears that on 28 April 2005 the City Court dismissed the company's challenge of the 2003 Tax Assessment in the part relating to additional taxes and surcharge interests. In respect of the company's request to reimburse the export VAT on operations conducted by the sham entities, the court noted the request was unsubstantiated and also lodged out of time. In particular, the company had failed to submit a proper claim with monthly calculations and

evidence that the goods in question had indeed been exported. The court also addressed the company's argument that Article 75 (3) of the Tax Code prevented the authorities from levying the interest surcharges. It noted that the provision in question only applied to cases in which the sole reason for the taxpayer's inability to pay tax debts was the seizure of its assets and cash funds. On the facts, the applicant company was unable to pay because it had insufficient funds and not because its assets were frozen. The court concluded that the company's argument was unfounded.

195. The judgment was upheld on appeal on 16 August 2005.

196. The applicant company appealed on cassation.

197. On 5 December 2005 the Circuit Court upheld the decisions of the lower courts.

(ii) Enforcement of penalties

198. On 17 February 2005 the Ministry applied to the City Court to collect the fines mentioned in the 2003 Tax Assessment.

199. The outcome of these proceedings is unclear.

(iii) Overall debt in respect of the year 2003

200. Overall, in respect of 2003 (excluding the seven percent enforcement fee) the applicant company was ordered to pay RUB 170,403,445,486.06 (approximately EUR 4,598,824,017).

5. Forced auctioning of OAO Yuganskneftegas

201. On 20 July 2004 the Ministry of Justice announced the forthcoming evaluation and sale of OAO Yuganskneftegas as a part of its ongoing enforcement procedures.

202. On 22 July 2004 the applicant company announced that “the company management [was] currently making every effort to raise additional funds in order to repay, as soon as possible, the tax liability and to finance current operations. However, should those efforts prove unsuccessful and Yuganskneftegas [be] sold, in the present circumstances, the management of the Company would be compelled to announce the bankruptcy of Russia's largest oil company”.

(a) Valuation report of 17 September 2004

203. On 17 September 2004 the valuation commissioned by the bailiffs and the Ministry of Justice from Dresdner Kleinwort Wasserstein, the investment branch of Dresdner Bank AG (working in Russia as ZAO Dresdner bank), for the purposes of the enforcement proceedings, estimated that 100 percent of shares in OAO Yuganskneftegas was worth between USD 15.7 and 18.3 billion, excluding the pending and probable tax liabilities of this entity.

204. The report evaluated 100 percent of the price of OAO Yuganskneftegaz as a separate entity and, having deduced its corresponding obligations, calculated the cost of its shares, on the basis of which it would be possible to calculate the price of one share in OAO Yuganskeftegaz.

205. It was specifically mentioned in the report that the valuation was not an opinion concerning the attainable price in the event of the sale of OAO Yuganskneftegaz or any kind of recommendation concerning the starting bid of the auction in the event of the sale of

Yuganskneftegaz by the Ministry of Justice or any other State institution, or any recommendation concerning particular actions to be undertaken by the Ministry of Justice with a view to levying the judicially determined or estimated amount of the applicant company's tax debt.

206. Among the basic risks affecting the price of OAO Yuganskneftegaz, the report mentioned the tax claims, the validity of oil extraction licences, future oil prices, export quotas etc. The report also mentioned that the price of OAO Yuganskneftegaz as a part of the applicant company could be substantially different from the price of OAO Yuganskneftegaz as a separate entity. The report also mentioned various valuations of OAO Yuganskneftegaz made by third parties, including investment institutions and banks, and ranging from USD 9 to 22 billion. It also mentioned that, because of the size of OAO Yuganskneftegaz, not many buyers would be financially capable of acquiring it.

207. The valuation (between USD 15.7 and 18.3 billion) did not take account of already pending and probable tax claims against OAO Yuganskneftegaz. If and when lodged, these claims would "substantially influence the assessment" of the equity of OAO Yuganskneftegaz. The claims already announced (as on that date) were USD 951.3 million.

208. To carry out the valuation, the report used the following three methods: the method of discounted cash flows, a method based on the analysis of comparable transactions, and a method based on the analysis of comparable publicly-held companies.

209. The report also specifically noted that:

"the decision concerning the starting bid of the auction is a tactical one and should strike a balance between the desire to reach the highest price on the one hand, and the need to attract the maximum number of potential buyers on the other. Because of this, the starting bid is most likely to be different from the assessment of the price."

(b) Service of the valuation report on the applicant company on 13 October 2004

210. A copy of the valuation report was served on the applicant company on 13 October 2004.

211. It does not appear that the applicant company contested the valuations made in the report before the courts.

212. On 21 October 2004 the bailiffs confirmed to the Ministry that they had collected 79,584,690,127 RUB (approximately 2,183,447,331 euros).

(c) The company's reply of 4 November 2004

213. On 4 November 2004 the applicant company responded to the valuation report. They disagreed with the decision to valuate and sell OAO Yuganskneftegaz, and would have preferred to sell its other assets first. The applicant company informed the bailiffs that it had already honoured a major part of the debt and that the remaining sum was USD 2.5 billion. According to the company, it would be more reasonable to lift the seizure and let it dispose of its minor assets in order to honour the remaining debt.

214. As regards Yuganskneftegas, the company referred to independent valuations by ZAO Dresdner Bank and JP Morgan PLC, valuing the subsidiary at "no less than USD 14 billion" and "between USD 16.1 billion and USD 22.1 billion, including tax liabilities" respectively.

215. The letter mentioned that the Ministry had brought tax claims against OAO Yuganskneftegaz totalling USD 2.903 billion.

(d) The bailiffs' decision of 18 November 2004

216. On 18 November 2004 the bailiffs noted that the company's debt to the Ministry on that date was RUB 204,902,386,620 (approximately EUR 5,506,781,584 or USD 7,147,250,717). Having referred to sections 4, 46 (6), 54 (2) and 88 of the Enforcement Proceedings Act, the bailiffs decided to sell 78.79 percent of the shares in OAO Yuganskneftegas at an auction which would take place on 19 December 2004. The published minimum bidding price for 78.79 percent of the shares in OAO Yuganskneftegas was RUB 246,753,447,303.18 (approximately USD 8.65 billion).

217. The sale was conferred on the Russian Fund of Federal Property ("the Property Fund"), a specialised State Institution in charge of organising sales of federal property and the property of those who had debts towards the State. The Fund was to sell the shares in the quantity necessary to meet the debt.

(e) Court action against the decision of 18 November 2004

218. The decision of 18 November 2004 was challenged in court on 26 November 2004.

219. It appears that on 3 December 2004 the City Court rejected the appeal against the decision of 18 November 2004.

220. Apparently, the applicant company appealed in cassation against the judgment on 11 January 2005.

221. It appears that on 21 January and 3 May 2005 the judgment was upheld on appeal and in cassation respectively.

222. It appears that the applicant company argued that the valuation report had failed to give a market valuation of the asset and that the decision of 18 November 2004 failed to mention a specific price for OAO Yuganskneftegaz. In response, the courts noted that 43 ordinary and 13 privileged shares in OAO Yuganskneftegaz had been seized by the bailiffs in satisfaction of the company's liability, that the shares had been valued by ZAO Dresdner Bank and that the applicant had been informed about all of the bailiffs' actions in the course of the enforcement proceedings. They also noted that the seizure of shares in OAO Yuganskneftegaz had previously been declared lawful, that the valuation by ZAO Dresdner Bank was not contested by the applicant in accordance with the special procedure provided for by the legislation in force, and that the bailiffs had properly indicated the amount of the company's debt and requested the Fund to sell the amount of shares necessary to satisfy the debt.

(f) Announcement about the sale of OAO Yuganskneftegaz

223. In the meantime, on 19 November 2004, the Russian Gazette, an official newspaper of the Government, published the announcement about the sale of 78.79 percent of shares in OAO Yuganskneftegaz at a public auction organised by the Property Fund. The only two conditions for participating in the auction were to file an application between 19 November and 18 December 2004 and to make a deposit payment.

224. It appears that OOO Gazpromneft, ZAO Intercom and OAO First Venture Company filed applications to bid at the auction.

225. The media reported that OAO Gazprom, a parent company of OOO Gazpromneft, had begun negotiating a financing arrangement with a consortium of international banks to finance its bid at the auction.

(g) The applicant company's application for bankruptcy in the United States of America and its request for injunctive relief

(i) Filing of bankruptcy petition and request for injunctive relief

226. On 14 December 2004 the applicant company filed a voluntary petition under Chapter 11 of the U.S. Bankruptcy Code in the U.S. Bankruptcy Court for the Southern District of Texas, Houston Division ("the U.S. Bankruptcy Court").

227. Simultaneously, the applicant company filed a request for injunctive relief, pursuant to Section 105 of the U.S. Bankruptcy Code in order, among other things, to enforce the automatic stay set out in Section 362(a) of the Bankruptcy Code by enjoining certain parties from participating in the Yuganskneftegaz Auction.

(ii) Scope of automatic stay

228. Under U.S. law, an automatic stay went into immediate effect when the company filed for bankruptcy. The automatic stay protected the company's assets by preventing the creditors from collecting claims that arose prior to the bankruptcy filing or from taking "possession" or "control" of the applicant's property covered under the filing.

(iii) Temporary restraining order of 16 December 2004

229. On 16 December 2004, having examined the company's request, the U.S. Bankruptcy Court issued a temporary restraining order barring certain specific entities from taking any actions with respect to the shares in OAO Yuganskneftegaz, including participation in the auction.

230. The entities mentioned in the order were (a) the three companies registered to bid at the Auction, including OOO Gazpromneft, ZAO Intercom and OAO First Venture Company, (b) six western financial institutions that had announced their intention to fund OOO Gazpromneft's bid at the auction (ABN Amro, BNP Paribas, Calyon, Deutsche Bank, JP Morgan and Dresdner Kleinwort Wasserstein) and (c) those persons in active concert or participation with them.

(iv) The outcome of bankruptcy proceedings in the U.S.

231. On 24 February 2005 the U.S. Bankruptcy Court dismissed the applicant company's petition for bankruptcy with reference to Section 1112 (b) of U.S. Bankruptcy Code which gave the court discretion to dismiss a case "in the best interest of the creditors and the estate".

232. The court noted that most of the applicant company's assets were oil and gas within Russia, so that the court's ability to carry out a re-organization without the cooperation of the Russian government was extremely limited, that the applicant company sought to substitute U.S. law in place of Russian, European Convention and/or international law, that the applicant company had commenced proceedings in other *fora*, including the European Court of Human Rights, and the court did not feel that it was uniquely qualified or more able that these other *fora* to consider the

issues presented. Lastly, the court noted that the vast majority of the business and financial activities of the applicant company continued to occur in Russia and that the applicant company was one of the largest producers of petroleum products in Russia. The court held that "the sheer size of [the applicant company] and its impact on the entirety of the Russian economy weighs heavily in favour of allowing resolution in a forum in which participation of the Russian government is assured".

(h) Auction of 19 December 2004

233. On 19 December 2004 the Property Fund auctioned 78.79 percent of the shares in OAO Yuganskneftegaz. It appears that media reporters were able to attend the auction.

234. There were two participants in the auction, OOO Baykalfinansgrup and OOO Gazpromneft. OOO Baikalfinansgrup, the only bidder in the auction, made two bids, first of USD 8.65 billion and then of USD 9.3 billion. It appears that whilst taking part in the auction OOO Gazpromneft was prevented from bidding by the injunction of 16 December 2004 (see paragraphs 229-230 above).

(i) The decisions and reports concerning the outcome of the auction

235. On 21 December 2004 the Ministry of Justice issued a report accepting that the Property Fund had properly carried out the services due under the contract of 18 November 2004.

236. On 21 December 2004 the Property Fund publicly reported the sale of the shares in OAO Yuganskneftegaz.

237. On 31 December 2004 the bailiffs issued a resolution confirming the results of the auction. The resolution stated that OOO Baykalfinansgrup had won the auction for 43 shares in OAO Yuganskneftegaz (78.79 percent of its stock) for RUB 260,753,447,303.18 (approximately EUR 6,896,341,940 or USD 9,396,960,842). By the time the decision was taken, the money had already been transferred to the bailiffs.

(j) Takeover of OOO Baykalfinansgrup by OAO Rosneft

238. According to press reports of 31 December 2004, OAO Rosneft, a State-owned oil company, acquired OOO Baikalfinansgrup and thus took control of OAO Yuganskneftegas.

(k) Court proceedings in connection with the auction

239. It appears that on 31 May 2005 the applicant company filed an action in the City Court to annul the auctioning of 43 shares in OAO Yuganksneftegas and the deed of sale. It also claimed damages in excess of RUB 324 billion.

240. The outcome of these proceedings is unclear.

6. Bankruptcy proceedings

241. It does not appear that any enforcement measures took place in respect of the applicant company after the auctioning of OAO Yuganskneftegaz and until September 2005.

242. On 8 September 2005 a consortium of foreign banks represented by the French bank Société Générale ("the banks") filed an application with the City Court for recognition and

enforcement of an English High Court judgment ordering the applicant company to re-pay the contractual debt of USD 482 million.

243. On 22 September 2005, at the banks' request, the bailiffs ordered to seize the applicant company's property.

244. In October 2005 the applicant company challenged this order.

245. On 30 November 2005 the City Court rejected the appeal as groundless.

246. The first-instance judgment was upheld by the Appeal Court and the Circuit Court on 27 February and 12 May 2006 respectively.

247. In the meantime, on 28 September 2005, the City Court allowed recognition and enforcement of the English High Court judgment.

248. On 5 December 2005 the Circuit Court granted the applicant company's cassation appeal and quashed the judgment of 28 September 2005. It remitted the case for a fresh hearing.

249. On 21 December 2005, having re-examined the case, the City Court allowed the banks' claims.

250. On 25 January 2006 the applicant company appealed against the judgment of 21 December 2005.

251. On 2 March 2006 the Circuit Court dismissed the appeal.

252. It appears that on 13 December 2005 the banks reached an agreement with the Rosneft company to sell to the latter the applicant company's debt to the banks.

253. On 9 March 2006 the banks lodged a petition with the City Court to declare the applicant company bankrupt.

254. On 14 March 2006 the banks notified the City Court about the decision to sell the debts owed by the applicant company to Rosneft.

255. On 28 March 2006 bankruptcy proceedings were initiated against the applicant company upon the banks' petition. It appears that the Ministry decided to join the proceedings as one of the bankruptcy creditors in respect of remaining tax debts of the 2000-2003 Tax Assessments still owed by the applicant company.

256. On 29 March 2006 the City Court substituted Rosneft in the place of the banks as a bankruptcy creditor. By the same decision the court imposed a supervision order on the applicant company and appointed Mr Eduard Rebgun as the company's interim receiver. It also prohibited the company's management from disposing of its property over a value of RUB 30 million.

257. On 6 and 7 April 2006 the company appealed against the decision of 29 March 2006 on all three points.

258. On 27 April 2006 the Appeal Court dismissed the appeals.

259. On 21 June 2006 the applicant company appealed against the lower courts' decisions to the Circuit Court. The outcome of these proceedings is unclear.

260. On 21 April 2006 the Ministry submitted a claim to the City Court, seeking to be included in the list of the company's creditors for the amount of 353,766,625,235.66 RUB (approximately EUR 10,435,809,153), along with 2,118 pages of documentation. The claim was the company's reassessed tax liability for the year 2004.

261. In June 2006 the City Court made a number of rulings concerning the formation of the list of creditors. In particular, on 1 and 7 June 2006 the City Court held hearings on the claim. On 14 June 2006 the final hearing of the claim was held. The court allowed the claims in its entirety and dismissed the application for stay.

262. On 21 June 2006 the City Court delivered a full version of the judgment of 14 June 2006. It decided to include the Ministry in the list of the company's creditors for the amount claimed and refused to stay the proceedings.

263. On 3 and 6 July the applicant company appealed against the judgment of 14 June 2006 concerning the allowed claims.

264. On 4, 7 and 11 August 2006 the Appeal Court heard the company's arguments.

265. On the latter date the Appeal Court dismissed the company's appeal.

266. It appears that on 18 August 2006 the Appeal Court delivered a full version of the appeal decision.

267. On 25 July 2006 the Committee of Creditors rejected the rehabilitation plan offered by the management and recommended the company's liquidation.

268. On 31 July 2006 the applicant company appealed against this decision.

269. On 4 August 2006 the City Court examined the company's situation, declared that the company was bankrupt and dismissed its management. The court appointed Mr E. Rebgun as the applicant company's trustee. It also refused the company's request to stay the proceedings.

270. Both parties appealed on 15 August 2006

271. The judgment was upheld on appeal and entered into force on 26 September 2006.

272. It appears that on 22 August 2006 Mr E. Rebgun revoked the authority of all counsel appointed by the company's previous management.

273. On 12 November 2007 the City Court examined the applicant's company's situation, heard the report of Mr E. Rebgun and decided to terminate the liquidation proceedings. The applicant company ceased to exist.

274. On 21 November 2007 a certificate was issued to the effect that the applicant company had been liquidated on the basis of the court decision.

275. It appears that a company Glendale Group Limited and Yukos Capital S.A.R.L. contested the decision of 12 November 2007 before the Appeal Court. The appeal of Glendale Group was

declared inadmissible for the failure to submit it on time, whilst the appeal of Yukos Capital S.A.R.L. has been accepted for examination. The hearing in this respect was scheduled by the Appeal Court on 19 November 2007.

276. The outcome of these proceedings remains unclear.

B. Relevant domestic law and practice

1. Tax liability

(a) General provisions

277. According to Article 57 of the Constitution of Russia, everyone is liable to pay taxes and duties established by law.

278. Article 44 of the Tax Code of 31 July 1998 No. 146-FZ (as in force at the relevant time) states that an obligation to pay a tax or a duty arises, alters or ceases in accordance with the present Code and other legislative acts on taxes and fees.

279. Articles 45 and 80 of the Tax Code provide that, as a general rule, taxpayers must comply with their obligation to pay a tax on their own initiative, and define a tax declaration as the written statement of taxpayers on their revenues and expenses, sources of revenue, tax benefits and the calculated sum of the tax, as well as other data related to calculation and payment of the tax.

280. Under Article 45, in the event of non-payment or incomplete payment of the tax in due time, the tax authorities may levy the tax liability directly from the taxpayer's bank account.

281. Article 11 (2) of the Tax Code defines a branch of an organisation as a geographically separate department, with stable employment posts.

(b) Tax inspections

282. Under Articles 82 and 87 of the Tax Code, the tax authorities may carry out documentary and on-site tax inspections of taxpayers. Such inspections may cover only the three calendar years of the taxpayer's activity directly preceding the year of inspection. In exceptional cases the authorities are allowed to carry out repeated on-site tax inspections. Such cases include, among other things, on-site inspections conducted by way of supervision of activities of the tax authority that conducted the initial audit (Article 87 (3) of the Code).

283. Under Article 100 (5) of the Tax Code a taxpayer has two months to file a detailed reply to the report drawn up by the tax authorities on the outcome of the tax inspection.

2. Applicable taxes

(a) General provisions

284. Article 38 of the Tax Code provides that objects of taxation may be the operations of retailing of goods, works and services, property, profit, income, value of retailed goods, works and services or other objects having cost, quantitative or physical parameters on the existence of which the tax legislation bases the obligation to pay tax.

285. Article 39 of the Code defines retailing of goods, works and services as, *inter alia*, the transfer (including exchange of services, works and goods) in return for compensation of property rights in respect of goods and results of works from one person to another, as well as the rendering of services from one person to another in exchange for compensation.

286. Article 41 of the Code defines profits as economic gains in monetary form or in kind.

(b) Value-added tax

(i) Before the entry into force of the Second Part of the Tax Code on 1 January 2001

287. Section 3 of RF Law No. 1992-1 of 6 December 1991 "On Value-Added Tax" (as in force at the relevant time) subjects to value-added taxation, among other things, the turnover generated by the retailing of goods, works and services on the territory of Russia, the rates of which range between 10 percent and 20 percent. Under section 5 of the Law, exported goods are exempt from payment of the tax. The exemption becomes effective only if the taxpayer properly justifies the claim. Until these documents are filed, the tax remains payable under the non-export rate.

288. Letter No. B3-8-05/848, 04-03-08 of the State Tax Service of Russia and the Ministry of Finance, dated 21 December 1995, stated that taxpayers had to file the following documents to justify the tax exemption: a contract concluded between the legal personality taxpayer registered in Russia with its foreign partner, proof of payment in respect of the goods, a customs declaration bearing an appropriate mark of the customs body confirming the export of goods from the customs territory of Russia.

(ii) After the entry into force of the Second Part of the Tax Code on 1 January 2001

289. In respect of the value-added tax ("VAT"), the applicable tax rate is zero percent if the traded goods are placed in an "export" customs regime and physically removed from the customs territory of the Russian Federation (Article 164 (1) of the Tax Code). In addition, the taxpayer may claim a refund of the "incoming" VAT already paid in respect of the exported goods.

290. For the zero rate to become effective and in order to claim the VAT refund, it is necessary to justify the claim by filing the following documents with the tax authorities (Article 165 of the Tax Code): the export contract concluded between the taxpayer and the foreign buyer, a bank statement confirming receipt of funds from the foreign buyer by a Russian bank duly registered with the tax authorities, a relevant customs declaration bearing the stamp of the customs bodies confirming the export of the goods from the customs territory of Russia, and copies of relevant transport bills and shipping documents bearing the stamps of the customs bodies confirming the export of goods from the customs territory of Russia.

291. The relevant documents should be filed with the competent tax authority within 180 days from the date of the customs clearance of the goods in question (Article 165 (9) of the Tax Code). Until these documents are filed, the tax remains payable under the non-export rate.

(c) Motorway fund tax

292. Section 5 (2) of RF Law No. 1759-1 of 18 October 1991 "On motorway funds in the Russian Federation" provides for a one percent motorway users' tax from the turnover of the retail of goods, works and services, payable by all motorway users. Section 4 also makes subject to a 25 percent tax the amount of retailing (excluding VAT) of the companies trading fuels and lubricants.

293. This tax was abolished from 1 January 2003.

(d) Tax for the maintenance of housing fund and objects of socio-cultural sphere

294. Section 21 ("Ch") of RF Law No. 2118-1 of 27 December 1991 "On the foundations of the tax system" imposes a tax of up to one-and-a-half percent for the maintenance of the housing fund and socio-economic development.

295. This tax was abolished with the entry into force of the Second Part of the Tax Code on 1 January 2001.

(e) Corporate property tax

(i) Before the entry into force of the Second Part of the Tax Code on 1 January 2001

296. Section 2 (1-2) of RF Law No. 2030-1 of 13 December 1991 "On corporate property tax" provided for a tax of up to two percent in respect of organisations' property.

(ii) After the entry into force of the Second Part of the Tax Code on 1 January 2001

297. Chapter 30 of the Tax Code provides for a tax of up to 2.2 percent in respect of organisations' property. The exact rate is defined by the regional authorities.

(f) Profit tax

(i) Before the entry into force of the Second Part of the Tax Code on 1 January 2001

298. Law No. 2116-1 of 27 December 1991 "On profit tax on enterprises and organisations" (sections 2 and 5) provided for a profit tax, the rate of which could vary depending on the type of taxable activity and the rate fixed by the local authorities. The mandatory rate to be transferred to the Federal budget was eleven percent.

(ii) After the entry into force of the Second Part of the Tax Code on 1 January 2001

299. Chapter 25 of the Tax Code provides for a profit tax of up to 24 percent (6.5 percent to be transferred to the Federal budget and the rest to the regional budget).

(g) Advertising tax

300. Section 21 (1) "z" of RF Law No. 2118-1 of 27 December 1991 "On the foundations of the tax system" imposed a tax in respect of the cost of advertisement services.

301. This tax was abolished from 1 January 2005.

3. Tax advantages

(a) General provisions

302. Article 56 of the Tax Code defines a tax benefit as a full or partial exemption from the payment of taxes, granted by the tax legislation.

(b) Requirements relating to registration of taxpayers

303. Under Article 83 (1) of the Tax Code, taxpayers which are legal entities are required to register with the tax authorities at their headquarters (location of their executive bodies), at the location of their branches and at the location of real estate and vehicles belonging to them.

304. Special rules of registration applied in respect of large taxpayers, including the applicant company.

305. By Decree No. АП-3-10/399 of the Tax Ministry, dated 15 December 1999, such taxpayers were required to register at their main location, at the location of their branches and at the location of real estate and vehicles belonging to them, in certain specific tax offices (inter-district level or as specifically indicated by the Ministry).

306. Annex 3 to the Decree contains the form "On subsidiary and dependant companies and subsidiary enterprises", to be filled in by the taxpayer. During registration the taxpayer is required to indicate all of its subsidiary and dependant companies.

307. In respect of domestic off-shore territories, according to commentators, this requirement means that in practice the taxpayer's executive body should always be physically located and functioning on the territory of the off-shore. If the taxpayer fails to comply with the requirement, the tax authorities could declare its registration void with the subsequent recovery of the entirety of the perceived tax benefits (see A.V. Bryzgalin, *Practical Tax Encyclopaedia*, Moscow, 2003-2006, Chapter 3 "Methodology of tax optimisation").

(c) Closed administrative-territorial formations (the town of Sarov in the Nizhniy Novgorod Region, the town of Trekhgornyy in the Chelyabinsk Region and the town of Lesnoy in the Sverdlovsk Region)

(i) Legal provisions

308. Under section 5 of Law No. 3297-1 of the Russian Federation "On closed administrative-territorial formations", tax concessions are provided to businesses if, *inter alia*, they have at least 90 percent of their fixed assets and conduct at least 70 percent of their activities on the territory of the respective formation (including a requirement that at least 70 percent of their average workforce be accounted for by persons permanently residing in the ZATO in question, and that at least 70 percent of their wage bill be paid to employees permanently residing in that territory).

309. Letter No. АП-6-01/505 of the Tax Ministry dated 24 June 1999 contained Methodological Directions to the tax bodies on issues of lawfulness of the use of additional tax benefits granted by local authorities in the closed administrative-territorial formations. It stated that the tax authorities ought to verify the actual presence of the taxpayer's assets on the territory in question by checking its accounting records and financial statements, and by confirming the physical location of the organisation at the indicated address and the actual functioning of the taxpayer's employees at the taxpayer's location.

(ii) Case No. A42-6604/00-15-818/01 (The Tax Ministry v. OOO Pribrezhnoe), referred to by the applicant company

310. The respondent legal entity is OOO Pribrezhnoe, registered in the closed administrative territorial formation town of Snezhnogorsk, which has a privileged tax regime. The Ministry tried unsuccessfully to contest the use of tax concessions by the respondent, by demonstrating that the entity had not been actually present at the place of its registration. The domestic court found for the respondent. They established that the entity had some assets on the territory of

Snezhnogorsk, a number of permanent employees (including a lawyer and the cleaning lady), a cash account in the local bank, which proved that the entity satisfied the criteria provided for in law.

311. The final decision in the case was taken by the Cassation Court on 5 June 2002.

(d) The Republic of Mordoviya

312. Under Law No. 9-FZ of the Republic of Mordoviya of 9 March 1999 "On the conditions of efficient use of the socio-economic potential of the Republic of Mordoviya", tax concessions are granted to taxpayers established after the entry into force of that law and whose activities meet certain conditions, including but not limited to the following:

(a) they conduct export operations, the quarterly proceeds from which account for at least 15 per cent of the business' total earnings;

(b) they engage in wholesale trade in fuel and lubricants and other types of hydrocarbon raw materials, the quarterly proceeds from which account for at least 70 percent of the business' total earnings.

313. Section 1 of the Law states that "this Law establishes concessions with the objective of creating favourable conditions for attracting capital into the territory of the Republic of Mordoviya, strengthening the socio-economic potential of the Republic of Mordoviya, developing the securities market and creating new jobs through special arrangements for the taxation of organisations".

(e) The Republic of Kalmykiya

314. Law No. 12-P-3 of the Republic of Kalmykiya of 12 March 1999 "On tax concessions for companies investing in the Republic of Kalmykiya" provides tax concessions to those who meet the following criteria:

(a) the taxpayer is not a user of mineral resources in the territory of the Republic;

(b) the taxpayer is registered with the Ministry of the Investment Policy of the Republic of Kalmykiya as an enterprise investing in the economy of the Republic;

(c) the enterprise's investment in the economy of the Republic meets the criteria established by the Ministry of Investment Policy of the Republic in accordance with this law.

(f) The Evenk Autonomous District

315. Under section 9 of Law No. 108of the Evenk Autonomous District "On specific features of the tax system in the Evenk Autonomous District" of 24 September 1998, substantially lower tax rates apply to local businesses whose activities meet certain conditions for applying the special taxation procedure set out in section 8 of that Law.

4. The use and interpretation of terms of civil legislation in tax disputes

316. Under Article 11 of the Tax Code, institutions, notions and terms of the civil legislation of Russia used in the Tax Code keep their respective meanings, unless specifically stated.

5. General principles governing the status of legal entities

(a) Presumption of independence

317. Under Article 2 of Civil Code of 30 November 1994 No. 51-FZ (as in force at the relevant time), the legal status of parties involved in civil-law transactions, the grounds for the creation of and the order of exercising the right of ownership and other property rights are defined by the civil legislation, which also regulates the contractual and other obligations.

318. The civil legislation regulates the relations between persons engaged in business activities or in those performed with their participation, on the assumption that business activity is an independent activity, performed at one's own risk, aimed at systematically deriving a profit from the use of the property, the sale of commodities, the performance of work or the rendering of services by the persons registered in this capacity in conformity with the legally-established procedure.

319. It is formally prohibited to make any unilateral property transfers (gifts, grants or gratuitous loans) between independent commercial legal entities (Articles 575 and 690 of the Civil Code). Unilateral property transfers are permitted by Article 251 (1) 11 of the Tax Code and not counted for the purposes of profit tax if they are made between associated entities, one of which holds more than 50 percent of shares in the equity of the other entity.

(b) Rules applicable to subsidiary and dependant companies

320. Article 105 of the Civil Code provides that a subsidiary company is one controlled by another company, either through ownership of the subsidiary company's shares, by virtue of a contract or by any other means.

321. The controlling company is jointly responsible for debts incurred by the subsidiary company as a result of compliance with the controlling company's instructions. The controlling company may be held vicariously responsible for a debt of the subsidiary company in the event of the latter's insolvency.

322. Article 106 of the Code provides that a company is dependant when the other company owns over 20 percent of the former company's voting stock. A company which purchases over 20 percent of the voting shares in other companies is obliged to make this information public.

323. Similar rules are established in respect of limited liability companies (*общество с ограниченной ответственностью*) by section 6 of Law No. 14-FZ on limited liability companies of 8 February 1998.

6. Definition of a property owner

324. Article 209 of the Civil Code defines an owner as the person who has the rights of possession, use and disposal of his property. In respect of his property, the owner has the right, at his will, to perform any actions not contradicting the law and the other legal acts, and not violating the rights and legally protected interests of other persons.

7. Contractual freedom and its limits

(a) Presumption of good faith and prohibition on abuse of rights

325. Articles 9 and 10 of the Civil Code provide that the parties involved in civil-law transactions are free to act contractually within the limits defined by law.

326. Article 10 (1 and 2) of the Code states specifically that parties involved in civil-law transactions are prohibited from abusing their rights. In such cases, the courts may deny legal protection in respect of the right which is being abused. Article 10 (3) establishes a refutable presumption of good faith and reasonableness of actions on the parties in civil-law transactions.

(b) Examples of the case-law of the domestic courts concerning the notion of bad faith

327. In its decision No. 138-O dated 25 July 2001 the Constitutional Court of Russia confirmed that there existed a refutable presumption that the taxpayer was acting in good faith and that a finding that a taxpayer had acted in bad faith could have unfavourable legal consequences for the taxpayer.

328. In its decision No. 168-O of 8 April 2004 the Constitutional Court noted that it would be inadmissible for bad faith taxpayers to use manipulation of the legal civil-law institutions to create and operate schemes for unlawful enrichment at the expense of the State budget.

(c) Rules governing sham transactions

(i) Statutory law

329. According to Article 153 of the Civil Code, transactions are defined as activities of natural and legal persons creating, altering and terminating their civil rights and obligations.

330. Article 166 of the Civil Code states that a transaction may be declared invalid on the grounds, established by the present Code, either by force of its being recognized as such by the court (a disputable transaction, *оспоримая сделка*), or regardless of such recognition (an insignificant deal, *ничтожная сделка*).

331. According to Article 167 of the Civil Code, insignificant transactions entail no legal consequences, apart from those relating to their invalidity, and are invalid from the moment they are effected.

332. Article 170 (2) establishes specific rules in respect of two types of insignificant transactions: 'colourable' transactions ("*мнимая сделка*", deals effected only for form's sake, without an intention to create corresponding legal consequences) and 'sham' transactions ("*притворная сделка*", deals which have been effected for the purpose of screening other transactions). This provision condemns both colourable and sham transactions as insignificant.

333. It also provides that in cases of sham transactions, the rules governing the transaction which was actually intended by the parties may be applied by a court, regard being had to the substance of this transaction (the so-called "substance over form" rule).

334. Under Article 45 of the Tax Code the power to re-characterise transactions by the taxpayer with third parties, the legal status and the character of the taxpayer's activity in tax disputes lies with the courts (as opposed to executive bodies). Section 7 of Law No. 943-1 of 21 March 1991 "On Tax Authorities in the Russian Federation" vests the power to contest such transactions and recover everything received in such transactions in favour of the State's budget.

(ii) Academic sources

335. Comments on the Civil Code (O.N. Sadikov, *Comments on the Civil Code*, Yuridicheskaya firma Kontrakt Infra-M, Moscow, 1998) state, with reference to Bulletin No. 11 of the Supreme Court of RSFSR (page 2), that any evidence admitted by the rules on civil procedure may also serve as proof of the invalidity of sham transactions.

8. General rules on price formation and price adjustment mechanism

336. Article 40 (1) of the Tax Code requires that the parties trade at market prices. It also establishes a refutable presumption that the prices agreed to by the parties correspond to market levels and are used for taxation purposes.

9. Price adjustment mechanism of the Tax Code

337. Under Article 40 (2) of the Tax Code, the tax authorities are empowered to overrule the above presumption by verifying and correcting the prices for taxation purposes. A finding that the prices were lowered usually leads to the conclusion that the taxpayer understated the taxable base and thus failed properly to pay his taxes (see Article 122 of the Tax Code below).

338. This may happen only (1) when the parties are interdependent within the meaning of Article 20 of the Tax Code; (2) in the event of barter transactions; (3) or international transactions; (4) when the prices set by a taxpayer during the same short period for certain identical types of goods, work or services fluctuate by more than 20 percent.

339. Article 20 (1) of the Tax Code defines interdependent parties as natural persons and (or) organisations whose mutual relations may influence the terms or economic results of their respective activities or the activities of the parties that they represent. In particular, (a) one organisation has a direct and (or) indirect interest in another organisation, and the aggregate share of such interest is more than 20 percent. The share accounted for by the indirect interest held by one organisation in another, through a chain of separate organisations, is defined as the product of the direct interest shares that the organisations in this chain hold in one another; (b) one natural person is subordinate to another natural person *ex officio*; (c) in the case of individuals, they are spouses, relatives, adopters or adoptees, guardians or wards under the family law of the Russian Federation.

340. Article 20 (2) of the Tax Code provides that the court may recognize persons as interdependent on other grounds, not provided for by Item 1 of this Article, if the relations between these persons may have influenced the results of transactions in the sale of goods (work, services).

10. Applicable tax offences and related penalties

341. Article 122 (1 and 3) of the Tax Code imposes a penalty of 40 percent of the unpaid tax liability on intentional non-payment or incomplete payment of the tax due, resulting from understating the taxable base. Articles 112 (2) and 114 (4) of the Tax Code provide for a 100 percent increase in this penalty in the event of a repeated offence by the same taxpayer.

342. Article 75 of the Tax Code provides for payment of an interest surcharge by taxpayers in cases of late payment of the taxes due. The interest surcharge amounts to one three-hundredth of the statutory rate for each day of the delay. The persons and entities that were unable to meet their tax liabilities in due time because their bank account was suspended by the tax authority or a court are excused from payment of the interest surcharge for the duration of the respective suspension (Article 75 (3) of the Tax Code).

11. Statutory time-bar

343. In accordance with Article 113 of the Tax Code, a person cannot be held liable for a tax offence under Article 122 of the Code if three years have expired since the first day after the end of the tax period during which the offence was committed.

12. Applicable rules on court procedure

(a) First-instance proceedings

(i) Territorial jurisdiction

344. Under Article 35 of the Code of Commercial Court Procedure of 24 July 2003 No. 95-FZ (as in force at the relevant time), claims should be brought to a court having jurisdiction over the defendant's seat.

345. Article 54 of the Civil Code defines a company's seat as the place of the company's registration, unless, in accordance with the law, the company's articles of association do not specify otherwise.

346. Decision no. 6/8 of the Plenary Session of the Supreme Court and Supreme Commercial Court of 1 July 1996 specifies that the company's seat is the location of its entities.

(ii) Interim measures

347. Under Article 91 of the Code of Commercial Court Procedure, a party may apply for proportionate security measures, including seizure of defendant's assets, pending the examination of the case by the courts.

(iii) Grace period

348. Article 213 of the Code of Commercial Court Procedure provides that in tax cases a court suit may be filed by the authorities when their demands have not been complied with voluntarily, or when the term for voluntary compliance has expired.

(iv) Time-limits for the preparation of the case at first instance

349. Article 134 of the Code of Commercial Court Procedure establishes a two-month time-limit for the preparation of the case for examination at first instance.

(v) Right to bring appeal proceedings against the first instance judgment

350. Under Article s 257 and 259 of the Code of Commercial Court Procedure participants in the proceedings have one month from the delivery of the first-instance judgment to bring appeal proceedings.

(b) Appeal proceedings

351. Under with Article 268 of the Code of Commercial Courts Procedure, an appeal court fully re-examines the case using the evidence contained in the case and any newly-presented additional evidence. In examining procedural motions of the parties, including requests to call

and hear additional witnesses or adduce and examine additional pieces of evidence, the appeal court is not bound by previous refusals of the same motions by the first-instance court.

352. Under Articles 180 and 271 of the Code, the first-instance judgment becomes enforceable on the date of the entry into force of the appeal decision confirming it.

(c) Cassation proceedings

353. In accordance with Article 286 of the Code, a cassation instance court, among other things, reviews the lower courts' decisions and checks whether the conclusions of the lower courts in respect of both law and fact correspond to the circumstances of the case.

354. Article 283 of the Code provides for a possibility of applying for a stay of enforcement of the lower courts' decisions. The applicant must show that it would be impossible to reverse the effects of an immediate enforcement of the lower courts' decisions if the cassation appeal were successful.

13. Domestic courts' case-law

(a) Court disputes involving re-characterisation of sham arrangements

(i) Case No. A40-31714/97-2-312 (the Tax Ministry v. OOO TF Grin Haus)

355. In 1996 the respondent legal entity was involved in a series of intertwined transactions with two third parties (rent contracts and loan agreements): as a result, the respondent rented a building in central Moscow to the third parties but was able to avoid inclusion of the rent payments in the taxable base of its operations by claiming that they were interest payment in respect of the loan agreement. The Ministry discovered the tax evasion scheme, re-characterised the transactions in question as rent and ordered the taxpayer to pay RUB 2 billion in back taxes.

356. The case was examined in three rounds of court proceedings by the courts at three levels of jurisdiction. Having regard to the substance of the transactions entered into by the respondent, the terms of payment and execution of the contested contracts, and, generally, to the conduct of the respondent company and third parties, the courts decided that the contractual arrangement had been sham, re-characterised the arrangement as rent and upheld the Ministry's decision.

357. In the first round of proceedings the courts adopted their decisions on the following dates: 1 December 1997, 27 January 1998 and 30 March 1998.

358. In the second round of proceedings the decisions were adopted by the first-instance and appeal courts on 26 May 1998 and 21 July 1998. The decision of the cassation court was taken on an unspecified date.

359. The third round of proceedings involved decisions on 17 November 1998, 25 January 1999 and 2 March 1999.

(ii) Case No. KA-A40/2183-98 (the Tax Ministry v. AuRoKom GMBH)

360. The respondent legal entity entered in a loan agreement with a third person; the tax authorities considered it a sham, re-characterised it as a rent contract and reassessed the tax due in respect of the gains received. The lower courts disagreed and quashed the tax authority's decision. By a decision of 17 September 1998 the cassation court quashed the lower courts'

decisions and ordered that the matter be re-examined, giving due regard to all relevant circumstances, including the substance of the transaction. The courts were to reconsider all relevant clauses in the agreement in question, the conduct of the parties and the fact of physical occupation of the allegedly rented space.

(iii) Case No. A40/36819/04-75-387 (the Tax Ministry v. OAO AKB Rossiyskiy Kapital)

361. The respondent legal entity is a bank which in 2001-2002 conducted business by buying and then reselling precious metals. To avoid the payment of full VAT on its sales operations in this respect, the bank entered into commission agreements with the sellers from which it bought the metals, in order to be considered not as the owner of the traded goods, but merely as the sellers' agent.

362. The domestic courts took account of the substance of the bank's transactions (terms of payment, actual circumstances of delivery and other relevant factual details) and, having established that in reality the bank had been buying and reselling the precious metals, re-characterised the bank's activity as sales. The courts referred to Article 209 of the Civil Code (containing the legal definition of owner) and concluded that the bank first bought the precious metals, thus becoming the "owner" within the meaning of the said provision and thereafter resold the goods. They found the bank liable for tax evasion under Article 122 of the Tax Code, ordered it to pay reassessed VAT in the amount of RUB 1,091,123,539.42, default interest of RUB 408,289.76 and penalties of RUB 436,391,918.65.

363. The first-instance judgment was taken on 3 November 2004 and upheld on appeal on 11 January 2005.

(b) Tax evasion schemes involving sham rent agreements and letter-box entities registered in the domestic offshore town of Baykonur

(i) Case No. A41 K1-13539/02 (the Tax Ministry v. OAO Ufimskiy NPZ and ZAO Bort-M)

364. OAO Ufimskiy NPZ, the main production unit of one of the biggest Russian oil companies, OAO Bashneft, physically located in the town of Ufa, used the domestic tax offshore territory situated in the town of Baykonur, the territory rented by Russia from the Republic of Kazakhstan for its space-related projects. The town's tax regime was similar to that in the closed administrative-territorial formations (see above).

365. On 1 February 2001 the respondents OAO Ufimskiy NPZ and ZAO Bort-M, a letter-box entity registered in Baykonur, entered into a rent agreement whereby the entirety of OAO Ufimskiy NPZ's production facilities were rented by ZAO Bort-M in exchange for nominal compensation. Since ZAO Bort-M was registered in Baykonur, the activity of OAO Ufimskiy NPZ enjoyed lower rates in respect of excise duties. The tax authorities discovered "the scheme" and contested it in court as sham and therefore null and void.

366. On 8 October 2002 the first-instance court had regard to the substance of the transaction and, having established that, despite the contractual arrangement, OAO Ufimskiy NPZ had continued to operate the facilities in question, that furthermore the letter-box entity was never properly registered and licensed as the operator of oil processing and oil storing facilities in accordance with the relevant law, and that the letter-box entity could not operate the facility because it had rented only one part of the production cycle (which technologically could not be split in two), that the sole aim and effect of the arrangement was tax evasion, that OAO Ufimskiy NPZ and ZAO Bort-M had "malicious intent" to evade taxes, upheld the tax authorities' claim.

367. The first instance judgment was upheld on appeal and in cassation on 17 December 2002 and 19 March 2003 respectively.

(ii) Cases nos. A41 K1-13244/02 (the Tax Ministry v. OAO Novo-ufimskiy NPZ and ZAO Bort-M), A41 K1-11474/02 (the Tax Ministry v. OAO Novo-ufimskiy NPZ and OOO Korus-Baykonur), A41 K1-137828/02 (the Tax Ministry v. OAO Ufimskiy NPZ and OOO Korus-Baykonur)

368. These case are essentially follow-ups to the previous case: OAO Novo-Ufimskiy NPZ is the second main production unit of OAO Bashneft and was also involved in exactly the same tax evasion scheme, using the sham offshore entities ZAO Bort-M and OOO Korus-Baykonur.

369. The domestic courts examined all three cases at three instances and granted the Ministry's claims.

370. The decisions in the first set of proceedings were taken on 9 October, 16 December 2002 and 13 March 2003.

371. The decisions in the second set of proceedings were taken on 19 September 2002, 5 December 2002 and 28 February 2003.

372. The decisions in the third set of proceedings were taken on 18 December 2002, 20 February 2003 and 26 May 2003.

(iii) Case No. A41 K1-9254/03 (the Tax Ministry v. OOO Orbitalnye sistemy and OAO MNPZ)

373. This case concerns exactly the same tax evasion scheme as in the previous cases, but involves OAO MNPZ, a major oil-processing facility located in Moscow and owned by the Government of Moscow, as the defendant.

374. The decisions in the case were taken on 29 October and 27 December 2004.

(c) Sham rent agreements and letter-box entities registered in the domestic offshore town of Ozersk (closed administrative-territorial formation)

(i) Case No. A55-1942/04-24 (the Tax Ministry v. OAO Novokuybyshevskiy NPZ and OOO SK-STR)

375. The case concerns the same tax evasion scheme as in the previous cases (involving the sham renting agreement), but the offshore territory at issue is the town of Ozersk and the taxpayer is OAO Novokuybyshevskiy NPZ, one of the applicant company's subsidiary oil-processing units.

376. The scheme operated from January 1999 and was prosecuted in 2004. The first-instance judgment in favour of the Ministry was taken on 13 August 2004. The court applied the same 'substance over form' approach as in the previous cases and, having assessed the defendants' conduct, the character of their relations and statements by the officials of the entities, granted the Ministry's claims and also ordered OAO Novokuybyshevskiy NPZ to pay RUB 120,688,860 in reassessed taxes.

(ii) Case No. A55-5015/2004-33 (the Tax Ministry v. OAO Novokuybyshevskiy NPZ and OOO SK-STR)

377. This is a follow-up to the previous case: in the first-instance judgment the court declared the defendants' contractual arrangement to be sham and unlawful and ordered OAO Novokuybyshevskiy NPZ to pay RUB 252,963,364 in reassessed taxes.

378. The first-instance judgment in the case, dated 19 October 2004, was upheld on appeal on 19 October 2004.

(iii) Case No. A55-1941/2004-40 (the Tax Ministry v. OAO Syzranskiy NPZ and OOO SK-STR)

379. This is a follow-up to the previous cases, involving OAO Syzranskiy NPZ, a production unit belonging to the applicant company. The rent agreement between the letter-box entity and the applicant's production unit was declared sham and voided. OAO Syzranskiy NPZ was ordered to pay RUB 30,309,119 in reassessed taxes.

380. The first-instance judgment of 18 August 2004 was upheld on appeal on 4 November 2004.

(d) Sham arrangements and VAT refund fraud

(i) Case No. A57-11990/01-5 (the Tax Ministry v. FGUP Nizhnevolzhskgeologiya)

381. The respondent legal entity is a State-owned enterprise specialising in geological exploration and identification of oil fields. In 2000 it entered into a series of deliberately unprofitable oil trading transactions with a third party, OOO Roza-Mira Processing. Since the transactions preceded the actual export of oil abroad, the two taxpayers, acting in concert, intended to obtain an artificially increased VAT refund. Having regard to the substance of the transaction and the relevant circumstances of the case, such as the terms of actual payment and execution, the courts decided that the transactions were sham, declared them null and void and refused the respondent's request for a VAT refund. In addition, the courts recovered the unpaid VAT with penalties.

382. The domestic courts took their respective decisions on 22 November 2001, 29 April and 8 July 2002.

(ii) Case No. 7543/02-16 (the Tax Ministry v. OAO Saratovneftegaz)

383. The respondent legal entity is the main production unit of OAO NK Russneft, one of the biggest Russian private oil companies, which was involved in a dispute with the Ministry over VAT refunds in respect of its export operations. The courts established that in 2001 the respondent entered into a series of transactions with a number of third parties, aimed at deceiving the Ministry and claiming an artificially increased VAT refund. The courts took account of the overall economic effect of the transactions taken in their entirety, numerous discrepancies and contradictions between the contractual arrangements, the actual movement of oil, the documents certifying the customs clearance of the goods in question, etc., and refused to recognise them as valid for the purposes of reimbursement of VAT. The courts concluded that the Ministry had been acting lawfully by refusing the respondent company's request for an export VAT refund.

384. The domestic courts took their respective decisions on 30 June 2003, 31 May and 16 September 2004.

(iii) Case No. A28-7017/02-301/21 (the Tax Ministry v. OAO Kirovskiy Shinnyy Zavod)

385. This is essential a follow-up to previous cases. The courts reached similar conclusions in respect of the respondent company and recovered RUB 5,000,000 in overpaid VAT in favour of the Ministry.

386. The decisions in the case during the first round of proceedings were taken on 19 December 2002, 19 March 2003 and 27 June 2003.

387. The second round of proceedings resulted in the first-instance judgment of 19 December 2002, the appeal decision of 19 March 2003 and the supervisory review decision of 23 December 2003.

(e) Case-law of the domestic courts concerning the invalidity of sham transactions

388. In a decision of 9 December 1997 in case No. 5246/97, the Presidium of the Supreme Commercial Court of Russia invalidated a loan secured by a promissory note and a related pay-off agreement as colourable and sham respectively. The court had regard to the terms of contracts concluded between the parties and the manner of their execution, in particular the fact that the loan had never been used by the borrower; it concluded that the transactions in question covered the sale of a promissory note and invalidated them as sham.

389. In a decision of 6 October 1998 in case No. 6202/97 the Presidium of the Supreme Commercial Court of Russia invalidated two contracts for the sale of securities and a related loan agreement as sham, having regard to the terms of contracts in question, the manner of their execution and the contractual prices. The court established that the sales contracts in fact covered the loan agreement secured by the pledge of securities and remitted the case for re-trial.

14. Enforcement proceedings in respect of a presumably solvent debtor

(a) General principles

390. The Enforcement Proceedings Act (Law No. 119-FZ) of 21 July 1997 (as in force at the relevant time) establishes the procedure by which a creditor may enforce a court award against a presumably solvent legal entity debtor.

391. Russian legislation provides for a set of special procedures in respect of presumably insolvent legal entity debtors (see section 15 below).

(b) Term for voluntary compliance with the execution writ

392. Under section 9 (3) of the Enforcement Proceedings Act, on an application by the creditor, the bailiff institutes enforcement proceedings, fixes the time-limit for enforcement of the execution writ, which may not exceed five days from the date of institution of enforcement proceedings, and notifies the debtor accordingly.

(c) Various ways to stay or delay enforcement proceedings

393. The Enforcement Proceedings Act provides for a possibility either: (a) to postpone enforcement actions for a term of up to 15 days (section 19); (b) to suspend the enforcement proceedings (section 21); or (c) to defer the execution of enforcement of a debt or arrange for payment in instalments (section 18).

394. With regard to (a), the bailiff takes the decision in the "appropriate circumstances" either on an application by the debtor or of its own motion.

395. With regard to (b), the decision may only be taken in seven enumerated cases: if the bailiff applied to the court with a request to interpret the judicial act; on a request from a debtor who has been drafted to serve in the army; if the debtor is on a long-term mission; if the debtor is hospitalised and being treated; if the actions of the bailiff are being contested in court; if the debtor himself or his property is being searched for; if the debtor or creditor are on holiday cannot be contacted.

396. As regards (c), the debtor, creditor or bailiff has the right to request the court to defer the execution of enforcement of a debt or arrange for payment in instalments if there are "circumstances impeding the enforcement actions".

(d) Seizure of the debtor's assets

397. If the debtor does not comply within the specified time limit, under section 9 (5) of the Enforcement Proceedings Act the bailiff, on an application by the creditor, has the right to make an inventory of the debtor's property and to put it under arrest.

398. Section 46 (5) of the Enforcement Proceedings Act provides that, if a debtor lacks sufficient cash funds to satisfy the creditor's claims, the debt may be levied from the other types of the debtor's property, unless the federal law states otherwise. The debtor has the right to indicate his preferred order of priority, but the final order is determined by the bailiff.

399. Section 51 of the Enforcement Proceedings Act establishes a one-month time-limit for the seizure of the debtor's property from the date of service of the ruling on the institution of enforcement procedure. The seizure is intended, *inter alia*, to secure the safety of the debtor's property and the creditor's claims, which shall be subject to a subsequent transfer to the creditor or to a subsequent sale. The seizure of securities is carried out in conformity with the procedure defined by the Government of the Russian Federation in Decree No. 934 "On the seizure of securities", dated 12 August 1998.

400. Section 59 of the Enforcement Proceedings Act establishes the order of priority in the seizure and forced sale of a debtor's property in three stages. Firstly, the bailiff sells the property which is not immediately involved in the debtor's production cycle (securities, cash on the debtor's deposit and other accounts, currency valuables, cars, office design objects, etc.); secondly, finished products (goods) and other material values not immediately involved in production and not intended to play an immediate part in it; and, thirdly, real-estate objects, as well as raw and other materials, machine-tools and equipment and other fixed assets, intended for immediate involvement in production.

401. In Ruling No. 4 "On certain questions arising out of seizure and enforcement actions in respect of corporate shares", dated 3 March 1999, the Plenary Supreme Commercial Court decided that in respect of companies which had been privatised by the State as parts of bigger holding groups through the transfer of controlling blocks of shares, the production cycle of the respective production unit should be preserved as much as possible.

(e) Enforcement fee

402. Section 81 of the Enforcement Proceedings Act penalises the debtor's failure voluntarily to comply with the writ of execution with a seven percent enforcement fee.

403. In ruling No. 13-P of 30 July 2001 the Constitutional Court of Russia described the enforcement fee as an administrative penal sanction having a fixed monetary expression, exacted by compulsion, formalised by the decision of an authorised official and levied in favour of the State. The Constitutional court struck the above provision down as unconstitutional, in so far as it did not allow the debtor to excuse his failure to comply with the writ by reference to certain extraordinary, objectively inevitable circumstances and to other unforeseeable and insurmountable obstacles beyond the debtor's control.

(f) Forced sale of arrested assets

(i) Rules concerning valuation of arrested property

404. Section 53 of the Enforcement Proceedings Act requires the bailiff to evaluate the arrested property on the basis of market prices on the date of execution of the enforcement writ. Should valuation be problematic for technical or any other reasons, the bailiff should appoint a specialist to carry out the valuation.

405. According to a Decree of the Ministry of Justice dated 27 October 1998, the bailiff is obliged to appoint a specialist to conduct the valuation if the seized property is shares or other securities (*ценные бумаги*). Under the same Decree the bailiff should inform the debtor and creditor of the resulting valuation.

(ii) General rules concerning sales of arrested property

406. Section 54 of the Enforcement Proceedings Act requires the bailiff to sell the arrested property in satisfaction of the debt within two months of the date of seizure. The sale is carried out by a specialised institution on the basis of a commission contract with the bailiff.

407. According to Government Decree No. 418 “On the Russian Fund of Federal Property” of 29 November 2001, the Fund is entrusted with the task, *inter alia*, of auctioning property seized in satisfaction of the debts owed to Russia.

(g) Distribution of levied sums and order of priority in the event of multiple claimants

408. Section 77 of the Enforcement Proceedings Act provides that, in respect of the sums levied from the debtor, including the proceeds from the forced sale of the debtor's property, the bailiffs first recover enforcement fees and all related payments and the remainder is used in satisfaction of the creditors' claims.

409. If the proceeds from the forced sale(s) are insufficient to satisfy all creditors, the following order of priority applies (section 78 of the Enforcement Proceedings Act): tort claims, employment and labour-related claims, claims made on behalf of the Pension Fund and the Social Security Fund of Russia, claims made on behalf of the budgets of various territorial levels and finally all other claims.

(h) Court appeals against bailiffs' decisions

410. Under section 90 of the Enforcement Proceedings Act, all actions by the bailiff in the course of enforcement proceedings can be appealed against within ten days from the date of proper notification of the action in question.

411. Any damage inflicted on the debtor as a result of the bailiff's omission is compensated for in accordance with the applicable legislation.

15. Enforcement proceedings in respect of an insolvent debtor legal entity

412. The enforcement of court awards and more generally debt claims against insolvent or presumably insolvent debtor legal entities is regulated by Insolvency (Bankruptcy) Act of 26 October 2002 (Law No. 127-FZ).

(a) Definition of the state of insolvency (bankruptcy)

413. Section 3 of the Insolvency (Bankruptcy) Act defines the state of bankruptcy of a legal entity as follows:

"A legal entity is regarded as being unable to satisfy the claims of creditors in respect of pecuniary obligations and (or) to fulfil its obligations in respect of mandatory payments if the respective obligations and (or) obligation are not complied with within three months of the date on which compliance should have occurred."

414. In accordance with section 4 of the Act, the obligations are, as a general rule, defined/recognised by the court on the date of examination of the bankruptcy petition.

415. Bankruptcy proceedings in respect of a legal entity may only be instituted by a court if the overall amount of debt claims exceeds RUB 100,000 (section 6 of the Act).

(b) Bringing of a bankruptcy petition

416. Under section 7 of the Act the debtor, the debtor's creditors in respect of pecuniary claims and State bodies competent to take part in bankruptcy proceedings in which the State is a creditor in respect of mandatory payments have the right to bring a bankruptcy petition.

417. Whilst the executive body of the debtor has the right to file for bankruptcy in circumstances where it is obvious that the debtor would be unable to fulfil its obligation in due time (section 8 of the Act), it has a legal duty to do so if the forced taking of the debtor's property in satisfaction of a claim would make the debtor's economic activity considerably difficult or impossible (section 9 of the Act). In this latter respect, the petition should be brought within one month from the date on which the respective relevant circumstances occurred.

418. Failure to abide by the above rules exposes the offender to civil liability action by virtue of section 10 of the Act and may also make the offender vicariously liable for any resulting damage.

(c) Examination of a bankruptcy petition

419. The admissibility of the bankruptcy petition is examined by a single-judge bench (section 48 of the Act). Having declared the petition well-founded (admissible), the judge should impose a supervision order in respect of the debtor (see below).

420. The merits of the bankruptcy petition should be examined by a court within seven months of the date of its filing (section 51 of the Act).

421. Having examined the merits of the bankruptcy petition, the court takes one of the followings decisions (section 52 of the Act): (a) it declares the debtor bankrupt and applies the liquidation procedure in respect of the debtor; (b) it rejects the request to declare the debtor bankrupt; (c) it introduces a “financial improvement order” in respect of the debtor; (d) it applies the procedure of external management; (e) it discontinues the bankruptcy proceedings; (f) it disallows the bankruptcy petition; (g) it approves the friendly settlement of the case.

(d) Various solutions available to a court in resolving a bankruptcy case

422. The following five procedures may be applicable in respect of the debtor in a bankruptcy case (section 27 of the Act): (a) order of supervision; (b) financial improvement order; (c) external management; (d) liquidation; (e) friendly settlement.

423. A supervision order is defined as the first procedure applied to the debtor (see above). It consists of securing the debtor's property, analysing its financial condition, composing the list of creditors and carrying out the first assembly of creditors (section 2 of the Act). The decision to impose a supervision order is taken by a judge in accordance with section 9 of the Act. It can be appealed against to a higher court. In the decision, the judge should also appoint an interim receiver.

424. A financial improvement order is a bankruptcy procedure aiming at re-establishing the debtor's solvency and consisting in repayment of the debts in accordance with a debt repayment schedule (section 2 of the Act).

425. External management is a bankruptcy procedure aiming at re-establishing the debtor's solvency (section 2 of the Act).

426. Liquidation is a bankruptcy procedure applied in respect of a debtor who has been declared bankrupt. It is essentially the sale of the debtor's property by a court-appointed trustee in proportionate satisfaction of the creditors' claims (section 2 of the Act).

427. Friendly settlement is a bankruptcy procedure applicable at any stage of bankruptcy proceedings, whereby the creditors and the debtor reach an agreement in respect of the debtor's liability (section 2 of the Act).

(e) Order of supervision and its consequences

428. The automatic consequences of the decision to adopt a supervision order in respect of the debtor legal entity (section 63 of the Act) are, in particular, the following: all debts due after the date of the decision are recoverable only pursuant to a special procedure; enforcement of execution writs already issued, including any pecuniary claims (with the exception of those relating to payment of salaries and tort claims) against the debtor, is halted, the seizure in respect of the debtor's property is lifted.

429. The law also introduces some restrictions in respect of operations with the debtor's shares and the actions of the debtor itself (section 64 of the Act). However, the debtor's management team remains in place, subject to limitations restricting their ability to dispose of the debtor's property above a certain value (more than five percent of the book costs of the debtor's property) or to indebt the debtor further by contracting loans, issuing guaranties or sureties, transferring debts to third parties or transferring the debtor's property for external management by a third party.

430. An interim receiver is appointed by a court in accordance with sections 45 and 65 of the Act. At this stage of proceedings, he or she has no management functions and is essentially responsible for securing the debtor's property, watching over the activities of the debtor's management, analysing the debtor's financial condition and identifying the debtor's creditors. The interim receiver is accountable to a court and is in charge of organising the first meeting of creditors.

431. For a period of thirty days from the date of publication of the supervision order notice, the creditors have the right to file their claims against the debtor (section 71 of the Act). The claims may be included in the list of creditors on the basis of the court's decision.

432. At least ten days prior to the date of termination of the supervision order, the interim receiver must organise the first meeting of creditors (section 72 of the Act). At the meeting, the creditors are competent, among other things, to decide either: (a) to introduce a financial supervision order and lodge the relevant request with the court; (b) to introduce an external management order and lodge the respective request with the court; or (c) to request the court to declare the debtor bankrupt and impose a liquidation order (section 73 of the Act).

COMPLAINTS

433. Under Article 6 of the Convention the applicant company complained that its tax liability case for the year 2000 had not been tried by a tribunal established by law because it should have been tried in Nefteyugansk.

434. The applicant company also complained with reference to this Convention provision that the Ministry had not replied to the applicant company's request to clarify the 2000 audit report.

435. The applicant company further complained that the proceedings before the domestic courts had been tainted with a number of procedural defects which made them unfair and as a whole unlawful, contrary to Article 6 of the Convention. The applicant company complained in respect of the 2000 Tax Assessment, in particular, that in the proceedings before the City Court the action had been brought by the Ministry within the grace period and that there had been no equality between the parties and no adversarial process; the applicant company's lawyers could not obtain from the Ministry answers to all the questions they wished to ask in the hearings before the court; the applicant company had not had enough time to prepare for the trial; the court had refused the applicant company's requests to adjourn the proceedings; the court had abruptly interrupted the pleadings of the applicant company's lawyer; the court gave its judgment without having studied all evidence. It also complained that in the proceedings before the Appeal Court the statutory appeal period was unlawfully abridged; the appeal court refused to adjourn the proceedings; the appeal court delayed the delivery of the reasons for its judgment and thereby prevented the applicant company from lodging a cassation appeal.

436. As regards the 2001-2003 Tax Assessments, the applicant company also complained, relying on Article 6 of the Convention, that the tax assessment had not been imposed by a court and that such extrajudicial enforcement of the tax assessment was incompatible with the right of access to court and the right to fair proceedings.

437. The applicant company next complained under Article 1 of Protocol No. 1 taken alone and in conjunction with Articles 1, 13, 14 and 18 of the Convention that that the Tax Assessments 2000-2003 had been arbitrary, unlawful and disproportionate.

In particular, the company argued that the decisions had been disproportionate in so far as they had been likely to ruin the company, and had been arbitrary, discriminatory and given in bad faith. It further submitted the whole "enforcement" of the supposed tax liability had been deliberately set up with a view to preventing the applicant company from repaying its debts. According to the applicant, the enforcement proceedings, especially the sale of OAO Yuganskneftegaz, the applicant company's most valued asset, was unlawful, arbitrary and disproportionate. It also argued that the attachment of its assets had been arbitrary and that it had prevented the applicant company from repaying the debt. Lastly, the company also argued that the prosecution for the year 2000 had been time-barred.

438. Relying on Article 7 of the Convention, the applicant company complained that the Tax Assessments had not been based on any reasonable and foreseeable interpretation of the domestic law. The applicant was allegedly the first entity to have ever been punished for the hitherto generally tolerated tax optimisation scheme. The applicant also submitted that the imposition of double penalties for the years 2001-2003 had amounted to a retrospective penalty, since it had been unforeseeable at the date when the liability had been incurred.

THE LAW

A. The Government's request to discontinue the examination of the case

439. On 26 December 2007 the Government informed the Court that by decision of the City Court of 12 November 2007 the applicant company had been liquidated (see paragraphs 273 and 274 above). The Government submitted that accordingly the Court had lost jurisdiction *ratione personae* in respect of the application and relying on Article 35 § 3 of the Convention requested to discontinue the examination of the case. In addition, they contested the authority of Mr J. P. Gardner to act continuously on behalf of the applicant company.

440. The Court notes that it is undisputed between the parties that the applicant company was not under compulsory administration in April 2004 and that the case was properly introduced with the Court by the company's counsel Mr Gardner (see, by contrast, *Capital bank AD v. Bulgaria* (dec.), no. 49429/99, 9 September 2004, and *Credit and Industrial Bank v. the Czech Republic*, no. 29010/95, §§ 43-52, ECHR 2003-XI (extracts)).

441. While under Article 34 of the Convention the existence of a "victim of a violation" is indispensable for putting the protection mechanism of the Convention into motion, this criterion cannot be applied in a rigid, mechanical and inflexible way throughout the whole proceedings. As a rule, and in particular in cases which, as the one at hand, primarily involve pecuniary, and, for this reason, transferable claims, the existence of other persons to whom that claim is transferred is an important criterion, but cannot be the only one. Human rights cases before the Court generally also have a moral dimension, which it must take into account when considering whether to continue with the examination of an application after the applicant has ceased to exist. All the more so if the issues raised by the case transcend the person and the interests of the applicant (see *Capital Bank AD v. Bulgaria*, no. 49429/99, §§ 74-80, ECHR 2005-XII (extracts), and, *mutatis mutandis*, *Karner v. Austria*, no. 40016/98, § 25, ECHR 2003-IX, with further references).

442. The Court has repeatedly stated that its judgments in fact serve not only to decide those cases brought before it but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties. Although the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on

public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of Convention States (see *Karner*, § 26).

443. The Court notes that the various alleged breaches of Articles 6, 7, 13, 14 and 18 of the Convention and Article 1 of Protocol No. 1 in the present case concern the tax assessment and enforcement proceedings in respect of the applicant company which eventually resulted in its bankruptcy and ceasing to exist as a legal person. Striking the application out of the list under such circumstances would undermine the very essence of the right of individual applications by legal persons, as it would encourage governments to deprive such entities of the possibility to pursue an application lodged at a time when they enjoyed legal personality (see *Capital Bank AD*, cited above, § 80).

444. This issue in itself transcends the interests of the applicant company and therefore the Court rejects the Government's request. The Court also accepts Mr Gardner as the valid representative of the applicant company.

B. Alleged hindrance with the applicant company's right of individual petition

445. In their submissions on admissibility of the case the applicant company complained under Article 34 of the Convention that the tax debt artificially created by the State had been likely to ruin the applicant company financially and to make it impossible for it to apply for protection to Strasbourg.

446. The Court recalls that it is of the utmost importance for the effective operation of the system of individual petition instituted by Article 34 that applicants or potential applicants should be able to communicate freely with the Court without being subjected to any form of pressure from the authorities to withdraw or modify their complaints (see *Akdivar and Others v. Turkey*, 16 September 1996, § 105, *Reports of Judgments and Decisions* 1996-IV). The applicant company alleged that the tax debt claimed by the State had been so large that the applicant company may have gone bankrupt, and, therefore, would no longer be able to apply to the Court. This allegation, however, is nothing but a restatement of their complaints under Article 1 of Protocol No. 1 and raises no substantive issues under Article 34 of the Convention.

447. The Court accordingly dismisses this part of the application pursuant to Article 35 §§ 3 and 4 of the Convention.

C. Admissibility of the complaints under Article 6 of the Convention

448. The Government contended in respect of the applicant company's complaints about the 2000 Tax Assessment proceedings that the dispute concerned the company's tax liability and that Article 6 of the Convention was therefore inapplicable.

449. The applicant company maintained that the Tax Assessment proceedings in its case had been criminal within the meaning of Article 6, given that they had involved its liability for tax offences and resulted in additional taxes, penalty interest and fines exceeding an overall sum of RUB 450 billion (approximately EUR 13 billion), surcharged fines of a further RUB 23.04 billion (approximately EUR 6 billion) and further enforcement penalties for non-performance of the obligation to pay the above liabilities, and had also concerned the right to control, charge or dispose of any of its assets and the forced sale of its principal production subsidiary. The proceedings were also civil as the tax assessments involved the re-allocation of ownership of the oil and oil products traded by the trading companies to the applicant company, whilst the

injunction of 15 April 2004 froze the entirety of its assets and the authorities sold its stake in OAO Yuganskneftegas at auction thus also determining its civil rights and obligations.

450. The Court notes that the issue, as raised by the Government, is whether Article 6 of the Convention applied to the 2000 Tax Assessment proceedings. The Court observes that as a result of these proceedings the applicant company was required to pay additional taxes of RUB 47,966,133,380 (approximately EUR 1,357,725,489), a default interest surcharge of RUB 32,167,990,383 (approximately EUR 910,544,532) and a 40 percent fine of RUB 19,186,430,950 (approximately EUR 543,089,561). Since the proceedings concerned, among other things, the imposition of a fine, the Court has to determine whether Article 6 of the Convention applied in these proceedings in its criminal limb.

451. The Court recalls that according to its well-established case-law (see, as the most recent authority confirming the approach, *Jussila v. Finland* [GC], no. 73053/01, §§ 37-39, ECHR 2006-...) three criteria are to be considered in the assessment of the applicability of the criminal aspect of Article 6 of the Convention: classification of the "offence" as "criminal" according to the domestic legal system, the very nature of the offence and the degree of severity of the penalty that the person concerned risks incurring.

452. Turning to the first criterion, it is apparent that the tax penalties in this case were not classified as criminal but as part of the fiscal regime. This is however not decisive. As regards the second and third criteria, the Court recalls that they are alternative and not necessarily cumulative. It is enough that the offence in question is by its nature to be regarded as criminal or that the offence renders the person liable to a penalty which by its nature and degree of severity belongs in the general criminal sphere.

453. On the facts, the company was found guilty of tax evasion and ordered to pay the default interest surcharges and a 40 percent fine. The latter fine, representing a very substantial sum of over half a billion euros, was imposed in proportion to the amount of the tax avoided, had no upper limit and was clearly intended as a punishment to deter re-offending (compare with 20 to 40 percent surcharge rates in the case of *Janosevic v. Sweden*, no. 34619/97, § 69, ECHR 2002-VII and a 20 percent surcharge rate in the mentioned *Jussila* case). The Court considers that this establishes the criminal nature of the offence for the purposes of Article 6 of the Convention. Hence, Article 6 applies under its criminal head to the 2000 Tax Assessment proceedings.

454. Under Article 6 of the Convention the applicant company complained that the case concerning its 2000 Tax Assessment had not been tried by a tribunal established by law as it should have been examined by a court in Nefteyugansk rather than in Moscow.

455. The Court recalls that a domestic court complies with the "established by law" criterion of Article 6 § 1 unless it acts in flagrant disregard of the applicable domestic laws governing its jurisdiction and procedures (see *Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, §§ 98-99, ECHR 2000-VII; *Lavents v. Latvia*, no. 58442/00, § 114, 28 November 2002; and *Buscarini v. San Marino* (dec.), no. 31657/96, 4 May 2000).

456. The domestic courts in the case at issue carefully examined the argument about the lack of jurisdiction and rejected it as unfounded (see paragraphs 24, 27 and 28). Indeed, having examined the applicable domestic law (see paragraphs 344 and 346), the Court finds nothing unreasonable about the application of the real seat doctrine in the present case.

457. Accordingly, the Court finds this complaint manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It must therefore be rejected pursuant to Article 35 § 4.

458. With reference to Article 6 of the Convention the company was also dissatisfied with the Ministry's failure to reply to the company's request to clarify the audit report in the tax proceedings for the year 2000.

459. The Court notes that there is nothing in the case file to suggest that the alleged lack of answer by the Ministry in any way affected the fairness of the subsequent proceedings as such. Furthermore, whilst under the applicable law the Ministry did not have an obligation to answer the company's argument, the Ministry's decision of 14 April 2004 contained detailed answers to all of the company's objections (see paragraph 17).

460. Accordingly, the Court finds this part of the application manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and rejects it pursuant to Article 35 § 4.

461. Under Article 6 of the Convention the applicant company complained that it had not received a fair trial. In particular, in respect of the first-instance proceedings in the 2000 Tax Assessment the applicant company complained that the Ministry had brought the action in these proceedings within the grace period, that the time to prepare for trial had been too short, that the courts had erred in refusing the company's requests to adjourn the proceedings and that there had been no adversarial proceedings on that account, that its lawyers could not obtain from the Ministry answers to all the questions they wished to ask in the hearings before the first-instance court, as the court had abruptly interrupted their pleadings. According to the applicant company, the first-instance court pronounced judgment without having studied all the evidence. With reference to the appeal proceedings in the 2000 Tax Assessment case, the company complained that the statutory time-limit for appeal had been unjustifiably abridged and that the appeal court had refused its request for adjournment of the proceedings. Lastly, the applicant company complained that the appeal court had delayed the delivery of the reasons for its judgment in the 2000 Tax Assessment case and thereby had prevented the applicant company from lodging a cassation appeal.

462. In its relevant parts, Article 6 provides:

"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

...

3. Everyone charged with a criminal offence has the following minimum rights:

(b) to have adequate time and facilities for the preparation of his defence; ..."

463. The Government submitted that the applicant company had brought appeal proceedings against the first-instance judgment of 26 May 2004. The possibility of review on both points of fact and law was expressly provided for by Russian law (Article 257 of the Code of Commercial Court Procedure) and the company had used it. It thus could not be said that the court procedures fell short of the requirements of Article 6 § 1 of the Convention.

464. As regards the argument that the company had insufficient time for the preparation of its defence, the Government referred to the domestic legislation, which established a two-month time-limit for the examination of the case at first instance (Article 134 of the Code of Commercial Court Procedure). The applicant company had had at least 37 days to prepare its defence from the date of the filing of the suit, which, in view of the above time-limit, had not

been unreasonable. Furthermore, the applicant company first became aware of the Ministry's arguments on 29 December 2003, when the Ministry issued the report indicating the applicant company's large tax liability, and already on 12 January 2004 the company filed its objections to the report under Section 100 (5) of the Tax Code. Moreover, the principal arguments contained in these objections remained unchanged throughout the proceedings. It could not therefore be said that the applicant company was unprepared to state its case, as it was well aware of the Ministry's arguments five months prior to the beginning of the court proceedings. In addition, the Government pointed out that the applicant company's lawyers were given an opportunity to study the evidence both in court and at the Ministry's premises throughout May, June and July 2004. According to the documents submitted by the Government, counsel for the applicant availed themselves of this opportunity on at least two occasions, on 18 and 19 May 2004 respectively. The Government argued that the applicant company's arguments about insufficient time for the preparation of the case had been carefully examined and eventually rejected by the domestic courts as unfounded.

465. In the Government's view, the appeal hearings were in compliance with Article 6. Under Article 267 of the Code of Commercial Courts Procedure, which requires an appeal court to examine the appeals by the parties within a month from the date on which they were filed, the Appeal Court had to examine the case within a month of 1 June 2004, which was the date on which one party to the case, OOO "YUKOS" Moskva, first lodged an appeal brief, notwithstanding the fact that the applicant company lodged its appeal on 17 June 2004. The appeal hearings started on 18 June and lasted eight days until 29 June 2004, which was in line with the above rule. In addition, the applicant company deliberately delayed the examination of the case by dispatching the appeal brief to an erroneous address.

466. Lastly, the Government underlined that the appeal decision had not been final and had been appealed against by the applicant company both in cassation instance and by way of supervisory review. The Government submitted that the fact that the reasoned copy of the Appeal Court decision of 29 June 2004 had been produced on 9 July 2004 did not affect the fairness of the proceedings as, in any event, it was open to the applicant company to lodge its cassation appeal within the two-month time-limit from the date of the delivery of the appeal decision on 29 June 2004, even in the absence of the reasoned copy of the decision. Indeed, the applicant company lodged its cassation appeal on 6 July 2004 in the absence of the reasoned copy of the appeal decision. The cassation appeal was accepted for consideration and on 17 September 2004 its full version was examined and rejected by the Circuit Court.

467. The applicant company submitted that the supporting material underlying the Tax Assessment for 2000 had first been provided to it as a result of the City Court's decision of 14 May 2004. Allegedly, the disclosure did not occur until 17 May 2004, when the Ministry had filed 24,000 pages of documents and had continued on 18 May 2004 with approximately 45,000 further pages and a further 2,000 pages late on 20 May 2004, the eve of the first-instance hearing. The company conceded that its representatives had indeed been given access to all these materials, both prior to the hearings and during the trial, but submitted that the manner and time for such access had been so unsatisfactory that it was of no practical use. It also argued that it had been unable effectively to access the court's filed documents during the first-instance hearings except for during lunch breaks. Overall, the company insisted that it had had insufficient time to prepare its defence and familiarise itself with the evidence before the court, as it had not had an opportunity to have knowledge of and comment on all evidence adduced or observations filed, or to express its views on every document in the file, contrary to Article 6.

468. The applicant company further submitted that the domestic courts had failed to address the question whether the abridgement of time had affected its substantive right to a fair hearing and

that, equally, they did not rely on Article 267 referred to by the respondent Government. Also, the rule in Article 267 requiring an appeal to be determined within one month is not respected in practice by the Russian courts; failure to comply with this requirement, even for a whole year, has no consequences for the proceedings. There was, according to the applicant company, no evidence of any particular urgency in listing or resolving the appeal: neither the Ministry, nor the co-appellant, OOO "YUKOS" Moscow, sought expedition when their appeals were lodged and the latter did not oppose the company's applications to adjourn the appeal hearing.

469. In response to the Government's criticism suggesting that the company's appeal was misaddressed, the applicant company stated that no evidence had been provided for any mistake in this respect and that, after all, the appeal had been received by the court and the tax authorities. In any event, the court made no criticism of the company in relation to the exercise of this appeal. Overall, the abridgement of the appeal period was a serious interference with the company's right to prepare for the appeal hearings, which failed to cure but rather accentuated the unfairness of the first-instance proceedings and no substantive reason was offered at all as to why this acceleration was lawful, necessary or consistent with the requirements of a fair trial.

470. The applicant company further submitted that the effect of delaying the reasons for the appeal decision was that the decision had been immediately enforced against the company, rendering any appeal nugatory. Only an application for a stay of enforcement pending an appeal in cassation, coupled with a valid appeal in cassation, could operate properly against the enforcement. In the company's view, any such valid appeal was strictly dependent on filing of the reasons by the appeal court. However, the appeal decision became subject to immediate forcible execution, the company became liable for the additional surcharge fine of seven percent of the total liability and the opportunity for exercising an effective appeal against these measures was circumvented. Having regard to all this, the applicant company maintained that the 2000 tax proceedings did not comply with the requirements of Article 6 of the Convention.

471. In the light of the parties' submissions, the Court finds that this part of the application raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other grounds for declaring it inadmissible have been established.

472. Under Article 6 of the Convention the applicant company complained that the 2001-2003 Tax Assessments had been imposed by the Ministry, rather than a court.

473. The Court observes that the applicant company had the right to appeal against the 2001-2003 Tax Assessments, which it eventually did (see paragraphs 146-149, 172-180, 193-199). In the absence of any credible allegations of the lack of access to court, the Court finds the complaint manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and rejects it pursuant to Article 35 § 4.

D. Admissibility of the complaints under Article 1 of Protocol No. 1, taken alone and in conjunction with Articles 1, 13, 14 and 18 of the Convention

474. Under Article 1 of Protocol No. 1, taken alone and in conjunction with Articles 1, 13, 14 and 18 of the Convention, the applicant company complained about the allegedly unlawful, arbitrary and disproportionate imposition and enforcement of the 2000-2003 Tax Assessments. The company complained furthermore that the sale of OAO Yuganskneftegaz had been unlawful, arbitrary and disproportionate too.

475. The Convention provisions relied on by the applicant company state as follows:

Article 1 of the Convention

"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention."

Article 13 of the Convention

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

Article 14 of the Convention

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Article 18 of the Convention

"The restrictions permitted under [the] Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."

Article 1 of Protocol No. 1

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

476. The Government maintained that the tax inspections in respect of the applicant company had been conducted in accordance with the domestic law and that the company had been acting in bad faith throughout the proceedings, in blatant breach of the tax legislation, and had only mimicked compliance with the law. The Government argued that the applicant company had committed blatant tax evasion which was confirmed by the findings of the domestic courts. The evidence to confirm the Ministry's claims was abundant and it was clear that the whole setup with sham entities was organised solely for the purpose of tax evasion.

477. As an example of the sham nature of the arrangement, the Government referred to the fact, established by the domestic courts, that on one occasion a person managing one of the company's sham entities signed three contracts simultaneously in three different locations, namely Samara, Nefteyugansk and the Tomsk region, which are located very far one from another. In addition, the Government referred to the internal opinion of the audit company PriceWaterhouseCoopers, which specifically mentioned various problems with the applicant company's "tax optimisation" scheme, including the Fund used by the company for receiving the money generated by the sham entities. It was in breach of the Russian legislation as money could only be transferred from one independent commercial entity to another independent commercial entity in exchange or in

payment for services or goods (Article 575 of the Civil Code, see paragraph 374). In addition, the company misled the public in its reports and financial statements. The Government submitted that the company's management had presented a distorted picture of the company's performance in order to attract investors.

478. According to the Government, the applicant company acted in bad faith and was also acting in bad faith in other sets of proceedings, including a failed attempt to file for bankruptcy in the United States. Furthermore, the management attempted to create artificial liabilities and existing debts to the applicant company, in order to increase their weight as creditors in the company's insolvency proceedings.

479. As regards the applicant company's argument about the selective application of the law in their case, the Government responded that the allegations that other taxpayers may have used similar schemes could not be interpreted as justifying the applicant's failure to abide by the law. They further contended that the occurrence of illegal tax schemes at a certain stage of Russia's historical development was not due to failures or drawbacks of the legislation, but was instead due to bad faith actions of economic actors and weakened governmental control over compliance with the Russian tax legislation on account of objective reasons, such the 1998 economic crisis, and the difficulties of the transitional period. At present, the Government were constantly combating tax evasion and had strengthened supervision in the sphere. The Government referred to statistical data which demonstrated that, since 2000, there had been a sharp increase in the number of tax disputes: during the five years between 2000 and 2005 the number of tax cases almost tripled. The Government also cited domestic case-law demonstrating that the courts' position in similar tax cases had been consistent (see paragraphs 401-426). Furthermore, at the relevant time tax proceedings had also been brought against such large companies as OAO Ufaneftekhim, IZ TNK, OAO Vympelkom, ZAO Ford Motor Ko., ZAO J.T. Marketing and Sales tobacco.

480. As regards the lawfulness of the company's use of domestic off-shore territories, the Government referred to statements by the former counsel of the applicant company and its majority shareholder Group Menatep, Mr D. Sch. In an interview with the Raschyot magazine of 30 January 2001, he suggested that tax planning was like a piece of cake with multiple layers. According to the Government, the applicant company used the schemes described by Mr D. Sch. in their crudest form and undoubtedly knew that the schemes had been illegal.

481. In respect of the lawfulness of the domestic authorities' actions, the Government submitted that the company's tax liability had been established by the domestic courts on the basis of, among other things, Article 122 of the Tax Code, which penalised the understatement of revenues and corresponding taxes, RF Law No. 2116-1 of 27 December 1991 “On profit tax of enterprises and organisations”, RF Law No. 1759-I of 18 October 1991 “On road funds in the Russian Federation”, RF Law No. 2118-I of 27 December 1991 “On the basics of the tax system”, RF Law No. 2030-I of 13 December 1991 “On property tax of enterprises”, RF Law No. 1992-I of 6 December 1991 “On valued-added tax” and RF Law No. 3297-I of 14 July 1992 “On closed administrative-territorial entities” which were all clear and foreseeable at the relevant time. They also referred to statistical data by AK&M and some other news agencies in 2002, which had reported that OAO LUKOIL and OAO Surgutneftegas, two other large Russian oil producers, had posted sales proceeds of RUB 434.92 billion and RUB 163.652 billion and paid RUB 21.190 billion and RUB 13.885 billion in profit tax respectively, whilst the applicant company had posted sales proceeds of RUB 295.729 billion and paid only RUB 3.193 billion in profit tax.

482. The Government submitted that the authorities had acted in full compliance with the domestic legislation and with Article 1 of Protocol No. 1 to the Convention, which expressly provided for the "right of a State to enforce such laws as it deems necessary to control the use of property to secure the payment of taxes or other contributions or penalties". In view of the State's wide margin of appreciation in the fiscal sphere and the applicant company's abusive conduct the Government maintained that the fair balance between the private and public interests had been struck. The tax inspections in respect of the applicant company had been conducted in accordance with the domestic law, and that the company's bad faith had been exemplified by an attempt to conceal the register of its subsidiaries. The tax evasion was committed at the expense of the least developed regions of Russia, represented a blatant breach of the legislation and had inflicted irreplaceable damage on the public interest.

483. The Government submitted that the enforcement proceedings in respect of the applicant company had been lawful and proportionate. The company, however, had failed properly to exhaust domestic remedies in respect of this part of the application. In particular, its complaints about the seizure of property pending the enforcement proceedings, the alleged failure by the bailiffs to grant the company access to the case in the enforcement proceedings, the bailiffs' alleged inaction in respect of the shares of Sibneft, the order to pay a seven percent enforcement fee as well as the circumstances of valuation and sale of OAO Yuganskneftegaz were inadmissible on account of the failure to exhaust domestic remedies.

484. The Government also submitted that the sale of OAO Yuganskneftegaz had been a lawful, proportionate and reasonable measure aimed at forcing the company to meet its debts. In their first set of observations the Government mentioned that out of a total of RUB 461.3 billion (approximately EUR 13 billion) due by the applicant company, the authorities had succeeded in recovering some RUB 380.9 billion (approximately EUR 11 billion), including RUB 120.5 billion (approximately EUR 3.4 billion) paid by the company in cash and RUB 260.5 billion obtained through auctioning of OAO Yuganskneftegas (approximately EUR 7.5 billion). After deduction of these sums, the company still owed some RUB 80 billion. The Government pointed out that during the enforcement proceedings there had been no restrictions on the company's production cycle or the sale of petroleum and mineral oils, and that the applicant company had remained fully operational.

485. The Government further submitted that the procedure of compulsory recovery of arrears of mandatory tax payments had been used with due respect to the applicant company. Such tax payments were recovered by way of charging the company's cash flows on bank accounts and in the event of insufficiency or absence of cash, recovery of tax would be effectuated at the expense of the taxpayer's assets the procedure for which was set out in detail in the domestic legislation and followed by the authorities. During the enforcement procedure, no restrictions were imposed on the company's production cycle and the company continued functioning.

486. There were no unjustified actions by the bailiffs and the measures represented control of the use of property and were in full compliance with the Convention. As regards the seizure of property, the Government referred to the Gasus Dosier and AGOSI cases and considered that, having regard to relevant factors, such as the enormous amount of arrears, the bad faith conduct of the applicant company and the need for an expedient and efficient recovery of tax to the State budget, the measure in question complied with the requirements of Article 1 of Protocol No. 1.

487. As regards the sale of OAO Yuganskneftegaz, the measure aimed at securing the payment of taxes and was effected in full compliance with the provisions of the Federal Enforcement Proceedings Act. In the course of the enforcement proceedings the bailiffs seized the entirety of the shares in OAO Yuganskneftegaz belonging to the applicant company. These actions were

contested in court, which on 23 August and 25 October 2004 rejected the complaints as unfounded. Before the end of 2004 the bailiffs received six writs to be executed and the total amount to be recovered was then RUB 461.3 billion. The bailiffs did all they could to find the cash, but the company's cash funds were clearly insufficient to cover the arrears. Under section 52 of Enforcement Proceedings Act, an impartial assessment of the cost of the shareholding of OAO Yuganskneftegza belonging to Yukos was commissioned and an appropriate report was submitted on 6 October 2004 to the bailiffs. The parties to the enforcement proceedings, including the applicant company, were familiarised with the assessment act on 13 October 2004, and the company never challenged the results in court.

488. Under section 54 (2) of the Enforcement Proceedings Act, the sale of the applicant company's property was made by a specialised organisation pursuant to the terms of commission and the relevant legislation. On 18 November 2004 the bailiffs decided to sell 43 shares (76.8 percent) of OAO Yuganskneftegaz at an auction. The Government noted that OAO Yuganskneftegaz was itself the debtor in mandatory payments to the budget totalling RUB 102.09 billion, so that the above arrears inevitably affected the price of the auctioned shares, as defined by the valuation institution and the results of the auction. The date of the auction and invitation to participate in the open auction were published in the mass media in due time. The auction itself was open as to its participants and to the form of submissions of price bids for shares. Bids were received between 19 November and 18 December 2004. On 19 December 2004 the open auction took place. The winner of the auction was recognised as OOO Baykalfinancegrup, which offered RUB 260,753,447,303.18 for the shares in question. The auction itself was public. The representatives of the mass media provided extensive media coverage. The results were published in the mass media and broadcasted. With regard to the proportionality of sale, the sum of 260.5 billion roubles generated as a result of the sale of the shares did not, however, cover the arrears of OAO Yukos entirely. In sum, the Government considered that there had been no breach of the Convention.

489. The applicant company argued that it had been deprived of its possessions, and that these deprivations had not been in accordance with the law and had imposed a disproportionate burden on the company. Firstly, the applicant company disagreed with the factual conclusions reached by the domestic courts in respect of the trading companies. The applicant argued that it had been the wrong defendant in the case, that there had been no links of dependency between the trading companies and itself, and that there were no grounds for making the applicant company, a holding company having at the material time only two employees with highly important but small scale administrative functions, liable for the trading companies' tax liabilities and creating a previously virtually unknown concept of “bad faith taxpayer”.

490. The company further argued that the denial of tax benefits to the trading companies and the failure to repay VAT in respect of the export of oil and oil products had been unlawful and unsubstantiated. The company further argued that it had been subjected to double taxation in respect of the profits received by the trading companies, that the courts' interpretation of the relevant laws had been unforeseeable, unprecedented, selective and unique, contradicting the established practice of the courts. The tax authorities and the Government had submitted no single comparable case, let alone practice to justify the contrary. The applicant company considered that the case-law referred to by the Government was not comparable to the facts or the legal analysis applied in the present case, that it substantially post-dated the relevant period, was largely unreported and inaccessible and related to the interpretation and application of Civil Code provisions which were not invoked or relied on in these proceedings by any party. Furthermore, the company relied on Article 251 (1) 11 of the Tax Code to justify the unilateral transfers of cash from the trading companies to the applicant company's Fund. They further argued that there had been no such notion as a “sham entity” in Russian law.

491. With reference to Article 75 (3) of the Tax Code, the applicant company claimed that it should not have been ordered to pay interest surcharges at all. The company argued that the authorities ought to have applied Articles 20 and 40 of the Tax Code in their case. It argued that it had been deprived of its possessions and that these deprivations had not been in accordance with the law and had imposed a disproportionate burden on the company. The tax liability and enforcement proceedings were a *de facto* disguised expropriation. The seizure of assets was disproportionate in that the authorities ordered the applicant company to pay and at the same time froze the company's assets, worth considerably more than the company's then liability. The authorities refused to use the company's equity in the Sibneft company as well as other realistic means of settlement of the debt. The domestic authorities should have accepted those other realistic means of settlement because they were required to do so by precedent in the practice of the commercial courts. The time of merely a couple of days given to the applicant company for payment was absurdly short. The requirement to pay seven percent enforcement fees was disproportionate and unlawful. The sale of OAO Yuganskneftegaz was unlawful, conducted at a gross undervaluation through a plainly controlled auction, with the participation of a sham bidder, OOO Baykalfinansgrup.

492. With regard to the company's failure to comply with the requirement to exhaust domestic remedies, the applicant company considered that exhaustion had been unnecessary in view of the lack of prospects of success. The domestic courts consistently rejected the company's attempts to contest the actions of the bailiffs, so the attempts would have been futile. In any event, the company did not disagree with the valuation report in respect of OAO Yuganskneftegaz as it was not materially inaccurate so as to be realistically challenged in litigation. Furthermore, the company submitted that it did challenge the entire process in which the voting shares of OAO Yuganskneftegaz were sold to a state-owned company OAO Rosneft.

493. The Court first notes that the Government raised an argument of non-exhaustion as regards the applicant company's complaints about various circumstances of the enforcement proceedings, including the auctioning of OAO Yuganskneftegaz. The Court considers that in view of the applicant company's complaints under Article 13 of the Convention, the question of exhaustion of domestic remedies is so closely linked to the merits of the case that it is inappropriate to determine it at the present stage of the proceedings. The Court therefore decides to join this objection to the merits.

494. In the light of the parties' submissions, the Court finds that this part of the application raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes that it is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other grounds for declaring them inadmissible have been established.

E. Admissibility of the complaints under Article 7 of the Convention

495. Under Article 7 of the Convention the applicant company complained that the Tax Assessments 2000-2003 had been based on an arbitrary interpretation of the domestic law, that the prosecution had been selective and arbitrary and that the imposition of double penalties for the years 2001-2003 had been retrospective. Article 7 of the Convention states as follows:

“1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

496. The Government argued that the proceedings had not been criminal within the meaning of the Russian law and that there had not been criminal proceedings within the meaning of Article 7 of the Convention. According to them, the dispute was adjudication of a tax debt of an administrative-law nature, a purely public policy issue falling outside of the Court's jurisdiction. In any event, Article 7 had not been breached. Overall, the Government argued that both the domestic law and practice had been clear and available and had complied with the requirements of lawfulness and legal certainty within the meaning of Article 7 of the Convention. Their arguments were similar to those mentioned earlier in respect of Article 1 of Protocol No. 1.

497. The applicant company argued that the proceedings had been "criminal" within the meaning of Article 7, that the offences had been interpreted in a selective, unprecedented and unforeseeable manner, that the case contained a novel interpretation of the Tax Code insofar as the applicant company had been made responsible for tax allegedly due on transactions conducted by the trading companies and these latter companies had been designated as "sham", that it could not have known in advance whether its conduct was criminal and that the Government had failed to produce a single example or case to justify the contrary.

498. As regards the Government's argument that Article 7 of the Convention was inapplicable, the Court observes that it has earlier established the criminal nature of the tax offence in the 2000 Tax Assessment for the purposes of Article 6 of the Convention. Since the 2001-2003 Tax Assessments concerned essentially the same offence committed by the applicant company during three subsequent years, the Court finds that the 2000-2003 Tax Assessment proceedings against the applicant company concerned criminal offence for the purposes of Article 7.

499. The Court considers that this part of the application raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes that it is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other grounds for declaring it inadmissible have been established.

For these reasons, the Court

Dismisses by a majority the Government's request to discontinue the examination of the case and *accepts* Mr Gardner as the valid representative of the applicant company;

Decides by a majority to join to the merits the examination of the issue of exhaustion in so far as the applicant company's complaints about the enforcement proceedings, including the auctioning of OAO Yuganskneftegaz, are concerned;

Declares by a majority admissible, without prejudging the merits:

– the applicant company's complaints under Article 6 of the Convention concerning various defects in the proceedings concerning its tax liability for the year 2000;

– the complaints under Article 1 of Protocol No. 1, taken alone and conjunction with Articles 1, 13, 14 and 18 of the Convention, about the lawfulness and proportionality of the 2000-2003 Tax Assessments and their subsequent enforcement, including the sale of OAO Yuganskneftegaz;

– the complaints under Article 7 of the Convention about the lack of proper legal basis, selective and arbitrary prosecution and the imposition of double penalties in the Tax Assessment proceedings for the years 2000-2003;

Declares unanimously inadmissible the remainder of the application.

Søren Nielsen Christos Rozakis
Registrar President