

# International treaty as a source of financial law in Ukraine

Professor **Yuriy ONISCHYK**<sup>1</sup>

Professor **Olena MAIDANNYK**<sup>2</sup>

Associate professor **Yaroslav ZHURAVEL**<sup>3</sup>

Senior researcher **Pavlo SELEZEN**<sup>4</sup>

## **Abstract**

*Double taxation agreement is one of the most widespread type of international treaty regulating financial relations. The efficiency of its application as a source of financial law depends on the features of the legal basis for implementation of its provisions into domestic legal orders of contracting states. Based on the practice of Ukraine, there is an attempt to describe key challenges in application of provisions of international treaties in the context of the requirements of the Tax Code of Ukraine based on the application of comparative method: 1) the legal status of double taxation treaties of Ukraine that are still in effect based on the fact of legal succession of Ukraine; 2) the legal status of protocols to international treaties concluded between competent authorities of contracting states; 3) the legal status of mutual agreements concluded on the basis of the provisions of double taxation treaties.*

**Keywords:** financial law; tax legislation; interpretation; international treaties; domestic implementation.

**JEL Classification:** K33, K34.

## **1. Introduction**

The system of legal acts regulating financial relationships needs clear understanding of the concept of legal act as a source of financial law in Ukraine<sup>5</sup>. It is determined by the growing activity of tax authorities in the area of normative regulation as well as active participation of Ukraine in the process of international cooperation in tax matters. At the same time, there is no doubt that international treaty is a source of financial law of Ukraine and that its importance is continuously growing based on the development of financial globalization<sup>6</sup>.

---

<sup>1</sup> Yuriy Onischyk - Academy of Labour, Social Relations and Tourism, Ukraine, onischyk@socosvita.kiev.ua.

<sup>2</sup> Olena Maidannyk - Academy of Labour, Social Relations and Tourism, Ukraine, maidannyk@socosvita.kiev.ua.

<sup>3</sup> Yaroslav Zhuravel - Academy of Labour, Social Relations and Tourism, Ukraine, dean\_if@socosvita.kiev.ua.

<sup>4</sup> Pavlo Selezen - University of State Fiscal Service of Ukraine, Ukraine, pselezen@i.ua.

<sup>5</sup> Dmytryk, Olga. *Djerala finansovogo prava: transformacia pidhodiv do vyznachennya* [Sources of financial law: transformation of approaches]. 'Derjavne Budivnyctvo ta Misceve Samovryaduvannya' [State Building and Local Self-Government]. 2005, Vol. 10, p. 112.

<sup>6</sup> Makuh, Oksana. *Dogovir u finansovo-pravovomu reguluvanni ta yogo vplyv na dynamicu finansovuh finansovuh pravovidnosyn* [Treaty in the financial and legal regulation and its impact on the dynamics of financial relations]. 'Pravo ta Innovacii' [Law and Innovations]. 2016, vol. 4, p. 73.

As it follows, building the concept of legal act as a source of financial law has to be based on analysis of all kinds of legal acts including international treaty. Such analysis of international treaty as a legal act would be incomplete without the characterization of domestic normative basis of application of international norms in tax matters because tax law is understood as a complex institute of financial law of Ukraine<sup>7</sup>.

It should be mentioned that sources of financial law of Ukraine has been in the area of interest of Ukrainian researchers since the beginning of 2000s<sup>8</sup>. Their research publications are focused on different issues such as the definition of term “source” in financial law, the classification of sources of financial law or the features of legal act as a source of financial law<sup>9</sup>. Meantime, there is only a limited number of research publications dedicated to the problem of understanding international treaty as a source of financial law in Ukraine.

Taking into consideration the need to understand the features of international treaty as a source of financial law in the context of domestic regulation in tax matters in Ukraine, our purpose is to characterize international treaty as a source of regulation of tax relations as a kind of financial relations based on the requirements of tax legislation of Ukraine and the trends of interpretation and/or application of international norms in tax matters.

The methodological basis is formed by different methods of research including the general and special ones. One of the key approaches is the systematic approach because it is a common research approach and allows to identify the existing issues of the different doctrinal positions concerning international treaty as a source of financial law. The logical semantic method is applied because of the necessity to analyze the terms and conditions of domestic legislation including the Tax Code of Ukraine. The proposals and conclusions are formulated based on the application of the formal method in the process of analysis the domestic legislation and judicial cases in Ukraine from the point of view of implementation of international treaties.

The structure of the article is determined by its purpose and is divided into two parts: 1) the characteristic of international treaty as a source of financial law of Ukraine based on the normative and doctrinal basis; 2) the description of challenges of implementation of tax treaties as the most widespread kind of international treaties applied in the area of financial law in Ukraine.

Based on the research results, it is stated that international agreements are important source of regulation of financial relations including the tax ones under

---

<sup>7</sup> Bayik, Oksana. *Okremi pytannya u formuvanni dzherel podtikovogo prava Ukrainy* [Some issues of formation of sources of tax law of Ukraine]. ‘Visnyk Nacionalnogo Universytetu «Lvivska Politehnika»’ [Herald of Lviv Polytechnic National University (Series of legal sciences)]. 2016, vol. 85, pp. 369-370.

<sup>8</sup> Dmytryk, Olga, *op. cit.*, 2005, pp. 105-106.

<sup>9</sup> Dmytryk, Olga, *op. cit.*, 2005, p. 105-112; Havryliuk, Ruslana. *Djerela finansovogo prava Ukrainy* [Sources of Financial Law of Ukraine]. Chernivtsi: Ruta, 2003, p. 43; Makuh, Oksana, *op. cit.*, 2016, pp. 73-77; Zhuk, Liudmyla. *Djerela finansovogo prava Ukrainy* [Sources of Tax Law (PhD Thesis)]. 2005, Irpin, National University of State Tax Service of Ukraine, p. 123.

the pressure of the ongoing financial globalization. At the same time, their implementation depends on the features of domestic legal orders of the contracting states as it is demonstrated on the example of double taxation agreements as widespread instrument of cooperation in tax matters. The case of Ukraine shows the existence of gaps and issues characterized in the article that might create the obstacles for the due realization of treaty commitments based on the requirements of the Tax Code of Ukraine.

## 2. Status of international treaty as a source of financial law of Ukraine

In accordance with art. 9 of the Constitution of Ukraine, international treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine. The Constitutional Court of Ukraine confirmed that international treaties ratified by the Verkhovna Rada of Ukraine should be covered by the definition of term “legislation” as it follows from the decision 12-rp/98 of 9 July 1998 in case on the interpretation of the term “legislation”.

Taking into consideration the position of the national legislator and the Constitutional Court of Ukraine, international treaties are included in the list of sources of financial law of Ukraine that are interpreted as forms of expression of public legislative activity concerning adoption of normative acts by competent authorities establishing the norms of financial law<sup>10</sup>. At the same time, it should be mentioned that it is not the only one approach to the definition of the term “source of financial law of Ukraine”. For example, it might be proposed to define the previously mentioned term as formal way of external expression and establishing norms of financial law<sup>11</sup>. In our opinion, the latter position seems to be more argued because it does not refer to the term “public authorities”. Therefore, it avoids the necessity to answer the difficult questions concerning the interpretation of the term “public authorities”. For example, local self-government authorities do not belong to the list of public authorities but have the right to adopt regulative acts on local taxes (for example, based on the requirements of Art. 12 of the Tax Code of Ukraine). Despite the differences in the existing doctrinal approaches, there is no disputes on the statement that international treaties belong to the sources of financial law of Ukraine.

The features of international treaties are determined by their nature. From the one hand, they are regulated by the provisions of international law as it follows from the Vienna Convention on the Law of Treaties of 23 May 1969. From the other hand, they become the elements of domestic tax legislation after their implementation in national tax law. Based on the analysis of double taxation agreements as the most widespread type of international treaties in tax matters, the

---

<sup>10</sup> Kucheriavenko, Mykola (ed.). *Financial Law*. Kharkiv: Pravo, 2013, pp. 21-40.

<sup>11</sup> Getmanec, Olga, Bandurka, Oleksandr (eds.). *Financial Law*. Kharkiv: Ecograph, 2015, pp. 42-56.

following specific traits of international tax agreements might be defined<sup>12</sup>:

- forming the basis of cooperation between contracting states in tax matters;
- establishing non-discrimination of residents by contracting states in the area of taxation;
- their application is asymmetrical in case of tax authorities and taxpayers because taxpayers are not obliged to use the provisions of international tax treaty but the tax authorities should give the priority to the international norms in any case.

In addition to these specific features, it should be mentioned that the priority of international norms in comparison with the domestic ones is established by the provisions of the Law of Ukraine “On International Treaties” (2004) (Art. 19), the Budget Code of Ukraine (2010) (Art. 4(3)) or the Tax Code of Ukraine (Art. 3(2)) (2011). For example, the referred provision of the Tax Code of Ukraine states that if an international treaty approved by the Verkhovna Rada of Ukraine includes other rules than those provided for in tax legislation, the rules of the international treaty shall prevail.

As it seems, the position of the national legislator is problematic taking into account the requirements of the Vienna Convention on the Law of Treaties of 23 May 1969. At the beginning, it is worth mentioning that the term “international treaty” is defined as “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation” (Art. 2(1)). Meanwhile, “every treaty in force is binding upon the parties to it and must be performed by them in good faith” (Art. 26). The principle of *pacta sunt servanda* is considered to be the primary explanation of why there is compliance with treaty obligations<sup>13</sup>. These provisions allow us to conclude that any international agreement concluded between contracting states in written form should be binding if it is in force.

### **3. Challenges in the process of implementation of tax treaties in Ukraine**

The need to comply with international obligations dictates the necessity to fully implement them into domestic legislation. Nevertheless, the approach embodied in the Tax Code of Ukraine does not fully comply with the requirements of international law of treaties:

1. Art. 3(2) of the Tax Code refers to international treaties approved by the Verkhovna Rada of Ukraine. At the same time, the Convention between the Government of the USSR and the Government of Spain for the avoidance of

---

<sup>12</sup> Shchekin, Denis (ed.). Course of Tax Law, Vol. I: General part. Moscow: Statut, 2009, pp. 857-858.

<sup>13</sup> Dixon, Martin, McCorquodale, Robert & Sarah Williams. *Cases & Materials on International Law*, 5th ed. Oxford: Oxford University Press, 2011, p. 66.

double taxation with respect to taxes on income and on capital of 1 March 1985 has never been approved by the Verkhovna Rada of Ukraine but is still in effect due to Art. 7 the Law of Ukraine “On Legal Succession of Ukraine” (1991): “Ukraine is legal successor of the rights and obligations according to the international treaties of USSR ...”. Consequently, is it possible to consider the adoption of the Law of Ukraine as equal to the approval of the Verkhovna Rada of Ukraine? If the answer is affirmative, then the double taxation agreement with Spain will be the part of domestic legislation and its provisions have the priority in comparison with the provisions of the Laws of Ukraine. If the answer is negative, then its provisions have indefinite status in the light of Art. 3(2) of the Tax Code of Ukraine. The position of the Constitutional Court of Ukraine seems more favourable for the latter of two options because states that the term “legislation” of Ukraine includes only international agreements ratified by the Verkhovna Rada of Ukraine (the decision 12-rp/98 of 9 July 1998). Meanwhile, the double taxation agreement with Spain has not been ratified by Ukraine because there is absent the Law of Ukraine on ratification of the same international agreement that would confirm the fact of ratification. In our opinion, this problem might be avoided if the formulation “an international treaty approved by the Verkhovna Rada of Ukraine” is replaced with the formulation “an international treaty approved by the Verkhovna Rada of Ukraine or applied according to the legal fact of succession of Ukraine” in Art. 3(2) of the Tax Code of Ukraine.

2. Double taxation agreements might be modified or amended from time to time in case of the necessity. As usual, such steps are made by the contracting states through the conclusion of protocols that are commonly recognized as international agreements taking into consideration the definition of the term “international treaty” in Art. 2(1) of the Vienna Convention on the Law of Treaties of 23 May 1969. Meanwhile, any international treaty should be approved by the Verkhovna Rada of Ukraine in the context of Art. 3(2) of the Tax Code of Ukraine. In other cases, the status of protocols between the contracting states become problematic if it is not approved by the Verkhovna Rada of Ukraine. It should be added that the domestic legislation of Ukraine allows the conclusion of intergovernmental international agreements that do not need any ratification (Art. 8 of the Law of Ukraine “On International Treaties” (2004)). In other words, such international treaties are not approved by the Verkhovna Rada of Ukraine but they come into force upon the compliance with the applicable requirements of internal procedure for implementation. At the same time, the practice of conclusion of protocols to double taxation agreements of Ukraine are fragmented. For example, the Protocol amending the Double Tax Treaty between Cyprus and Ukraine (2015) was ratified in October 2019 as it is required by the provisions of the same Protocol. In contrast, the Protocol amending the Double Tax Treaty between Belgium and Ukraine (1996) does not include any requirement of its ratification by the contracting states. Moreover, the Law of Ukraine “On ratification of the Convention between Government of Ukraine and Government of the Kingdom of Belgium on Avoidance of Double Taxation and Prevention of Fiscal Evasion with

Respect to Taxes on Income and Estate” (1996) does not refer to the Protocol so it is hardly possible to conclude that it has been approved by the national legislator. Consequently, the Protocol with Belgium is not covered by Art. 3(2) of Tax Code of Ukraine. In our opinion, any protocol to double taxation agreement should be ratified if it modifies or amends the text of the double taxation agreement on the basis of which they are concluded. In other scenario, there is the opportunity to change the double taxation agreements without the approval from the Verkhovna Rada of Ukraine that would contradict the demands of the established hierarchy of normative acts in Ukraine. As it seems, the similar approach is recognized in the decision of District Administrative Court of Kyiv in the case No. 826/10513/17 (25 April 2019).

3. All double taxation agreements of Ukraine have a provision regulating mutual agreement procedure (MAP). It is the first and most used treaty-based form of international tax dispute resolution<sup>14</sup>. If MAP is successful, the competent authorities reach the mutual agreement that can help, in particular, to interpret a term not defined in the double taxation agreement or to complete or clarify the definition of a term, where such an agreement would resolve difficulties or doubts arising as to the interpretation or application of the provisions of double taxation agreement. At the same time, it worth mentioning that the mutual agreements might have different legal status based on the requirements of domestic legal orders and practice of contracting states (para. 6.2 of Commentary on the provisions of the Article 25 of the OECD Model Tax Convention on Income and on Capital)<sup>15</sup>.

As it follows from the provisions of the Law of Ukraine “On International Treaties” (2004), mutual agreements of competent authorities do not need ratification because they have special domestic procedure of implementation based on the requirements of Art. 12(3)(b). Consequently, the adoption of them by the Verkhovna Rada of Ukraine is not the necessary condition for coming into force and their provisions are obligatory for competent authorities of contracting states. Nevertheless, there is no clear answer on the question concerning their legal status in the context of Art. 3(2) of the Tax Code of Ukraine<sup>16</sup>. Such approach might create the problem of due fulfilment of international obligation in the context of the provisions of domestic legal order. For example, the Kyiv Administrative Court of Appeal states that the national legislation of Ukraine do not contain any references to the issue of interrelations between domestic instruments of tax dispute resolution (administrative or judicial proceedings) and MAP (the decision in the case No. 2a-7088/12/2670, 4 October 2012). It seems that the position of the court is determined by different reasons but one of the most important among them is complex legal nature of MAP and mutual agreements in particular.

---

<sup>14</sup> Christians, Alison. *How Nations Share*. ‘Indiana Law Journal’. 2012, vol. 87, pp. 1433.

<sup>15</sup> OECD. *Model Tax Convention on Income and on Capital (condensed version) (as it read on 21 November 2017)*. Paris: OECD Publishing, 2017, p. 430.

<sup>16</sup> Tymchenko, Leonid, Selezhen, Pavlo & Maria Karmalita. *Procedura vzaemnogo uzgodjennya na pidstavi dogovoriv pro unyknennya podviynogo opodatkuvannya u konteksti svitivigo dosvidu* [Mutual Agreement Procedure on the Basis of Double Taxation Treaties in the Context of World Practice]. Kyiv: Alerta, 2018, p. 95.

Based on the features of double taxation agreements as a source of legal regulation of tax relations in Ukraine, it might be assumed that the process of their implementation is complex and challenging issue in the context of domestic legal order. Thus, there is the need of development of conceptual basis for implementation of the provisions of international treaties regulating financial relations like the tax ones because the example of double taxation agreements demonstrates the existence of gaps and issues of legal regulation in the domestic legal order of Ukraine that might be the obstacles on the way of proper realization of international obligations.

#### 4. Conclusions

Better normative regulation is a vital pre-condition for the success of the implementation of international treaties into the domestic legal order of Ukraine and their proper application. The area of financial law is not an exception in this case. As it follows from our analysis of challenges of tax treaties' implementation, there is a need to amend the provisions of the Tax Code of Ukraine with the following changes:

- to replace the formulation "an international treaty approved by the Verkhovna Rada of Ukraine" with the formulation "an international treaty approved by the Verkhovna Rada of Ukraine or applied according to the legal fact of succession of Ukraine" in Art. 3(2);

- to add the provision that the international treaties without being ratified could not create any legal consequences in contrast to the laws of Ukraine or any international agreements ratified by the Verkhovna Rada of Ukraine as the sole legislature;

- to add the provision that any mutual agreement as a result of MAP is considered to be a part of domestic legislation of Ukraine if it comes into effect in accordance with the requirements of the domestic legal procedure.

The proposed measures do not remove all difficulties in the process of application of international treaties to the regulation of tax relations but might help to limit their number and to improve legal basis of the whole process. As it follows, such consequences might have a positive influence in the process of development of the concept of international treaty as a source of financial law of Ukraine.

#### Bibliography

1. Bayik, Oksana. *Okremi pytannya u formuvanni dzherel podtkovogo prava Ukrainy* [Some issues of formation of sources of tax law of Ukraine]. 'Visnyk Nacionalnogo Universytetu «Lvivska Politehnika»' [Herald of Lviv Polytechnic National University (Series of legal sciences)]. 2016, vol. 85.
2. Christians, Alison, *How Nations Share*, 'Indiana Law Journal', 2012, vol. 87.
3. Dixon, Martin, McCorquodale, Robert & Sarah Williams. *Cases & Materials on International Law*, 5<sup>th</sup> ed. Oxford: Oxford University Press, 2011.

4. Dmytryk, Olga. *Djerela finansovogo prava: transformacia pidhodiv do vyznachennya* [Sources of financial law: transformation of approaches]. 'Derjavne Budivnyctvo ta Misceve Samovryaduvannya' [State Building and Local Self-Government]. 2005, Vol. 10.
5. Getmanec, Olga, Bandurka, Oleksandr (eds.). *Financial Law*. Kharkiv: Ecograph, 2015.
6. Havryliuk, Ruslana. *Djerela finansovogo prava, Ukrainy* [Sources of Financial Law of Ukraine]. Chernivtsi: Ruta, 2003.
7. Kucheriavenko, Mykola (ed.). *Financial Law*. Kharkiv: Pravo, 2013.
8. Makuh, Oksana. *Dogovir u finansovo-pravovomu reguluvanni ta yogo vplyv na dynamicu finansovuh finansovuh pravovidnosyn* [Treaty in the financial and legal regulation and its impact on the dynamics of financial relations]. 'Pravo ta Innovacii' [Law and Innovations]. 2016, vol. 4.
9. OECD. *Model Tax Convention on Income and on Capital (condensed version) (as it read on 21 November 2017)*. Paris: OECD Publishing, 2017.
10. Shchekin, Denis (ed.). *Course of Tax Law*, Vol. I: General part. Moscow: Statut, 2009.
11. Tymchenko, Leonid, Selezen, Pavlo & Maria Karmalita. *Procedura vzaemnego uzgodjennya na pidstavi dogovoriv pro unyknennya podviynogo opodatkovannya u konteksti sivitivigo dosvidu* [Mutual Agreement Procedure on the Basis of Double Taxation Treaties in the Context of World Practice]. Kyiv: Alerta, 2018.
12. Zhuk, Liudmyla. *Djerela finansovogo prava Ukrainy* [Sources of Tax Law (PhD Thesis)], National University of State Tax Service of Ukraine, Irpin, 2005.