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THE ESSENCE OF DOUBLE TAXATION IN TRANSFER PRICING

ПРИРОДА ПОДВІЙНОГО ОПОДАТКУВАННЯ У ТРАНСФЕРТНОМУ ЦІНОУТВОРЕННІ

The article is devoted to the study of the essence and nature of double taxation in the conditions of transfer pricing. The crux of the problem is that profits from transfer transactions may be subject to taxation in both countries where the related parties are located. This can create complications and misunderstandings between countries, as well as cause conflicts between businesses and tax authorities. The main goal of solving the problem of double taxation in transfer pricing is to create a stable and transparent system that satisfies the interests of all parties. International standards and dispute resolution mechanisms play a key role in achieving this goal, ensuring a fair and clear playing field for all participants. In the further development of transfer pricing and the fight against double taxation, it is important to continue the development and implementation of effective international standards, as well as to strengthen cooperation between countries and enterprises. Only in conditions of mutual understanding and cooperation will it be possible to ensure an effective and fair transfer pricing system that considers the interests of all parties.

Key words: *transfer pricing, double taxation, controlled transactions, bilateral agreements on the avoidance of double taxation.*

Статтю присвячено дослідженню сутності та природи подвійного оподаткування в умовах трансфертного ціноутворення. У сучасному світі, де бізнес стає все більше глобалізованим, а міжнародна торгівля і інвестиції виявляються необхідними для розвитку, трансфертне ціноутворення стає важливим елементом податкової системи. Визначаючи ціни на трансфертні операції між пов'язаними сторонами, компанії стикаються з ризиком подвійного оподаткування, що може виникнути внаслідок розбіжностей у податкових системах різних країн. Суть проблеми полягає в тому, що прибуток від трансфертних операцій може бути підданий оподаткуванню в обох країнах, де розташовані пов'язані сторони. Це може створювати складнощі та непорозуміння між країнами, а також викликати конфлікти між підприємствами та податковими органами. Однією з основних концепцій у трансфертному ціноутворенні є принцип «витягнутої руки», який передбачає, що ціни на трансфертні операції між пов'язаними сторонами повинні бути такими, які б були укладені між незалежними компаніями в аналогічних умовах. Проте, в реальності виникають труднощі в точному визначенні адекватних цін, що може вести до розбіжностей у розумінні обчислення прибутку. Для вирішення цього питання, багато країн укладають Багатосторонні угоди про уникнення подвійного оподаткування. Ці угоди встановлюють правила, за якими прибуток визначається та розподіляється між країнами. Однак, не завжди можна досягти єдності у визначенні чітких правил, що іноді призводить до додаткових спорів та конфліктів. Основною метою розв'язання проблеми подвійного оподаткування у трансфертному ціноутворенні є створення стабільної та прозорої системи, яка задовольняє інтереси всіх сторін. Міжнародні стандарти та механізми вирішення спорів грають ключову роль у досягненні цієї мети, забезпечуючи справедливі та чіткі правила гри для усіх учасників. У по-

дальшому розвитку трансфертного ціноутворення та боротьбі з подвійним оподаткуванням, важливо продовжувати розробку та впровадження ефективних міжнародних стандартів, а також посилювати співпрацю між країнами та підприємствами. Тільки в умовах взаєморозуміння та співпраці можна буде забезпечити ефективну та справедливу систему трансфертного ціноутворення, яка враховує інтереси всіх сторін.

Ключові слова: *трансфертне ціноутворення, подвійне оподаткування, контрольовані операції, двосторонні угоди про уникнення подвійного оподаткування.*

Problem statement. Digitization and remote interaction between subjects determined the direction and trends of the development of the economy and international taxation. Approaches to the elimination of double taxation are related to measures taken by countries in the field of foreign investment promotion, tax calculations, and even income distribution tools. Such diversity has complicated the tax systems of the world and, accordingly, it is increasingly difficult to develop a solution to this problem. The pandemic has covered many spheres of society and has not bypassed the tax sphere. States and businesses experienced fiscal difficulties caused by the general economic upheaval. As a result, the need to expand and create new tax benefits has become the most important tool for tax regulation.

Analysis of recent research and publications. The problem of double taxation is actively researched by domestic scientists-practitioners, among whom the works of R.G. Braslavsky [1], Yu.V. Horodnichenko [2], K.F. Kovalchuk [3], K.O. Kuts [10], T.Yu. Medinska [8], I.Ya. Olendera [5], V.V. Parkhutsia [6], L.V. Petrova [3], I.P. Ustinova [8], V.V. Khodzytska [9], T.M. Shulgi [10]. However, along with the significant development in this scientific direction, in our opinion, the problem of double taxation should be considered when carrying out transfer pricing operations.

The purpose of the article. The purpose of the article is to study the nature and essence of double taxation in the implementation of transfer pricing operations, to determine the genesis of this phenomenon and its main parameters.

Presentation of the main material. In its formation, the organization of the taxation process required the creation of a certain type. Therefore, as the cooperation of the state strengthened, at the turn of 1928, a group of experts in the field of taxation proposed the first prototype of the model.

In the future, this problem was increasingly subjected to the process of unification of content, in which certain international organizations played an active role. A special place was given to developed countries, which dominated in terms of the number of approved agreements. So, for example, in 1963, the OECD developed a standard convention that mainly takes into account the interests of capital donors [2]. In the following years, these phenomena permeated the activities of both developed countries. The number of agreements concluded between developing countries increased every year. Naturally, under such conditions, the problems of adapting the provisions of the OECD convention to modern realities were brought up to date [2]. The growth of economic expansion of domestic enterprises is accompanied by the growth of the opportunity to have income from foreign sources, to own property there. These phenomena become the object of close attention of state governments and, of course, in these conditions, the need for international double taxation is obvious [3] and the creation of legal ways to prevent double taxation. The UN also played a significant role in these tasks. This applies both to the conceptual apparatus and the definition of terms, and to the establishment of various tax collection schemes. It should be noted that the elimination of discrimination in the taxation of countries is different, as is the system of methods for eliminating double taxation [9]. The essence of the development of the double taxation elimination mechanism is the application of approaches:

– the first is based on the use of territorial binding, namely in the taxation of incomes received in the regions of this space;

– second, the approach is based on the essence of residency, when taxation covers all incomes outside of their place of receipt. In this, natural persons are based on citizenship, and legal entities are based on the place of registration and performance of the main activity.

From 1 December 2020, the Luxembourg tax authorities issued a circular stating that from 1 January 2021, the provisions incorporating the EU Parent and Subsidiary Directive into Luxembourg law will no longer apply to companies registered in Gibraltar with regard to the compliance of legal persons Conversely, the dividend exemption may apply if the dividends are distributed by a non-resident company subject to income tax comparable to Luxembourg income tax (known as “subject to the tax test”).

In the US, a bill has been issued that includes a requirement to report beneficial ownership. Information provided to FinCEN will be kept confidential and protected in accordance with the highest standards of information security.

On 11 December 2020, the French Supreme Administrative Court (Conseil d’Etat) delivered its decision in the case of whether an Irish resident company has a permanent establishment in France under Article 2 of the Franco-Irish Income Tax Treaty (1968), which is similar to the provisions of the OECD Model Convention until the 2017 renewal.

First, the court ruled that the concept of a dependent permanent establishment (DAPE) includes French companies that routinely take decisions on deals systematically approved by a non-resident company.

Second, the court officially ruled that tax treaties can be interpreted in the light of the OECD commentary published after their conclusion (ambulatory interpretation). According to previous case law, an OECD commentary could be used as a means of interpretation only if it was published before the conclusion of the relevant treaty.

On December 4, 2020, Belgium proposed adjustments to the interest deductibility limits and the Anti-Abuse Regulation for jurisdictions included in the list of non-cooperative EU countries. These measures are taken starting from 2021.

The Danish Parliament has passed a bill amending the corporate income tax rules regarding permanent establishments, deduction of final losses in foreign subsidiaries and requirements for transfer pricing (TP) documentation. The rules enter into force on January 1, 2021. Digital service charges have appeared in Portugal since November 19, 2020, where a law has been issued to introduce: relating to cinematographic and audiovisual activities. First, a fee of 4% of the price for audiovisual commercial communication is included in video sharing platforms. The exhibition fee began to be collected from advertisers based on the income realized in Portugal. Secondly, an annual fee of 1% of the revenues of subscription service providers – by video request. The law entered into force 90 days after the date of its publication, that is, from February 17, 2021 [5].

The phenomenon of double taxation is increasingly increasing with the increase in the degree of internationalization of the economy and the progressive expansion of tax "claims" of states on income received outside their territory. The nature of double taxation is revealed purely from a technical point of view, when one and the same economic transaction is connected with several tax systems, and, therefore, a tax obligation arises that coincides as a result of the application of the provisions of the current tax legislation, which are simultaneously in force in different legal jurisdictions. systems of countries. This combination of rules arises from the adoption in each legal system of certain criteria, the joint application of which is not agreed upon. Limiting the review of direct taxation, it should be noted that the common criteria that determine the territorial aspect of taxation have a dual nature, objective or subjective. To clarify this aspect, we can say that for the purpose of selecting the facts of economic activity subject to taxation, the first criterion strengthens the connection between the fact and the territory, while the second one strengthens the connection between the subject and the territory. From this it follows that, based on an objective criterion, these taxes are applied to all economic transactions that take place in the state, regardless of the connection that exists between the entity that carries them out and the territory itself (and therefore the tax is applied to all income received within the territory of a certain state), while, based on a subjective criterion, these taxes are applied to all actual economic transactions carried out by subjects connected in a certain way to the territory of the state (residence or even just citizenship), regardless of the place where similar economic transactions take place (and therefore income tax is applied to all resident incomes, wherever they are received). It is when two (or more) states involve the same tax base in their tax sphere that the phenomenon of double taxation arises.

This is a consequence of the coincidence of conflicting criteria of connection by their nature, i.e. at the systematic level, or since a certain taxpayer represents actual elements of connections with several jurisdictions, i.e. at the level of one economic transaction. However, the problem arises because all the main common factors commonly used express an extraterritorial tax claim. In practice, various combinations may occur:

– conflict between two objective criteria (for example, different identification of the place of income production);

– a conflict between two subjective criteria (for example, a person is considered to be connected to two different tax jurisdictions);

– conflict between subjective and objective criteria.

Hypotheses of opposition between criteria of the same nature (double objective criterion or double subjective criterion) refer to a conflict that can be defined as formal because it is resolved at the level of the legal qualification of the source or place of residence: dual residence, for example, which can be effective, if the person actually meets the requirements for residence in both states, or also presumed, if residence in one of the two states is recognized as a result of the presumption.

Otherwise, the hypothesis of a conflict between objective and subjective criteria implies a different approach to the main tax policy. It often happens that two principles coexist: the principle of taxation of income from foreign economic activity extends the tax powers of the relevant state to its residents even outside its territory, the principle of taxation at source extends the tax powers of the state to non-resident entities that operate on the national territory and receive there is income that would be taxable if it were received by resident entities. From the above, it is clear how closely related the issue of "territoriality" of taxes is to the problem of double taxation. In fact, it is about harmonizing the taxation of residents of income received abroad (the principle of taxation of income from foreign economic activity) and non-residents for income received on the national territory (a direct expression of the principle of territoriality).

It should also be noted that international legal practice did not contain any direct prohibition of double taxation, legal or economic. Each state could consider a certain economic transaction as taxable within the legitimate exercise of its sovereignty, regardless of the choice of other states. As noted, there is no consensus either on the criteria based on which the tax should be distributed among the various states involved, nor, therefore, on the distribution of responsibility for eliminating double taxation.

In today's world, where business is becoming more and more global, and international trade and investment are necessary for development, transfer pricing is becoming an important element of the tax system. When determining the prices of transfer transactions between related parties, companies face the risk of double taxation, which may arise because of differences in the tax systems of different countries.

The crux of the problem is that profits from transfer transactions may be subject to taxation in both countries where the related parties are located. This can create complications and misunderstandings between countries, as well as cause conflicts between businesses and tax authorities.

One of the main concepts in transfer pricing is the arm's length principle, which provides that the prices for transfer transactions between related parties should be those that would be agreed between independent companies under similar conditions. However, there are difficulties in accurately determining adequate prices, which can lead to differences in the understanding of profit calculation.

To solve this issue, many countries conclude Bilateral Agreements on the Avoidance of Double Taxation (DTA). These agreements establish the rules by which profits are determined and shared between countries. However, it is not always possible to achieve unity in defining clear rules, which sometimes leads to additional disputes and conflicts.

The main goal of solving the problem of double taxation in transfer pricing is to create a stable and transparent system that satisfies the interests of all parties. International standards and dispute resolution mechanisms play a key role in achieving this goal, ensuring a fair and clear playing field for all participants.

In the further development of transfer pricing and the fight against double taxation, it is important to continue the development and implementation of effective international standards, as well as to strengthen cooperation between countries and enterprises. Only in conditions of mutual understanding and cooperation will it be possible to ensure an effective and fair transfer pricing system that considers the interests of all parties.

Conclusions. Thus, international taxation, being a serious tool in regulating the foreign economic activity of enterprises and states, requires special attention in the conditions of a rapidly changing world and comprehensive digitalization. Meanwhile, multiple international taxation places an additional burden not only on taxpayers, but also has negative consequences for all participants in tax-legal relations. If only fiscal interests are pursued in the country, then, in addition to the fact that basic principles of universal law, such as respect for human rights and fundamental freedoms, non-discrimination, etc., will not be observed, a natural obstacle to the development of international economic relations and international cooperation will also be created. Therefore, in global practice, the elimination of double taxation is of the utmost importance, and there are differences in the procedure for applying the method of exemption of the country of residence.

References:

1. Braslavskyi R. H. (2017) Konventsii pro unyknennia podviinoho opodatkuvannia yak dzherela zakriplennia pryntsypiv podatkovoho prava [Conventions on the avoidance of double taxation as a source of consolidation of the principles of tax law]. *Aktualni problemy vitchyznianoi yurysprudentsii*, no. 4, pp. 51–55.

2. Horodnichenko Yu. V. (2017) Podviine opodatkuvannia: yoho sutnist ta metody usunennia [Double taxation: its essence and methods of elimination]. *Ekonomika ta suspilstvo*, vol. 10, pp. 574–578.

3. Kovalchuk K. F. & Petrova L. V. (2018) Doslidzhennia suchasnykh problem u sferi unyknennia podviinoho opodatkuvannia [Study of modern problems in the field of double taxation avoidance]. *Problemy ekonomiky ta politychnoi ekonomii*, no. 1, pp. 260–270.

4. Kraievskyi V. M. & Muravskyi O. Yu. (2023) Oblikovo-podatkova pryroda transfertnoho tsinoutvorennia [Accounting and tax content of transfer pricing]. *Mizhnarodnyi naukovyi zhurnal "Internauka". Seriia: "Ekonomichni nauky"*, no. 5 (73), tom 2, pp. 84–89.

5. Olender I. Ia. (2019) Vyznachennia oznak podviinoho opodatkuvannia [Determination of signs of double taxation]. *Vcheni zapysky TNU imeni V.I. Vernadskoho. Seriia: yurydychni nauky,* tom 30 (69), no. 3, pp. 83–86.

6. Parkhuts V. V. (2020) Pryroda podviinoho opodatkuvannia [The nature of double taxation]. *Nauka onlain: Mizhnarodnyi elektronnyi naukovyi zhurnal*, no. 12, pp. 1–5.

7. Pro vykonannia zakhodiv, yaki stosuiutsia uhod pro opodatkuvannia, z metoiu protydii rozmyvanniu bazy opodatkuvannia ta vyvedennia prybutku z-pid opodatkuvannia [On the implementation of measures related to taxation agreements, with the aim of countering the erosion of the tax base and the removal of income from taxation]. Available at: https://zakon.rada.gov.ua/laws/show/2692-19#Text (accessed February 1, 2024).

8. Ustynova I. P. & Medynska T. Iu. (2017) Mizhnarodna praktyka usunennia podviinoho opodatkuvannia [International practice of elimination of double taxation]. *Yurydychnyi visnyk*, no. 3, pp. 75–80.

9. Khodzytska V. V. (2019) Unyknennia podviinoho opodatkuvannia dokhodiv: svitovi tendentsii [Avoiding Double Taxation of Income: Global Trends]. *Finansy Ukrainy*, no. 4, pp. 79–96.

10. Shulha T. M. & Kuts K. O. (2023) Vplyv mizhnarodnykh podatkovykh uhod na opodatkuvannia v Ukraini [The impact of international tax treaties on taxation in Ukraine]. *Molodyi vchenyi*, no. 12 (124), pp. 142–145.

Список літератури:

1. Браславський Р.Г. Конвенції про уникнення подвійного оподаткування як джерела закріплення принципів податкового права. *Актуальні проблеми вітчизняної юриспруденції*. 2017. № 4. С. 51–55.

2. Городніченко Ю.В. Подвійне оподаткування: його сутність та методи усунення. *Економіка та суспільство*. 2017. Випуск 10. С. 574–578.

3. Ковальчук К.Ф., Петрова Л.В. Дослідження сучасних проблем у сфері уникнення подвійного оподаткування. *Проблеми економіки та політичної економії.* 2018. № 1. С. 260–270.

4. Краєвський В.М., Муравський О.Ю. Обліково-податкова природа трансфертного ціноутворення. *Міжнародний науковий журнал «Інтернаука». Серія : «Економічні науки»*. 2023. № 5 (73). Том 2. С. 84–89.

5. Олендер І.Я. Визначення ознак подвійного оподаткування. *Вчені записки ТНУ імені В.І. Вернадського. Серія: юридичні науки*. 2019. Т. 30 (69). № 3. С. 83–86.

6. Пархуць В.В. Природа подвійного оподаткування. *Наука онлайн*: *Міжнародний електронний науковий журнал*. 2020. № 12. С. 1–5.

7. Про виконання заходів, які стосуються угод про оподаткування, з метою протидії розмиванню бази оподаткування та виведення прибутку з-під оподаткування. URL: https://zakon.rada.gov.ua/laws/show/2692-19#Text

8. Устинова І.П., Мединська Т.Ю. Міжнародна практика усунення подвійного оподаткування. *Юридичний вісник*. 2017. № 3. С. 75–80.

9. Ходзицька В.В. Уникнення подвійного оподаткування доходів: світові тенденції. *Фінанси України*. 2019. № 4. С. 79–96.

10. Шульга Т.М., Куц К.О. Вплив міжнародних податкових угод на оподаткування в Україні. *Молодий вчений*. 2023. № 12 (124). С. 142–145.