UDC 343.359.2:341

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SEVERAL ISSUES OF REGULATION OF THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF TAX AVOIDANCES BETWEEN UKRAINE AND PRC

The author analyzes the Agreement between Ukraine and the Republic of China for the avoidance of double taxation and prevention of fiscal evasion with the respect to taxes on income and property, identifies several problems in the legal regulation of an avoidance of double taxation between Ukraine and China and formulates proposals for their elimination.

Keywords: *avoidance of double taxation, prevention of tax evasion, the Contracting States, residents.*

The development of foreign economic relations, international population migration has led to the actualization of the problems of international double taxation and evasion of tax, the cause of which are the differences in tax laws of various states. As each country seeks to protect its own tax sovereignty, the defined problems cannot be solved unilaterally. Effective fight against international double taxation and evasion of taxation is the signing of the relevant conventions and agreements between individual countries.

Ukraine as an independent State is a member of more than 50 existing international conventions and agreements on the eliminating of double taxation [1]. In addition, according to the Bill of the Succession of Ukraine, dated September 12, 1991 No. 1543-XII [2] on its territory there are several agreements during the existence of the USSR. Among this diversity a special attention require research agreements with the above-mentioned issue between Ukraine and the People's Republic of China (PRC) because of recent international cooperation and

intensified relations between these countries. So, the first Vice Prime Minister of Ukraine S. Arbuzov has identified exactly the PRC as a strategic partner of Ukraine and the foreign economy as a key partner in the Asia-Pacific Region [3].

It should be noted that certain aspects of eliminating double taxation and evasion of taxes are considered in the works of V. Babanìn, M. Voronin, O. Dubovyk, O. Kozirìn, M. Kucheryavenko, O. Meshcheriakova, V. Pirumov, J. Stump, M. Tkachenko, V. Ualìd and others, but they are not accentuated on the problems of legal regulation of evasion and tax evasion between Ukraine and China, whereas they need to research, identifying the problems and developing the proposals to eliminate them.

Therefore, the purpose of our work is the study of normative and legal acts regulating the avoidance of the tax and tax evasion between Ukraine and China, identifying problems and developing proposals to eliminate them

On December, 4, 1995 between Ukraine and China signed an agreement on the avoidance of double taxation and prevention of tax evasion with respect to taxes on income and property (hereinafter referred to as Agreement from 04.12.1995) [4], which was ratified by Ukraine on July 12, 1996, Bill No. 342/96-VR [5]. This Transaction uses the default model Convention, the Organization for Economic Cooperation and Development (OECD). It should be noted that the typical Convention on avoidance of double taxation was introduced in 1928 under the auspices of the League of Nations and presented by four models: 1) on the avoidance of double taxation direct taxes; 2) on the avoidance of double taxation, taxes on inheritance; 3) on administrative assistance in tax matters; 4) for assistance in collection of taxes [6, p. 34]. Later States that an the agreement on the avoidance of double taxation, was used as the mentioned above common Convention (model) and developed later – typical OECD Convention on the avoidance of double taxation of income and capital, 1963, 1977 (with changes and additions in 1992, 1994, 1995, 2000) [7], a typical OECD Convention on the avoidance of double taxation concerning tax on the property and inheritance in 1966 [7], a typical tax agreement the British community of Nations 1964 [7],

Typical of the Convention on the Elimination of Double Taxation Treaties between the countries – members of the Ands Group (Bolivia, Venezuela, Columbia, Peru, Ecuador) and between the countries – members of the Ands Group and other countries in 1971 [7], the Typical Convention of United Nations Organization (UN) in 1980, created to protect the interests of developing countries, with changes and additions in 1995 [8], a typical model of the OECD Convention on the provision of mutual assistance in tax matters in 1981 [7], A typical model of the OECD Convention on stationary property, heritage and talent [7] etc. The agreement of 04.12.1995 uses a typical OECD Model Convention on the avoidance of double taxation of income and capital, 1977.

In the art. 1 the above mentined Agreement establishes the list of persons to which the dispositions of this legal act, namely, to the persons who are the residents of the Contracting States. In the context of the proposed amended regulations it will be needed to decide on the concepts of "the Contracting States" and "resident".

Contracting States are Ukraine and China. In the art. 3 from 04.12.1995 it is described the field of apparatus, according to which the term "Ukraine" used in a geographical sense, means the territory of Ukraine, its continental shelf and its exclusive (maritime) economic zone, including any area outside the territorial seaside of Ukraine, which under international law is, or can be further defined as the area within which can be made law with respect to seabed, subsoil and their natural resources. China, in turn, is defined as the PRC, when used in a geographical sense, means all the territory of China, including its territorial sea, where applied Chinese laws regarding taxation, and any area beyond the territorial sea, where China has sovereign rights of the exploration and development of resources of the seabed and its subsoil, and resources of the surrounding waters, in accordance with international. It should be emphasized that applied definition of "China" does not include the Special Administrative Region of China, Hong Kong (another name – Hong Kong). It can be explained with the historical development of the region. Since 1842 Hong Kong was a colony of Great Britain, and,

consequently, the avoidance of double taxation between residents of Ukraine and Hong Kong was carried out according to the dispositions of the Convention between the Government of Ukraine and the Government of the United Kingdom of Great Britain and Northern Ireland on the Elimination of Double Taxation and Prevention of Tax Evasion regarding taxes on income and on property value increase, signed on February 10, 1993 (hereinafter referred to the Convention from 10.02.1993) [9]. However, in 1997 the sovereignty of Hong Kong was returned to China on the basis of the Joint Sino-British Declaration on the transfer of Hong Kong from July 1, 1997 [9]. Meanwhile, according to the agreement between the United Kingdom of Great Britain and Northern Ireland and the Republic of China on the issues of the future of Hong Kong [9], this region was given a considerable degree of autonomy and independence for a period of 50 years from the date of joining the PRC, including the Tax Legislation. As Dr. Zlobin emphasizes [10, p. 14], through the “tax autonomy"of Hong Kong, the dispositions of the Agreement on 04.12.1995 does not act on the territory of Hong Kong. It would seem that in this case, on the territory of Hong Kong will continue operating the norms of the Convention from 10.02.1993, however this is not so, because China has not acceded to the Vienna Convention on the succession of States in respect of treaties of September, 23, 1978 [11], that the relevant principles of international law concerning succession of States during the decolonisation set forth in this Convention, the PRC (and, according to Hong Kong) do not apply. Consequently, there was a situation where a territorial part of one of the Contracting States designated in the agreement of 04.12.1995, namely Hong Kong, is not covered by this agreement.

The next aspect on which I would like to focus is the definition of "the resident", because according to the norms of the national legislation of Ukraine and China, these definitions are different. So, according to subparagraph. 14.1.213 of p. 14.1 of the art. 14 of the Tax Code of Ukraine [12] residents are: a) legal persons and their individuals who formed and conduct their activities in accordance with the legislation of Ukraine with the location as on its territory and abroad; b)

diplomatic, consular and other official missions abroad who have diplomatic privileges and immunity; the individuals who have a place of residence in Ukraine. Thus, if an individual also has a residence in a foreign country, she is considered to be a resident if such person has a place of residence in Ukraine; if a person has a place of residence in a foreign country, she is considered a resident if has a close personal or economic ties (Center of Vital Interests) in Ukraine. If the State in which the individual is the center of vital interests cannot be determined, or if the individual has no place of residence in any of the States, then it is considered a resident if it is staying in Ukraine not less than for 183 days (including the day of arrival and departure) during the period or periods of the tax year. In addition, a sufficient (but not exceptional) condition for the determination of location of the Centre of Vital Interests of physical persons is the place of residence of the members of his family or her registration as a business entity. If it is impossible to determine tax residence status of the individuals using the previous dispositions, the individual is considered resident if he is a citizen of Ukraine. Sufficient to identify a person resident is an independent definition of her principal residence on the territory of Ukraine in the manner prescribed by the TCU, or his register. According to the Bill of the PRC on the tax on income of individuals "as of December 29, 2007 [13, p. 144] and the Detailed Rules of an Application of the Bill of the PRC on the tax on income of individuals" [13, p. 145] residents are either citizens of the PRC or foreign citizens, permanently residing on the territory of the PRC for more than 1 year, while they have to pay tax on the income of natural persons in relation to the incomereceived on the territory of the PRC and other countries. In addition, in accordance with art. 6 Detailed Rules of Application of the Law of the PRC on tax on income of individuals "of foreign nationals residing on the territory of the PRC for a period from 1 to 5 years are exempt from the payment of tax on income earned abroad, and with only 6 year stay in the PRC, in case of the foreign citizen during the tax year has not lost the status of the tax resident of China, such an income is the subject of Declaration and payment of tax. However, foreign nationals who are not tax residents of China, but on the territory

of the PRC is less than 1 year, pay the tax on the income of natural persons in relation to the income received in the territory of the PRC.

Agreement of the 04.12.1995 solves the conflict this way. According to art. 4 the above agreement, the term "resident of a Contracting State" means a person who under the laws of that Contracting State is taxable in it, on the basis of a permanent residence, permanent location, the location of the head office, the location of the governing body, place of registration or any other similar criteria. If an individual is a resident of both Contracting States, his status is defined as follows: a) it is considered to be a resident of the Contracting State where it has a permanent housing; if it has a permanent home in both Contracting States, it is considered to be a resident of the Contracting State in which it has a close personal and economic ties (Center of Vital Interests); b) if the Contracting State in which it has a centre of vital interests cannot be determined, or when she has no permanent housing in any of the Contracting States, it is considered to be a resident of the Contracting State where it normally resides; in the case if it resides in both Contracting States or when she usually does not live in any of them, it is considered a resident of a Contracting State, the national entity which it is; g) if it is the national face of both Contracting States or if it is not a national face of any of them, the competent authorities of the Contracting States to decide the issue of the taxation of such a person by mutual agreement. In the case where the person is a resident of both Contracting States, then the competent authorities of the Contracting States to determine that the person is a resident of a Contracting State for the purposes of this agreement by mutual agreement.

Therefore, pursuant to the dispositions of the agreement on the avoidance of double taxation, there are several criteria that are used to define the notion of "residence" is the place of the residence, permanent location, the location of the head office, the location of the governing body, etc., that is, the criterion of nationality is not a criterion for the definition of the concept for tax purposes, and therefore, a citizen of Ukraine, which is a resident of China, is not a resident of Ukraine, therefore the link per capita taxable (i.e. resident), does not apply in the

case of an absence of taxation by the virtue of domestic legislation (for example, charity organizations).

It is necessary to note that the differences in national laws of both countries regarding the definition of the "resident", unresolved questions remain concerning the application of tax benefits – it is unclear whether a tax resident of Ukraine does not apply the dispositions of the agreement on the avoidance of the double taxation, if pursuant to the legislation of Ukraine provides for the tax breaks. As it is rightly pointed out by O. Pogorlecky [14, p. 22], the purpose of the international agreements on the avoidance of double taxation and tax evasion is, above all, the reduce of the tax burden on the taxpayer. Therefore, in cases when according to the legislation of Ukraine for tax resident of Ukraine are provided tax incentives, their application should not be limited to the dispositions of the agreement on the avoidance of double taxation, it is advisable to consolidate the dispositions of the mentioned agreement. This approach reflects the principle agreements on the avoidance of double taxation to reduce the tax burden.

Thus, concluded in 1995 between Ukraine and China the Agreement on the Avoidance of Double Taxation and the Prevention of the Tax Evasion regarding the taxes on income and property of today's obsolete, certain dispositions require revision and refinement, namely in the rules of the above mentioned agreement, it is advisable to foresee the dispositions in that Agreement from 04.12.1995 which does not limit any benefits provided by the legislation of the Contracting States for the residents of these States. In addition, it seems to be the signing of an Interim Agreement between Ukraine and the people's Government of Hong Kong concerning the avoidance of double taxation and prevention of tax evasion for the term for which Hong Kong is given a considerable degree of autonomy and independence in accordance with the Agreement between the United Kingdom of Great Britain and Northern Ireland and the Republic of China on the issues of the future of Hong Kong (until 1904). It is considered, that problematic aspects associated with the avoidance of double taxation between Ukraine and China, are not exhaustive, and should be the subject of further research.

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