

Artículo de investigación

Legal ways of double taxation resolving

Правові шляхи розв'язання подвійного оподаткування

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Abstract

The purpose of the article is a comprehensive study of the problems of double taxation, which is at the intersection of categories of taxable entity and taxpayer. According to the purpose, it is substantiated that double taxation arises in the case of taxation of income received by residents abroad, or in the case of a mixed procedure of tax payment, or in the taxation of the distributed part of the profits of enterprises. It has been established that double taxation is also possible with the partial imposition of one object on another, and this can occur both within the same country and under different tax systems. The taxation of petroleum products with excise tax, which resulted from the legislative regulation that led to double taxation, was considered and analyzed. In the process of researching the topic of the article, the authors conclude that, starting from 2016, the legislator actually introduced double taxation with the same tax and accordingly replaced the ad valorem excise tax rate on retail sales of excisable goods with specific ones (Euro tax rate per unit of tax). It is stated that double taxation of one and the same taxpayer is a violation of Article 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms of each natural or legal person, the right to peacefully own their property.

Keywords: Tax, excise tax, double taxation, international treaty.

Анотація

Метою статті є комплексне дослідження проблем подвійного оподаткування, яке перебуває на стику категорій об'єкта оподаткування та платника податку. Відповідно до мети обґрунтовано, що подвійне оподаткування виникає в разі оподаткування доходів, отриманих резидентами за кордоном, або у разі змішаного порядку сплати податку, чи при оподаткуванні розподіленої частини прибутку підприємств. Встановлено, що подвійне оподаткування можливо також і при частковому накладенні одного об'єкта на інший, причому це може відбуватися як в рамках однієї країни, так і при дії різних податкових систем. Розглянуто та проаналізовано оподаткування нафтопродуктів акцизним податком, яке стало наслідком законодавчого регулювання, що привело до подвійного оподаткування. В процесі дослідження теми статті, автори приходять до **висновку** про те, що, починаючи з 2016 року законодавцем було фактично запроваджене подвійне оподаткування одним і тим самим податком та відповідно замінено адвалорну ставку акцизного податку з роздрібного продажу підакцизних товарів на специфічну (податкова ставка у розмірі євро до певної одиниці оподаткування). Зазначено, що подвійне обкладання одним і тим самим податком одного і того самого платника податків є порушенням гарантованого статтею 1 Протоколу до Конвенції про захист прав людини і основоположних свобод кожної фізичної або юридичної особи право мирно володіти своїм майном.

Ключові слова: податок, акцизний податок, подвійне оподаткування, міжнародний договір.

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Introduction

The relevance of the topic is due to the theoretical and practical importance of research into issues related to double taxation. It should be noted that there are several types of double taxation, among which are: internal double taxation (in countries where the same tax is levied at the level of different administrative territorial units) and external (international) taxation, which face national legislation in determining tax or payer, treating him or her as a liable person by analogy with the law of another state. External double taxation issues are resolved through the conclusion of international bilateral or multilateral agreements. The origin of double taxation is, as a rule, different legislative regulation of the payer and sources of income in the legislation of different states. There are two ways to eliminate double taxation. And this is usually one-sided (a change in national tax law) or bilateral (based on international agreements by bringing national tax laws into conformity).

In Ukraine, the issue of avoidance of double taxation is governed by the Tax Code of Ukraine and a number of international legal acts. The problems of resolving domestic double taxation are exclusively the prerogative of the state tax policy; at the same time, external double taxation is solved by concluding international bilateral or multilateral agreements. Issues of double taxation are often the subject of litigation between taxpayers and bodies of the State Fiscal Service of Ukraine. One such litigation was the taxation of petroleum products with an excise tax, which in turn was caused by appropriate legislative regulation. At the same time, the unacceptability of the approach adopted by the legislator was exacerbated by the fact that they applied an *ad valorem* excise tax rate to the taxation of petroleum products, which directly contradicted the basic principles and the generally accepted practice of taxation of excisable goods in the Member States of the European Union.

There are currently many international double tax treaties in the world that determine the tax jurisdiction of each of the contracting countries.

Methodology

The methodological basis of the article is a set of approaches and methods of scientific knowledge. The systematic approach allowed us to investigate the problems of double taxation. Achievements of the set goals and objectives within the chosen topic of the article are based on

the set of scientific methods of philosophical (dialectical, hermeneutic), general scientific (analysis, synthesis, induction, deduction, analogy, etc.) and special scientific levels (normative-analytical, method of complex analysis, comparative method, Methods of research allowed to carry out scientifically grounded analysis of the concept of double taxation, measures of avoidance of double taxation, to study scientific works and jurisprudence on issues of double taxation. th tax, which has been the subject of litigation between taxpayers and fiscal authorities of the State Service of Ukraine.

Results and discussions

Any modern state is a tax power. The legal sphere of taxation is constantly changing due to the formation of market relations and socio-economic growth of the state. The expediency and effectiveness of tax reforms carried out in the state will be much higher if they are based on both theoretical and practical experience of legal regulation. Therefore, there is a need to understand the systemic qualities of modern tax law, and to highlight the specific problems that arise in practice as a result of errors of legislative regulation. One such tax law problem is the problem of double taxation. Concepts such as "double taxation", "elimination of double taxation", "internal double taxation", "external double taxation" need to be clarified and obtain new meaning, which would correspond to modern realities.

The system of taxes and fees, and the public-legal nature of tax relations, implies the obligatory participation of state bodies, officials and entities with delegated powers of authority in them, ensures the functioning of the state apparatus and the development of the state as a whole. Tax relations, regulating relations in the field of taxation, act as a result of such regulation, the implementation of state will and as a means of legal regulation through the system of tax legislation. At a time when fiscal policy is aimed at collecting from taxpayers the maximum amount of such payments, knowledge of the rules of tax legislation in legally permissible situations of tax exemption, reduction of tax rates, and avoidance of double taxation become especially relevant.

The concept of double taxation is defined as the taxation of a single tax entity by a single payer with one (or similar) tax over the same period

(usually the tax period) (Kucheriavenko, N.P., 2005).

The problem of double taxation is at the intersection of the taxable entity and the payer, that is, when they are taxed within one or more fiscal jurisdictions with a tax of more than one type. On the one hand, there is a rather difficult situation in determining the tax base, because it is not easy to distinguish in the diversity of income outside the state and within its borders. On the other hand, the differentiation of payers into residents and non-residents requires a peculiar system of accounting for income and, accordingly, tax exemptions. The amount of income received abroad is credited to the total amount of taxable income in Ukraine and is taken into account when determining the amount of tax to be paid by the payer in Ukraine. In this case, the amounts credited may not exceed the amount of tax payable in Ukraine. In such a case, the written confirmation of the tax authority of the relevant foreign country is obligatory that the tax has been paid and that there are international agreements on elimination of double taxation (Latkovska, T.A., 2019).

In Ukraine, the Tax Code of Ukraine and a number of international legal acts govern the issue of avoidance of double taxation. The problems of resolving domestic double taxation are exclusively the prerogative of the state tax policy.

With regard to residents, the rules on avoidance of double taxation are enshrined in Art. 13 of the Tax Code of Ukraine, according to which the income received by a resident of Ukraine (other than individuals) from sources outside Ukraine is taken into account when determining its object and / or base of taxation in full.

In determining the object and / or base of taxation, expenditures incurred by a resident of Ukraine (other than individuals) in connection with the receipt of income from sources outside Ukraine, are taken into account in the manner and amounts established by the Tax Code (Tax Code of Ukraine: statutory comment) (2011).

Income received by a resident individual from outside Ukraine is included in the total annual taxable income, except for non-taxable income in Ukraine under the provisions of the Code or international treaty, the consent of which is provided by the Verkhovna Rada of Ukraine.

Taxes and fees paid outside Ukraine are deducted when calculating taxes and fees in Ukraine

according to the rules established by the Tax Code.

In order to qualify for taxes and fees paid outside Ukraine, the payer is obliged to obtain from the state authority of the country in which such income (profit) is received, authorized to pay such tax, a certificate of the amount of tax paid and fees, as well as the base and / or subject to tax. This certificate is subject to legalization in the respective country, corresponding to the foreign diplomatic institution of Ukraine, unless otherwise stipulated by the current international treaties of Ukraine (Tax Code of Ukraine, 2010). Both theory and practice distinguish between internal double taxation and external double taxation. Internal double taxation is considered as taxation in countries where the same tax is levied at the levels of different administrative and territorial units. It is defined as vertical double taxation, payment of the same tax at the state and local level; horizontal double taxation, which arises at the same administrative level due to differences in the definition of the object of taxation (Kozyrin, A.N., 1993).

External double taxation issues are resolved through the conclusion of international bilateral or multilateral agreements.

Multilateral double taxation avoidance measures include:

- 1) the method of estimation by which income is taxed in both contracting countries, but subject to adjustment to the level of tax in a country of smaller size. The deduction method means that both parties to the agreement may be taxed, but one party should reduce its tax to the other party's tax rate if it is lower. Unless double taxation instruments are adopted, unilateral measures are taken. Such practices are widely exercised by the government for exporting goods and capital, such as credit for foreign taxes and tax rebates (Pepeliaev, S.G., 2017);
- 2) the exemption method, which provides for the exclusion from the taxable base of income received abroad and property located abroad;
- 3) a method of tax credit, which means the deduction of taxes paid abroad to reduce the taxpayer's obligations to pay tax in his country;
- 4) the method of deferral, that is, the deferral of taxation of foreign income until their import into the country of the taxpayer's domicile;

- 5) the tax rebate method whereby tax paid abroad is treated as an expense that reduces the amount of taxable income.

As a rule, in the case of external (international) double taxation, national legislations face each other in defining the subject of taxation or entity, treating it as obligated by analogy with the legislation of another country. International double taxation is caused by the conflict of tax laws of two or more countries (Fedosov, V.M., 1994).

Regarding international treaties on avoidance of double taxation, the State Fiscal Service of Ukraine, by letter dated 02.01.2018 № 78/7 / 99-99-01-02-02-17 "On international treaties on avoidance of double taxation" (2018) informed that information received from the Ministry of Foreign Affairs of Ukraine entered into force international treaties on avoidance of double taxation with 69 countries.

In tax theory and practice, there is a distinction between double economic and double legal taxation. Double economic taxation refers to the situation where several of its successive recipients pay the tax on the same income. Double economic taxation has to do with the idea of two or more taxes from the same tax base. Scientists have noted that economic double taxation occurs when the same base is twice taxed "in the hands" of different entities (Ashmarina, E.M., 2011).

The problem of economic double taxation can be solved in the development of national tax legislation, which will prescribe rules that allow in a certain way to calculate the tax paid at the enterprise level, when calculating the tax obligations of shareholders.

Double legal taxation refers to the situation where the same taxpayer is subject to similar taxes on the same taxable entity (tax base) twice or more in a single period. Moreover, double taxation is not a mathematical doubling of the tax amount; it is an excessive increase in the tax burden for the taxpayer (Perov, Tolkushkin, 2002).

For a long time, the problem of double taxation was due to the peculiarities of determining the tax legislation of the taxable entity and the subject. This was due to the fact that, on the one hand, with the diversity of incomes within the state and beyond, a rather difficult situation arose in determining the tax base. On the other hand, the distinction between taxable entities for

residents and non-residents requires a system of accounting for income and, accordingly, for tax exemptions.

Issues of double taxation are often the subject of litigation between taxpayers and bodies of the State Fiscal Service of Ukraine.

It should be noted that double taxation was a consequence of the legislative regulation of 2015-2016. This was clearly seen in the example of the excise tax on petroleum products. At the same time, the unacceptability of the approach adopted by the legislator in 2015 is further exacerbated by the fact that the ad valorem excise tax rate was applied to the taxation of petroleum products, which directly contradicts the basic principles and the generally accepted practice of taxation of excisable goods in the EU Member States. Yes, the possibility of applying ad valorem rates to excisable goods is only provided for tobacco products in accordance with Council Directive 2011/64 / EC of 21 June 2011 on the structure and rates of excise duty applicable to tobacco products (codification). Thus, according to Part 1 of Art. 7: "Cigarettes manufactured in the Union and produced from third countries are subject to an ad valorem (cost) excise duty, calculated at the maximum retail selling price, including customs duties, as well as a specific unit charge".

Whereas, for all other types of excisable goods, only special (specific) tax rates of EUR up to a specific unit of tax apply (according to Council Directive 2003/96 EC of 27 October 2003 on the restructuring of the Community system for the taxation of energy and electricity products; 92 / 83 / EEC "On the harmonization of the structures of excise duties on alcohol and alcoholic beverages" of 19 October 1992 ", and in particular 92/81 / EEC" On the harmonization of the structures of excise duties on petroleum products "of 19 October 1992.

However, the Ukrainian legislator decided that in 2015, any excise goods should be subject to an ad valorem excise tax rate. Moreover, in addition to the ad valorem rate, excise duty was also applied to excise goods. As a result, the European Union's requirements for taxing excise goods were violated twice: for the first time, when ad valorem rates were introduced; the second time - when introducing a "double" rate (ad valorem (for "retail excise duty") and specific (for "import excise" and excise duty on production) excise tax, as a result of which taxpayers must bear a double tax burden (Resolution of the Supreme Court of Ukraine, 2018).

Paragraph 25, Paragraph 56 of Law of Ukraine No. 71-VIII of 28.12.2014 "On Amendments to the Tax Code of Ukraine and Certain Legislative Acts of Ukraine on Tax Reform" paragraph 215.3. Article 215 of the Tax Code of Ukraine is supplemented by subparagraph 215.3.10. read as follows: "For excise goods sold in accordance with subparagraph 213.1.9. 213.1. Article 213 of this Code, the rates of tax shall be set by the decision of the village, settlement or city council as a percentage of the value (with value added tax), in the amount of 5 percent. "

In accordance with subparagraph 214.1.4. of paragraph 214.1. Article 214. of the Tax Code of Ukraine, as of January 1, 2015, the base of excise tax on the retail sale of excisable goods is the value (with value added tax) of such excisable goods.

In accordance with paragraph 188.1. Article 188 of the Tax Code of Ukraine, as of January 1, 2015, the tax base for value added tax on the supply of goods / services is determined on the basis of their contractual value (in the case of controlled transactions, not lower than the ordinary prices determined in accordance with Article 39 of this Code) subject to national taxes and fees (except for compulsory state pension insurance, which covers the cost of cellular mobile services, value added tax and excise tax on Ethyl alcohol used by manufacturers for the manufacture of medicines, including blood components and derived products (excluding medicines in the form of balms and elixirs).

Based on the content of the provisions of paragraph 188.1. Article 188 of the Tax Code of Ukraine, as of January 1, 2015, the excise tax was included in the tax base in the case of supply of goods / services, and the ad valorem rate (tax rate "ad valorem" - "according to the value") of excise tax on retail sale of excisable goods was applied to it.

Thus, in fact, the excise tax on retail sales of excisable goods was included in the definition of the value added tax base, which also included the value added tax.

Taxpayers included in value added tax excise tax on excise goods, including value added tax in accordance with the requirements of the tax legislation as of 01.01.2015, which is unambiguous in their tax value-added tax base double taxation of the same tax (value added tax) of the same tax base (contract value).

Double taxation of the same tax by the same taxpayer is a violation of Article 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms of each natural or legal person.

These statements are fully confirmed by the fact that on December 24, 2015, the legislator adopted the Law of Ukraine "On Amendments to the Tax Code of Ukraine and Some Legislative Acts of Ukraine on Balance of Budget Revenues in 2016" under No. 909-VIII, which entered into force on January 1, 2016.

Paragraph 214.4. Article 214. of the Tax Code of Ukraine, in the wording of 01.01.2016 it is established that for the goods specified in paras. 215.3.4. § 215.3. Art. 215 of the Tax Code of Ukraine (petroleum products, liquefied gas, substances used as components of motor fuels, motor alternative fuels) sold by retailers of excisable goods, the tax rate is 0.042 euros for each liter of goods sold (released). .10 para. 215.3 of Article 215 of the Tax Code of Ukraine), and the tax base is, accordingly, the value of excise goods, defined in units of volume.

Paragraph 188.1. Art. 188 of the Tax Code of Ukraine, as of January 1, 2016, the base of taxation on value added tax for the supply of goods / services is determined on the basis of their contract value, including national taxes and fees (except excise tax on the sale of retail trade tax entities of goods, the compulsory state pension insurance levy on cellular mobile services, value added tax and the excise tax on ethyl alcohol that id used by manufacturers – entities for production of medications, including blood components and products manufactured from these drugs (except drugs in the form of balms and elixirs). Revised version of paragraph 188.1. Art. 188. The Tax Code of Ukraine is still in force today.

It should be noted that not only taxpayers whose tax burden repeatedly increases with the consistent taxation of the same object in different countries are interested in the prevention of double taxation of income and property, but also the states that seek to increase domestic and foreign trade, trade investments and enhancing the competitiveness of individual national enterprises and the economy as a whole.

Measures to eliminate double taxation can be established in two ways: unilateral, by changing national tax legislation; bilateral (multilateral), by concluding international agreements.

It is possible to eliminate double taxation when the country of the taxpayer's domicile allows them to take into account the taxes paid by them abroad when fulfilling their tax obligations. However, this can lead to unjustified budget losses, or lead to various frauds by fraudulent taxpayers.

Double taxation will actually be double taxation if it is applied to the same objects or entities, usually for the same period of time (tax period). As is known, the uniqueness of taxation is understood as taxation of a specific tax of the same object only once during the tax period (Somoyev, R.G., 2000)

International double taxation is possible if the same entity has been subject to taxation more than once during the calendar year or other time period for individual taxes, after which the tax base is determined and the amount of tax payable is calculated (Tolkushkin, A.V., 2000).

Double taxation does not necessarily mean literally using the same tax leverage. It is also possible with the partial imposition of one object on another, and it can occur both within one state and under different tax systems (Sutyryn, S.F., 1998).

Therefore, if the problem does not go beyond state borders, it can be solved by bringing the rules of national legislation into a certain logical conformity and harmony.

However, if such a situation arises in international relations and affects the tax law of sovereign states, then international double taxation can be eliminated by reconciling numerous and complex issues at the interstate level.

It is through such regulation that the situation of international double taxation can be solved, which arises under the following circumstances:

- if, in accordance with the national legislation of several states, the taxpayer is recognized as a resident and, accordingly, bears unlimited tax liability to each of them with respect to the objects of taxation;
- if a resident of one state has an object of taxation in the territory of another state and both of these states tax the object;
- if several states make the same person, who is not a resident of either of them, subject to taxation on an object that

arises in the subjects of taxation in those states (Gusev, V.V., 2000).

Based on the conducted research, including legislative changes of the last period, as well as situations that give rise to the problem under study, it is possible to propose the same definition of double taxation as repeated taxation of a taxable entity (tax base) or a specific taxpayer with the same tax over a period of time (tax period).

Moreover, since double taxation can take many forms (taxation of the same entity within the same country and different countries, different definition of payer, etc.), all this has made double taxation an international problem.

Conclusion

Thus, since 2016, the legislator has actually introduced double taxation with the same tax and accordingly replaced the ad valorem ("ad valorem" - "according to the value") excise tax on excise goods retailing for a specific (tax rate of EUR to a specific unit of tax).

In accordance with the norm of the Constitution of Ukraine (Article 9), existing international treaties, the consent of which is granted by the Verkhovna Rada are part of the national legislation of Ukraine, and the Law of Ukraine "On International Treaties of Ukraine" (Article 9) establishes: if by an international treaty of Ukraine, which has entered into force in accordance with the established procedure other rules than those stipulated in the relevant act of the legislation of Ukraine, the rules of the international treaty shall apply. Therefore, in order to properly apply the principles of the Double Taxation Convention concluded by Ukraine, it is necessary in each case to be guided by the provisions of the relevant bilateral Convention. As a rule, the Convention on the Avoidance of Double Taxation applies to residents of Ukraine and to residents of another state, as well as to persons who are residents of both states. As a rule, property taxes are applied to income taxes, not including the indirect taxes to which the excise tax applies.

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