UDC 342.1
DOI https://doi.org/10.24144/2307-3322.2024.81.2.12

CHARACTERISTIC OF MUTUAL AGREEMENT PROCEDURE IN CASE OF THE DOUBLE TAXATION TREATY BETWEEN AZERBAIJAN AND UKRAINE

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Гасанов Парвіз Ариф огли. Характеристика процедури взаємної угоди на прикладі Договору про уникання подвійного оподаткування між Азербайджаном і Україною.

Стаття присвячена порівняльно-правовому аналізу положень про процедуру взаємного узгодження в ст. 25 Конвенції між Урядом України та Урядом Азербайджанської Республіки про уникнення подвійного оподаткування та попередження ухилень від сплати податків на дохід і майно від 30 липня 1999 р. в контексті рекомендацій, передбачених в ст. 25 Модельної податкової конвенції ОЕСР. Остання є широко визнаним джерелом тлумачення норм двосторонніх договорів про уникнення подвійного оподаткування, в т.ч. і в Україні. Запропонований аналіз, з одного боку, спрямований на пошук можливих шляхів удосконалення нормативних засад процедури взаємного узгодження з урахуванням ризику підвищення кількості податкових спорів (наприклад, використання терміна «резидент» в першому реченні ст. 25(1) згаданої Конвенції замість терміна «особа» створює можливість неоднозначного тлумачення суб'єктної сфери процедури взаємного узгодження у випадку порушення вимог недискримінації), а з іншого боку – сприяє встановленню відповідності ст. 25 згаданої вище Конвенції багатостороннім міжнародним зобов'язанням обох договірних держав (зокрема, обидві договірні держави взяли на себе зобов'язання в рамках глобальної кампанії з протидії розмиванню бази оподаткування та переміщення прибутків щодо запровадження мінімального трирічного строку для звернення платників податків щодо ініціювання процедури взаємного узгодження, однак ст. 25(1) відповідної Конвенції не передбачає аналогічних обмежень, на відміну від ст. 25(1) Модельної податкової конвенції ОЕСР). Крім того, автор також звертає увагу на те, що ст. 25(2) двосторонньої українo-азербайджанської конвенції не містить вказівки на обов'язок щодо імплементації досягнутих домовленостей між компетентними органами в рамках процедури взаємного узгодження без прив'язки до національних строків, що також не відповідає згаданим вище багатостороннім зобов'язанням. На підставі викладеного автор формулює власні пропозиції стосовно необхідності внесення змін у положення ст. 25(1) та ст. 25(2) відповідної Конвенції, які можуть підвищити ефективність та результативність процедури взаємного узгодження як механізму вирішення спорів.

Ключові слова: міжнародне оподаткування, міжнародні податкові угоди, процедура взаємного узгодження, податкові спори, подвійне оподаткування.

Hasanov Parviz Arif. Characteristic of mutual Agreement procedure in case of the double taxation treaty between Azerbaijan and Ukraine.

The article is dedicated to comparative and legal analysis of the provisions on mutual agreement procedure in Art. 25 of the Convention between the Government of Ukraine and the Government of Azerbaijan Republic on Avoidance of Double taxation and Prevention of Tax Evasion regarding Taxes on Income and Capital dated 30 July 1999 in the context of recommendations included in Art. 25 of the OECD Model Tax Convention. The latter one is widely recognized source of interpretation of norms of bilateral double taxation treaties in many countries including Ukraine. This analysis, on the one hand, is aimed at finding ways of improvement of normative basis of mutual agreement procedure taking into consideration the risk of high number of tax disputes (for example, the replacement of the term 'person' with the term 'resident' in the first sentence of Art. 25(1) of the abovementioned Convention

creates the risk of ambiguity in the context of personal scope of mutual agreement procedure in case of non-compliance of contracting state with the duties on non-discrimination regime) and, on the other hand, is assisting in the determination of compliance of Art. 25 of the abovementioned Convention with other international commitments of both contracting states (e.g., both contracting states have accepted commitments to introduce three-year minimum term for initiation of mutual agreement procedure by taxpayers according to the framework of the global campaign on counteracting base erosion and profit shifting but Art. 25(1) of the mentioned Convention does not mention such limitation in contrast to the provisions of Art. 25(1) of the OECD Model Tax Convention). Moreover, the author also admits that Art. 25(2) of the bilateral Convention does not include reference to the duty on implementation of mutual agreements concluded between competent authorities under the mutual agreement procedure without the link to the domestic time limits that is also not in accordance of the multilateral commitments. On the basis of this analysis, the author determines the need of amendments of Art. 25(1) and Art. 25(2) of the mentioned Convention that could improve efficiency and effectiveness of mutual agreement procedure as a mechanism of dispute resolution.

Key words: international taxation, international tax treaties, mutual agreement procedure, tax disputes, double taxation.

Introduction. The mutual agreement procedure is the most common instrument for resolving disagreements and disputes arising between treaty states under double tax treaties, which is provided for in most of the more than 3,000 international tax treaties in force [1]. At the same time, taking into account the number of Ukrainian citizens who arrived on the territory of Azerbaijan due to Russia's military aggression against Ukraine, the number of which exceeds 4369 people as of September 13, 2022 [2], there is a need to characterize the provisions on the mutual agreement procedure in the context of the Convention between the Government of Ukraine and the Government of the Azerbaijan Republic on the avoidance of double taxation and the prevention of tax evasion on income and property of July 30, 1999 (hereinafter referred to as the Azerbaijan-Ukraine Convention) [3]. This need is due, for example, to potential issues of taxation of Ukrainian refugees in the context of resolving disputes about dual tax residency, the risk of permanent establishments of Ukrainian companies represented by Ukrainian citizens who continue to work for their Ukrainian employers from the territory of Azerbaijan, as well as the distribution of tax rights between treaty states in relation to income in the form of wages paid by Ukrainian employers to their employees who are located on the territory of Azerbaijan.

The author **aims** to describe the mutual agreement procedure using the example of the Double Taxation Avoidance Agreement between Azerbaijan and Ukraine.

Main part. In its modern form, the mutual agreement procedure appeared after the end of World War II as a result of the active work of the League of Nations to develop draft model acts related to double taxation issues [4, 688-689]. Today, the possibility of its use is provided for in the vast majority of international tax treaties and Azerbaijan is no exception to this rule.

At its core, the mutual agreement procedure is a mechanism for direct negotiations between the competent authorities of the involved treaty states, aimed at ensuring uniform application of treaty provisions in each of such states [5, 18]. The convenience of the corresponding mechanism is that the possibility of direct contacts, on the one hand, creates the opportunity for a constructive dialogue without excessive formalization of the process and, on the other hand, is closed to access by third parties or taxpayers, which also presupposes a sufficient level of openness of the parties and creates comfortable conditions for constructive discussion.

It should be noted that the potential of the mutual agreement procedure can be used both to resolve disputes related to the facts of the case and legal disputes themselves. An example of the former would be dual residence, where treaty states have only limited information regarding the circumstances of a particular taxpayer to make a final decision regarding his status as a resident. The second category of disputes, for example, includes different approaches of treaty states to the interpretation of a treaty term that is not explained directly in the text of the double tax treaty or allows for the possibility of different interpretations.

As K. Koch notes, the main purpose of the mutual agreement procedure is to enable treaty states to resolve problems regarding the interpretation and application of treaty provisions, which determines its two key functions, namely (1) allowing agreement to be carried out directly between the competent authorities and (2) further improvement and development of treaty provisions depending on the needs of the treaty states [6, 98].

Most provisions on the mutual agreement procedure in double tax treaties follow the structure of Art. 25 of the OECD Model Tax Convention, which is often used as a starting point when developing provisions for specific bilateral double taxation treaties. Consequently, the dominant number of provisions on the mutual agreement procedure suggest the possibility of its implementation in one of three forms, depending on the nature of the disagreements between the treaty states [7, 44]:

1. Mutual agreement procedure at the request of the taxpayer (specific case MAP)

The possibility of initiating it is provided to the taxpayer if he is or may be subject to taxation not in accordance with treaty rules in one or both treaty states in that case, however, the deadline for filing a corresponding request in any of the treaty states is most often limited to three years from the moment taxation arises is not in accordance with treaty rules (Article 25(1) and Article 25(2) of the OECD Model Tax Convention).

2. Interpretative mutual agreement procedure (interpretative MAP)

In the event that it becomes necessary to resolve any disputes or doubts arising in the interpretation or application of treaty provisions, the competent authorities should endeavor to find an option to resolve such disputes or doubts (first sentence of Article 25(3) OECD Model Tax Convention). Unlike the mutual agreement procedure at the request of the taxpayer, in this case the competent authorities can enter into contact on their own initiative, but it is also important to note that the agreement they reach under the mutual agreement procedure may concern several taxpayers or groups of taxpayers.

3. Legislative mutual agreement procedure (legislative MAP)

According to the second sentence of Article 25(3) of the OECD Model Tax Convention, the competent authorities of treaty states are given the opportunity to conduct joint consultations to eliminate double taxation in cases that are not directly covered by treaty rules (the most often cited example is a resident of a third state having permanent establishments in the territories of two treaty states that actively interact with each other, but the third state does not have a valid double tax treaty with any of the treaty states where there is a permanent establishment [7, 451]). Describing the latter type of mutual agreement procedure, G. Groen notes that it is rather not a dispute resolution mechanism as such, but a tool aimed at filling gaps to the extent that they can lead to double taxation [8, 6].

The Azerbaijan-Ukraine Convention contains provisions on all three types of mutual agreement procedures, which are provided for in Art. 25 of the mentioned agreement. However, it should be noted that there are certain provisions that differ from the proposed OECD approach under Art. 25 of the OECD Model Tax Convention and may potentially adversely affect the effectiveness or appropriateness of using the mutual agreement procedure as a dispute resolution tool, especially in the case of a mutual agreement procedure at the request of the taxpayer:

1. Possibility of submitting a request for a mutual agreement procedure not in the state of residence

In the current version of Art. 25(1) of the OECD Model Tax Convention provides that a person who is or may be taxed other than in accordance with the treaty provisions may submit a request for a mutual agreement procedure to the competent authorities of any of the treaty states. At the same time, in the wording that was in force until 2017, Art. 25 of the OECD Model Tax Convention, the right to submit a request for a mutual agreement procedure not in the state of residence was granted only in cases that were covered by the provisions of Art. 24(1), i.e. provisions on the regime of non-discrimination in relation to nationals of such treaty states on each other's territory [9].

At the same time, it should be noted that the wording of the provisions of Art. 25(1) of the Azerbaijan-Ukraine Convention differs in this context from the OECD approach by using the term "resident" rather than the term "person" in the text. If in the first case we are talking about persons who are residents of the treaty states according to the national tax legislation (since the term "resident" is not defined in the treaty provisions, and Article 3(2) of the said Convention refers to the national legislation of the treaty states), then in the case of using The term "person" is not linked to tax residence in a specific treaty state. The combination of use of the term "person" in Art. 25(1) and the subject scope of Art. 24(1) of the Azerbaijan-Ukraine Convention, which is not limited by the requirements of Art. 1 of the same Convention, could allow a national of one contracting state to initiate a mutual agreement procedure not in the contracting state of which he is a resident, but in the one of which he is recognized as a national, but only in cases of violations of the non-discrimination regime (the term "national person" itself) » is disclosed in Article 3(1)(c) of the Azerbaijan-Ukraine Convention). The logic of such an exception is clear, since in this case protection must be provided by the state of nationality, which guarantees the objectivity of consideration of the grounds for the mutual agreement procedure. At the same time, the use of the term "resident" instead

of the term “person” in Art. 25(1) of the Azerbaijan-Ukraine Convention raises a question that concerns the practical expediency of using in the same provision the possibility of a taxpayer to initiate a mutual agreement procedure in the state “of which he is a national” if “his case falls within the scope of paragraph 1 of Article 24 » Azerbaijan-Ukraine Conventions. In this case, the use of such a possibility is directly excluded by the first part of Art. 25(1), which uses the term “resident” rather than “person”.

2. No restrictions regarding the line limiting the taxpayer’s ability to initiate a mutual agreement procedure upon request.

In accordance with the second sentence of Art. 25(1) of the OECD Model Tax Convention provides that any taxpayer’s case “must be presented within three years from the date of first notification of the action resulting in taxation not in accordance with the provisions of the Convention” [7, 44]. The validity of such a limitation is justified for two reasons. Firstly, it allows us to avoid a situation where the mutual agreement procedure will be initiated by taxpayers in cases, for example, 10 years ago, when even the statute of limitations in tax disputes has already passed. Secondly, such a unified restriction also makes it possible to reduce the risk of a situation where different approaches of treaty states to the timing of filing a request for a mutual agreement procedure may result in the initiation of a mutual agreement procedure in one state, but a refusal to carry it out by another state due to upon the expiration of the period for filing such an appeal in the last-mentioned state.

Based on the foregoing, the practical expediency of the absence of a time limit on the possibility of initiating a mutual agreement procedure by a taxpayer may be questioned or, at a minimum, requires additional justification.

3. Lack of indication that the agreements reached by the competent authorities must be implemented regardless of the applicable domestic deadlines

As noted in the second sentence of Art. 25(2) of the OECD Model Tax Convention, “any agreement reached must be implemented regardless of any time restrictions in the internal law of treaty states” [7, 44]. This approach can be considered a logical reflection of the principle of *pacta sunt servanda* and the unacceptability of reference to national law as a basis for failure to fulfill contractual obligations, as provided for in Art. 26 and 27 of the Vienna Convention on the Law of Treaties of 23 May 1969. In other words, the application of temporary restrictions on carrying out, for example, a recalculation of the amount of tax payable by a particular person, conditioned by the result of agreements reached within the framework of the mutual agreement procedure upon request, if such restrictions provided for by the national legislation of the relevant treaty state cannot be used. Otherwise, there will be a violation of the requirements of the mentioned Art. 26 and art. 27 of the Vienna Convention on the Law of Treaties of May 23, 1969, since according to Art. 2 of the same Vienna Convention, the term “treaty” is defined quite broadly and allows it to include within its scope also interdepartmental agreements, which are essentially agreements between competent authorities within the framework of the mutual agreement procedure on the basis of treaties for the avoidance of double taxation.

Consequently, the inclusion of an analogue of the second sentence of Art. 25(2) of the OECD Model Tax Convention into the text of Art. 25(2) of the Azerbaijan-Ukraine Convention would make it possible to practically eliminate the possibility of a situation arising in which there may be a risk of non-compliance with the agreements reached by the competent authorities within the framework of the mutual agreement procedure due to the restrictions provided for by domestic legislation and the place of interdepartmental international treaties in the system of sources of law of the relevant treaty state.

Special attention in the context of the above differences in Art. 25(1) and art. 25(2) of the OECD Model Tax Convention deserves the fact that both Azerbaijan and Ukraine are participants in the expanded framework cooperation within the framework of the G20/OECD Inclusive Framework on BEPS [10]. Consequently, both states have accepted international obligations to ensure compliance with the so-called. minimum standards, some of which relate to improving the functioning mechanism of the mutual agreement procedure [11, 25]. In particular, element 1.1 defines the obligation of treaty states to ensure compliance with Art. 25(1), 25(2) and 25(3) of the OECD Model Tax Convention, but taking into account the opportunities provided by elements 3.1 and 3.3 of the relevant minimum standard to improve the mutual agreement procedure within the framework of the global G20-OECD Base Erosion Project and profit transfer [12]. It should also be added that the obligation to comply with the minimum standards is subject to joint monitoring by other participants in the enhanced framework cooperation within the framework of the mentioned G20-OECD project (peer review monitoring mechanism). Accordingly, both Azerbaijan and Ukraine must jointly make sufficient efforts

to eliminate the specified features of Art. 25(1) and art. 25(2) of the Azerbaijan-Ukraine Convention due to not only the need to ensure effective resolution of disputes regarding the elimination of double taxation, but also to fulfill the international obligations assumed within the framework of multilateral cooperation mechanisms.

Conclusion. The number of forced migrants from the territory of Ukraine as a result of Russia's military aggression exceeded 4,000 people, which, combined with the protracted nature of the conflict and the impossibility of a safe return to the territory of Ukraine in the current situation, can lead to the emergence of complex issues in the context of taxation of their income in certain situations. In particular, such issues may relate to the emergence of double tax residency, the risk of a permanent establishment of a Ukrainian company if an employee is located in the territory of Azerbaijan and continues to work remotely, or the taxation of income received as an employee of a Ukrainian enterprise while performing their work duties from the territory of Azerbaijan. The resolution of such disputes within the framework of each of the national legal orders of the treaty states separately may not lead to the elimination of negative consequences for taxpayers, for example, in the form of double taxation, since the decision of administrative bodies or courts of one country is not binding on the territory of another. The most acceptable option for resolving such situations is the mutual agreement procedure provided for in Art. 25(1) and art. 25(2) of the Azerbaijan-Ukraine Convention, based on its bilateral nature. At the same time, the wording of the mentioned provisions themselves may be problematic from a practical point of view, in particular, the impossibility of initiating a mutual agreement procedure in the state of nationality in the case of tax discrimination or the possibility of initiating a mutual agreement procedure in the case of disputes for which the statute of limitations has passed. The presence of such difficulties emphasizes the need to bring Art. 25(1) and 25(2) of the Azerbaijan-Ukraine Convention in accordance with the provisions of Art. 25(1) and art. 25(2) of the OECD Model Tax Convention, since the latter eliminates the possibility of such difficulties arising in practice. Moreover, such a step is justified in light of ensuring that treaty states comply with their obligations under the enhanced framework of cooperation under the G20-OECD Project on Base Erosion and Profit Shifting.

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