

Legal Status of the Commentaries on the OECD Model Tax Convention in Ukraine



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As with the OECD Model Tax Convention on Income and Capital (the “Convention”), the Commentaries on the Convention (the “Commentaries”) were drafted by the OECD Committee on Fiscal Affairs. The Commentaries are intended to interpret the provisions of the Convention thus minimizing the possibility of discrepancies arising between different countries in the course of the application of the bilateral tax treaties based on the Convention. The Commentaries are regularly updated to bring them into line with current international practice regarding the application and interpretation of tax treaties.

The impact of the Convention and Commentaries has extended far beyond the OECD area. In recognition of this growing impact, official positions on the Convention and Commentaries were expressed by OECD non-member countries (including Ukraine). While these countries generally agree with the text of the Convention and Commentaries, each country has some areas of disagreement.

There is no clarity as to the legal status of the Commentaries from an international law perspective. As a result, there exist a number of approaches regarding the treatment of the Commentaries under the Vienna Convention.

Pursuant to Article 31.1 “General rule of interpretation” of the Vienna Convention “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

Having read Article 31.2 of the Vienna Convention, it appears that the Commentaries may be considered as “context” within the meaning of Article 31.1 of the Vienna Convention provided that the parties to the treaty have agreed that such treaty is based on the Convention and the Commentaries would be applicable for interpreting such treaty. As an example, the Protocol to the Ukraine-Austria Double Tax Treaty stipulates that provisions of this treaty which are drafted according to the Convention shall generally be expected to have the same meaning as expressed in the Commentaries.

The Commentaries may also be viewed as “subsequent practice in the application of the treaty” within the meaning of Article 31.3 of the Vienna Convention, which should be taken into account together with the context, when interpreting the treaty. In practice, however, it can be quite difficult to determine whether certain practices of the parties to the treaty establish their intention (agreement) to apply the Commentaries when interpreting such treaty. This being said, it appears that the State Tax Administration supports this approach regarding the treatment of the Commentaries under the Vienna Convention (explanatory letter # 5601/6/12/0116, dated 03.06.2008).

Another approach is to treat the Commentaries as “supplementary means of interpretation” under Article 32 of the Vienna Convention (e.g., “preparatory work of the treaty”), which can be used to confirm the Convention-based treaty meaning resulting from the application of Article 31 of the Vienna Convention or to determine the Convention-based treaty meaning when the interpretation according to Article 31 of the Vienna Convention (a) leaves its meaning ambiguous or obscure, or (b) leads to a result which is manifestly absurd or unreasonable. In the author’s view, this appears to be the most reasonable approach regarding the legal treatment of the Commentaries (unless a particular tax treaty provides that the Commentaries are applicable when interpreting such treaty).

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From a practical perspective, the effective value of the Commentaries varies from one jurisdiction to another. In some countries, the tax authorities and courts rely heavily on the provisions of the Commentaries to interpret the Convention-based tax treaties; in others they simply consider the Commentaries as being scholarly works on the subject.

So far there have been no instances of Ukrainian courts or tax authorities referring to the Commentaries in their decisions/letters when applying the tax treaties of Ukraine.

Although Ukraine is not a member of the OECD, most tax treaties of Ukraine generally follow the Convention. Moreover, as noted above, Ukraine has set out its position on the Convention and Commentaries. Therefore, it can be argued that Ukraine accepts the provisions of the Commentaries as an interpretive instrument to the extent Ukraine has not taken a specific stance in respect of such provisions.

Nevertheless, neither Ukrainian law nor the Vienna Convention provides clear guidelines for determining the

legal status of the Commentaries. In view of this, the legal status of the Commentaries needs further clarification from the Ukrainian perspective, in particular, by means of court interpretation.

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