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With the adoption of the Tax Code of Ukraine (TCU) the terminological apparatus of the national tax science has been significantly enriched by the range of new concepts, among which the concept of "beneficial owner" (art. 103 TCU) is particularly worth mentioning. For many years, the concept has been widely used within the framework of the international tax law; nevertheless, its content still differs depending on the country where it is being applied. Ukraine still lacks sufficient experience in using the concept of beneficial owner, which is unknown both for our country as well as for all countries of civil law legal system, as it emerged within the institute of "trust" in common law legal system. In this respect, there is a need to analyze the international experience in usage of the concept of beneficial owner in order to find out potential problems of its applications in the national legal system, and to develop feasible approaches towards their solutions.

Prevention of misuse of the international tax treaties' provisions applying clauses about the beneficial owner is far from being a new research subject in the foreign legal science. Baker P. [1], Van Weegel S. [2], Vogel K. [3] and others have worked on the research of this mechanism. A new wave of particular interest to this issue is caused by the activity of national courts towards clarification of the concept of beneficial owner, and also by the activities of the national governments who search the new opportunities to further improve measures to prevent misuse of the international tax treaties' provisions regarding the global financial crisis. However, until recently the concept of beneficial owner was not extensively researched by Ukrainian as well as Russian scientists who often restrict their analysis to a specific legal case [5], or general characteristic [6].

The main purpose of this research paper is to identify potential contradictive aspects of the concept of beneficial owner in Ukraine, and to develop feasible solutions taking into account the international experience.

The praxis of concluding conventions on avoidance of double taxation was lunched back in the nineteenth century, but during the second half of the twentieth century it developed particularly intensively (for instance, as of October 2008 only on the basis of the OECD Model Tax Convention on Income and on Capital, 1977 more then 3000 existing double taxation conventions were prepared). Differences in contractual modes of taxation regarding particular type of income have caused significant interest of the part of taxpayers about the possibilities to reduce the tax burden. The spread of such practices has led to the intensive search of state measures to prevent the abuse of international tax treaties; one of such measures is the introduction of restricting provisions concerning the access to treaty benefits on the basis of the concept of beneficial owner.

The practice of inclusion the beneficial owner's provisions into the double taxation avoidance conventions has been initiated in the 1950s. [7] For example, in art. VI(3) and (4) of the Double Taxation Convention between Switzerland and Great Britain, 1954, the concept of beneficial owner was already in use. However, this concept has been spread enormously only after the OECD Model Tax Convention on Income and on Capital, 1977 have been amended. [8, p.2]. This step was preceded by the long discussion, taking place in 1968-1970, between the experts from the participating countries regarding the suitability of this approach. The debate, for its part, occurred due to the fact that articles 10-12 of the aforementioned OECD Model Tax Convention, in the absence of the concept of beneficial owner, were assumed to be applicable both to agents and nominees who posses the income right only formally. It was Great Britain who for the first time took cognizance of inadmissibility of the international tax conventions provision to be used in such a way, and initiated the amendment of the OECD Model Tax Convention. At the same time, Great Britain has initially proposed the "subject-to-tax" approach which guarantees the treaty benefits in the

state of source only in case the income is the subject to taxation in the state of residency. Nevertheless, the OECD experts have rejected this approach and concentrated on the definition of the actual owner of the income which resulted in the introduction of the beneficial owner concept. [8, p.4]

Nowadays in the official Commentary to the OECD Model Tax Convention, in the articles 10, 11, and 12, the requirement of the beneficial ownership is explained to serve as a clarification to the words "paid…to a resident" as they are used in the respective articles. Thus it is evident that a sate of source is not obliged to give up own taxing rights over dividend income just because such income was immediately received by a resident of a state with which the state of source had concluded a convention on double taxation. The term 'beneficial owner' should not be narrowly used in a technical sense, it should rather be understood in light of the object and purposes of the respective convention, including avoidance of double taxation and the prevention of fiscal evasion and avoidance. Where an item of income is received by a resident of a contracting state acting in the capacity of agent or nominee it would be inconsistent with the object and purpose of the convention for the state of source to grant relief or exemption merely on account of the status of the immediate recipient of the income as a resident of the other contracting state. The immediate recipient of the income in this situation qualifies as a resident but no potential double taxation arises as a consequence of that since the recipient is not treated as the owner of the income for tax purposes in the state of residence. It would be equally inconsistent with the object and purpose of the convention for the state of source to grant relief or exemption where a resident of a contracting state otherwise that through an agency or nominee relationship, simply acts as a conduit for another person who in fact receives the benefit of the income concerned. A conduit company cannot normally be regarded as the beneficial owner if, though the formal owner, it has, as a practical matter, very narrow powers which render it, in relation to the income concerned, a mere fiduciary or administrator acting on account of the interested parties. [9, p. 187-188].

International double taxation conventions, including those ratified by Ukraine, do not contain definition of the term beneficial owner. In this case according to art. 3(2) of the OECD Model Tax Convention (which is almost literally reproduced in the Ukrainian double taxation treaties) any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that state for the purposes of the taxes to which the convention applies. Such formulation causes uncertainty as what is the true meaning of the "beneficial owner" concept in light of the application of the international double taxation conventions.

The UN experts, summing up the world experience, distinguish three main approaches towards solution of such problem [10, p. 2-3]:

1. As the double taxation conventions do not contain a definition of "beneficial ownership", such term shall have the meaning prescribed under the domestic laws of the state applying the convention. This is the widespread practice for the Unites States of America. At the same time, taking into account the reservation in the double taxation conventions "unless the context otherwise requires", depending on the circumstances as well as agreement by the competent authorities the term "beneficial owner" can have a meaning independent of the domestic law of either country.

2. Due to the fact that many countries while being the source state do not have well-developed rules regarding the beneficial ownership in their domestic laws to apply, they may favour the application of an internationally agreed definition of the term "beneficial owner". For example, in the Indofood decision the United Kingdom's Court of Appeal arrived at the conclusions that "the term "beneficial owner" is to be given an international fiscal meaning not derived from the domestic laws of the contracting states" [11]. In this case the Commentary of the OECD Model Tax Convention should be addressed, which, however, does not contain the exhaustive explanation of the beneficial owner of the passive income.

3. A third interpretation foresees an application of the contextual meaning of the term only in certain instances; for example, when an application of the source state's definition would produce a result that is not consistent with the purpose of the convention. In this respect the revenue authority of the United Kingdom gives the following explanation: although, in the context of double taxation conventions, beneficial ownership will take what the Court of Appeal decision accepted as an "international fiscal meaning" rather than a UK domestic meaning… there are unlikely to be many cases where the difference is material. The issue would only arise when the substance of an arrangement amounts to an improper use of the relevant double taxation convention in the light of its object of prevention of fiscal evasion and avoidance,

for example “treaty shopping”. Such situation is only likely to take place where the “real” beneficial owner of the income… is resident in a state with which the United Kingdom has either double taxation convention or a convention less favourable than the convention applicable to the intermediate lender, or if the recipient of an income stream into which an intermediate lender has been interposed is resident in such a state (regardless of whether they themselves are the beneficial owner). These are the only situation where the “international fiscal meaning” of the term “beneficial owner” will be needed. [12].

The similar uncertainty in opinions is evident among the various representatives of the foreign tax law doctrine. In general they can be clustered into two main groups.

The first group representatives insist that the term “beneficial owner” should bear an international fiscal meaning and not take the meaning under the domestic tax law of the contracting state. According to P. Baker, there are several reasons for his commitment to this statement, namely: 1) the term itself was introduced into international usage through the work of the OECD; 2) its application is stipulated by the OECD Model Tax Convention as well as by the UN Model Convention; 3) it is employed in double taxation conventions entered into force by countries some of which employ the term “beneficial owner” in their domestic law, while others – do not; 4) the English-terms’ cognates in foreign languages do not always have the identical meaning, which could lead to the variety of emphasis, and consequently adversely affect the law enforcement practice. For instance, the French version of the OECD Model Tax Convention (which, nevertheless, bears the equal authority with the English version) uses the term «le bénéficiare effectif». The Spanish version interprets the term closer to “beneficial owner” (“el proprietario beneficiario”); the Chinese version uses the term applied to person who has benefit from the dividend, interest or royalties (受益所有人). The Russian version of the UN Model Convention contains a direct translation of the term “beneficial owner” – “собственник-бенефициар”, while in the Arabic version the same term is translated as “the effective beneficiary”. In this regard, P. Baker argues that the different translations of the same term “place different emphasis on the requirement of ownership as opposed to being the effective beneficiary of the income. This contrast between terms focusing on ownership and on beneficiary status is important” because of the possible impact on courts examining cases which involves interpretation of the term “beneficial owner”. [13, p.15-16]

J. Petkeviča similarly deems inappropriate to attach the meaning of the term “beneficial owner” on the basis of the domestic law of contracting states. She argues that it seems unjust when the same clause negotiated by two countries is applied with a different result depending on which state the payment is coming from, and which domestic definition of “beneficial owner” is invoked. What is more, a broad interpretation of this term may render a treaty partially inoperative in case extensive domestic anti-abuse measures regarding such treaties are applied. Thought the purpose of the tax treaty is also the prevention of fiscal evasion, it does not allow a state to apply domestic anti-abuse rules extensively. For these reasons, resort to a domestic meaning of the concept does not facilitate uniformity and is clearly not a result to be welcomed in applying tax conventions. [7, p.13]

The main arguments of the second group representatives will be examined on the example of C. Elliffe’s research. He has analyzed the New Zealand practice regarding the usage of contextual and domestic interpretation of the concept “beneficial owner”, and came up with the following conclusions. 1) Usage of the standard approach to interpretation of double taxation conventions by New Zealand courts demonstrates the relative certainty of the provisions of international tax conventions based upon art. 3(2) of the OECD Model Tax Convention. ¬In this case an interpretation in good faith and the ordinary meaning of the terms in accordance with the Vienna Convention on the Law of Treaties allows application of the domestic interpretation of the term “beneficial owner” which is more concise and clear for the national courts. 2) The term “beneficial owner” is expressly found in New Zealand tax law, and has been applied extensively. 3) Foreign courts tend to apply domestic definition of the term “beneficial owner” rather then international fiscal meaning based on the OECD Model Tax Convention. At the same time, the author emphasized that while in the Indofood case (concerning a proper interpretation of the Indonesian/Mauritian treaty) the English court has initially declared the need to apply the international fiscal meaning of the term “beneficial owner”, the Court of Appeal has nevertheless used the Indonesian tax law definition. [14, p. 284-288].

Ukrainian legislator under chapter 10 of section II of the Tax Code of Ukraine has unambiguously opts for the domestic definition of the term “beneficial owner”.

However, scrutinizing the provisions of chapter II, one may notice that its drafters have been willingly using the official OECD materials to prevent any conflict between contextual and domestic meaning of the term. Nevertheless, inherited from the contextual meaning of the beneficial ownership, its domestic interpretation has also obtained some uncertainties regarding particular law-enforcement aspects. For example, art.103 of the Tax Code of Ukraine does not contain any clarification of the ways the taxpayer can prove that he is a beneficial owner. Instead, there is only a specification of who cannot be a beneficial owner, namely: an agent, nominee, or conduit in respect of an income which is paid from the source within Ukraine. Such an approach requires the need for the fiscal authority to define independently whether a person is an agent, nominee or conduit in each particular situation.

It would be quite justified to borrow the tax authorities' experience of the United Kingdom, Israel or China regarding the adoption of subordinate legislative acts which clearly determines how the provision on the beneficial owner should be applied. For instance, Chinese tax authority instead of simple imitation of the OECD approach has significantly supplemented it in the Notice 601 (from 27.10.2009). All taxpayers willing to get an access to the treaty benefits must prove that they are beneficial owners, otherwise they would not be able to take advantages of favourable regime of treaty. The beneficial ownership must be decided by following the general principle and passing the "negative elements" test. The general principle is that the "beneficial owner" must be decided in light of the object and purpose of double taxation conventions, including avoiding double taxation and the prevention of fiscal evasion and avoidance, following the substance over form doctrine. Authority representatives base their decision on the actual circumstances of specific case, rather than just from a technical or domestic law perspective on the term "beneficial owner".

The taxpayer is not a beneficial owner in China in case at least one of the conditions ("negative elements") is met:

1) The taxpayer claiming the tax treaty benefits (applicant) has the obligation to pay or distribute, within the prescribed time (e.g within 12 months after receiving the income), the whole or most of the income (e.g. more then 60 %) to a resident of a third state;

2) Non-resident does not perform or barely performs any business activity other that holding the property of right from which the income is generated from China;

3) Where the non-resident is a company, the asset, scale or personnel of which is too small or few to match the amount of the income generated from China;

4) Non-resident does not have or barely has a controlling right or disposing right of the income coming from China, or the property or right from which the income is generated, and does not or barely bears any risk;

5) The other contradicting state does not tax the income or exempts the income coming from China from tax, or the actual tax burden is extremely lower than it is in China;

6) Besides the loan contract according to which the interest is generated and paid on the territory of China, there is another loan or deposit contract with a similar amount, interest rate and concluding date between the creditor and a third person;

7) Besides the contract that assigns the rights to use the copyright, patent, technology, and according to which the royalty is generated and paid to the non-resident from the territory of China, there is another contract that assigns the copyright, patent or technology involved between the non-resident and a third person. [15, p. 209, 220].

Conclusions.

Summing up the result of the research the following propositions can be formulated:

1. To ensure minimization of the negative effects from the possible conflict between contextual and domestic interpretation of the concept of beneficial owner through adaptation of the relevant provision of the Tax Code of Ukraine to the requirements of the official Commentary of the OECD Model Tax Convention. For example, the limitation of tax in the state of source remains available when an intermediary, such as an agent or nominee located in a contracting state or in a third state, is interposed between the beneficiary owner and the payer but the beneficial owner is a resident of the contracting state. It is not so obvious according to the relevant provision of the Tax Code of Ukraine.

2. To prepare and publish explanations of the State Tax Service of Ukraine concerning the law-enforcement aspects of the beneficial owner concept, which would contain clearly defined mechanism of establishment whether the taxpayer meets the requirements of the art.103 of the Tax Code of Ukraine. The tax authorities of the United Kingdom, Israel and China have similar quite successful experience. For the average taxpayer such a move will facilitate formation of the appropriate understanding of the provisions on the beneficial ownership, and prevention of the conflict situations in the sphere of taxation. The tax authorities, for their part, will get the clear guidance on the proper actions in case the beneficial owner's conditions should be applied.

3. The role of the official Commentary to the OECD Model Tax Convention in the process of the international tax treaties' interpretation within the Ukrainian tax system should be defined clearly. Lack of the law-enforcement practice regarding the resolution of conflict between contextual and domestic understanding of term "beneficial owner" does not mean the impossibility of its occurrence in the future, especially taking into account the requirement of good faith interpretation of the international conventions' provisions in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objects and purpose, and supplementary means of interpretation. The last provision is prescribed by the Vienna Convention on the Law of Treaties ratified also by Ukraine.

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