

**TAXPAYER PROTECTION STANDARD IN INTERNATIONAL TAX DISPUTES\*\*****Maria D. Polenchuk***St. Petersburg University, St. Petersburg, Russia***Article info**

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The research project aims to find the most optimal solution to develop the current level of taxpayers' guarantees in the tax treaty disputes resolution procedures.

The subject of the article is the analysis of the case law of the European Court of Human Rights on application and interpretation of Article 6 "Right to a fair trial" of the European Convention on Human Rights in the context of the tax treaty disputes resolution procedures. The Author believes that the standard of protection of human right to a fair trial can be used as a starting point for the development of a taxpayer protection standard in the tax treaty disputes resolution procedures.

The methodology of the research includes the logical and analytical methods, such as analysis and synthesis, induction and deduction, as well as formal legal interpretation of the European Convention on Human Rights and the case law of the European Court of Human Rights.

The key findings are the following. Currently, the international tax disputes resolution procedures under tax treaties based on the OECD / UN Model Tax Conventions are contrary to Article 6 of the European Convention on Human Rights. The mutual agreement procedure, which provides the taxpayer with the opportunity personal participation, could eliminate such a contradiction.

The main results, scope of application. The study showed that two approaches in relation to application of the Article 6 of the European Convention on Human Rights to tax disputes can be defined – (a) formal and (b) "substantial".

Formally, the guarantees of Article 6 of the European Convention on Human Rights do not apply to taxpayers in tax treaty disputes resolution procedures, i.e. mutual agreement procedure and arbitration, at least as long as a taxpayer has access to the national court of one of the contracting states to protect the violated rights. Under the case law of the

European Court of Human Rights cross-border tax disputes are not typical category of disputes. At the moment the European Court of Human Rights does not express a position on the merits of such disputes with reference to the wide discretion of states in the field of taxation.

Nevertheless, according to the "substantial" approach it is necessary to extend guarantees of the right to a fair trial to taxpayers in the tax treaty disputes resolution procedures. This conclusion is based on the fact that the national courts cannot be treated as an effective means of protection of the rights of taxpayers as it is determined by the Article 13 of the European Convention on Human Rights. This approach is in line with the trend set by EU Directive 2017/1852 on tax dispute resolution mechanisms in the European Union, as well as the idea of foreign researchers to develop a global standard for protecting the rights of taxpayers.

In the Author's view, compliance with the fair trial guarantees requires provision of direct participation of the taxpayers in the tax treaty disputes resolution procedures. In this case, the taxpayer will receive the opportunity to be heard and to review all the evidence and procedural documents on the case. The participation of the taxpayer will mitigate the key drawback of the mutual agreement procedure - the lack of a guarantee of a final decision on the case. This is especially important for those states that do not use arbitration, such as Russia.

The main conclusion is that the application of the standard of protection of human right to a fair trial in relation to the taxpayers in the tax treaty disputes resolution procedures is an efficient way to develop the current mutual agreement procedure and arbitration and to increase the confidence of taxpayers in these mechanisms.

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## I. Introduction

According to OECD statistics recently the number of cases submitted to the mutual agreement procedure, but not resolved has tripled from 2,352 cases at the end of 2006 to 6,041 cases at the end of 2020<sup>1</sup>. In connection with measures to tackle base erosion and profit shifting (BEPS Plan<sup>2</sup>), it is expected that the number of international tax disputes will only increase. Accordingly, as noted in the literature, there is an objective need to improve existing mechanisms for international tax disputes resolution [1, p. 2; 2, p. 4]. In this regard, the drafters of BEPS Plan supplemented it with Action 14 aimed at developing the existing dispute resolution system.

The key initiative of the OECD was to supplement the mutual agreement procedure with a binding and mandatory arbitration. Binding and mandatory arbitration creates clear benefits for the taxpayer since it ensures that a final decision on a dispute is reached within a specified time frame. However after long discussions this initiative was included in BEPS Plan only as a recommendation. The provision of binding and mandatory arbitration was excluded from the final version of minimum standard in BEPS Plan. The business community met this decision with criticism<sup>3</sup>. It is noted in the literature [3, 277] that such decision of the drafters of BEPS Plan is a compromise. On the one hand, they understood that it was necessary to strengthen the protection

of the taxpayers' rights. On the other hand, many states were strongly against the proposed initiative fearing for violation of their sovereignty. Currently only 31<sup>4</sup> of the 96 signatories to the OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting<sup>5</sup> have agreed to the application of binding and mandatory arbitration.

It should be noted that the international tax dispute resolution procedure under the UN Model Double Taxation Convention between Developed and Developing<sup>6</sup> was developed on the basis of the OECD Model Tax Convention on Income and on Capital<sup>7</sup>, therefore, it largely repeats its provisions and provides for a similar scope of guarantees to protect the taxpayers' rights. Along with the OECD and the UN approach at the European Union level there is EU Convention 90/436/EEC of 23 July 1990 on the elimination of double taxation in connection with the adjustment of profits of associated enterprises<sup>8</sup>, as well as EU Directive 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms

<sup>1</sup> MAP Statistics. OECD Publ., 2016. URL: <http://www.oecd.org/tax/dispute/mutual-agreement-procedure-statistics.htm>. MAP Statistics. OECD Publ., 2020. URL: <https://www.oecd.org/tax/dispute/mutual-agreement-procedure-statistics-2020-per-jurisdiction-transfer-pricing.htm>

<sup>2</sup> Action Plan on Base Erosion and Profit Shifting (BEPS). OECD Publ., 2013. URL: <https://www.oecd.org/tax/beps/beps-actions/>

<sup>3</sup> Comments of Business Industry Advisory Committee (BIAC) of the OECD, Comments Received on Public Discussion Draft, BEPS Action 14: Make Dispute Resolution Mechanisms More Effective. OECD Publ. 19 January 2015. P. 41. URL: <http://www.oecd.org/ctp/dispute/public-comments-action-14-make-dispute-resolution-mechanisms-more-effective>.

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<sup>4</sup> Signatories and Parties to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting. OECD Publ., 28 February 2022. URL: <https://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf>: Andorra, Australia, Austria, Barbados, Belgium, Canada, Curacao, Denmark, Fiji, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Malta, Mauritius, Netherlands, New Zealand, Papua New Guinea, Portugal, Singapore, Slovenia, Spain, Sweden, Switzerland, UK.

<sup>5</sup> Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting. OECD Publ., 24 November 2016. URL: <https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm>

<sup>6</sup> Model Double Taxation Convention between Developed and Developing Countries. UN Publ., 2017. URL: [https://www.un.org/esa/ffd/wp-content/uploads/2018/05/MDT\\_2017.pdf](https://www.un.org/esa/ffd/wp-content/uploads/2018/05/MDT_2017.pdf)

<sup>7</sup> Model Tax Convention on Income and on Capital: Full Version. OECD Publ., 21 November 2017. DOI: 10.1787/g2g972ee-en

<sup>8</sup> EU Convention 90/436/EEC of 23 July 1990 on the elimination of double taxation in connection with the adjustment of profits of associated enterprises. URL: <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A41990A0436>

in the European Union<sup>9</sup> aimed at strengthening the role of arbitration and the position of the taxpayer in arbitration similar to the OECD Model Tax Convention on Income and on Capital.

Limited scope of the guarantees for protecting the taxpayers' rights connects all the approaches regulating the international tax disputes resolution procedures mentioned above, both at the international and supranational levels. The participation of the taxpayer in the mutual agreement procedure is revealed in the filing of an application for initiation of the procedure, in the provision of information and documents at the request of the competent authorities, as well as in the presentation of the position and arguments on the dispute if necessary and at the discretion of the competent authorities<sup>10</sup>. At the same time, the taxpayer does not have the rights ensuring direct and active participation in the mutual agreement procedure, and the competent authorities are not assigned corresponding obligations<sup>11</sup>. Furthermore, the issue of an adequate level of protection of the taxpayers' rights is not solved in the arbitration. The arbitration is applied by a number of states but it still remains only a part of the mutual agreement procedure instead of the autonomous dispute resolution mechanism. This situation predetermines the limited scope of the taxpayers' procedural rights completely depending from the discretion of the competent authorities [4, 210].

In this regard, the discussion in foreign doctrine on the extension of the fair trial guarantees provided by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms as of 4 November 1950 (hereinafter referred to as the "ECHR") to

taxpayers in international tax disputes resolution is particularly true [for example: 5; 109; 6, 153; 7, 387; 8, 205; 9, 360; 10, 309].

All existing Russian bilateral tax treaties include the provision on mutual agreement procedure based on the OECD or UN Model Tax Conventions. Russia's attitude towards arbitration is ambiguous. Historically, only the treaty with the Netherlands provided for the possibility of arbitration<sup>12</sup>. However, arbitration was not applied in practice. For this purposes the treaty required to approve the rules of arbitration. Such rules were not approved at least by Russia. Additionally, Russia signed onto the BEPS Plan and in 2019 ratified the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting dated 24 November 2016, but Russia denied the arbitration. Therefore, the issue of providing guarantees for the protection of the taxpayers' rights in international tax disputes resolution is directly related to Russia.

## II. Fair Trial Protection Standard

In the doctrine, the European system of human rights protection<sup>13</sup> is considered as the most developed [11, 431; 5, 114]. This is due to the fact that the European Court of Human Rights (hereinafter referred to as the "ECtHR") was created for ensuring the human rights. ECtHR is authorized to consider interstate complaints filed on behalf of any state party to the ECHR on violations committed by another state party.

According to Paragraph 1 of Article 6 of the ECHR "everyone is entitled to a fair and public hearing within a reasonable time by an independent

<sup>9</sup> Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union. URL: <https://eur-lex.europa.eu/eli/dir/2017/1852/oj>

<sup>10</sup> Best Practice No. 5, 13, 14 of the OECD Manual on Effective Mutual Agreement Procedures (MEMAP). OECD Publ. URL: <https://www.oecd.org/tax/dispute/manualoneffectivemutualagreementproceduresmemap.htm>

<sup>11</sup> Paragraph 3.7 of the Manual on Effective Mutual Agreement Procedures (MEMAP). OECD Publ. URL: <https://www.oecd.org/tax/dispute/manualoneffectivemutualagreementproceduresmemap.htm>

<sup>12</sup> Treaty between the Government of the Russian Federation and the Government of the Kingdom of the Netherlands dated 16 December 1996 "On the avoidance of double taxation and the prevention of tax evasion in relation to taxes on income and property"

<sup>13</sup> Human rights mechanisms have been established in the following regions: Europe, the Americas, Africa, the Arab States and Asia. The right to a fair trial is provided by each of them. See Report of the Advisory Committee of the Human Rights Council "Regional Mechanisms for the Promotion and Protection of Human Rights" - A/HRC/39/58 dated 07/10/2018, section II, paras. 4-9, pp. 3-6.

and impartial tribunal established by law”.

Based on the Guidelines of the ECtHR on the application of Article 6 of the ECHR “Right to a Fair Trial”: civil<sup>14</sup> and criminal<sup>15</sup> aspects, the following guarantees covered by the right to a fair trial can be highlighted:

- *Right of access to justice*: the right to initiate legal proceedings and to apply to the tribunal for protection<sup>16</sup>. Such a right must be real and effective. Effectiveness means that everyone must have a clear, practical opportunity to challenge an act affected the rights provided by ECHR<sup>17</sup>.
- *Right to a tribunal established by law*: the legal basis for the existence of the tribunal, the rules governing operation of the tribunal and the legitimacy of the composition of the tribunal in each case<sup>18</sup>.
- *Right to an independent and impartial tribunal*: no control or influence by non-judicial entities, no affiliation with the parties to the dispute, no prior connection to the case, no prejudice or bias<sup>19</sup>.
- *Right of the parties to be personally present in the proceedings*<sup>20</sup>.
- *Adversarial*: the opportunity for the parties to review all the evidence and present objections to them influencing the decision of the tribunal<sup>21</sup>.
- *Right to equality of arms*: each party must be able to present a case and evidence without risk of disadvantageous position in relation to the other party, the parties must have equal procedural opportunities (for example, free assistance of a lawyer, option of a witness)<sup>22</sup>.
- *Right to a reasonable time of proceedings*: the justice without delays that could jeopardize its effectiveness and credibility<sup>23</sup>. The reasonableness of the time of proceedings is assessed in accordance with the following criteria established by the ECtHR: the complexity of the case, the behavior of the applicant and the competent authorities and risks for the applicant in the dispute<sup>24</sup>.

<sup>14</sup> Guidance on Article 6 of the Convention: Right to a Fair Trial (Civil Aspect). Council of Europe / European Court of Human Rights, 31 December 2013. URL: [https://www.echr.coe.int/Documents/Guide\\_Art\\_6\\_rus.pdf](https://www.echr.coe.int/Documents/Guide_Art_6_rus.pdf)

<sup>15</sup> Guidance on Article 6 of the Convention: Right to a Fair Trial (Criminal Aspect). Council of Europe / European Court of Human Rights, 1 May 2013. URL: [https://www.echr.coe.int/Documents/Guide\\_Art\\_6\\_criminal\\_RUS.pdf](https://www.echr.coe.int/Documents/Guide_Art_6_criminal_RUS.pdf)

<sup>16</sup> Case 4451/70 Golder v. the United Kingdom, ECtHR, judgement of 21 February 1975; case 32555/96 Roche v. the United Kingdom, ECtHR, judgement of 19 October 2005; case 6232/73 Konig v. Germany, ECtHR judgement of 28 June 1978

<sup>17</sup> Case 21/1995/527/613 Bellet v. France, ECtHR judgement of 4 December 1995; case 69829/01, 2672/03 Nunes Dias v. Portugal, ECtHR, judgement of 11 February 2000

<sup>18</sup> Case 21/1995/527/613 Bellet v. France, ECtHR judgement of 4 December 1995; case 69829/01, 2672/03 Nunes Dias v. Portugal, ECtHR, judgement of 11 February 2000

<sup>19</sup> Case 10486/83 Hauschildt v. Danmark, ECtHR, judgement of 24 May 1989; case 19187/91 Saunders v. United Kingdom, ECtHR, judgement of 9 May 2000; case 15287/89 Beaumartin v. France, ECtHR, judgement of 25 October 1994; case 8790/79 Sramek v. Austria, Law Enforcement Review

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ECtHR, judgement of 22 October 1984; case 33958/96 Wettstein v. Switzerland, judgement of 21 December 2000; case 17056/06 Micallef v. Malta, ECtHR, judgement of 15 October 2009

<sup>20</sup> Case 10563/83 Ekbatani v. Sweden, ECtHR, judgement of 26 May 1988; case 9024/80 Colozza v. Italy, ECtHR, judgement of 12 February 1985.

<sup>21</sup> Case 11170/84; 12876/87; 13468/87 Brandstetter v. Austria, ECtHR, judgement of 28 August 1991; case 12952/87 Ruiz-Mateos v. Spain, ECtHR judgement of 23 June 1993; case 16424/90 McMichael v. the United Kingdom, ECtHR judgement of 24 February 1995; case 19075/91 Vermeulen v. Belgium, ECtHR, judgement of 20 February 1996; case 15764/89 Lobo Machado v. Portugal, ECtHR, judgement of 20 February 1996; case 39594/98 Kress v. France, ECtHR, judgement of 7 June 2001.

<sup>22</sup> Case 14448/88 Dombo Beheer BV v. the Netherlands, ECtHR, judgement of 27 October 1993; case 68416/01 Steel and Morris v. the United Kingdom, ECtHR, judgement of 15 February 2005; case 12952/87 Ruiz-Mateos v. Spain, ECtHR, judgement of 23 June 1993.

<sup>23</sup> Case 315499 H. v. France, ECtHR, judgement of 16 February 2009; case 12539/86 Katte Klitsche de la Grange v. Italy, ECtHR, judgement of 27 October 1994.

<sup>24</sup> Case 35382/97 Comingersoll S.A. v. Portugal, ECtHR, judgement of 17 April 2000; case 30979/96 Frydlender v. France, ECtHR, judgement of 27 June 2000; case

- *Right to a reasoned judgment*: the decision of the tribunal must be sufficiently reasoned, both factually and legally<sup>25</sup>.
- *Right to a final decision of the tribunal (principle of legal certainty)*: the final decision of the tribunal cannot be challenged, re-examination of the decided case is prohibited<sup>26</sup>.
- *Right to enforce a court decision*<sup>27</sup>.
- *Right to a public hearing*: the right to a public hearing (oral hearing), public announcement of the tribunal's decision, publication of the tribunal's decision<sup>28</sup>.
- Additional guarantees in criminal cases (e.g., presumption of innocence, notification of a criminal charge, right to a defense, etc.)<sup>29</sup>.

It is clear that the mechanism for protecting the taxpayers' rights provided by bilateral tax treaties based on the OECD or UN Model Tax Conventions does not meet the standard of protection of the right to a fair trial guaranteed by the ECHR. The inability of the taxpayer to be present in the process of the dispute resolution and express their position on the case is a significant omission. In addition, taking into account the practice of the ECtHR, such rights should not depend on the discretion of the competent authorities, they should be granted to the taxpayer directly.

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75529/01 *Sürmeli v. Germany*, ECtHR, judgement of 8 June 2006; case 30979/96 *Frydlender v. France*, ECtHR, judgement of 27 June 2000

<sup>25</sup> Case 30544/96 *Garcia Ruiz v. Spain*, ECtHR, judgement of 21 January 1999

<sup>26</sup> Case 52854/99 *Ryabykh v. Russia*, ECtHR, judgement of 24 July 2003

<sup>27</sup> Case 18357/9 *Hornsby v. Greece*, ECtHR, judgement of 19 March 1997; case 59498/00 *Burdov v. Russia*, ECtHR, judgement of 7 May 2002.

<sup>28</sup> Case 14810/02 *Ryakib Biryukov v. Russia*, ECtHR, judgement of 17 January 2008; case 18928/91 *Fredin v. Sweden*, ECtHR, judgement of 23 February 1994; case 16970/90 *Allan Jacobsson v. Sweden*, ECtHR, judgement of 19 February 1998; case 36590/97 *Goc v. Turkey*, ECtHR, judgement of 9 November 2000

<sup>29</sup> Case 28245/04 *Mokhov v. Russia*, ECtHR, judgement of 4 March 2010; case 63993/0 *Romanov v. Russia*, ECtHR, judgement of 20 October 2005.

### III. Application of the Fair Trial Protection Standard to International Tax Disputes: Arguments "Against"

The key question is whether the fair trial guarantees cover tax disputes. Literally, Article 6 of the ECHR deals with disputes about civil rights and obligations and cases of criminal charge. The practice of the ECtHR shows that the concept of civil rights and obligations has an independent, autonomous from the usual understanding meaning in the ECHR, independent of the corresponding meaning in the national law of a particular state<sup>30</sup>.

The application of Article 6 of the ECHR to tax disputes related to criminal charges was recognized by the ECtHR<sup>31</sup>. At the same time, the question of whether non-criminal tax disputes are subject to the regulation of this rule is not resolved neither in the practice of the ECtHR nor in doctrine [see for example: 12, 45; 13, 87; 14, 540]. In the case of *Ferrazzini v. Italy*, the ECtHR gave the negative answer to this question with reference to the fact that tax disputes are of a public law nature, therefore, developers of the ECHR supposed to exclude tax disputes from the regulation of the ECHR. The ECtHR noted that the results of this dispute were not decisive for civil rights and obligations, the dispute was purely monetary in nature, which is not enough to recognize the admissibility of the application of Article 6 of the ECHR<sup>32</sup>.

There was a great criticism in relation to this case in scientific circles [15, 67; 16, 495; 17, 423; 18, 615], since the ECHR does not contain provisions expressly excluding tax disputes from the regulation of Article 6. Neither the Universal Declaration of Human Rights nor the International Covenant on

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<sup>30</sup> Case 6232/73 *König v. Germany*, ECtHR, judgement of 28 June 1978; case 2614/65 *Ringeisen v. Austria*, ECtHR, judgement of 16 July 1971.

<sup>31</sup> Case 1936/63 *Neumeister v. Austria*, ECtHR, judgement of 27 June 1968; case 12547/86 *Bendenoun v. France*, ECtHR, judgement of 24 February 1994; case 36985/97 *Västberga Taxi Aktiebolag and Vulic v. Sweden*, ECtHR, judgement of 23 July 2002; case 73053/01 *Jussila v. Finland*, ECtHR, judgement of 23 November 2006.

<sup>32</sup> Case 44759/98 *Ferrazzini v. Italy*, ECtHR, judgement of 12 July 2001.

Civil and Political Rights contain such a limitation. Indeed, the ECtHR has subsequently repeatedly come to the opposite conclusion, confirming that Article 6 can apply to tax disputes<sup>33</sup>. However, the cases containing such a conclusion were not related with purely tax matters, tax matters constituted only part of the applicant's claim – for example, a claim for a tax refund based on the results of restitution applied when the transaction was declared invalid, a claim for compensation for illegal seizure of property by the tax authorities. This connection allowed the ECtHR to conclude that the resolution of the tax part of the claim is directly related to the civil rights and obligations of the applicant.

There is the position expressed in foreign literature in the context of international tax disputes that the provisions of tax treaties, being an integral part of the national tax system of states, can be checked for compliance with the guarantees provided by the ECHR [15, 64; 5, 133; 7, 376]. It is noteworthy that in the practice of the ECtHR there were cases on double taxation issues<sup>34</sup>. However, in these cases, the ECtHR did not express a position on the merits of the dispute, but only pointed to the wide margin of appreciation that states have in the field of taxation.

The practice of the ECtHR on tax disputes, including issues of cross-border taxation, allows us to come to the following conclusions regarding the possibility of extending the guarantees of Article 6 of the ECHR to international tax disputes.

Firstly, the practice of non-criminal tax disputes, where the position of the ECtHR was expressed on the merits of the case, refers to mixed cases. The wording of the ECtHR's decisions on cross-border tax disputes covering purely tax

issues is very cautious.

Secondly, the guarantees of Article 6 of the ECHR are considered to be complied with Article 6 of the ECHR if the applicant has the opportunity to apply to an independent and impartial court at any stage of the dispute resolution<sup>35</sup>. Accordingly, it is not necessary that guarantees be implemented at all stages of dispute resolution. In this sense, the mutual agreement procedure is an alternative or additional mechanism to litigation in the contracting states, therefore, formally, only the stage of resolving a cross-border dispute by a national court falls under Article 6 of the ECHR. Thus, as long as the taxpayer whose rights have been violated has the opportunity to apply to the court of any (or both) of the contracting states, there are formally no grounds for a violation of Article 6 of the ECHR.

Thirdly, the parties to the dispute in the mutual agreement procedure and arbitration are the states parties to the tax treaty, the taxpayer is deprived of procedural status, therefore, formally, the taxpayer cannot refer to Article 6 of the ECHR in case of non-compliance with guarantees when resolving the dispute on the basis of the tax treaty.

Thus, the ECtHR is guided by a formal approach and proceeds from the fact that purely tax disputes are not covered by the wording of Article 6 of the ECHR on the "civil rights and obligations" disputes, despite the material consequences for the taxpayer. With this in mind, the extension of the guarantees of Article 6 of the ECHR to international tax disputes can be seen, rather, not as a formal requirement based on the provisions of the ECHR, but as a way to increase the efficiency international tax disputes resolution.

#### **IV. Application of the Fair Trial Protection Standard to International Tax Disputes: Arguments "For"**

First of all, as it is rightly noted in foreign literature [15, 16], the mere fact that the applications on cross-border taxation were accepted for consideration by the ECtHR shows that tax treaty

<sup>33</sup> Case 25564/94 *Filippello v. Italy*, ECtHR, judgement of 15 May 1996; case 21319/93, 21449/93 and 21675/93 *National & Provincial Building Society, Leeds Permanent Building Society et Yorkshire Building Society v. the United Kingdom*, ECtHR, judgement of 23 October 1997

<sup>34</sup> Case 12560/86 *Hanzmann v. Austria*, ECtHR, judgement of 16 March 1989; case 12670/87 *H v. Sweden*, ECtHR, judgement of 12 May 1998; case 30128/96 *FS v. Germany*, judgement of 27 November 1996.

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<sup>35</sup> Case 77617/01 *Mikheyev v. Russia*, ECtHR, judgement of 26 January 2006; case 59261/00 *Menesheva v. Russia*, ECtHR, judgement of 9 March 2006.



disputes may become the subject of consideration by the ECtHR. Additionally, in one of the cases, the ECtHR pointed out that the provisions of tax treaties should not automatically be considered as consistent with human rights standards<sup>36</sup>.

Furthermore, foreign researchers note [19, 16] that the global trend among states to ignore the creation of an effective mechanism for protecting the taxpayers' rights in cross-border disputes contradicts the parallel development of measures aimed at prevention of tax evasion leading to an increase in the number of disputes at the national level. As a result, different positions of courts in different jurisdictions have the potential to undermine legal certainty and the proper functioning of cross-border economic and social relations. Foreign researchers propose to develop a global standard for the effective protection of taxpayers' rights for the purposes of elimination the existing gap in the legal regulation of guarantees for the protection of taxpayers' rights in cross-border disputes [20, 421; 21, 1902; 22, 115; 23, 441; 24, 28]<sup>37</sup>. Pasquale Pistone notes [25, 19] that the case law of the ECtHR and the EU Court of Justice is the cornerstone of effective protection of the taxpayers' procedural rights and can be used as the basis for the development of a global standard for protecting the taxpayers' rights.

The International Bureau of Fiscal Documentation annually organizes the project for review the practice of states in the field of protecting the taxpayers' rights. From the report reflecting the results of the project for 2020 [19, 128] it follows that the states are cautiously, but starting to take steps towards strengthening the protection of taxpayers' rights in resolving international tax disputes. In particular, 12% (23% in 2019) of the surveyed jurisdictions indicated that

taxpayers were granted the right to access notifications exchanged between competent authorities under the mutual agreement procedure (Czech Republic, Denmark, Mexico, Panama, Sweden and Venezuela). Greece, Mauritius and Russia have indicated that they are ready to follow the practice of giving taxpayers the right to be heard in the mutual agreement procedure and the right to be notified of the progress of the mutual agreement procedure.

Along with this, the report [19, 130] notes a positive trend in the judicial practice of individual states. Thus, the Belgian court in the decision on the case No. 247.694 X. v. Belgium of 2 June 2020 found that the refusal to provide the taxpayer with access to documents in the mutual agreement procedure conducted under the tax treaty between Belgium and the United Kingdom violates Article 32 of the Belgian Constitution.

In addition, it should be noted that at the level of supranational regulation, the EU Directive 2017/1852 on tax dispute resolution mechanisms in the European Union of 10 October 2017 firstly expressly provides that the mechanisms for tax disputes resolution are based on the right of the taxpayer to a fair trial established by Article 47 of the Charter of Fundamental Rights of the European Union<sup>38</sup>.

It is also important that the provision of judicial protection at the national level in the context of international tax disputes can hardly be considered as an effective remedy. The right to an effective remedy is established in Article 13 of the ECHR and contributes to the purpose of Article 6 of the ECHR. In the literature such right usually refers to ancillary rights that enhance fundamental rights and freedoms [26, 220]. The ECtHR has repeatedly pointed out in its decisions that the "effectiveness" of a remedy is to be understood as preventing the alleged violation or maintaining the disputed state of affairs or providing adequate compensation for any violation that has already occurred. However, if one of the remedies individually does not satisfy the requirements of Article 13 of the ECHR, the rest of

<sup>36</sup> Case 30128/96 FS v. Germany, ECtHR, judgement of 27 November 1996.

<sup>37</sup> Taxpayers' Rights and Obligations: A Survey of the Legal Situation in the OECD Countries. Committee of Fiscal Affairs, OECD Publ., 27 April 1990. URL: <http://www.oecd.org/pdf/M00023000/M00023881.pdf>; Taxpayers' Rights and Obligations – Practice Note. Committee of Fiscal Affairs, OECD Publ., August 2003. URL: [https://www.oecd.org/tax/administration/Taxpayers'\\_Rights\\_and\\_Obligations-Practice\\_Note.pdf](https://www.oecd.org/tax/administration/Taxpayers'_Rights_and_Obligations-Practice_Note.pdf)

<sup>38</sup> Paragraph 9 of Preamble of the EU Directive 2017/1852 on tax dispute resolution mechanisms in the European Union of 10 October 2017

remedies provided by domestic legislation may meet them<sup>39</sup>.

Foreign researchers [27, 777; 28, 81; 29, 227; 30, 216] repeatedly expressed the position that the resolution of an international tax dispute by a national court is not an effective remedy, since national courts are obliged to follow the norms of national law but are not obliged to ensure that the provisions of national legislation comply with the provisions of international law. As the researchers note, if the national court makes a decision that will be in conflict with the international obligations of the state, the question of the legal force of such a decision will depend on the concept of the relationship between international and national law which the state follows, i.e. monistic [31, 5] or dualistic [31, 6]. At the same time, at the international level, the only way for a contracting state to respond to the bad faith behavior of another contracting state is to terminate the international tax treaty in accordance with Article 31 of the OECD Model Tax Convention<sup>40</sup>.

Additionally, Katerina Perrou points out that an obstacle to the effectiveness of an international tax dispute resolution in a national court unilaterally (without the participation of another state) is also the risk of non-execution of a decision of a national court of one state on the territory of another state [5, 142]. Indeed, as a rule, the execution of a decision of a court of a foreign state on tax issues is in conflict with public policy [32, 80; 33, 127]. This conclusion is also supported

in Russian judicial practice. Thus, the Ruling of the Supreme Court of the Russian Federation No. 305-ES16-13303 dated 1 February 2017 provides<sup>41</sup>: “By virtue of the principle of sovereign equality of states, assistance from the judiciary of one state in the formation of the financial basis (budget) of the sovereign power of another state can be carried out only if the states expressed the will for such interaction”, as well as “The execution of a decision of a foreign court violating the norms on the jurisdictional immunity of the Russian Federation and the fiscal immunity of its property is contrary to the public policy of the Russian Federation”. Accordingly, the national court of one state cannot unilaterally decide on tax consequences affecting the jurisdiction of another state. As noted above, such a practice, when a court decision cannot be enforced, is not recognized by the ECtHR as consistent with the guarantees of Article 6 of the ECHR<sup>42</sup>.

Finally, foreign doctrine expresses [34, 71; 35, 285] concerns about failure to comply with the impartiality requirement by national courts when they consider cross-border disputes involving tax non-residents. Should this risk materializes, Article 6 of the ECHR will be also violated.

If the taxpayer applies to the courts of both contracting states, it is obvious that this may lead to opposite decisions on one issue<sup>43</sup>. As a result, double taxation may not be eliminated which cannot be considered as an effective remedy. In addition, Katerina Perrou points out [5, 150] that the length of proceedings carried out in the courts of both states is incompatible with the guarantees of Article 6 of the ECHR. Furthermore, the high costs and language barriers can be considered as factors hindering the effectiveness of the trial.

<sup>39</sup> Case 39483/05 и 40527/10 Liseytseva and Maslov v. Russia, ECtHR, judgement of 9 October 2014; case 59498/00 Burdov v. Russia, ECtHR, judgement of 7 May 2002; case 57950/00 Isayeva v. Russia, ECtHR, judgement of 24 February 2005; case 15339/02, 21166/02, 20058/02, 11673/02, 15343/02 Budayeva and others v. Russia, ECtHR, judgement of 20 March 2008; case 5108/02 Khatsiyeva and others v. Russia, ECtHR, judgement of 17 January 2008; case 57941/00, №58699/00 и №60403/00 Musayev and others v. Russia, ECtHR, judgement of 26 July 2007; case 40464/02 Akhmadova and Sadulayeva v. Russia, ECtHR, judgement of 10 May 2007.

<sup>40</sup> Model Tax Convention on Income and on Capital: Full Version. OECD Publ., 21 November 2017. DOI: 10.1787/g2g972ee-en  
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<sup>41</sup> Review of judicial practice of the Supreme Court of the Russian Federation No. 2 (2017) approved by Presidium of the Supreme Court of the Russian Federation on 26 April 2017 (paragraph 29).

<sup>42</sup> Case 18357/9 Hornsby v. Greece, ECtHR, judgement of 19 March 1997; case 59498/00 Burdov v. Russia, ECtHR, judgement of 7 May 2002.

<sup>43</sup> OECD Report on Improving the resolution of tax treaty disputes (30 January 2007), para. 13; OECD Commentary on Article 25 of the OECD Model Tax Convention, para. 7.



## V. Conclusion

The practice of the ECtHR shows that the standard for protecting the right to a fair trial under Article 6 of the ECHR is broad and includes a large amount of guarantees for a person whose rights have been violated. However, when comparing this standard with the scope of guarantees of the taxpayers' rights in international tax disputes resolution in the mutual agreement procedure and arbitration in accordance with the provisions of bilateral tax treaties based on the OECD or UN Model Tax Conventions it becomes obvious that the developers of mechanisms for international tax disputes resolution did not focus on Article 6 of the ECHR and left the taxpayer with a passive role.

Despite the fact that at the international level the taxpayer has certain procedural rights the implementation of these rights depends on the discretion of the competent authorities of the contracting states. The inability of a taxpayer to directly participate in the procedure for international tax dispute resolution corresponds to the general approach of international public law according to which an international dispute is an interstate dispute in which there is no place for a private person. However such conclusion contradicts the Article 6 of the ECHR.

The main question that arises in connection with the current situation is the question of whether the requirements of the standard for the protection of the right to a fair trial provided by Article 6 of the ECHR apply to tax disputes. The study showed that two approaches can be highlighted when answering this question: formal and "substantial".

The formal approach suggests that literally Article 6 of the ECHR does not refer to tax disputes that do not have a criminal charge focus. This approach can be seen in the practice of the ECtHR on the application of Article 6 of the ECHR. The position of the ECtHR has changed over time from being extremely tough on the exclusion of tax disputes from the regulation of Article 6 of the ECHR to extending guarantees of the right to a fair trial to mixed disputes including a tax element but the results of which affect the civil rights and

obligations of the applicant. At the same time, the taxpayer can formally realize the guarantees of Article 6 of the ECHR by applying to the national court of one of the contracting states.

The "substantial" approach to the interpretation of Article 6 of the ECHR was developed by foreign researchers. Based on this approach the taxpayer does not receive an effective remedy for protecting rights when applying to the national court to resolve a cross-border tax dispute. In addition, the recognition of the need to extend the standard of protection of the right to a fair trial to international tax disputes is expressly provided by EU Directive 2017/1852 on tax dispute resolution mechanisms in the European Union of 10 October 2017.

According to the author's view, granting the taxpayer the right to directly participate in the mutual agreement procedure will overcome the contradiction between bilateral tax treaties based on the OECD or UN Model Tax Conventions and Article 6 of the ECHR. In this case, the taxpayer will have the opportunity to personally attend the process, review all the evidence and objections on the case, as well as present own position on the case and evidence. The participation of the taxpayer will minimize the key drawback of the mutual agreement procedure - the lack of a guarantee of a final decision on the case. This is especially important for those states that do not use arbitration such as Russia. Of course, the standard of protection of the right to a fair trial should not be automatically transferred to international tax dispute resolution mechanisms but should be adapted to the particular case. Thus, for example, in order to comply with the deadline of the mutual agreement procedure depending on the specific circumstances of the case, oral hearings can be replaced by the exchange of documents.

At the same time, taking into account the concerns of states regarding granting the taxpayer the status of a party in an international tax dispute the author suggests that it would be advisable firstly to give the taxpayer the role of a witness in the mutual agreement procedure. This is now recommended by the OECD Sample mutual agreement on arbitration providing that the taxpayer should be given the role of a witness at the

arbitration stage. In this case the taxpayer can testify in writing and orally<sup>44</sup>.

Article 6 of the ECHR grants the right to an independent and impartial tribunal. The mutual agreement procedure is carried out by the competent authorities of the contracting states (usually the ministries of finance). Of course, formally it is an administrative body, not a court. But in fact, the decision made by the competent authorities as a result of the mutual agreement procedure (in case of reaching an agreement) is final and becomes binding. Arbitration does not perform the function of an appeal. Arbitration resolves only those issues that have not been resolved in the mutual agreement procedure.

From this point of view the author supposes that the functions of the competent authorities can be considered as comparable with the jurisdictional (judicial) function performed by the court. This conclusion is confirmed by the practice of the ECtHR<sup>45</sup> according to which the administrative body making the final decision on the case actually implements the jurisdictional (judicial) function. This means that such an administrative body can be considered as a "court" in the meaning of Article 6 of the ECHR if it resolves issues covered by its competence on the grounds of law and in the procedure carried out in the prescribed manner provided that it meets a number of additional requirements such as independence and impartiality.

The impartiality and independence of the competent authorities involved in the mutual agreement procedure should be ensured at the level of national legislation. The OECD recommends states to provide in the domestic legislation measures ensuring the independence of the competent authorities from the tax authorities

involved in the tax audit of the taxpayer<sup>46</sup>.

Therefore, the standard for protecting the right to a fair trial established in Article 6 of the ECHR can be the basis for developing a standard for protecting the rights of taxpayers in international tax disputes resolution.

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<sup>44</sup> Sample mutual agreement on arbitration, article 5(2). Model Tax Convention on Income and on Capital: Full Version. OECD Publ., 21 November 2017. DOI: 10.1787/g2g972ee-en

<sup>45</sup> Case 10328/83 *Belilos v. Switzerland*, ECtHR, judgement of 29 April 1988; case 8790/79 *Sramek v. Austria*, ECtHR, judgement of 22 October 1984; case 30003/0 *Stojakovic v. Austria*, ECtHR, judgement of 9 November 2006

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<sup>46</sup> Best Practice No. 23 of the Manual on Effective Mutual Agreement Procedures (MEMAP). OECD Publ. URL: <https://www.oecd.org/tax/dispute/manualoneffectivemutualagreementproceduresmemap.htm>

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