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OVERRIDING THE RULES OF INTERNATIONAL TAX TREATIES BY THE MEANS OF THE NATIONAL LAW OF ONE OF THE PARTIES ("TAX TREATY OVERRIDE")

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Subject of research. The article is dedicated to the "tax treaty override"; it outlines debatable aspects, associated herewith. "Tax treaty override" is an action (in certain cases - omission of action) to expand taxation beyond (jurisdictional boundaries), defined in double taxation agreements which is implemented mainly through the intentional alteration of national legislation. The correlation between national and international legal norms has major impact upon the agreements on double taxation of income taking into account that many states including Russia are participants to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting 2016, which modifies rules of the mentioned agreements and therefore begets a large number of possible collisions.
Goal of the article. The goal of the article is to demonstrate that even if constitutional provisions don't prevent the adoption of legislation on taxes and charges in contradiction with international obligations – that doesn't imply that the latter lack legal significance. The goal also includes revealing specific features of double taxation agreements one of which is deep integration with domestic tax legislation that doesn't stand still, but is evolving constantly.
Methods of research. The preparation phase included the following research methods: formal-logical analysis, system-based analysis, description, juxtaposition, synthesis and summarizing.
Basic outcomes. The author draws a conclusion that the alteration (expansion) of tax jurisdiction which impacts i.a. the contents of tax residents' rights of one or both treaty countries (party countries, treaty states) is actually the essence of tax treaty override. The main objectives of regulatory impact are jurisdictional capabilities (distributive rules) of states and tax reliefs for residents (individuals for the tax agreements). The phenomenon under consideration represents an artificially generated collision between the provisions of tax treaties and more recent norms of domestic legislation of one of the countries subject to a tax agreement, while the mentioned issue should be resolved in favor of domestic regulations. The main goals of regulatory impact include: jurisdictional capabilities of states (distributive rules) and tax reliefs or benefits for residents (individuals for the tax agreements). Tax treaty override emerges when a provision of a law prevails and cannot be overridden by the means of tax agreements, including the test of correspondence between a national legal definition and the agreement context. At the same time legal changes that have prevailing power may correspond with international law (reasonable protection of national tax base) since the treaty states seek to eliminate double taxation without creating possibility of taxation freedom or reduction of taxation through tax avoidance and tax evasion.

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1. Introduction

The correlation between national and international legal norms has major impact upon the agreements on double taxation of income (hereinafter – DTA) taking into account that many states including Russia are participants to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting 2016[1], which modifies rules of DTA [1, p. 35-40] and therefore begets a large number of possible collisions.

Most researchers treat correlation between international tax agreements and internal tax legislation as a complex phenomenon since legislation of a number of states allow actual non-application of DTA (difference between monistic and dualistic approaches) [2,3,4,5]. The grounds of correlation between international and national law include: 1) independence of the two legal systems from each other; 2) corresponding interaction; 3) vertical, horizontal and other multilayered connections and hierarchy between international law and national legislation taking into consideration applicable mechanisms of concordance between international and national law specific to the state [6, p. 7-8].

With regard to international tax law I.I. Kucherov outlines that correlation between its norms and the norms of national tax law "may vary in different countries greatly – from the priority of the first over the second to their equality and finally – to the situation where international norms dominate over national ones by their legal force" [7, p.63].

A.I. Kovler differentiates the concepts of correlation between international and national law in the following manner: "dualistic" (their rough divide), "monistic" (priority of international law as the supreme law layer) and the other monistic concept implying priority of national law over international. As it is noted by B.I. Osminin in most states international agreements or treaties are treated as standing hierarchically lower than constitutions, i.e. constitutions should prevail in case of collisions [9].

Assessing the degree of scientific development of issues related to overriding DTA provisions by the means of national legal acts, we may note that in Russian literature these issues haven't been thoroughly summarized yet. Even though there is a significantly larger number of foreign studies – the research topic isn't very popular among foreign authors as well [10,11]. The goal of this article is to make an attempt to fill this gap introducing an original point of view on such a phenomenon as tax treaty override and outlining relevant debatable aspects.

2. Understanding the contents of tax treaty override

In domestic legal literature the wording "tax treaty override" as well as a more common term "treaty override" has no certain definition. The most precise description is provided by the alphabetical subject catalogue to the monograph by D.V. Vinnitsky ("breach of tax treaty/treaty override") [12].

We wouldn't support the approach "the violating state" as we are talking about objective features of national legal systems, their natural diversity – including the matters of correlation between the national legal norms and the provisions of international treaties. Objective diversity of legal systems should not be treated as violation.

It is worth mentioning that domestic legal practice knew various approaches to the issue as well. In soviet history as it is mentioned by Yu. A. Tikhomirov national law was treated as top priority. The novelty on the priority of international treaties was introduced along with the adoption of the Basic Principles of Civil Legislation of the USSR and Soviet Republics. As time passed it distributed upon other branches of legislation. For instance, the Article 6 of the USSR Law of April 23, 1990 № 1443-1 "On Income Tax of USSR Citizens, Foreign Individuals and Stateless People" stated that if the USSR international treaty provided other rules than the ones included into the soviet tax legislation – then international rules should be applied. The Constitution of the Russian Federation of 1993 introduced the principle of "insertion" of

[1] Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting // URL: https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm (reference date: 23.03.2023).

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international legal acts into the legal system and acknowledged the priority of international legal provisions over the national legal norms in cases of their contradiction [13].

V.A. Gidirim determines "treaty override" as "types of internal legislative norms that either in law or in fact prevail over the provisions of international treaties" or more generally – as "prevalence over international treaties" [14, p. 322]. In tax law the term "treaty override" (as it is reasonable noted by K. Du Pietro) has gained specific meaning, which implies breach of one or several provisions of an international treaty due to the adoption of the sequent national legislation that contradicts those provisions [10, p. 7]. B.I. Osminin, in analyzing German practice, points at tax treaty override as "prevalence of subsequent acts over contradictory preceding treaties" [9].

The OECD report "Tax Treaty Overrides" of 1989 (hereinafter – the OECD Report)[2] under the definition "treaty override" understands certain situations where the internal state legislation overrules provisions of one or all effective DTAs. This may happen due to certain circumstances (for instance - abuse by taxpayers).

The OECD Report outlines the need to separate treaty override from associated and similar situations as well as situations with the same consequences, e.g.:

1) The state may by legislative means overrule action of a court decision which deviates from interpretation, presumed (either directly or silently) by the DTA parties. In this case the damage to the basis of international tax relationships is not inflicted provided competent public authorities agree that the decision contradicts their intentions in concluding a treaty;

2) The state may in its inner legislation alter the definition that is utilized in DTA, but has not been determined for the needs of a treaty. In this particular case treaty override does not appear provided DTA contains a provision similar to the paragraph 2 of the Article 3 of the OECD Model Tax Convention on Income and on Capital[3], where any term which hasn't been determined by the convention shall (if the context does not provide otherwise) be treated according to the legislation of the relevant state concerning taxes, covered by the convention (see more: [1, p. 125-128]);

3) Updated legislation of one of the treaty states (negotiating states, treaty countries) may be incompatible with DTA provisions without intention to achieve such effects or even without recognizing relevant legal consequences.

The OECD Report pointing at inadmissible treaty override, distinguishes acceptable and inacceptable behavior of states highlighting the adoption of internal legislation, which (according to the plans of legislature) should have consequences that clearly contradict state obligations in relation to DTA. Thus, tax treaty override may occur along with the adoption of a law, and not just its legal application for real situations.

3. Approaches of international public law

The Vienna Convention on the Law of Treaties of 1969 (hereinafter – Vienna Convention) provides for an array of norms oriented towards fulfillment of obligations assigned to the states:

- the Article 26 – the principle "Pacta sunt servanda" (each effective treaty is binding to its parties and must be fulfilled benevolently and in good faith);
- According to the Article 27 a party may not refer to its national provisions as an excuse for non-fulfillment of a treaty;
- the Article 18 deters states from taking actions that would deprive a treaty of objectives or goals.

The Article 27 of the Vienna Convention by not allowing internal norms to serve as an excuse for ignoring conventional norms does indirectly acknowledge the possibility of collisions. At the same time international law does not "dictate" ways and means to achieve treaty fulfillment effects, but instead only formalizes the results ("must be fulfilled in good faith"). Fulfillment of an international

[2] Model Tax Convention on Income and on Capital 2017 (Full Version). R(8). Tax treaty override (1989). OECD Publishing [electronic resource]. URL: http://dx.doi.org/10.1787/g2g972ee-en (reference date: 11.03.2023).

[3] OECD (2019), Model Tax Convention on Income and on Capital 2017 (Full Version), OECD Publishing [electronic resource]. URL: http://dx.doi.org/10.1787/g2g972ee-en (reference date: 01.03.2023).

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obligation is unique for every state as it depends upon the features of its legal system as well as the nature of a treaty.

Even though constitutional provisions do not exclude adoption of legislation that might contradict with international obligations – that doesn't mean that the latter have no legal significance. Surely enough the risks of treaty override are likely eliminated if the treaty provision is given greater significance than internal laws – or if the state treats conventional norms as lex specialis by giving them top priority. But if treaty obligations are treated as equal with the norms of internal legislation – they may be covered by the rule lex posterior degreat legi priori (i.e. the recent law prevails over the older one), However that is also not very accurate as long as the principle is aimed at contradictions between the older and the newer laws and courts reluctantly interpret treaty provisions as not being consistent with national legislation.

4. Approaches of Russia and certain states

Generally accepted principles and norms of international law and international treaties of the Russian Federation are parts of its legal system: if an international treaty of Russia provides rules that are different from the ones given in a law – treaty rules should be applied (the paragraph 4 of the Article 15 of the Russian Constitution). This approach is reflected in the Russian Tax Code (hereinafter – RTC)[4]. In contrast the Article 7852 (d) of the US Internal Revenue Code[5] defines that neither treaty provisions nor tax legislation provisions have priority. This approach corresponds with constitutional provisions. The US Constitution and US laws passed in execution thereof as well as international treaties that are or will be concluded by the US government become supreme law of the country (the Article VI of the US Constitution)[6], therefore equal power of US laws and international treaties is secured.

As it has been noted in the studies of the US Congressional Research Service, collisions between the Internal Revenue Code provisions and tax treaties of the country are usually resolved upon the rule "last in time" [15]. Complex interconnections between DTAs and internal legislation (as it was noted by R. Dernberg) were reflected in the Article 894 (a) of the US Internal Revenue Code which provided that Code provisions must be observed "with due respect to all US treaty obligations" [16, p. 98]. Thus we should not exaggerate US abilities to "correct" conventional provisions by the means of laws – the recent case of denouncing an agreement with Hungary is one example. On July 8, 2022 Hungary was informed[7] on the cessation of the Treaty between the US and the Hungarian governments on double taxation, which was effective since 1979 [17].

Quite often legislative changes that impact DTAs are explained in the US by the fact that such measures are oriented towards the prevention of undue application of benefits with reference to the Article 22 of their agreements that provides for limitation of benefits concerning taxation. It is possible that by the same logic the US Model Tax Treaty of 2016 was supplemented with the Article 28 which provides for the measures that may be taken in cases when after signing of a DTA the tax legislation of a partner state faced major amendments (usually – reduction of tax rates)[8]. Therefore, according to the Article 28 "Subsequent changes in law" of the US Model Tax

[4] If an international treaty of the Russian Federation which contains provisions related to taxation and charges provides for other rules and norms than the ones set in the RTC and legal acts on taxation and charges, adopted in accordance with the RTC – then international treaty rules and norms must be applied (Article 7 of the RTC).

[5] Treaty obligations (§ 7852(d)). US Internal Revenue Code // URL: https://www.govinfo.gov/content/pkg/USCODE-2021-title26/pdf/USCODE-2021-title26-subtitleF-chap80-subchapB-sec7852.pdf reference date: 01.04.2023).

[6] The addressed US Constitution text was provided by the "Constitutions of American Countries / Ed. by T. Ya. Khabrieva. – Vol. 1 M: IZISP, 2006. P. 819.

[7] The decision to terminate DTA followed after Hungary's disagreement with the global reform of corporate taxation (Pillar 2 of the OECD's Pillar Two Model Rules).

[8] United States Model - Tax Treaty (2016) // URL: https://www.irs.gov/businesses/international-businesses/united-states-model-tax-treaty-documents (reference date: 23.03.2023).

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Treaty 2016 if, at any moment after signing the Treaty a treaty state reduces the prescribed company income tax rate which is applied to almost all income of resident companies and as a result it will drop below either 15% or 60% of the common prescribed corporate tax rate applied in the other treaty state or if the first mentioned treaty state provides tax relief to resident companies in relation to the major part of income from foreign sources (including interests and royalties) – then the treaty states shall perform consultations in order to amend the treaty and recover due distribution of tax rights between them. If those consultations fail, the other treaty state may inform the first one (via diplomatic channels) on cessation of provisions of the Article 10 (dividends), 11 (interests), 12 (royalties) and 21 (miscellaneous income). In this particular case provisions of the mentioned articles cease to apply in both treaty states in relation to tax resident companies upon 6 months after a cessation note was made in writ.

In 2015-2016 the science community was struck with the practice of the German Federal Constitutional Court (hereinafter – German Constitutional Court) in relation to the question under consideration. According to the Article 25 "International legal regulation" of the German Basic Law, the generally acknowledged norms of international law are a part of the federal law. They have priority over laws and directly produce rights and obligations for country residents. B.I. Osminin explains that tax treaties are not self-executable in Germany – their provisions should be transposed into national law, so that "treaty provisions" have the same status as ordinary laws and have no priority over them. And since subsequent laws may replace or cancel earlier legal acts, it is deemed that international treaties may be superseded or cancelled by the following federal laws, which provide different rules. Following this logic, as the researcher notices, the German Constitutional Court in its decision of December 15, 2015 (2015 2 BvL 1/12)[9] concerning the DTA between Germany and Turkey of 1985 (hereinafter – Regulation of the German Constitutional Court 2015) stated that the parliament is allowed to adopt laws which contradict earlier international treaties. And though the principle "Pacta sunt servanda" binds (according to international public law) the state with its counterparties – it however does not regulate the action of international treaties in the national legal system. This principle, according to the Court reasoning doesn't provide international treaties with the status of generally acknowledged norms of international public law as they are defined in the Article 25 of the German Basic Law and have priority over laws [9].

A. Blankenagel reviewing the mentioned regulation outlines that the case was about the matters of treaty-overriding laws – i.e. laws, adopted after the ratification of an international treaty which conflict with its content. The situation of possible breach of international treaties by the legislator has traditionally been treated as unsatisfactory – thus the legal doctrine and the practice of the German Constitutional Court developed the principle of "friendly approach to the international law" (Volkerrechtsfreundlichkeit). According to it public authorities should stay loyal to the international obligations of the country. However the content of the principle remained unclear and so in relation to the Regulation of the German Constitutional Court of 2015 (as the researcher noted) "the Sun of state sovereignty illuminated the principle" – or to be more precise its modest scale since according to the elaborated approach "the legislator is only bound by Constitution in contrast to the executive and the judicial branches which are also bound by laws and justice" [18].

5. Peculiarities of double taxation agreements

In some of our studies we have noted that DTAs may not exist by themselves without any support from the national tax legislation. Such is the nature of these agreements which don't create tax obligations, but distinguish tax jurisdictions [1, p. 128-130; 19, p. 104]. Rule 2 of the Article 3 of the OECD Model Tax Convention which has already been referred to confirms the following: the

9 https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2015/12/ls20151215_2bvl000112en.html (reference date: 23.03.2023).

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definitions of an agreement based upon the principle of tax sovereignty may not be precise – a number of parallel definition systems formed in the national law is inevitable. Thus, according to the paragraph 2 of the Article 3 of the Russia-Germany Agreement of May, 29, 1996 "On Avoidance of Double Taxation in Relation to Income and Property Taxes" – when a counterparty state applies the Agreement, any definition that has not been determined by the Agreement shall (if the context doesn't provide otherwise) have a meaning that is given in the relevant national legislation concerning taxes that are covered by the Agreement.

The rule is sometimes called technical tax treaty override which is actually a metaphor that confirms the following: altering national legislation of states while the DTA text is effective may lead to methodological issues. Original meaning of a conventional term – is naturally the one, which is present at the moment of signing a DTA. New meaning (modern definition) in certain cases may ruin the agreement. This doesn't however mean that the content of definitions should always stand still, but the content development is only possible and reasonable only in cases (and to the degree) when this is compatible with general anticipations and intentions of parties (in concluding an agreement) as well as their consistent will.

One of the DTAs' specific features is their deep integration with internal tax legislation, which is not standing still, but constantly developing. We should not forget about the historical context of the regulatory development of tax relationships. Addressing internal tax legislation even though it is not acknowledged by doctrine, serves as a priority notwithstanding national principles of correlation between national and international (DTA) norms. The following is one example of very close interaction between international and national norms taken from the Agreement on Double Taxation between the Republic of Belarus and the Kingdom of Spain 2017. According to the first paragraph of the Protocol to the Agreement – "the Agreement should not be interpreted as to hinder the application of national provisions on preventing tax evasion or tax avoidance". At the same time "internal rules and procedures may be applied to interpret such violations"[10].

The phenomenon of specific priority of a tax law is the result of one of the basic DTA objectives (to avoid double taxation of income). When a DTA empowers the state with rights to levy taxes (when the state serves as a state of income)[11] - that does not by itself create legal grounds for taxation in the state. And thus, the income should first be assessed legally from the viewpoint of national legislation (as subject to taxation) and only after that it should be compared with the income, covered by a DTA and its taxation rules in the mechanisms of separating tax jurisdictions of treaty states.

6. Conclusions

Tax treaty override means activity (sometimes – inactivity) aimed at expanding taxation beyond (jurisdictional boundaries) limits, specified in DTAs, that is generally implemented by intentional alteration of internal legislation. Alteration (expansion) of tax jurisdiction that impacts among other things the content of rights specific to tax residents of one or both treaty states is exactly the nexus of tax treaty override. The phenomenon under consideration is an artificially created collision between DTA norms and more recent national norms of one of the DTA parties, which should be formally resolved in favor of national norms. The main goals of regulatory impact include jurisdictional capabilities of states (distributive rules) and tax benefits/tax reliefs for residents (individuals for the tax agreements).

We may agree with K. De Kock that tax treaty override presumes adoption of national norms, which obviously conflict with DTA provisions [20 p. 21], but there's more than that. We should consider the content and nature of legislative alteration since the threat is over the effectiveness of basic (material) provisions of DTA – i.e. the norms, without which the objective and goals of an agreement would never be reached.

We are not either persuaded by the fact that main "offenders" will be among the states where international treaty provisions are not given top

[10] https://zakonrb.com/npa/konvenciya-mezhdu-respublikoy-belarus-i-korolevstvom (reference date: 01.03.2023).

[11] With rare exceptions

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priority. The academic literature reasonably mentions that the violation of main treaty provisions might as well result from adoption of retrospective amendments to laws, that cover (among other matters) the issues, regulated by DTAs and that said changes would apply to future consequences of events that occurred before the adoption [21].

L. Oppenheim stated that even in the states that “lean towards accepting the so-called dualistic viewpoint” there is presumption of no contradictions between international and national law. Since international law is based upon common concordance between states – it is deemed that the state cannot intentionally make a norm that would break international law. So, the national legal norm that looks like it is capable of breaking international law should (as far as possible) be interpreted in a manner to dispose of contradictions [22, p. 62]. As O.I. Tiunov mentioned, “the principle pacta sunt servanda can never be replaced or substituted with a different or opposite principle, as this would destroy international law completely” [23].

Tax treaty override emerges when a provision of a law prevails and cannot be overridden by the means of tax agreements, including the test of correspondence between a national legal definition and the agreement context. It should be noted that the mutual concordance procedures performed by competent authorities according to DTA provisions may be used not only to resolve specific cases but also to eliminate any complications or doubts that naturally occur in legal application and interpretation.

At the same time legal changes that have prevailing power may correspond with international law (reasonable protection of national tax base) since the treaty states seek to eliminate double taxation without creating possibility of taxation freedom or reduction of taxation through tax avoidance and tax evasion.

Just like taxpayers who search for loopholes in treaty provisions, states may also use DTA gaps in order to benefit from DTA application effects by changing internal legislation [24]. As a result of legislative and executive activities or inactivity they may artificially shift the balance in treaty distribution of tax rights [25].

We can’t agree with the idea that agreements (since we are talking about the separation of tax jurisdictions) are aimed at drawing the borderlines, within which the tax legislator is allowed to take action [24]. This approach would probably be relevant if the state only had a single agreement, but these agreements with different terms and conditions (even if they all are based on the OECD Model Tax Convention) count in dozens. So what now? Do we have to test all possible legal amendments on the subject of their correlation with each DTA? The legislator “bound” with each agreement would only be a sad nominal figure.

As the final part we should note that there is a recent tendency to overcome collisional image of “treaty override” and to see it more like a question of jurisdiction and observance of international principles, rather than a matter of hierarchy or “lex specialis”. Shifting away from formulas that apply for typical resolution of collisions is happening due to the fact that the connections between DTAs and national tax laws are much more complex and multilayered.

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