

# SECTION 1

## CURRENT ISSUES OF CONSTITUTIONAL AND LEGAL STATUS OF HUMAN AND CITIZEN

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### APPLICATION OF THE MLI CONVENTION AS A MEANS OF ENSURING THE CONSTITUTIONAL OBLIGATION TO PAY TAXES

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#### **Summary**

The purpose of the article is to determine the consequences of the application of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (Multilateral Instrument (MLI) in Ukraine, to evaluate it as a platform for coordinating the tax policy of various states, and also to make proposals to improve such coordination.

To achieve the outlined purpose and fulfill the set objectives in the research process, the following universal general scientific and special legal methods were used: dialectical, formal logical, formal legal, comparative legal, analysis and synthesis, and logical semantic.

The article emphasizes the importance of combating tax abuse as one of the main directions of the government's tax policy. It points out the need to support business and create a favorable investment climate on the one hand, and to counteract tax minimization strategies and the relocation of capital to low-tax jurisdictions on the other. It is noted that since business has crossed national borders, the coordination of the world community to harmonize tax policies of different states, their cooperation and interaction is necessary to solve the above problems. The main steps of the world community to coordinate their efforts to combat tax abuse are indicated. The leading role of the OECD in this process is noted, in particular with regard to the development of a model convention on the avoidance of double taxation, an initiative to combat harmful tax practices and, ultimately, an action plan on tax base erosion and profit shifting (BEPS). Considerable attention is focused on the MLI Convention as one of the main steps of the BEPS Plan. The article explains the purpose of the MLI Convention, which is to unify the rules for applying international tax conventions in terms of establishing taxation rules with respect to income taxes, to create an effective mechanism for implementing the agreed changes in a coordinated and efficient manner, according to which such agreements will fulfill the task of avoiding double taxation, but at the same time will not be an instrument for abuse, which creates opportunities for tax exemption or reduction of taxes through tax evasion. The author points to the provisions of the Convention limiting the application of benefits to dividend payment transactions and counteracting the abuse of the status of permanent establishments. Also, a critical assessment is given of the procedure for resolving tax disputes between residents of different countries provided for in the convention.

The study substantiates that the system of dispute resolution between taxpayers and competent authorities of different contractual jurisdictions as defined in the MLI Convention is not perfect, since it is not characterized by promptness of dispute consideration, and the system of determining arbitrators is unclear and not completely understood. The author proposes to establish an international tax arbitration court with clear rules of procedure and a professional panel of judges from among the most authoritative experts in the field of international tax law.

To ensure effective and efficient coordination of states in the fight against tax abuse, taxation of TNCs, the digital economy and many other areas where global cooperation is needed, it is proposed to establish an international intergovernmental organization with delegation of part of the sovereign tax powers to it.

**Key words:** tax; tax policy; constitutional obligation; double taxation; tax planning, low-tax jurisdictions; BEPS; MLI Convention; permanent establishment; tax disputes.

## **1. Introduction**

Counteracting tax abuse, preventing tax base erosion and artificial tax minimization is one of the main areas of any state's budget policy, especially at a time when the global economy is experiencing a deep crisis. Governments are faced with the task of supporting businesses that have found themselves in difficult circumstances on the one hand, and protecting state budgetary interests on the other hand, as the decline in GDP leads to a decrease in tax revenues and a significant increase in the budget deficit. These tasks are not mutually exclusive. They can be implemented when the government creates a favorable domestic tax climate, improves conditions for faithful and conscientious taxpayers, at the same time taking measures to prevent tax abuse that may occur as a result of dishonest behavior of taxpayers, implementation of aggressive tax planning, and shifting profits and capital to low-tax jurisdictions. Given that business has long crossed national borders and skillfully uses differences in tax systems of different countries to optimize its payments, the efforts of one government are not enough to solve these problems. Clear and effective tools are needed to coordinate the governments' tax policies, which often requires finding compromise solutions. This problem is still relevant in Ukraine, as after winning the war, we will face the challenges of economic reconstruction, stabilization of the financial system and improvement of the investment climate.

The problems of combating tax abuse in the process of tax optimization and planning have received attention from scholars, in particular, O. Artyukh, O. Bazov, M. Vitlina, V. Ilyushenkova, V. Marchenko and others. However, the issue of application of such an instrument as the MLI Convention for the purpose of ensuring constitutional obligations has not yet been sufficiently covered in scientific sources.

The purpose of this article is to determine the consequences of the application of the MLI Convention in Ukraine, its evaluation as a platform for coordinating the tax policy of the states, and making proposals for improving such coordination.

To achieve this goal, it is necessary to solve the following research tasks: to find out what actions have been taken by the international community to coordi-

nate tax policy, to determine the place of the MLI Convention in the system of measures to combat tax abuse, to disclose the main provisions of the MLI Convention and the consequences of its implementation in Ukraine, and to formulate proposals for improving the interaction of governments in coordinating tax policy.

## **2. Key Actions of the World Community to Coordinate Tax Policy**

At some point, the active use of offshore and large-scale tax minimization abuse forced the world community to take measures to counter it. As O. Artyukh and V. Ilyushenkova rightly point out, the international community had to admit that tax evasion and tax fraud schemes cannot be overcome by the efforts of each country alone (Artyukh&Ilyushenkova, 2019, p. 6). The Organization for Economic Cooperation and Development (OECD) made a major contribution to this process. Back in 1977, the OECD Model Tax Convention was developed aiming to eliminate double taxation. In 1988, the OECD developed an initiative to combat harmful tax practices aiming to identify jurisdictions that wrongly lured businessmen from high-tax countries. In the same year a multilateral convention on mutual administrative assistance in tax issues was concluded (Implementation of the BEPS Plan in Ukraine: Problems and Prospects, 2019).

O. Bazov notes that in the current conditions, the leading countries of the world, in particular the G20 states, have come to the conclusion that the international legal framework of the principle of tax competition needs significant improvement. This is primarily reflected in the fact that the international taxation system, which was previously aimed at counteracting double taxation, is being actively improved by the international community with the purpose of preserving incomes and the possibility of their taxation by the countries where the income originates. earlier, within the framework of ordinary tax competition, states adhered to the so-called "right model" of taxation, based on the principle of tax competition and free circulation of capital, in the new conditions, the so-called "left model" of taxation is applied, i.e. governments have begun to fight the outflow of capital to offshore areas (Bazov, 2019, p. 258).

V. Marchenko argues that the G20 and the OECD have initiated a large-scale international effort to move from the era of indifferent contemplation, and even actual encouragement of the so-called aggressive tax planning to its limitation and elimination. It is obvious that international tax planning has become too expensive even for developed countries (Marchenko, 2018, p. 303). In view of this challenge, in 2012 the leaders of the G20 countries requested the OECD experts to develop an action plan to address the problems of erosion of the tax base and profit shifting. Already in 2013, the OECD presented its first report on this issue and proposed the Action Plan on Base Erosion and Profit Shifting or BEPS Plan (Implementation of the BEPS Plan in Ukraine: Problems and Prospects, 2019).

The conclusion of the MLI Convention on November 24, 2016 was one of the key steps in the regulatory implementation of certain measures of the BEPS Plan. This Convention was signed by Ukraine on July 23, 2018 and ratified in accordance with the Law of Ukraine No. 2692-VIII dated February 28, 2019 with certain reservations.

M. Vitlina emphasizes that the BEPS requirements relate to the reform of domestic tax legislation and the conclusion of double taxation treaties by the states. The purpose of BEPS is to create a mechanism to effectively combat schemes that facilitate the global transfer of company profits to offshore areas and a legal framework to combat corporate tax minimization to prevent the use of aggressive international tax planning schemes. (Vitlina&Shulga, 2019, p. 179).

The BEPS plan contains new or more stringent international standards, as well as specific measures to help the governments overcome the problems of tax base erosion and profit shifting, defining 15 actions aimed at addressing these problems comprehensively (BEPS, 2018).

### 3. Basic Provisions of the MLI Convention

The MLI Convention is Action 15 of the BEPS Action Plan. By signing and ratifying this Convention, the participants simultaneously fulfill Actions 6 and 14, which are included in the BEPS Minimum Standard, as well as Actions 2 and 7, to which the parties can join. The purpose of the MLI Convention is to unify the rules for the application of international tax conventions in terms of establishing taxation rules with respect to income taxes, to create an effective mechanism for implementing the agreed changes in a coordinated and efficient manner, according to which such agreements will fulfill the task of eliminating double taxation without creating an opportunity for non-taxation or reduced taxation through tax evasion or avoidance. Concluding the MLI Convention, the parties defined in the Preamble the following factors they are guided by:

1) governments lose substantial corporate income tax revenues because of aggressive international tax

planning that has the effect of artificially shifting profits to locations where they are subject to non-taxation or reduced taxation;

2) base erosion profit shifting is a pressing issue not only for industrialized countries but also for emerging economies and developing countries;

3) the importance of ensuring that profits are taxed where substantive economic activities generating the profits are carried out and where value is created;

4) the need to ensure swift, coordinated and consistent implementation of the treaty-related BEPS measures in a multilateral context (MLA, 2019).

The MLI Convention directly defines the so-called hybrid mismatches to reduce tax. In particular, it establishes rules for the application of double taxation treaties for fiscally transparent entities and dual resident entities. At the same time, the Convention provides for three options that can be applied by the parties to regulate the procedure for taxing the incomes of their residents, in particular, establishing the possibility of not applying the provisions of international treaties that provide for the exemption from taxation of income in one contracting jurisdiction, if another contracting jurisdiction exempts such income from taxation or applies a reduced rate. At the same time, instead of exemption from taxation, the possibility of deducting the amount of tax paid in this other contractual jurisdiction is applied.

Also, the MLI Convention provides for steps to prevent the abuse of the provisions of double taxation treaties, in particular by including in the text of the preamble of the tax treaties to which it applies, the provisions on the intention to eliminate double taxation with respect to the taxes to which this agreement applies, but without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including by improper use of agreements for the purpose of obtaining the benefits provided for in this agreement, for obtaining indirect benefits by residents of third jurisdictions).

An important provision of the MLI Convention is that the benefit provided by the tax treaty will not be granted if it is established, taking into account all the facts and circumstances, that obtaining this benefit was one of the main purposes of any arrangements or transactions that led to its application (implementation of Action 6 of the BEPS Plan). This is, in fact, a regulatory consolidation of the business purpose doctrine at the level of international law in terms of the possibility of applying the benefits provided by double taxation treaties. At the same time, the Convention also provides for mechanisms to protect the interests of taxpayers, preserving their right to apply for benefits if, at their request, the competent authority of a contracting state establishes that the relevant tax benefit would have been granted in the absence of the disputed transaction or arrangement.

Special conditions are provided for by the MLI Convention regarding the application of benefits to dividend payment transactions (it is established that the person receiving dividends must hold a part of the capital, shares or stock during a 365-day period). The Convention also regulates the procedure for applying tax treaties in case of alienation of shares or rights, the value of which is derived mainly from real property (under certain conditions, it is possible to tax such income in the contractual jurisdiction in which the real property is located).

Particular attention should be paid to the provisions of the MLI Convention on countering the abuse of permanent establishments (implementation of Action 7 of the BEPS Plan). Mechanisms have been established to counteract tax minimization schemes in cases where permanent establishments are situated in the third jurisdictions with a lower level of taxation, as well as in cases of artificial avoidance of the permanent establishment status. The main methods of such artificial avoidance have been identified, in particular by concluding commission contracts or other similar schemes. In particular, it is provided that an enterprise resident in one contractual jurisdiction has a permanent establishment in another contractual jurisdiction if it acts in a contracting jurisdiction through an entity that habitually concludes contracts, or habitually plays the principal role leading to the conclusion of contracts, and these contracts are concluded in the name of the enterprise or relate to the transfer of the ownership of, or for the granting of the right to use, property owned or used by that enterprise, or they relate to the provision of services by such enterprise.

An important task of the MLI Convention is to regulate the procedure for improving the dispute resolution mechanism. Its provisions expand the ways of protecting taxpayers by granting them the right, irrespective of the remedies provided by the domestic law, to apply to the competent authority of either contracting jurisdictions if the taxpayer believes that their rights arising from the tax agreement are violated. This provides for coordination and interaction between the competent authorities of the contracting jurisdictions by reaching mutual agreement on any complex or disputed situations arising from the interpretation or application of the Tax Agreement. They may hold joint consultations or take other measures and make efforts to resolve disputes promptly and effectively. In this context, it should be noted that despite the ratification of the MLI Convention by Ukraine, the national legislation is currently not harmonized with its provisions on mutual agreement, in particular, it does not provide for a legal mechanism for consideration of appeals of non-residents to the tax authorities of Ukraine on the application of tax agreements, the procedure for making decisions based on the results of such appeals and the consequences.

If during the mutual agreement procedure the contracting parties fail to reach an agreement on the resolution of the dispute within a period of two years, the unresolved disputes shall be submitted to arbitration at the request of the interested party. Settlement of a dispute over the application of a tax agreement by an arbitration panel is a rather interesting institution of international tax law. The arbitration panel consists of three independent members with expertise and experience in international tax matters. Two members of the panel are appointed by the competent authorities of each of the contracting parties, and the third, who will be the chair of the arbitration panel, is appointed by these members of the panel. The chair of the panel cannot be a resident or citizen of any of the contracting jurisdictions. The arbitration decision, except in certain cases, shall be final and binding on the contracting jurisdictions. It should be emphasized that by ratifying the MLI Convention, Ukraine reserved the right not to apply the arbitration clause to its tax agreements, so domestic taxpayers cannot currently use this tool.

#### **4. Effectiveness of Application of the MLI Convention in Ukraine and the World**

In our opinion, such a dispute settlement system cannot be considered perfect, since, firstly, it is not characterized by the promptness of consideration of disputes, as the process, first at the national and then at the international level, may take years, and secondly, the system for determining arbitrators is unclear and not completely understood, nor does it guarantee an impartial and objective resolution of the dispute at the highest professional level. We believe that these tasks could be solved much more effectively by creating an international tax arbitration with clear rules of procedure and a professional panel of judges from among the most authoritative experts in the field of international tax law.

The introduction of the BEPS Plan into the legislation of Ukraine, which is expected in the near future, has certain advantages and disadvantages, which were described above. But it seems that another choice is hardly acceptable for Ukraine, because we cannot be isolated from global world processes and not recognize these realities. For business, this leads to a new quality of tax planning, with the rejection of artificial schemes, taking into account financial monitoring, the actual limitation of bank secrecy. Along with this, the main task for Ukraine in the coming period will be to ensure that these steps are properly legislated, that effective reform of the tax authorities and other necessary reforms are implemented, and that corruption is fought. This should ensure the necessary balance between the interests of the state and business. One way or another, we all have to get used to living and working under the new

taxation rules, which are stricter but more transparent and fairer. (Hretsa, 2020, p. 394).

Despite great efforts and significant steps in the issue of coordinating the actions of states in the field of tax policy, combating tax abuse at the global level, in our opinion, the level of cooperation is not sufficient today. Many steps identified within the framework of the BEPS Plan and other initiatives cannot be implemented due to the lack of appropriate international legal means of their implementation. It is not enough to define the necessary international tax rules, it is necessary to have effective tools to ensure their application. At the level of national tax systems, it is difficult to introduce such tools a priori. This applies to taxation of TNCs, the digital economy, and many other areas. The procedure for resolving disputes at the intergovernmental level regarding the avoidance of double taxation and other important aspects also needs to be improved. We believe that these problems can be effectively addressed only by establishing an international intergovernmental organization with delegation of some sovereign tax powers to it. The task of this organization could be to coordinate the tax policy of states, ensure the implementation of the BEPS plan, administer the tax payment of TNCs and the segment of large digital business, monitor their compliance with the rules of international tax treaties and paying taxes in the relevant jurisdictions. Another crucial task of such an international organization will be to resolve disputes at the international level.

### 5. Conclusions

The system of settling disputes between taxpayers and the competent authorities of different treaty jurisdictions defined in the MLI Convention cannot be considered perfect, since, firstly, it is not characterized by the promptness of dispute consideration, because the process, first at the national and then at the international levels, can drag on for years, and -secondly, the system of determining arbitrators is unclear and incompletely understood, it does not guarantee an impartial and objective resolution of the dispute at the highest professional level. We believe that these tasks could be solved much more effectively by creating an international tax arbitration, with clear work regulations and the formation of a professional panel of judges from among the most authoritative experts in the field of international tax law.

To ensure effective and efficient coordination of governments in countering against tax abuse, taxation of TNCs, digital economy and many other areas where global cooperation is necessary, we consider it expedient to create an international intergovernmental organization with the delegation of part of the sovereign tax powers to it. The task of this organization may be to coordinate the tax policy of states, implement the steps of the BEPS plan by developing international legal means

for their implementation, take measures to administer the payment of taxes by TNCs and the segment of large digital business (creating a kind of international office of ultra-large taxpayers within the structure of an international organization), monitor their compliance with the rules of international tax treaties, pay taxes in the relevant jurisdictions, analyze master file and country-by-country reporting and provide recommendations on how to improve the tax system. The concept of tax cooperation should prevail over the policy of tax selfishness of states even in the context of the economic and financial crisis. Another crucial task of such an international organization will be to settle disputes at the interstate level by creating a body to resolve such disputes – international tax arbitration.

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## ЗАСТОСУВАННЯ КОНВЕНЦІЇ МЛІ ЯК ЗАСІБ ЗАБЕЗПЕЧЕННЯ КОНСТИТУЦІЙНОГО ОБОВ'ЯЗКУ ЩОДО СПЛАТИ ПОДАТКІВ

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### Анотація

Метою даної статті є визначення наслідків застосування багатосторонньої конвенції щодо виконання заходів, які стосуються угод про оподаткування, з метою протидії розмиванню бази оподаткування та виведенню прибутку з-під оподаткування (Multilateral Instrument (MLI) в Україні, її оцінка як платформи для координації податкової політики різних держав, внесення пропозицій щодо покращення такої координації.

Для досягнення окресленої мети й виконання поставлених завдань у процесі дослідження використано низку різноманітних універсальних загальнонаукових та спеціально-юридичних методів наукового пізнання: діалектичний, формально-логічний, формально-юридичний, порівняльно-правовий, аналізу та синтезу та логіко-семантичний.

У статті наголошується на важливості протидії зловживанням у сфері оподаткування як одному із основних напрямків податкової політики держави. Вказується на необхідності, з одного боку, підтримувати бізнес, створити сприятливий інвестиційний клімат, а з іншого – протидіяти мінімізації податкових зобов'язань та витоку капіталу в низькоподатковій юрисдикції. Зазначається про те, що оскільки бізнес

став транскордонним, для вирішення цих завдань необхідна координація світової спільноти по узгодженню податкової політики різних держав, їх співпраця і взаємодія. Зазначаються основні кроки світової спільноти для координації їх зусиль по протидії податковим зловживанням. Відмічається провідна роль ОЕСР у цьому процесі, зокрема щодо розробки модельної конвенції про уникнення подвійного оподаткування, ініціативи щодо протидії шкідливій податковій практиці і, зрештою, плану дій щодо розмивання податкової бази і виведення доходів з-під оподаткування (BEPS). Значна увага зосереджується на конвенції MLI як одному із основних кроків плану BEPS. Розкривається мета конвенції MLI, яка полягає у тому, щоб уніфікувати правила застосування міжнародних податкових конвенцій у частині встановлення правил оподаткування стосовно податків на доходи, створення ефективного механізму впровадження погоджених змін скоординованим та ефективним способом, згідно з яким такі угоди будуть виконувати завдання уникнення подвійного оподаткування, однак разом з тим не будуть інструментом для зловживань, при яких створюються можливості для звільнення від оподаткування або зменшення розміру податків через ухилення або уникнення від сплати податків. Вказується на положення конвенції щодо обмеження застосування пільг до операцій з виплати дивідендів, а також протидії зловживання статусом постійних представництв. Дається критична оцінка передбаченому в конвенції порядку розв'язання податкових спорів між резидентами різних країн.

Висновується, що визначена в конвенції MLI система врегулювання суперечок між платниками податків і компетентними органами різних договірних юрисдикцій не є досконалою, адже не відзначається оперативністю їх розгляду, крім того, система визначення арбітрів нечітка та неповністю зрозуміла. Пропонується створення міжнародного податкового арбітражу, з чітким регламентом роботи та формуванням професійного складу суддів з числа найбільш авторитетних фахівців у галузі міжнародного податкового права.

Для забезпечення ефективної та дієвої координації держав у питаннях боротьби з податковими зловживаннями, оподаткування ТНК, цифрової економіки та багатьох інших сфер, де необхідна глобальна взаємодія, пропонується створення міжнародної міжурядової організації з делегуванням їй частини суверенних податкових повноважень.

**Ключові слова:** податок; податкова політика; конституційний обов'язок; подвійне оподаткування; податкове планування; низькоподаткові юрисдикції; BEPS; конвенція MLI; постійне представництво; податкові спори.