

INTRODUCTION OF INTERNATIONAL LAW EXPERIENCE IN THE DIGITAL ECONOMY

ELEN AVALYAN

Key words - Monism, dualism, tax evasion, tax planning, tax burden, digital company, digital factors.

INTRODUCTION

International law is mainly intended to regulate the existing relations between the states that are parties of international relations¹. The approach of how a country implements the provisions of international law in its domestic legislation is very important.

The theory of the relationship between international and national law is divided into the following approaches;

1. Monism, that is based on the idea that international and national law is an interrelated unit². This view is also divided into the following groups;

a) Monism, which is dominated by international law, ranks the hierarchy of international law higher than national law.

b) Monism, which is dominated by national law, ranks the hierarchy of national law higher than international law. As far as international law usually develops through the experience of communication between countries, then it can only be considered a continuation of national law.

2. Dualism is based on the idea that international law and national law are separate parts, as far as they function as two different legal systems.

3. Hybrid: The monistic-dualistic approach shows the characteristic features or tendencies of both monistic and dualistic approaches, depending on international law. Monist-dualists justify their hybrid approach to practice and uniqueness, which is associated with the observance of international law, in particular treaties, and their various forms.

If there is a discrepancy between international and national law, than the dualist state will generally prefer national law. Since dualism views national law

¹ Վիգեն Քոչարյան, Միջազգային իրավունք, 2002թ. էջ 7 <https://vahagnakanch.files.wordpress.com/2011/04/mijazgayin-iravunq-by-vigen-qocharyan-full-version-pdf1.pdf>

² Damos Dumoli Agusman, “Treaties under Indonesian law”, 2015, p. 12.

and international law as separate parts, then the application of provisions of national law which are not acceptable by international law may be justified¹.

DESCRIPTION OF THE APPLICATION OF INTERNATIONAL LAW

When conducting foreign transactions, states are often guided by certain rules and norms of international law.

However, by and large, countries have the right to decide for themselves which path to take when establishing international contacts, in particular, to accept monism, dualism, or monistic-dualistic principles.

For example;

➤ The United Kingdom applies existing theories of dualism monism, but it is dominated by a monistic approach that recognizes the rules of international law as part of its national legislation².

➤ According to the Kenyan Constitution, the current law treats any treaty or convention ratified by Kenya as part of Kenyan law, whereas the previous constitution had a more dualistic approach³.

➤ The American case of *Medellin vs. Texas*⁴ has introduced a monistic-dualistic (hybrid) approach to the United States. The case emphasizes that this hybrid approach is based on some contracts that do not operate independently and therefore they are required to be adopted in accordance with domestic legislation.

➤ The case of "*Australia vs Toeh*" shows that Australian jurisprudence supports the dualistic approach. In Australia, the main basis and justification of the dualistic approach is more accurately presented in the above mentioned case of Toeh as follows: "It is well established that the provisions of the international treaty to which Australia is a party are not part of Australian law unless those provisions are validly incorporated into our civil law⁵".

➤ According to Article 2 of the RA Tax Code, tax relations in the Republic of Armenia are regulated by the Constitution of the Republic of Armenia, according to the international agreements ratified by the Republic of

¹ **Craig Elliffe**, "The Lesser of Two Evils: Double Tax Treaty Override or Treaty Abuse? British Tax Review", 2016, p. 88

² Quoted in Malcom supra note 1 at P. 140.

³ Republic of Kenya in the high court of kenya at nairobi milimani law courts constitutional and human rights division petition no. 190 of 2011

⁴ *Medellin v Texas* 522 US 49 (2008), <https://supreme.justia.com/cases/federal/us/552/491/>

⁵ *Minister of State for Immigration and Ethnic Affairs v Toeh* (1995) HCA 20; 1995 183 CLR 273, https://seafarersrights.org/wp-content/uploads/2018/03/AUSTRALIA_CASE-LAW_MINSTER-OF-STATE-FOR-IMMIGRATION-AND-ETHNIC-AFFAIRS-V-AH-HIN-TEOH_1995_ENG.pdf

Armenia, the Code, the laws of the Republic of Armenia on payments, according to subordinate normative legal acts adopted on the basis of them and to ensure their implementation¹. Therefore, it can be stated that at least in terms of taxation, Armenia can also be classified as a monist state, in particular as monism with the supremacy of international law, taking into account Article 5 of the Constitution of the Republic of Armenia, according to which the norms of international agreements ratified by the Republic of Armenia are applied in case of contradiction between the international treaties and norms of laws².

In many countries, the term "tax evasion" can be divided into acceptable tax avoidance and unacceptable tax avoidance mechanisms³.

Each country may have different views on the two mechanisms, as far as what is considered acceptable tax evasion in one country, may be considered unacceptable by other countries. Although there are no "tax avoidance mechanisms" in the standard classification, many countries have agreed that the avoidance of unacceptable / abusive taxes is explained as minimization of the tax burden by using tax incentives provided by the tax legislation of the country, which are often incompatible with the goals of the developer of the given incentive⁴.

The term tax planning is often used to denote legal tax evasion practices, while tax evasion emphasizes tax evasion practices that are illegal. The decision to be legal or illegal is usually based on criminal involvement in tax evasion.

Tax planning is described as the organization of financial activities so that the appraised one can make the most use of tax incentives by making the most use of all legal privileges, such as reductions, tax exemptions and so on. On the other hand, tax evasion is a mechanism to avoid tax liabilities, but it seeks to subvert the fundamental motivation of the legislature.

According to Xynas⁵, tax planning is defined as "the delay in payment or occurrence of taxes from the current period to future periods, as a result of which, different tax regimes collide having the aim to transfer the resulting revenues from areas with higher tax regimes to areas with lower tax regimes". Tax evasion, on the other hand, is defined by Asprey and Parsons as a "violation of the law in case of which a taxable person is not taxed or pays less tax than he or she was required to pay"⁶.

¹ ՀՀ հարկային օրենսգիրք, հոդված 2, <https://www.arlis.am/documentview.aspx?docid=127335>

² ՀՀ Սահմանադրություն, հոդված 5, <https://www.arlis.am/>

³ **Darussalam, John Hutagaol, and Danny Septriadi**, *Konsep dan aplikasi Perpajakan internasional*. Jakarta: Danny Darussalam Tax Center.2010, p. 198.

⁴ **Xynas, L.** (2010). *Tax Planning, Avoidance and Evasion in Australia1970-2010*, 2010, p.4

⁵ **Xynas, L.** (2010). *Tax Planning, Avoidance and Evasion in Australia1970-2010*, 2010, p.4

⁶ **Xynas, L.** (2010). *Tax Planning, Avoidance and Evasion in Australia1970-2010*, 2010, p.6

Tax planning is legal and moral in nature, it saves taxes and aims to be implied in the long period of time, while tax evasion is legal but not moral and it is planned to be implied in the short period of time¹.

The boundaries of tax planning and tax evasion have been constantly changing and developing in recent years. The dividing line between the two concepts is thin and blurred². The theory of exchange is the basis for the emergence of a theory called the theory of tax benefits, according to which every citizen is obliged to support the state in order to bring benefits in accordance with the support received from the state.

In particular, with regard to digital economy transactions that take place between two or more countries, this theory highlights both the positive and negative impact that the state will have on the digital business conducted by a digital company. When a digital company generates revenue in any country, it is natural that the country also has a positive impact on the transaction, as far as the country provides certain conditions as a source, in particular, creates a favorable legal environment for the company to operate and get benefit from its activity.

For example, in the Republic of Armenia, a tax agent certified in accordance with the Law of the Republic of Armenia “On State Support in the Field of Information Technologies” calculates income tax on wages paid to employees and income equivalent to it at a rate of 10%³ instead of the current 21% during the validity of the certificate.

As far as entrepreneurial activity has an impact on the tax burden that a company has to bear⁴, it makes sense for the company to take various possible steps to minimize the tax burden.

For example, Apple, one of the most expensive technology companies in the world, has established subsidiaries in low-income regions such as Ireland, the Netherlands, Luxembourg and the British Virgin Islands to reduce the taxes the company pays all around the world. Apple's local tax field⁵ is of particular interest to experts. Although the company is based in the United States, most of the profits come from other areas. The country's tax code is based on the idea that a company earns revenue from where value is generated, not from where it is sold. However, Apple accountants have found legal ways to get more than 60% of their profits from abroad, focusing on countries with lower tax rates. As

¹ <https://keydifferences.com/difference-between-tax-planning-and-tax-avoidance.html>

² <https://keydifferences.com/difference-between-tax-planning-and-tax-avoidance.html>

³ Եկամտային հարկի մասին ՀՀ օրենք, հոդված 10, <https://www.arlis.am/>

⁴ **Calegari, M.** (1998). *Flat Taxes and Effective Tax Planning*, .p. 690

⁵ <http://www.nytimes.com/2012/04/29/business/apples-tax-strategy-aims-at-low-tax-states-and-nations.html>

a result, Apple's international subsidiaries are helping to reduce the cost of taxes levied on US and other governments.

The company Facebook being established and based in Singapore will not tax income from Indonesia due to the terms of the Indonesia-Singapore tax agreement. This condition can be seen as a step towards tax evasion in Indonesia. However, tax evasion is classified as an acceptable tax evasion because it focuses on the tax planning scheme. It is also very important to establish a permanent institution in the country, based on a significant economic presence. Factors that can be used to analyze a significant economic presence include revenue-based factors, digital factors, user-based factors, and possible combinations of income-based factors with other factors¹.

1. According to BEPS Action 1, when a digital company that is not a tax resident of a country receives a stable income from another country, then such an income can be considered a key factor in determining a significant economic presence.

Another thing that needs to be reviewed after deciding on the deals involved is the threshold level included in determining a significant economic presence based on income factors.

The application of precise thresholds to revenue factors is highly dependent on the ability of a country's tax authorities to identify and measure the overseas distance selling activities of digital companies. One of the possible ways to overcome this challenge is to introduce a mandatory registration system for companies that can create a significant economic presence².

2 When a customer becomes a target in any country, the digital company will use the local domain name to make it easier for local users to be searched and found.

When a digital company offers a product or service to a customer in any country, setting up a local website or other digital platform in that country, it usually takes into account the use of dominant linguistic and cultural norms in order to attract local potential customers who are considered to be digital factors.

¹ Organisation for Economic Co-operation and Development/G20. (2015). Base Erosion and Profit Shifting Project Addressing the Tax Challenges of the Digital Economy: Action 1 p. 107, <https://www.oecd-ilibrary.org/docserver/9789264241046-en.pdf?expires=1650570823&id=id&accname=guest&checksum=64ED49EE0D01DB0B128BD060BD15FA4C>

² Organisation for Economic Co-operation and Development/G20. (2015). Base Erosion and Profit Shifting Project Addressing the Tax Challenges of the Digital Economy: Action 1 p. 108, <https://www.oecd-ilibrary.org/docserver/9789264241046-en.pdf?expires=1650570823&id=id&accname=guest&checksum=64ED49EE0D01DB0B128BD060BD15FA4C>

3 taking into account the importance of network requirements in the digital economy, users are an important indicator of stable interactions. One of the factors that reflect the degree of penetration into the country's economy is the total amount of MAUs on the digital platform. MAUs are registered Facebook and Messenger users who log in through websites or mobile devices within the last 30 days after the measurement date.

4 The OECD recommends in BEPS Action 1 that income factors should be combined with other factors, such as digital factors and / or user-based factors that indicate a targeted, stable interaction with a country's economic life¹.

The choice of which factors should be combined with income factors in order to ensure a significant economic presence is probably due to each market features and economic characteristics in the country, such as market size, local language used, currency usage limits, banking system².

The rise of e-commerce companies such as eBay and Amazon, which allow consumers to buy almost any product from anywhere in the world, has changed the relationship between consumers and sellers, creating more affordable, unprecedented trading platforms. Digital companies which provide services (not products) such as Netflix have made it possible for the Internet to become one-stop shop to meet the needs of consumers.

Although the trade methods and the approaches to their application are being changed, the existing problems remain relevant, as organizations become more innovative in selling goods and services, while countries try to assert their right to income and try to create a fair tax environment.

In order to solve the problems, the EU introduced a goal-based regime that required companies to apply VAT at rates of the country where their customers are located rather than at the company's country of residence, which prevents companies to be established at the competent areas of low-VAT rates.

The purpose of these actions is to establish coherence, because even if each country tries to simplify the registration and payment system, but does it in different ways, then the chaos of this seeming simplicity will itself lead to certain complications.

¹ **Wadlin, L., Jenn, B., Donnell, D. O., & Navarro, G. P.** (2015). Tax Administration in the Base Erosion and Profit Shifting (BEPS) Era. *Taxes The Tax Magazin*, p. 98

² **Bal, A., & Gutierrez, C.** (2015). *Taxation of the Digital Economy*. 2, p. 324

CONCLUSION

In general, the provisions of national tax laws and regulations should not overestimate the provisions of international tax treaties as part of international law, as far as this would invalidate local tax treaties¹.

Although online sales provide opportunities for companies to reach global markets, they have also led governments to find ways to tax those sales.

The OECD guidelines are not perfect, but it makes improvements using the experience gained from EU rules. Taking into account the input of countries and companies that have already imported VAT or GST on a target principle for digital sales, it can be assumed that this is the best option for most countries that want to introduce these rules.

Stability and consolidation are very important for the companies, and taking into account the adoption of the BEPS recommendations, most of them hope that countries that choose to tax e-commerce will adhere to that decision. Competitive models will create problems for companies and governments in the form of double taxation, double non-taxation and disputes that cause uncertainty, so the best variant is to reach out to international cooperation that will pave the way for progress.

Էլէն Ավայան, Միջազգային իրավունքի կիրառման փորձի ներկայացումը թվային տնտեսությունում - Թվային տնտեսությունը հիմնականում բնութագրվում է թվային տեխնոլոգիաների՝ մասնավորապես ինտերնետի միջոցով կատարվող էլեկտրոնային գործարքներով:

Թվային տնտեսությունը հարկելու մարտահրավերները հաճախ պայմանավորված են գործող հարկային օրենքների թերի լինելով, քանի որ դրանք կարող են կիրառելի չլինել թվային տնտեսության գործարքների նկատմամբ՝ էլնելով այդ գործարքների և ավանդական գործարքների բնութագրերի որոշակի առանձնահատկություններից:

Այս առանձնահատկությունները գործող հարկային օրենքներում ներկայացնելու հետ կապված դժվարությունները թվային ընկերություններին հնարավորություն են տալիս կատարել ձևավորվող շահույթի տեղափոխություն և հարկվող բազայի քայքայում:

Հետևաբար՝ անհրաժեշտ է մշակել որոշակի քաղաքականություն՝ ապահովելու այն հանգամանքը, որ եկամուտը հարկվի այն երկրում, որ-

¹ **Pietro, C. D.**, Tax Treaty Override and the Need for Coordination between Legal Systems, 2015 p. 74

տեղ տեղի է ունենում եկամուտ ստեղծող ընկերության տնտեսական գործունեությունը և որտեղ ստեղծվում է տնտեսական արժեքը:

Զարգացող երկրներում միջազգային չափանիշներից տարբերվելու հետ կապված հնարավոր խնդիրները երբեմն պայմանավորված են ոչ լիարժեք հարկային օրենսդրությամբ:

Ուսումնասիրությունը ցույց է տալիս, որ թվային ապրանքների և ծառայությունների սահմանման վերաբերյալ որոշակի միջազգային կանոններ լավագույն դեպքում ներկայացված են բավականին կցկտուր:

Սակայն ՏՀԶԿ-ն այլևս չի խոսում էլեկտրոնային ծառայությունների մասին՝ որպես առանձին տնտեսություն, քանի որ BEPS Action 1-ի եզրակացություններից մեկն այն է, որ «քանի որ թվային տնտեսությունը գնալով դառնում է հենց հիմնական տնտեսություն, դժվար կլինի, եթե ոչ անհնար, հարկային առումով թվային տնտեսությունը առանձնացնել մնացած տնտեսությունից»:

Элен Аваян, Представление опыта применения международного права в цифровой экономике - Цифровая экономика в основном характеризуется электронными сделками, совершаемыми посредством цифровых технологий, в частности, Интернета.

Вызовы, связанные с налогообложением цифровой экономики, как правило, обусловлены изъятиями действующего налогового законодательства, поскольку законы в сфере налогообложения могут быть неприменимы к сделкам в цифровой экономике по причине некоторых особенностей этих и традиционных сделок.

Трудности, связанные с внедрением этих особенностей в действующее налоговое законодательство, позволяют цифровым компаниям осуществлять перемещение формирующейся прибыли и приводят к размыванию налогооблагаемой базы.

Следовательно, необходимо разработать определенную политику для того, чтобы доходы облагались налогами в стране, где осуществляется экономическая деятельность компании, создающей доход, и где создается экономическая стоимость.

В развивающихся странах возможные проблемы, связанные с несоответствием международным стандартам, зачастую обусловлены недостатками налогового законодательства.

Исследование показывает, что некоторые международные правила определения цифровых товаров и услуг в лучшем случае представлены довольно отрывочно.

Однако ОЭСР больше не говорит об электронных услугах как об отдельной части экономики, поскольку один из выводов BEPS Action 1 заключается в том, что «поскольку цифровая экономика постепенно становится основным видом экономики, трудно и даже невозможно с налоговой точки зрения цифровую экономику отделить от остальной экономики».

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