The OECD Model Tax Convention and its commentaries as a source of interpretation of double taxation treaties in Ukraine

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Abstract

Interpretation of double taxation treaties is of utmost importance for application of their norms according to the criteria of good faith in compliance with the provisions of the Vienna Convention on the Law of Treaties. At the same time, there is no consensus in understanding the role of the OECD MC and its Commentaries as means of interpretation of double taxation treaties. As it is demonstrated on the basis of the development of court practice in Ukraine, the present situation does not add certainty to implementation of double taxation treaties and might even have the negative effect on investment climate in a state of source of income. The article does also contain the ways of improvement of application of the OECD MC and its Commentaries during the implementation of double taxation treaties of Ukraine including (1) preparation of the letter on issue of application of the OECD MC and its Commentaries as a source of interpretation of double taxation treaties by the Supreme Court of Ukraine, (2) granting of the technical assistance to tax authorities of Ukraine in the area of application of double taxation treaties in accordance with the international standards such as the OECD MC and its Commentaries and (3) translation of the OECD MC and its Commentaries into Ukrainian language.

Keywords: *court interpretation, double taxation treaties, domestic implementation, model acts*.

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1. Introduction

As mentioned by F. Engelen, "the right to rely on a single text for purposes of routine interpretation is … not absolute but should be exercised in good faith". At the same time, he adds that "relying on a single text for purposes of interpretation always entails the risk that the treaty is interpreted and applied incorrectly"[5]. In the context of this position, the OECD Model Tax Convention on

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[5] Engelen, Frank. *Interpretation of Tax Treaties under International Law*. Amsterdam: IBFD, 2004, pp. 87, 391.

Income and on Capital (the OECD MC) and its Commentaries have become of paramount importance in the process of interpretation and application of double taxation treaties around the world based on the provisions of Art. 31 and Art. 32 of the Vienna Convention on the Law of Treaties (the VCLT)[6]. The reason of widespread recognition of the role of the respective model acts of the OECD is that domestic courts of many countries "apply an assumption that whenever tax treaty parties adopt a wording similar to the OECD MC their mutual intention is also to adopt a normative content identical to the OECD MC. Thus, when the terms of the OECD MC are reproduced in a bilateral tax treaty the OECD Commentaries become an essential source of information as to the common intention of the treaty parties"[7].

Based on its own analysis, P. Selezen mentions that the "Ukrainian researchers agree to consider the legal status of the OECD MC and its Commentaries as supplementary means of interpretation according to Art. 32 of the VCLT"[8]. It is worth underlying that this statement does not include the positions of domestic courts on the interpretation of the double taxation treaties of Ukraine in accordance with the OECD MC and its Commentaries despite their crucial role in the proper application of the treaty norms. Leaving aside the position of courts does not give an opportunity of complete understanding of the features of interpretation of double taxation treaties. As it is stated by C. Djeffal, "quantitatively, court decisions might constitute only a small part of all interpretations. But qualitatively there is no better context to study the «art of interpretation»"[9].

Despite the attention of many researchers to the development of different aspects of court practice, it is obvious that the role of the OECD MC and its Commentaries as a source of interpretation has not been widely investigated in Ukraine, except for the contributions of M. Karmalita, L. Lepetiuk, P. Selezen and L. Tymchenko.

The purpose of our research is to characterize the current development and the ways of improvement of interpretation of double taxation treaties in accordance with the OECD MC and its Commentaries in Ukraine.

Given article consists of three following sections: 1) interpretation of double taxation treaties in accordance with the OECD MC and its Commentaries; 2) role of the OECD MC and its Commentaries as a source of interpretation of double taxation treaties in the practice of Ukrainian courts; 3) improvement of application of the OECD MC and its Commentaries during interpretation of double taxation treaties in Ukraine.

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[6] Vienna Convention on the Law of Treaties of May 23, 1969, available online at: https://treaties. un.org/doc/Publication/UNTS/ Volume%201155/ volume-1155-I-18232-English.pdf (accessed on October 07, 2020).

[7] Nieminen, Martti. *OECD Commentaries under the Vienna Rules*. Tampere, 2014, p. 170.

[8] Selezen, Pavlo, *Purposes of double taxation treaties and interpretation of beneficial owner concept in Ukraine*, „Juridical Tribune - Tribuna Juridica", October 2017, Vol. 7, Special Issue, p. 30.

[9] Djeffal, Chistian. *Static and Evolutive Treaty Interpretation*. Cambridge: Cambridge University Press, 2016, p. 8.

2. Interpretation of double taxation treaties in accordance with the OECD MC and its Commentaries

It is worth mentioning that "interpretation of international treaty is clarification and explanation of the treaty content… with the purpose of the most appropriate its application and realization"[10].

The means of interpretation of international treaties are described in Art. 31 and Art. 32 of the VCLT. Taking into account this fact, "wherever a treaty is being applied, the Vienna rules are the appropriate framework for its interpretation"[11]. The area of double taxation treaties is not an exception in the context of applicability of the rules of interpretation defined by the provisions of the VCLT: "In principle, the rules of interpretation, laid down in the VCLT, are also applicable to tax treaties"[12]. At the same time, there is no consensus on what provision of the VCLT directly covers the application of the OECD MC and its Commentaries in the process of interpretation of double taxation treaties.

The provisions of the OECD MC and its Commentaries clearly state that their rules are not legally binding but might be followed in practice even in case of members of the OECD. Paragraph 3 of the Introduction to the OECD MC and its Commentaries provides that these states should just conform "to this Model Convention as interpreted by the Commentaries thereon and having regard to the reservations contained therein and their tax authorities should follow these Commentaries, as modified from time to time and subject to their observations thereon, when applying and interpreting the provisions of their bilateral tax conventions that are based on the Model Convention"[13].

Despite the variety of positions concerning the place of the OECD MC and its Commentaries in the system of means of treaty interpretation under the VCLT, one might agree that there is "a growing trend to use the OECD Model as a vehicle to aggregate the rules of all tax treaties around some consolidated and homogeneous legal standards, thus facilitating a voluntary building-up of internationally accepted standards. This approach minimizes the relevance of domestic law to mismatches in tax treaty interpretation, achieving in fact consistency across bilateral tax treaties, and it secures legal certainty while preventing interpretative disputes"[14].

As states M. Nieminen, anyone seeking guidance from the OECD MC and its Commentaries should focus on the two of their key functions:

- to specify the contents of the provisions of the OECD MC;

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[10] Talalaev, Anatoliy. *Mezhdunarodnie dogovory v sovremennom mire* [International treaties in the modern world]. Moscow: Institute of International Relations, 1973, p. 141.

[11] Gardiner, Richard. *Treaty Interpretation*. 2nd ed., Oxford: Oxford University Press, 2015, p. 141.

[12] Engelen, Frank. *Interpretation of Tax Treaties under International Law.* Amsterdam: IBFD, 2004, p. 549.

[13] *Model Tax Convention on Income and on Capital (condensed version)*. Paris: OECD Publishing, 2017, p. 9.

[14] *The Impact of the OECD and UN Model Conventions on Bilateral Tax Treaties*, ed. by M. Lang, P. Pistone, J. Schuch and C. Staringer. Cambridge: Cambridge University Press, 2012, p. 6.

- to prefer one option among the multiple plausible other interpretations of the provisions of the OECD MC[15].

The present situation determines the necessity for judges to be very discreet in the context of application of the OECD MC and its Commentaries during the interpretation of double taxation treaties.

3. Role of the OECD MC and its Commentaries as a source of interpretation of double taxation treaties in the practice of Ukrainian courts

Based on the analysis of the practice of Ukrainian courts, one might state that there is no common position concerning the interpretation of double taxation treaties in accordance with the OECD MC and its Commentaries. Nevertheless, it does not mean that national judges totally avoid or reject the opportunity to make a reference to the OECD MC and its Commentaries:

1) Decision of the Mykolaiv District Administrative Court, No. 814/399/16, April 21, 2016. The court had to resolve the issue that appeared in accordance with the status of the UK limited liability partnership (LLP) where its general partners were companies formed in offshore jurisdictions (Belize, Seychelles). The judges rejected the reference of the Ukrainian tax authorities to the OECD MC and its Commentaries in their attempt to interpret the definition of the term "non-residents with offshore status" (Art. 161(3) of the Tax Code of Ukraine). Their argumentation was based on the fact that "Art. 3(1) of the Tax Code of Ukraine contains the complete list of tax legislation of Ukraine. Legislation of foreign country is not included to the list … The Court agrees with the statements of the applicant that the provisions of the OECD MC have only the force of recommendation. Additionally, Ukraine is not a member of the OECD and the Verkhovna Rada of Ukraine has not given its consent on the legal force of the OECD MC"[16].

As it seems, the position of the court is partly based on the wrong assumptions in this case. First, the absence of membership of the OECD does not have any influence on the role of the OECD MC and its Commentaries as a source of interpretation of double taxation treaties in Ukraine because of their formal non-binding character even in case of the members of the OECD itself. Second, the OECD MC and its Commentaries are not international treaties according to the VCLT because they are adopted by the international organization. Besides, they lack formal obligatory character in accordance with their normative nature as a recommendation of the OECD Council. At the same time, the Verkhovna Rada of

[15] Nieminen, Martti. *OECD Commentaries under the Vienna Rules*. Tampere, 2014, p. 3.

[16] Decision of the Kyiv Administrative Court of Appeal in case No. 814/399/16, April 21, 2016, available online at: http://www. reyestr.court.gov.ua/Review/57371552 (accessed on October 09, 2020).

Ukraine gives the consent to be bound by international treaties but not by acts of international organizations (Art. 9 of the Constitution of Ukraine[17]).

2) Decision of the Kyiv Appeal Administrative Court, No. 2a-9844/11/2670, April 1, 2012. The taxpayer tried to demonstrate that its overall activity of the fixed place of business is of a preparatory or auxiliary character that is of the utmost importance in accordance with the application of the permanent establishment concept based on the provisions of double taxation treaties including Art. 5 of the Convention between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ukraine for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains[18].

The one could reveal that the judges made the reference to the OECD MC and its Commentaries in the text of the decision. They mentioned that paragraphs 23 and 24 of the Commentaries on Art. 5 of the OECD MC state that the activity of the non-resident could not be of a preparatory or auxiliary character in the state of source of income if it predominantly performs the functions of the parent company[19]. At the same, the court did not discuss the issue of the OECD MC and its Commentaries as means of interpretation of double taxation treaties in accordance with the VCLT.

3) Decision of the Kyiv Appeal Administrative Court, No. 826/3191/13-a, September 18, 2013. The court again had to decide whether the activity of non-resident pharmaceutical company created the permanent establishment under the provisions of Art. 5 of the Convention between the Government of the Republic of Poland and the Government of Ukraine for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital[20]. The applicant stated that the activity of the non-resident was covered by the Art. 5(4)(e) because of its preparatory or auxiliary character. Unlike the abovementioned decision, the court stated that the normative basis for the reference to the OECD MC and its Commentaries might be Art. 31(3)(a) and Art. 31(3)(b) of the VCLT. Based on this position, the judges repeatedly used the provisions of the

[17] Constitution of Ukraine (with the amendments and supplements) adopted by the Law of Ukraine, June 28, 1996 No. 254k-96, available online at: https://www.kmu.gov.ua/storage/app/imported_content/document/110977042/Constitution_eng.doc (accessed on October 09, 2020).

[18] Convention between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ukraine for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to taxes on Income and Capital Gains, February 10, 1993, available online at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/507430/ukraine_DTC_-_in_force.pdf (accessed on October 09, 2020).

[19] Decision of the Kyiv Appeal Administrative Court in case No. 2a-9844/11/2670, April 1, 2012, available online at: http://www. reyestr.court.gov.ua/Review/22240992 (accessed on October 09, 2020).

[20] Convention between the Government of the Republic of Poland and the Government of Ukraine for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, December 1, 1993, available at: https://zakon.rada.gov.ua/laws/show/616_168 (accessed on October 09, 2020).

paragraphs 23 and 24 of the Commentaries on Art. 5 of the OECD MC[21]. One might assume that such interpretation creates the obligation to use provisions of the OECD MC and its Commentaries in case of resolution of disputes concerning the application of double taxation treaties. This assumption might be based on the provisions of Art. 31 of the VCLT because it states that any subsequent agreement between the parties and subsequent practice in the application of the treaty should be taken into account in the process of interpretation of its norms.

It is worth mentioning that the paragraphs 23 and 24 of the Commentaries on Art. 5 of the OECD MC were adopted earlier than the respective Convention between the governments of Poland and Ukraine was concluded[22]. Taking into consideration this fact, it is difficult to understand how they might create the subsequent agreement between the parties or the subsequent practice in the application of the double taxation treaty under the provisions of Art. 31(3) of the VCLT.

4) Decision of the Supreme Administrative Court of Ukraine, No. 805/7337/13-a, March 24, 2014. The tax authorities stated that the taxpayer had to withhold tax from the income paid to non-residents at normal rate because they did not have all the necessary attributes of beneficial owners of income under the provisions of the double taxation treaties with the USA and Sweden. It is interesting that the court states that "the term «beneficial owner of income» should not be interpreted in a narrow technical sense, it should be defined taking into account the object and purposes of the double taxation treaties such as the prevention of fiscal evasion and based on the main principles including the prevention of tax treaty abuse"[23]. The cited fragment of the decision demonstrates its close similarity to the provisions on beneficial owner of income in Art. 10, Art. 11 and Art. 12 of the OECD MC and its Commentaries (e.g., paragraph 12.1 of the Commentaries on Art. 10 of the OECD MC[24]). At the same, the judges did not recognize the necessity to mention the OECD MC and its Commentaries as a source of interpretation of the provisions of double taxation treaties. Using practically the same wording in its decision in case No. 804/4659/15, June 16, 2016, the Supreme Administrative Court of Ukraine added that such interpretation of beneficial owner concept is based on "the international practice of application of double taxation treaties"[25].

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[21] Decision of the Kyiv Appeal Administrative Court in case No. 2a-9844/11/2670, April 1, 2012, available online at: http://www. reyestr.court.gov.ua/Review/33679111 (accessed on October 09, 2020).

[22] *Model Tax Convention on Income and on Capital (updated 2010).* Paris: OECD Publishing, 2012, p. C(5)-60.

[23] Decision of the Supreme Administrative Court of Ukraine in case No. 805/7337/13-a, March 24, 2014, available at: http://www. reyestr.court.gov.ua/Review/38106136 (accessed on October 09, 2020).

[24] *Model Tax Convention on Income and on Capital (condensed version)*. Paris: OECD Publishing, 2017, p. 234.

[25] Decision of the Supreme Administrative Court of Ukraine in case No. 804/4659/15, June 14, 2016, available at: http://www. reyestr.court.gov.ua/Review/58510203 (accessed on October 09, 2020).

5) Decision of the Odesa District Administrative Court, No. 1540/4891/18, November 28, 2018. The case relates to the issue of interpretation of beneficial owner concept in the context of application of Art. 11(2) of the Convention between the Government of the Republic of Cyprus and the Government of Ukraine for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income[26]. The Ukrainian taxpayer stated that he had the right to use the reduced withholding tax rate at the moment of paying income to the resident of Cyprus but the tax authorities did not recognize that right of taxpayer on the basis that the recipient of the income did not have the characteristics of the beneficial owner of income.

First of all, the court stated that the term "beneficial owner of income" could not be identified in the legal tradition of Ukraine because it came from the common law countries and interpreted in the provisions on passive income (dividends, interest, royalties) of the OECD MC and its Commentaries. Then, the judges made the next step and stated that the OECD MC and its Commentaries have to be understood as supplementary means of interpretation under Art. 32 of the VCLT. At the same time, they added that the OECD MC and its Commentaries are not regarded as sources of law in Ukraine but have to be used if an international treaty does not allow to define any term in its text[27].

4. Improvement of application of the OECD MC and its Commentaries in the process of interpretation of double taxation treaties in Ukraine

As it was mentioned by O. Merezhko, application of treaty norm is mediated by interpretation of such norms where its task is to define the normative prescriptions in the context of real situation". Moreover, "there is no clear difference between interpretation and application of legal norms because courts… simultaneously perform both functions"[28]. It is obvious that such approach underlines the crucial importance of interpretation in the process of application of provisions of double taxation treaties in Ukraine.

The practice of the Ukrainian courts reveals the existence of issues in the context of application of the OECD MC and its Commentaries as means of interpretation of double taxation treaties under the demands of Art. 31 and Art. 32 of the VCLT. At the same time, the same problem is deeply rooted in the practice

[26] Convention between the Government of the Republic of Cyprus and the Government of Ukraine for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, November, 8, 2012, available at: http://mof.gov.cy/ assets/modules/wnp/articles /201610/45/editor/ukraine_2012_11_06_en.pdf (accessed on October 09, 2020).

[27] Decision of the Odesa District Administrative Court in case No. 1540/4891/18, November 28, 2018, available at: http://www. reyestr.court.gov.ua/Review/78315075 (accessed on October 09, 2020).

[28] Merezhko, Oleksandr. *Pravo mizhnarodnih dogovoriv: suchasni problemy teoriy ta praktyki* [Law of international treaties: the modern problems of theory and practice]. Kyiv: Taxon, 2002, p. 232, 235.

of the tax authorities in Ukraine. For example, tax authorities do not exclude the opportunity to deny the applicability of treaty benefits to non-resident in the absence of the attributes of the beneficial owner of income that is not dividends, interest or royalties. Nevertheless, they point out that the OECD MC and its Commentaries might be used as means of interpretation of the beneficial owner concept[29]. It has to be noted that the OECD MC and its Commentaries do not recognize the direct applicability of the beneficial owner concept in case of the payment of non-passive income. In this case, P. Selezen admits the potential conflict of the practice of the tax authorities based on the provisions of Art. 103 of the Tax Code of Ukraine with the demands of Art. 26 of the VCLT on the application of international treaties according to the criteria of good faith[30].

Current situation related to OECD MC and its Commentaries does not favor the certainty of the prescriptions of tax legislation that might have a negative impact on the attraction of investments and the protection of taxpayers. Based on this fact, it might be useful to define some ways of improvement of application of the OECD MC and its Commentaries in the process of interpretation of double taxation treaties in Ukraine:

1) The Supreme Court of Ukraine might publish the letter on issue of application of the OECD MC and its Commentaries as a source of interpretation of double taxation treaties. According to the national legislation of Ukraine, the Supreme Court of Ukraine is the highest court in the court system of Ukraine which shall ensure the sustainability and uniformity of case law following the procedures and in the manner specified by procedural law (Art. 36, the Law of Ukraine on the Judiciary and Status of Judges[31]). One of its functions is to ensure uniform application of provisions of law by courts of different specialization following the procedure and in the manner stipulated by the procedural law. Taking into consideration given function, it might be highly recommended to provide the certainty in the process of interpretation of double taxation treaties of Ukraine by preparing and publishing the letter to the lower courts. Of course, this step could not completely prevent tax disputes about the applicability of the OECD MC and its Commentaries, but it might help the judges of lower courts to focus on the most complex and sufficient issues in the process of dispute resolution. Additionally, it might have a positive effect on the court practice by favoring its sustainability and uniformity in case of interpretation and application of the double taxation treaties of Ukraine. It is worth mentioning that the predecessor of the Supreme Court of Ukraine – the High Specialized Court on Civil and Criminal Cases – had used the practice of issuing similar letters to lower

[29] Letter of the State Tax Administration of Ukraine on the application of the term "beneficial owner", No. 3917/5/12-0216, March 30, 2011, available at: http://consultant.parus.ua/?doc=084AP743E5 (accessed on October 09, 2020).

[30] Selezen, Pavlo. *Institut beneficiarnogo vlasnyka dohodu v Ukraini ta napryamy yogo vdoskonalennya* [Institute of beneficial owner of income and the ways of its improvement in Ukraine]. Ed. by L. Tymchenko. Odesa: Fenix, 2016, p. 100.

[31] Law of Ukraine on the Judiciary and Status of Judges, No. 1402-VIII, June 2, 2016, available at: https://zakon3.rada.gov.ua/laws/ show/1402-19 (accessed on October 09, 2020).

courts before its liquidation in 2017. For example, it implemented its position concerning the rules of application of international treaties in the legal order of Ukraine in 2014[32].

As it seems, the Supreme Court of Ukraine might clarify the next aspects of the interpretation and application of double taxation treaties in accordance with the OECD MC and its Commentaries via its letter to the lower courts:

– dynamic and static interpretation of the double taxation treaties of Ukraine;

– the OECD MC and its Commentaries in the context of application of Art. 31 and Art. 32 of the VCLT;

– role of mutual agreements concluded by the competent authorities of Contracting States in the process of interpretation of treaty provisions;

– difference between the OECD MC and its Commentaries and the UN Model Double Taxation Convention between Developed and Developing Countries and its Commentaries.

Based on the results of the analysis of court practice on double taxation treaties, E. Zverev points out that "the Ukrainian courts often need to interpret bilateral double taxation treaties concluded by Ukraine because of huge number of cases initiated by taxpayers against tax authorities. That is why the judges should perform interpretation very carefully"[33]. It is difficult to think that such "careful interpretation" might be realized without the references to the OECD MC and its Commentaries.

2) The OECD and other international partners might provide the tax authorities of Ukraine with technical assistance in the area of application of double taxation treaties in accordance with the international standards including the OECD MC and its Commentaries. The OECD/UNDP Tax Inspectors Without Borders (TIWB) initiative demonstrates how the international partners might help to transfer skills to strengthen capacity in auditing multinational enterprises to tax authorities of developing countries. To date, $414m of additional revenues have been raised with costs of less than $4m. Additionally, the TIWB initiative is now branching out from general audit support to more specific sector audits as well as from tax avoidance issues to tax evasion issues supporting investigations for tax and crime[34].

There is no doubt that the realization of the projects like the TIWB improve skills of tax authorities in different areas including the interpretation and

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[32] Ruling of the Plenum of the Supreme Specialized Court of Ukraine on Civil and Criminal Cases No.13 of December 19, 2014, available online at: http://zakon2.rada.gov.ua/laws/show/v0013740-14 (accessed on October 09, 2020).

[33] Zverev, Ievgen. *Tlumachennya mizhnarodnih dogovoriv nacionalnimy sudamu: evropejskiy dosvid ta ukrainska praktika* [Interpretation of international treaties by national courts: European experience and Ukrainian practice], Candidate of Legal Sciences diss. National University of 'Kyiv-Mohyla Academy', 2015, p. 175.

[34] OECD Secretary-General Report to the G20 Leaders (OECD, December 2018), available online at: http://www.oecd.org/tax/oecd-secretary-general-tax-report-g20-leaders-argentina-dec-2018.pdf (accessed on October 09, 2020).

application of double taxation treaties in accordance with the OECD MC and its Commentaries because multinational enterprises are among the most widespread beneficiaries of double taxation treaties. As a result, the transfer of skills might make better the situation with the lack of resources in the form of competent and skilled staff for providing tax audits especially of multinational enterprises.

3) Translation of the OECD MC and its Commentaries into Ukrainian language. One of the possible ways of stimulating proper interpretation of double taxation treaties is the translation of the OECD MC and its Commentaries into Ukrainian language. This suggestion is based on the similar step of the Ukrainian government concerning the OECD Guidelines for Multinational Enterprises that was made in relation to the introduction of the transfer pricing rules in 2012. Analyzing the relevant court practice on the issues of transfer pricing, it is difficult to ignore the fact that the abovementioned OECD Guidelines are used widely by taxpayers as well as tax authorities in resolving tax disputes. For example, the Dnipropetrovsk District Administrative Court stated in one of its decisions that "the OECD Guidelines is the generalization of the best contemporary practices of application of arm's-length principle for transfer pricing assessment in the process of conducting controlled operations by enterprises and might be used by taxpayers as well as tax authorities as recommendatory and methodological materials on the application of Art. 39 of the Tax Code of Ukraine"[35].

Considering the positive practical effects of the translation of the respective OECD Guidelines into Ukrainian language, it seems possible that the Ukrainian version of the OECD MC and its Commentaries might be beneficial for the appropriate interpretation and application of the double taxation treaties of Ukraine by courts, taxpayers and tax authorities.

5. Conclusion

Despite the widespread application of the OECD MC and its Commentaries for the interpretation of double taxation treaties, such materials are used differently by the Ukrainian courts due to the absence of common position on their applicability under the provisions of Art. 31 and 32 of the VCLT. In our opinion, the existing situation might be put to the issue from the viewpoint of the obligation of Ukraine concerning the interpretation of its double taxation treaties in good faith. Additionally, it does not create assurance to foreigners of stability for their investments and the respective tax regime. Prevention of these negative effects demands the improvement of the interpretation of the double taxation treaties of Ukraine in accordance with the provisions of the OECD MC and its Commentaries. Such step might be done with the realization of three measures:

[35] Decision of the Dnipropetrovsk District Administrative Court in case No. 804/1483/18, August 21, 2018, available online at: http://reyestr.court.gov.ua/Review/76812372 (accessed on October 09, 2020).

– the Supreme Court of Ukraine might publish the letter for the lower courts on issue of application of the OECD MC and its Commentaries as a source of interpretation of double taxation treaties;

– the OECD and other international partners might provide the tax authorities of Ukraine with technical assistance in the area of application of double taxation treaties in accordance with the international standards including the OECD MC and its Commentaries;

– the OECD MC and its Commentaries should be translated into Ukrainian language.

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