

Legal Personality in International Tax Law: Notion and Types

Erdos Charipovich Murzagaliev

The Department of International Law Eurasian National University
named after L.N. Gumilev, Astana, Kazakhstan

Abstract: The author studies the notion of subject of international tax law and types of the subjects, comes to the conclusion that subjects of international tax law are participants of international tax relations that have subjective legal rights and responsibilities and divides them into two groups: primary and secondary ones.

Key words: Notion of responsibility • Subjects of international tax law • Types of subjects • Notion of responsibility in international tax law • Primary and secondary subjects

INTRODUCTION

The notion of subject of law includes in theory the international law, though the latter has some peculiarities. The subjects of international law are the participants of international legal relations, who have legal rights and responsibilities. The latter can take part in international relations on a stand-alone basis, legally interact with other subjects.

The subjects of international law are divided into two groups: primary and secondary. The primary group includes sovereign state, nations and nationalities which are fighting for their independence. The latter exercise their right to self-determination. These two groups of subjects are combined into the primary group as they have common feature - sovereignty. A state has a state sovereignty, a nation and nationality which are fighting for their independence have a national sovereignty.

The secondary group is represented by international organizations and state-like formations. The special group of subjects of international law consists of legal entities and natural persons.

State as the main subject of international tax law. A state as a subject of international law is characterized by peculiar political-judicial features - supremacy on the whole territory and independence in international relations. Due to its sovereignty the state has legal personality (*ipso facto*), i.e. as the result of the fact of its existence. The transactional capacity of the state is revealed in its participation in international contractual

practice, in the result of establishment of diplomatic and consular relations, questions of membership in international organizations.

If we consider this question in respect to the Republic of Kazakhstan, we find out that the objective property of the international legal personality of the Republic of Kazakhstan is unassisted contractual practice. D.I. Filimonov defines the legal personality of a state being the subject of international tax law as follows: "The state is a managing subject of tax law, having actual requirements of financial resources formation and interest in constant satisfaction of these requirements, the state forms certain social bounds, that contribute to implementation of these interests. The state models these bounds, basing on the norms of financial law and creates the judicial content of tax legal relations, which are then materialized in the particular behaviour of the subjects. The special feature of the tax legal relations is the fact that they always appear at the discretion of the state, in the result of unilateral expression of its will and have unilateral managing character. An obligation of paying taxes to the state is unilateral and is not supported by the state's cross obligations to perform any actions in respect of the taxpayer within a specific legal relations.

Of course, this is gratuitousness in the judicial sense, since taxes, imposed by the state, are spent to some extent for the social, cultural and other actions. Thus, the state in the name of a legislative authority forms a judicial model of the tax system by means of passing laws. However, the state also has another characteristic feature

- it imposes taxes, control tax relations, supporting them by force. For this purpose the state forms the revenue service, which is a part of executive authority.

This service is entitled to deal with questions of imposing taxes and controlling of correctness of taxpaying" [1, p. 51].

International tax legal personality of nations and nationalities, fighting for their independence. The existence of this primary subject is determined by the content of one of the main concepts of international law - equality and self-determination of nations. The genesis of this concept is determined by nationalist fight of nations of the world. UN Charter recognised the nations' right for self-determination as a universally received norm of the international law (item 2, article 1, article 55).

Under the modern conditions this concept gives nations and nationalities an opportunity to determine their political, economic, cultural and social development on free stand-alone basis.

Legal personality of international organisations in international tax law. The world literature didn't pay necessary attention to the responsibility of international organisations. Even those, who wrote about it were restricted to the *limited* number of general questions. In most cases everything ended up with a general phrase that an international organisation can be the subject of contingency. The world literature has a small chapter in the book by E.A. Shybaeva and M. Potochnyi devoted to this issue [2, p. 92].

E.A. Shybaeva notices that "...international organisations initially didn't have international legal personality. It reveals on a particular stage of development of international organisations, international law and international relations..." [3, p. 27].

For example, as of 2013, OECD combines 30 governments of the most developed states, attached solely to the democracy and market economy throughout the world [4,5,6,7,8,9,10,11].

The aim of OECD is to create optimal conditions for the free flow of funds and immaterial products (services and intellectual property) in the world economy. In this sphere the work on monitoring of observance of terms, submitted by OECD, Code of liberalization of capital flow [6] and Code of liberalization of current invisible operations [7] is going on.

In the field of improving of international taxation system OECD investigates the negative effect of harmful competition between separate states (we mean the practice of forming offshore and other special zones), improves Model convention on taxation of income and

funds which is the basis for making bilateral agreements on avoidance of double taxation including for the purposes of the RF. Besides this, OECD promotes the access of the states, which are not the part of an organization, to the administration of OECD for multinational enterprises and tax authorities on transfer pricing of 1995, which is the main advisory-guidance document in the sphere of tax regulation of transfer pricing.

Due to the increase of the role of international organisations under the modern conditions, an organisation is in its legal nature the subjects of international law. The size of their legal personality is different and depends on subject matter, range of activity and subject of regulation. In the sphere of international-tax relations the problematic issues are discussed within the United Nations Organisations (UNO), United Nations Conference on Trade and Development, the UN Commission on Transnational Corporations, Organisation of American States (OAS), Organization for Economic Cooperation and Development andean Pact, EU etc. In 1946 according to the decision of Economic and Social Council (ECOSOC) Fiscal commission for assistance in the sphere of state finances and especially of their judicial, administration and technical aspects was established. In 1956 the Tax Committee on Organization for European Economic Cooperation was established, it started the development of a new standard convention taking into account the interests of the member states of Organization for European Economic Cooperation. In 1963 the Standard Convention for avoidance of double taxation of incomes and funds was represented. Within the UN the issues of taxations are tackled by the Council on taxation matters and partially by UN Committee on transnational enterprise. UN contributed a lot to the development of the projects aimed at assistance to the states introducing market-type reforms, including the reforms in taxation sphere.

The most important achievement of UN in the sphere of international taxation is the formation of the World Tax Code. The document in the form of "Bases of World Tax Code" was developed and published in 1993. Its authors are the specialists of Harvard University - Word M. Hassy and Donald S.Lubeck. The Code consists of 591 articles and has commentaries.

One of the main tasks is the creation of International Tax Organisation. This authority will be under the auspices of UN and will be in order to gather information about taxes from around 200 states of the world which are members of UN and to work out measures of restraint of

taxes running into the offshore zones and other issues which are to be solved on a global scale, in particular: exchange of information about violation of the tax legislation by legal entities and natural persons; cooperation in implementation of measures aimed at prevention, revealing and restraint of violation of the tax legislation; presentation of properly attested copies of documents related to the taxation of legal entities and natural persons; exchange of information about national tax systems, changes and additions to tax legislation and guidelines for organisation of fighting violation of tax legislation; sharing experience of creating and supporting the functioning of informational systems, used in fighting violation of tax legislation; coordination of activity on questions arising in the process of cooperation, including the formation of work groups, exchange of their representatives and training of the personnel; carrying out research-to-practice conferences and seminars on questions of fighting violation of tax legislation. Regional tax cooperation is an important part of the world process of harmonizing tax systems of different states. For example, in our region the development of such cooperation with respect to the present economic relations is under the auspices of the Commonwealth of Independent States. The first steps have been already made; the Agreement between the governments of the member states of the Commonwealth of Independent States on agreed guidelines of tax policy was signed (Moscow, March 13th, 1992). According to this Agreement the Parties shall implement coordinated tax policy on the basis of harmonization of principles and rules of taxation and shall use the consolidated list of underlying taxes concerning the interests of all the member states of the Commonwealth of Independent States in order to provide interest in investment and other forms of financial and economic activity on the territory of all the member states of the Commonwealth of Independent States. The signing of this Agreement within the CIS allowed the Republic of Kazakhstan to determine the high-priority direction in international tax cooperation. Thus, on May 15th, 1992 in Tashkent in accordance with the above mentioned Agreement, the Report on unification of approach and conclusion of agreements on avoidance of double taxation of incomes and funds was made. In this Report the member states of the Commonwealth agreed to use between themselves and with the third states the unified standard form of the Agreement on avoidance of double taxation of incomes and funds [1, p. 62 - 70].

Moreover, the member states of the CIS concluded a great number of bilateral agreements on taxation issues: on avoidance of double taxation and prevention of evasion of taxes, on sharing tax information, on cooperation and mutual assistance in questions of observance of tax legislation, on cooperation and sharing information in the sphere of fighting violation of tax legislation, on principles of imposing indirect taxes while exporting and importing goods (services), on questions of imposing VAT etc.

The globalization of commercial activity made the tax harmonization-coordination of national tax policies, approaching of tax levels, methods of defining taxation base and character of provided tax concession one of the high-priority tasks. The concepts of tax globalization appear as the result of European economic integration. The EU pays great attention to the problems of taxation. One of the main directions of the EU activity was the elimination of hindrances in free flow of persons, services and funds between the member-states. Now a great work on harmonization and unification of tax systems of European states is being carried out.

International tax legal personality of state-like formations. In international law "free cities", such as West Berlin, belonged to the state-like formations; now such formation is Vatican City State. Due to the formation of the unified Germany West Berlin doesn't exist now as the subject of international law. Vatican as the subject of international law is determined by the Agreement with Italy of 1984. It is called city-state. Vatican takes part in international relations, keeping in touch with many states it is the participant of multilateral conventions on different issues.

With reference to the foregoing we can draw a conclusion that the notion of subjects in the theory of international law can be applied to the international tax law, in spite the fact that the latter has certain peculiarities. The subjects of international tax law are the participants of tax legal matters that are entitled with subjective legal rights and responsibilities. They can take part in international economic relations on a stand alone basis; enter into legal cooperation with other subjects; they are independent except legal entities and natural persons.

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