TAX RESIDENCY OF INDIVIDUALS IN UKRAINE: ISSUES RELATED TO THE APPLICATION OF CRITERIA AND THEIR IMPACT ON TAX JURISDICTION

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DOI: https://doi.org/10.61345/1339-7915.2025.2.7

Annotation. The aim of the work is to prove, through a comparative legal analysis, the inefficiency and non-compliance with international standards of the current model for determining the tax residency of individuals in Ukraine, and to develop proposals for its legislative improvement.

The methodological basis of the study includes the comparative legal method, used to analyze the legislation of foreign countries and Ukraine; the formal-dogmatic method for interpreting the norms of the Tax Code of Ukraine and the OECD Model Convention; as well as general scientific methods of analysis and synthesis to formulate the findings and proposals.

Results. The study found that, contrary to common international practice, the Tax Code of Ukraine integrates a hierarchical system of tests into its national definition of a tax resident. This structure almost completely replicates the conflict-resolution mechanism ("tie-breaker rules") from Article 4 of the OECD Model Convention. It has been proven that this approach constitutes an unjustified "self-limitation" of Ukraine's tax jurisdiction, as the state preemptively cedes its right to tax an individual even before an international treaty is applied. This creates a significant risk of reducing the tax base for personal income tax.

Conclusions. It is concluded that the current definition of a tax resident in Ukraine is inefficient and requires revision. The author substantiates the proposal to amend the Tax Code of Ukraine by removing the sequential tie-breaker rules from the domestic definition. It is proposed to establish a clear list of primary, alternative criteria (e.g., permanent home, duration of stay), which will align Ukrainian legislation with international best practices, expand the state's tax base, and simplify tax administration.

Key words: tax residency, tax jurisdiction, Tax Code of Ukraine, tie-breaker rules.

1. Introduction.

In the context of unprecedented mobility of individuals, intensified by globalization processes, digital transformation of the labor market and forced displacement of citizens, the issue of determining the tax status of a person is becoming particularly relevant. The institution of tax residence is a cornerstone of the income tax system, as it determines the scope of a person's tax liability to the state – full, covering worldwide income, or limited, covering only income from sources in a particular country. Therefore, the clarity and effectiveness of national rules for determining residency directly affect the stability of government revenues and legal certainty for taxpayers.

Generally accepted international practice provides that national legislation establishes primary, sufficiently broad criteria for recognizing a person as a tax resident, while resolving conflicts of dual residency is the responsibility of international agreements. However, the current version of the Tax Code of Ukraine contains a unique construction that implements a complex hierarchical system of tests into domestic law, which in essence resembles the tie-breaker rules of the OECD Model Convention. This approach creates a paradoxical situation of "self-limitation" of the state's own tax jurisdiction even before the application of an international treaty, which requires a deep scientific analysis for compliance with international practices and fiscal expediency.

2. Analysis of scientific publications.

The fundamental aspects of state sovereignty and tax jurisdiction over individuals have been deeply studied in the works of, among others, M. Kucheriavenko, L. Vdovychena, O. Shcherbaniuk, I. Bondarenko, I. Olender, V. Riadinska, etc. At the same time, despite the considerable scientific heritage, there is a lack of special comparative legal studies devoted to the structural shortcomings of the Ukrainian model of determining tax residence. The issue of the negative impact of the tie-breaker rules into national legislation and assessment of potential fiscal losses of the state remains insufficiently studied.

3. The aim of the work.

The aim of this study is to prove, on the basis of a comparative legal analysis, the inefficiency and inconsistency with international standards of the current model for determining the tax residence of individuals in Ukraine. In order to achieve this goal, the author sets the following tasks: to analyze the approaches of foreign countries to establishing the criteria for residency; to identify structural deficiencies in the definition of residency under the Tax Code of Ukraine by comparing it with the provisions of the OECD Model Convention; to substantiate proposals for amending the legislation in order to expand Ukraine's tax jurisdiction and harmonize it with the common international practice.

4. Review and discussion.

As L. Vdovychena rightly notes, the tax jurisdiction of any state is based on the extension of its sovereignty to the national territory, where the decisive factor for taxpayers is their belonging to the group of residents and non-residents of the respective state. Tax residents have a full tax liability to the state of their tax residence, which means, in particular, the obligation to pay taxes worldwide income, i.e. both from sources in the territory of the state of their tax residence and from sources in any other territory. In turn, non-residents have only a limited tax liability with respect to income originating in the territory of such a state [1]. In this regard, for each state that taxes the global income of tax residents, having clear criteria for determining tax residency is extremely important, as taxation of global income leads to a greater fiscal effect due to a larger tax base that is not limited to the source of income within the state.

In turn, V. Riadinska defines tax residency as a feature of an individual's status as a taxpayer, which is an economic and legal connection of a person with a country, by virtue of which they are obliged to bear the tax liability to pay taxes and fees regardless of the location or source of income [2]. While agreeing with the conclusion that tax residency can be viewed as a feature of taxpayer status based on the economic and legal connection of such a person, it is important to make a reservation that the existence of an economic and legal connection for recognizing a person as a tax resident of a particular state is based on a number of criteria provided for by national legislation, which in turn are the subject of tax policy.

Although the set of criteria used by foreign countries in their national legislation to determine the tax residence of individuals is quite well-established and is limited to such criteria as "place of residence", "permanent home", "habitual abode", "center of vital interests" [2], it can usually be observed that foreign countries use 2-3 main criteria from this set, on the basis of which the tax residence of an individual is determined. It is also important to note that such a set of criteria has been historically formed as best practices, which can be indirectly confirmed in the provisions of Article 4 of the OECD Model Tax Convention [3], which provides for the criteria of "permanent home", "center of vital interests", "habitual abode" as the main rules for resolving disputes over the double tax residence of individuals.

When studying the experience of foreign countries, it is worth paying attention to the experience of countries that use the length of stay in their territory and the availability of permanent home as criteria for determining the tax residence of individuals. For example, in Estonia and the Czech Republic, the main two criteria for recognizing individuals as tax residents are the availability of permanent home or staying in the country for 183 or more days in any 12-month period for Estonia [4], and 183 or more days in a calendar year for the Czech Republic [5]. Similarly to the legislation of Estonia and the Czech Republic, Denmark uses as criteria for recognizing individuals as tax residents the stay of a person for more than 6 consecutive months or if an individual acquires or rents home in Denmark for purposes other than short-term stay or vacation [6]. In other words, it seems that Denmark uses very similar criteria for long-term stay in its territory and permanent home, with the only difference being in the approach to the formulation of such criteria.

At the same time, examples of countries that use the center of vital interests to determine tax residence are Poland, which also uses the criterion of length of stay, and Lithuania, whose legislation also defines permanent home and length of stay as criteria for determining tax residence [7; 8]. A possible justification for the absence in the legislation of such countries as the Czech Republic, Estonia and Denmark of the center of vital interests as a criterion for determining tax residence of individuals may be that the center of vital interests is a rather complicated, in terms of proof, and multi-component criterion, where the tax authority may be obliged to determine both business and personal interests of the taxpayer within the territory of a particular country, while such a tax authority has limited access to information about such interests in the territory of another country. In other words, the assessment of the tax authority may be affected by the effect of accessibility and selective bias, which does not contribute to the accuracy of the assessment of tax residence status and leads to significant administrative resource costs. At the same time, such criteria as long-term stay in the country and the availability of permanent home are matters of objective reality, evidence of which can be collected by the tax authorities of countries without involving significant administrative resources (interaction with migration/border/customs authorities, access to municipal and real estate registers, etc.)

In terms of analyzing the criteria for tax residency under the laws of foreign countries, it is worth paying attention to the United States, where citizenship is a crucial criterion for recognizing a person as a US tax resident. In this respect, the US experience is unique, since the legislation of this country provides that US citizens pay taxes on all their income in this country, regardless of the place of their receipt and the place of residence of US citizens [9, p. 33]. At the same time, it should be noted that this approach is quite controversial, since if a citizen of a state that uses citizenship as a criterion for tax residency resides permanently in a foreign country, in almost all cases such a citizen will be recognized as a resident of the foreign country in which they reside, for example, based on the criterion of long-term stay or availability of permanent home. Article 4 of a double taxation treaty based on the OECD or UN model would resolve such a dispute over tax residency in favor of the country in which the person has a permanent home, making the practice of recognizing citizens as tax residents impossible for such countries. In this regard, the use of the citizenship criterion for recognizing individuals as residents can be effective only in the absence of a double taxation treaty with a foreign country in which a citizen is recognized as a tax resident or in the presence of special provisions in Article 4 that would take into account this approach of national legislation (which the United States has actually done by implementing its own model of a bilateral tax treaty).

Thus, it can be argued that the legislation of the analyzed foreign countries is based on a list of criteria, which usually boil down to determining the habitual abode of an individual during a calendar year or a 12-month period, the availability of permanent home or a center of vital interests. Such criteria are applied alternatively, i.e., the presence of one of them in relation to a certain individual will indicate that such person has acquired the status of a tax resident. At the same time, the example of the United States may demonstrate that a state can justify an economic and legal connection through the citizenship of that country, but this approach is not generally accepted.

In the tax legislation of Ukraine, the definition of an individual resident of Ukraine is contained in sub-clause "c" of sub-clause 14.1.213 of clause 14.1 of Article 14 of the Tax Code of Ukraine [10]. Analyzing the above definition, we can conclude that the approach of the domestic legislator differs from the approaches of the analyzed foreign countries due to the existence of internal rules for resolving disputes over the tax residence of a person. Thus, unlike the provisions of the legislation of foreign countries, which define only the criteria for recognizing an individual as a tax resident, the national legislation also offers consecutive rules that take into account the presence of a place of residence, permanent home and center of vital interests in a foreign country. It is believed that such rules should serve to resolve conflicts regarding the dual tax residency of individuals, excluding their recognition as residents of Ukraine, in cases where a person has a permanent home only in a foreign country, or when a person has closer economic and personal ties (center of vital interests) with a foreign country.

In the context of the analysis of the provisions on the resolution of disputes on the double tax residence of a person, it is worth paying attention to the provisions of Article 4 of the conventions on the avoidance of double taxation concluded on the basis of the OECD or UN models. Article 4(2) contains the rules by which a dispute over the tax residency of a person is resolved if both contracting states consider the person to be their tax resident, whose global income is subject to taxation under the rules of the national legislation of both states [3]. Thus, if a person is recognized as a resident of both contracting states, his or her status is determined by a number of consecutive criteria, the so-called "tie-breaker rules".

First of all, a person will be considered a resident of the state where they have a permanent home. If a person has a permanent home in both states, they will be considered a resident of the state with which they have closer personal and economic ties, i.e. where their center of vital interests is located. If the center of vital interests cannot be determined, or if a person does not have a permanent home in either state, they are recognized as a resident of the state where they habitually reside (habitual abode). If a person is habitually resides in both states or does not reside in either state, their nationality is the decisive criterion, and they will be a resident of the state of which they are a national. Finally, if a person is a citizen of both states or is not a citizen of either state, the issue of their residency is resolved by the competent authorities of the contracting states by mutual agreement.

Having compared the provisions of sub-clause "c" of sub-clause 14.1.213 of clause 14.1 of Article 14 of the Tax Code of Ukraine and Article 4(2) of the model of the OECD Convention, one can conclude that these provisions are significantly similar, which indicates that the legislator tried to provide for tie-breaker rules at the level of national legislation. Although the purpose of these provisions of national law is to avoid situations where double taxation arises due to the recognition of an individual as a tax resident in two countries, based on foreign experience, the need for these rules at the level of national law is rather questionable.

The national legislator has independently limited Ukraine's tax jurisdiction in terms of taxation of individuals, which obviously has an impact on the tax base for personal income tax and military duty. Such "self-restriction" is not typical for the domestic tax legislation of foreign countries, and the avoidance of double taxation in case of recognition of an individual as a tax resident of two states can be realized through the application of Article 4(2) of the conventions on the avoidance of double taxation concluded by Ukraine.

Indeed, in the absence of a valid convention on the avoidance of double taxation between Ukraine and a foreign state in which an individual is also recognized as a tax resident, there may be a risk of double taxation, but given the extensive network of conventions concluded by Ukraine [11], as well as the rules provided for in Sections I, II and IV on the crediting of taxes paid in foreign countries, such risks are insignificant. In this regard, it is proposed to revise the provisions of the Tax Code of Ukraine by excluding tie-breaker rules from them, leaving only the criteria that determine the status of an individual as a tax resident of Ukraine. Such amendments will increase tax revenues by expanding the tax base for personal income tax and military duty, as well as reduce the required administrative resources for proof in cases of recognition of individuals as tax residents of Ukraine.

5. Conclusions.

The study has established that determination of the tax resident status is fundamental for the State to exercise its tax jurisdiction over the global income of individuals. The analysis of the legislation of foreign countries (Estonia, Czech Republic, Denmark, Poland, Lithuania) has shown that the vast majority of states use a limited set of clear, objective and alternative criteria for identifying residents, including the availability of permanent housing and the duration of stay in the country. The more complex and evaluative criterion of the "center of vital interests" is used less frequently due to significant administrative difficulties in proving it.

Against this background, the approach of the Ukrainian legislator, enshrined in the Tax Code of Ukraine, looks unique and atypical. Instead of establishing primary criteria for the widest possible coverage of potential residents, the domestic legislation has implemented a hierarchical system of tests into domestic law, which actually duplicates the mechanism for resolving conflicts (tie-breaker rules) from Article 4 of the OECD Model Convention.

The main conclusion of the study is that this approach constitutes an unjustified "self-limitation" of Ukraine's tax jurisdiction. At the stage of applying the national law, the state renounces the right to tax a person who could be considered its resident under international practice, leaving the resolution of this issue to the discretion of international agreements. This leads to a narrowing of the tax base for personal income tax and military duty.

In view of the above, it is proposed to amend sub-clause 14.1.213 of Article 14 of the Tax Code of Ukraine by excluding from it the consistent rules for dispute resolution. Instead, it would be advisable to establish a list of primary alternative criteria (e.g., permanent home in Ukraine; stay in Ukraine for more than 183 days). Such a step would bring national legislation in line with widespread international practice, expand the state's fiscal sovereignty and simplify administration for tax authorities, while eliminating double taxation risks would be effectively ensured by an extensive network of existing international conventions.

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