TALLINN UNIVERSITY OF TECHNOLOGY
School of Business and Governance
Tallinn Law School

Kseniya Gladenkaya

REGULATIONS TO AVOID DOUBLE TAXATION BETWEEN EU MEMBER STATES AND THE RUSSIAN FEDERATION

OCCURENCE OF DOUBLE NON-TAXATION IN THE RETROSPECTIVE OF DOUBLE TAX TREATIES ON THE BASIS OF OECD MODEL CONVENTION.

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Supervisor: Thomas Hoffmann, Ph.D.

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Kseniya Gladenkaya ………………………
(signature, date)

Student code:
Student e-mail address:

Supervisor: Thomas Hoffmann, Ph.D.
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‘Taxes for the state – the same as sails for the ship. They serve to bring it into the Harbor rather than to fill it with their own burden or to keep it always on the high seas and finally to sink it.’

- Catherine II the Great

ABSTRACT

This paper highlights the issues of cooperation between the European Union and the Russian Federation in the sphere of inter-state direct taxation. Attention is paid to the treaties between Russia and the European Union on the recommendations of the OECD Model Convention. The fundamental principles of international and European taxation are listed and explained.

The paper deals with the problems of double taxation that existed before, and the tendency of the settlement of the problems of double taxation and the methods of solving the newly appeared ones. The problem of the appearance of double non-taxation, gaps of national legislation based on that issue is also considered, since special attention is paid to the avoidance of double taxation and the non-taxation that appeared on this basis. The issues of taxation of e-commerce and techniques to improve national legislation in the scope of digital taxation are also considered.

There is an increasing integration of the Russian Federation into the process of international business and settlement of tax evasion.

Keywords: Taxation-Double Taxation- Avoidance of Double Taxation between EU Member States and Russian Federation- OECD- Occurrence of Non Taxation –Digital Taxation- E-Commerce

INTRODUCTION

Where there is a state, there are taxes. The state cannot survive without taxes, since they are the primary wellspring of its revenue. Thusly, it is not astonishing that the state, trying to expand its incomes, is searching for better approaches for tax assessment. As indicated by the principle of proportionality, the taxation existing in the state ought not to overwhelm financial activity of subjects of economic turnover and in the meantime ought to give the essential level of incomes. Legal entities and natural persons venture being taxed by more than one state the same income the moment they cross a border.

By concluding treaties, conventions and agreements on avoidance of double taxation, states recognize that, in the context of international business, taxation of the same income or profit or taxpayer is a burdensome link in international business. The development of world market relations and the international economy what ultimately depends on the development of the states and define the mutual order of levying taxes from subjects of foreign economic activity.

To justify the relevance of the topic of my research I would like to emphasize that international double taxation results from the practical implementation by various states of claims for a share of income from international economic activities (receipt of fiscal payments in the Commission of individual transactions in the framework of international economic activities)[1].

There are the following reasons, based on the article written by Gusev, for the occurrence of double taxation in Russia Federation, but these principles are applied in European Union (EU) on what I would like to build up my research:

1. the same person is recognized as a resident in a country and in one or more countries;
2. the same income of a resident is treated as having origin in two or more countries and is taxed in each of these countries;
3. the same income of the company is taxed in the country on the basis of recognition of residency, and in another country - in accordance with the legislation on the source of income;

[1] Shakhmametiev, A. (2006). Mezhdunarodnoe Nalogooblazhenie i mezhdunarodnoe nalogovoe pravo: pravovie aspekti vzaimosviyazi. - *Journal of Finance law*, No 3. Moscow: Izdatelskaya Grupa Jurist, 24-31.

4. there are differences between EU Member States and Russia in the order and norms of offset of expenses incurred by the taxpayer;
5. there are no provisions on the offset of certain types of taxes paid by a Russian resident in another country.

Therefore, the objectives in the scope of double taxation would be a reduction double taxation, excessive and uncertain taxation, tax avoidance and evasion. Distinction in the tax systems of states interfere with external commercial activity, so the research question of this thesis is whether unification of general principles of taxation conditions and conclusion of agreements on avoidance of double taxation allows fighting against unfair tax competition of countries. Most countries have no doubts about the need to eliminate double taxation as a major obstacle to mutual trade and investment between countries, as well as to the exchange of technology. By changing their tax policies and taxation conditions, countries compete for the place of their goods, works and services on the world market. It is clear that a country with a lower tax burden, due to all other things being equal, has the advantage of being able to supply its products and services on the world market at lower prices than its competitors. For many types of goods and services, competition in the world market has increased so much that the mere lowering of tax rates is no longer sufficient. Exporting countries are beginning to apply so-called negative taxation (in the form of targeted export subsidies) and direct promotion of capital exports, which help to consolidate their producers in the world's major commodity and service markets.[2]

The problem is aggravated by the double taxation occurring in international transactions. The economic irrationality of double taxation in the current environment is obvious as it prevents the movement of capital from one country to another, which does not correspond to the general trends of the world economy rules. As a result, the capital is merged into those jurisdictions where, all other things being equal, and the taxation conditions are optimal for the taxpayer.

[2] Gusev, V. (2000). Problemy Dvoinogo Nalogooblazheniya v Rossiiskoi Federatsyi. Puti Resheniya. - *Journal of Finance*, No 4.

1. Main Concept of European Tax law

EU tax law is an arrangement of tax provisions of constituent treaties and standardizing lawful acts received by EU organizations, general standards of European law material to tax relations and decisions of the EU court of Justice on tax matters. A critical characteristic of European Tax Law is the restrictions it enforces on taxation by Member States.[3] These incorporate the non-appearance of inward customs duties and for the most part the preclusion of Member States to charge to hinder four freedoms in accordance with Articles 3(1) (a), 18, and 34, 45-54 and 56-66 of the Treaty on the Functioning of the European Union.

1.1 The crucial international principles influenced on the development of European Taxation

The aim of concluding an international treaty on the avoidance of double taxation is to reach an agreement between states or other subjects of international law establishing their mutual rights and obligations in tax relations in order to avoid double taxation.[4]

However, the functions of tax treaties are not just simply avoiding of double taxation and preventing tax evasion, but also include the elimination of double residency. The establishment of detailed rules for the allocation of tax rights between states, the fight against tax avoidance and evasion, the international exchange of information and in some cases - administrative intergovernmental assistance in tax collection.

The EU Council for the effective functioning of the common market issues the sources of the tax law of the EU in accordance with the EU Treaty Article 115 directives. The Directive on Parent and Subsidiary companies of 1990 Directive is followed by the EU position at which the withholding tax on dividends within the EU is a significant barrier to a single internal market. Thus, if article 10 of the Organisation for Economic Co-operation and Development Model Tax Convention (OECD MC) allows reducing the withholding tax to a minimum rate of 5%, then the Directive completely abolishes withholding tax subject to certain conditions. Nowadays, the

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[3] Thuronyi, V. *Comparative Tax Law.* (2003). 1st ed. The Hague: Kluwer Law International, 2003, p 100-109.

[4] *Puty resheniya problemy dvoinogo nalogooblazheniya v Rossiiskoi Federatsii*. Online Encyclopedia. Acessible: https://studopedia.su/16_93928_mezhdunarodnie-soglasheniya-ob-izbezhanie-dvoynogo-nalogooblozheniya.html , 10 May 2015.

most significant court decision concerning the taxation of dividends affecting the freedom of establishment like as in the *Denkavit* case. According to the facts of the case, the French subsidiary paid dividends to the Dutch parent company. Under article 10 of the tax Treaty between France and the Netherlands, France had the right to levy a tax at a rate of 5 %. However, France did not apply a similar tax on dividends distributed between French parent and subsidiary companies, and on that basis, the Dutch company claimed that withholding tax was contrary to the freedom of the institution. The court of justice of the EU accepted these arguments, noting that France taxed dividends of non-residents located in the EU, although domestic dividends are not taxed. This case establishes different taxation of residents and non-residents, so there was determined the principle of unjustified discrimination against non-EU residents compared to residents of France, which contradicts the principle of freedom of establishment.[5]

In order to eliminate double taxation the state can take unilateral measures remove the obligation from the taxpayer. However, the problem is that states will not take actions that limit their tax jurisdiction and deprive themselves of budget revenues. Since each state has the right to establish its national tax law within its territory, it follows that international tax principles are acquired special relevance and significance.[6]

The first group of principles is the general principles of the European law applicable to taxation defined by the Court of Justice:

1. the structural principles: principle of subsidiarity, adequacy, proportionality, and fair cooperation ought to be incorporated into that category;
2. the «fundamental principles»: the principle of legal certainty, the protection of good faith, the principle of the fair trial and the fair administrative proceedings should be suggested.[7]

Further, the principle of tax jurisdiction extends to two fundamental categories: territorial and personal tax jurisdictions. The first approach is based on the right of the state to tax any events

[5] Court Decision, 14.12.2006, Denkavit Int. BV, Denkavit France SARL v. Ministre de l'Economie, des Finances et de l'Industrie, C-170/05, ECLI:EU:C:2006:783, points 19, 24- 30, 36 and 46.

[6] Boria, P. (2017). *Taxation in European Union.* 2nd ed. Switzerland: Springer International Publishing AG, p 74-86.

[7] *Ibid, 174.*

as transactions, property, occurring in its territory. The second approach is for the state to tax its subjects regardless of whether they are in the territory of the state or outside it.[8]

In the modern science of international law, there is no unity of opinion as to where the limits of state jurisdiction end, and hence there is no uniform understanding of the question of the possibility of exercising extraterritorial jurisdiction based on international law. For example, could a state exercise such jurisdiction freely, as long as it was not limited to a specific prohibition in international law, or could it exercise that jurisdiction only under a special provision of international law?[9] What degree of attachment to the state justifies its tax jurisdiction over a person and what are the criteria for such justification? Is it reasonable to subject a non-residential natural person temporarily staying in the country to an unlimited tax obligation?

There are two competing doctrines with regard to the limits of the tax jurisdiction of states, based on a different understanding of state sovereignty.[10]

The first doctrine is based on the decision in a court case, *Lotus Case* since international law derives solely from the will of states, they are free to establish any jurisdiction that is not expressly prohibited by a formal international Treaty, or because of a generally accepted principle of positive law.[11]

I would like to emphasize Asif Qureshi's conclusions, based on the views of various legal scholars on this issue, to note that, in his view, there is no authoritative principle prohibiting any state from asserting its right to tax anyone in the world in respect of its global income.[12] However, in real life this approach can never be implemented and faced with legitimate impedances from other states.[13]

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[8] Zagler, M. (2013). *International Tax Coordination: An Interdisciplinary Perspective on Virtues and Pitfalls.* 1st ed. Oxford: Routledge, p 13-21.

[9] Zemanek, K. (1997). *The Legal Foundations of the International System: general course on public international law.* Volume 266. The Hague: The Hague Academy of International Law, ch XII.

[10] *Ibid.*

[11] Permanent Court of International Judgement, Series A, No. 10, *S.S. Lotus (France v. Turkey)*, 7 September 1927, para 44-47.

[12] Qureshi, A. H. (1994). *The Public International Law of Taxation. Text, Cases and Materials.* London: Graham & Trotman, p 122-125.

[13] *Ibid.*

The norms of international and domestic constitutional law should limit not only the tax policy of the state, but also impose a ban on arbitrary extraterritorial taxation and on its actions in the territory of other States. As the taxation of natural and legal persons outside the state's territory is influenced by the risk of earned income from international businesses falls within the jurisdiction of more than one country.[14]

So based on the conclusions of Professor Sol Picciotto I refer to the causes of conflicts of jurisdiction, noted that international law does not provide formal restrictions for the application of extraterritorial jurisdiction by a state.[15]

Reviewing same problem in the light of general international law and the Vogel's ideas, I would like to emphasize that the principle of territoriality allows the state to apply national tax law in other countries in the necessary situations.[16] Vogel wrote that, in practice, the evidence of the difference between judicial and executive jurisdictions is the tax law of states limited by their ability to exercise their jurisdiction beyond their geographical boundaries.[17]*The Island of Palmas case* confirms Vogel's view on the limitations of executive and judicial tax jurisdictions. In the present case, the judge held that the jurisdiction of a state was the right to exercise the functions of a state, excluding the exercise thereof by any other state.[18] Considering the position of Reuven Avi-Yonah I inferred that the possibility of states to take unilateral action is limited to two underlying norms. The first is the principle of one-time taxation and the second is the concept of benefits when a person conducting business in one country receives benefits from the other state what contributes to the growth of business.[19]

It becomes eventual that the limits of the state tax jurisdiction can be specified in practical application, that is, in court decisions on tax disputes. A. Fokin points out that the court proceedings on the attempts of extraterritorial extension of tax legislation indicate a rather significant issue of the definition of the income as well as the uncertainty of the criteria for

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[14] Arnold, B. J. (1991). *Tax Discrimination against Aliens, Non-residents, and Foreign Activities: Canada, Australia, New Zealand, the UK, and the US*. Toronto: Canadian Tax Foundation, p 73-85.

[15] Picciotto, S. (1992). *International business taxation: a study in the internationalization of business regulations*. Cambridge: Cambridge University Press, p 38-40 and 77- 97.

[16] Vogel, K. (1997). *Double Taxation Conventions*. 3rd ed. London: Kluwer law International Ltd, p 11 and 131-132.

[17] *Ibid,* p 12-14.

[18] *Island of Palmas case*. Reports on International Arbitral Awards. Vol. II, 04.04.1927, p 838 and 845.

[19] Reuven S. Avi-Yonah. (2007). Tax Competition, Tax Arbitrage, and the International Tax Regime. - *Journal of Bulletin for International Taxation: Michigan Law Schoo*l, No 4, 130-138.

determining the individual or financial reference to the source. Specifically, the tax laws of many countries do not provide a uniform definition of source and income, posing a risk of extraterritoriality.[20]

The recognized right based on both doctrines of the state to levy taxes is a linking element to bind the taxpayer to the state and its tax jurisdiction. In the framework Gustafson's concept[21] and nevertheless its abstractness, it is possible to consider that the concept of modern taxation recognizes the agreed view that international law. It allows a state to collect taxes only in a rational or significant link between the taxpayer and the state. The connection between the country and the financial event, in which the taxpayer takes part, or property, which he possesses and in respect of whom the duty is charged.[22] The crucial problem here is a definition of the sufficiency or validity of the connection. In general, capital-importing countries are interested in applying the principle of territoriality, which is the result of the policy of neutrality of capital imports.[23]

In order to emphasize the relationships between the EU and international tax law should be described the following principles what are based on the Double Tax Treaty (DTT) principle. That treaty is concluded between two countries for the purpose for the avoidance of double taxation in both states:

- the principle of non-aggravation;
- the principle of subsidiarity of DTT, meaning that in order to apply a DTT one should first allude to domestic tax law;
- the principle of preservation of the preferences allowed by national law;
- a general principle that DTT can restrict but not create a tax burden.[24]

The right of the state to tax certain persons is a natural and inseparable feature of state sovereignty. The European Law of taxation is a body of law, distinct both from international tax

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[20] Fokin, A. (2009). *Mezhdunarodnoe Nalogooblazhenie Passivnih Nalogov (procentov, dividentov, royalty): Amerikanskii opit.* Moscow: Wolters Kluwer. p 87 and 93.

[21] Gustafson, Charles H., Peroni, Robert J., Pugh Crawford R. (2006). *Taxation of International Transactions: materials, texts and problems*. St.Paul, Minnesota: Thomson West Publishing. 3rd ed. p 227 and 84-152.

[22] Gidirim, V. (2017). *Osnovy Mezhdunarodnogo Korporativnoogo Nalooblazheniya.* Moscow: Chelovek Slova 2017, p 51 and, p 87-92.

[23] Arnold, B.J. (2015) An introduction to tax treaties. *New York: United Nations Department of Economic and Social Affairs.* Accessible: http://www.un.org/esa/ffd/wp-content/uploads/2015/10/TT_Introduction_Eng.pdf

[24] Katja S. Ziegler, (2016). *Relations between EC law and International Law- New Perspectives.* Accessible: https://ec.europa.eu/taxation_customs/sites/taxation/files/docs/body/raingeard_summary.pdf , 5 March 2016.

law and from the taxation laws of the Member States of the European Community. The importance and impacts of which is visual on domestic tax systems. Correlation between the EU institutions, the economic issues, judgements of ECJ, restrictions set on how Member States may actuate their domestic tax systems and mutual affect between international tax law, domestic law and EU tax law are arisen from them and often necessitate an interdisciplinary approach.[25]

The investigation of the experience of the EU countries in the scope of tax control demonstrated that one of the major standards is the utilization of an arrangement of dynamic tax rates, which enables private companies amid their development to use the minimum income tax rates. While expanding further the volume of creation, and thusly increment the tax rate. For the most part, so as to keep away from the enthusiasm for falsely controlling the advancement of organizations, trying to avoid double tax collection, when, in doubt, the highest income tax rate is somewhat lower than the past one.

1.2 Occurrence of international legal regulation of tax relations in the EU based on essential international theories and principles

The early Articles of the Treaty Establishing the European Community what is important to the tax scope inside the EU set the errands, exercises and regular approaches. Later there were established Articles what restrains the powers of the Community and imposition of the subsidiarity guideline. The fundamental freedoms of the EU include such free movements of goods and workers, freedom of establishment and to provide services, free movement of capital and payment; prohibit the discrimination on any grounds and specify the competition rules between Member States. Articles 101- 117 of the Treaty on the Functioning of the European Union (TFEU) is entitled, but in specific conditions the state aids is declared illegal. Tax can become entailed in that issue in case when the Member State would provide tax subsidies to specific organizations. The EU has accomplished unification of law in regard of customs duties - the European Customs Code is the Council Regulation and in accordance with the Treaty

[25] Lamb, M. (2003). *Taxation. An Interdisciplinary approach to research.* 1st ed. Oxford: Oxford University press, p 223-231, p 139-153

establishing the European Community Article 3(1) (a) which applies to each Member State and there are no inward customs duties.[26]

The law of VAT was harmonized while different VAT laws exist in each EU country; they should be predictable with the sixth VAT directive and other VAT directives what was received on EU level. Aforementioned implies that citizens in EU countries can depend on the EU law regardless of whether the domestic law is contradictory and this defines the concept of direct effect. However, this does not preclude to Member States to use a fiscal veto.[27]

The Human Rights Convention of 4 November 1950 is another important source of international law affecting direct taxation. The Convention and its protocols, which entered into force for the Russian Federation in May 1998, became part of the country's legal system. They have more legal force than national laws according to Article 1 of the law on ratification of the Convention of the Russian Federation.[28]

Cross-border monetary flows from business activities, investments and technologies are balanced. It is not of fundamental importance to what extent European States agree to limit themselves in tax rights, since the taxation of income received by residents from sources in other countries compensates for losses from the exemption of income of non-residents. However, in case of unbalanced flows, the provisions of the tax agreement relating to the distribution of tax rights between States acquire political significance. For example, developing countries, mostly net importers of capital, are effectively deprived of tax revenues in favour of capital - exporting countries when entering into agreements limiting their rights to withhold tax at source.

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[26] Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, *OJ L 302, 19.10.1992, p 1–50.*

[27] Thuronyi, V. (2003). *Comparative Tax Law.* The Hague: Kluwer Law International, p 315-318.

[28] Federalnyi zakon “O Ratifikatcii Konventcii o Zaschite Prav Cheloveka i Osnovnyh Svobod i Protokolov k Nei” 30.03.1998/ No 54-FZ, art.1.

2. The development trend of the agreements on avoidance of double taxation between EU and Russia

In the event of a discrepancy with a national law, the international treaty shall not derogate from the rule of law, which is contrary to it, but make an exception for the case in question. This is typical of international tax agreements, which, for example, set lower tax rates. An international tax treaty is an agreement between states or other subjects of international law establishing their mutual rights and obligations in the scope of international tax relations. The level of international treaties is significant for determining the impact of national legislation on tax treaties in the state. International tax relations are based on international tax law. International tax law is an arrangement of legitimate standards and rules governing international tax relations. The guidelines of international tax law are contained in the acts of tax legislation of individual state and in addition in international treaties.[29]

In relation to the development of globalization, many legal and natural persons conduct their business in several countries, which in turn affected the tax law in most countries that are constructed in such a way as to avoid the international double taxation.

The relations in the scope of taxation in a specific state are governed by the standards of both national legislation and international law. The role of realization of international legal regulations are based in international treaties and agreements, the status of which changes from state to state and in a few states may have equal legitimate force with national legislation as, for example, in the UK, Germany, or they may be given priority over domestic legislation as, for example, in the Russian Federation.[30]

Universal concurrences on avoidance of double taxation usually apply to income taxes, property and capital. In the meantime, agreements, when in doubt, do not influence the issue of indirect

[29] Trefilova, O. (2017). Sootnoshenie natsionalnogo i mezhdunarodnogo zakonodatelstva ob izhbezhanii dvoinogo nalogooblazheniya i primenenii spetsialnih nalogovih reghimov.- *Journal of Uridicheskaya Misl*, No 2 (100). Saint-Petersbourg: Chastnoe obrazovatelnoe uchrezhdenie vishego obrazovaniya “Uridicheskii institut”, 135-143.

[30] Shcherbinina, O. Tereshkova, V. Sidorova, T. Pavelyeva, E. (2008). *Mezhdunarodnoe Pravo: konspekt lekcji.* Krasnoyarsk: IPK SFU, p 66-80.

taxation and do not impose to value-added charges, sales taxes, taxes that decrease financial profitability (turnover taxes, advertising taxes, other taxes included in the expenses).[31]

The domestic regime is widespread, assuming equality of subjects of foreign and domestic law in the field of taxation. It reveals in two dimensions such as in their rights and duties of taxpayers, and in the most efficient elements of particular tax obligations.[32] Tax treaties play a crucial role in the prevention of tax evasion and avoidance. The international treaties on tax issues, in the essence, establish the most favourable tax regime for partner states or provide a system of benefits and rights.[33] National law and an international treaty form a part of a single legal system in which an international treaty is in priority. In monistic systems, international treaties take precedence over national laws because of the *lex specialis* principle, since an international treaty is considered as a special law.[34] Administrative procedures and requirements for the application of international agreements are not permitted if they have been duly adopted and entered into force. This group of countries includes Austria, Belgium, France, Germany, Luxembourg, the Netherlands, Portugal, Russia, Spain and Switzerland.[35]

Currently, as I. Brownlie pointed out that states of dualistic doctrine are required the principle of incorporation of customary international law. Countries that need an internal act of transformation include such countries as Great Britain and Sweden. A growing number of states are introducing relevant provisions into their Constitutions.[36]

In Russia, there are two ways to apply the provisions of agreements on avoidance of double taxation: preliminary exemption from taxation of passive income of foreign legal entities from sources in the Russian Federation and the return of taxes on income of foreign legal entities from sources in the Russia.[37]

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[31] Popova, L., Drozhinina, I., Maslov, B. (2007), *supra nota 21*, p 40-50.

[32] Pepelyaev, S., Polyakova, V., Fokin, V. (2015) Nalogovoe Pravo: Uchebnik dlya Vuzov. (Ed.) Pepelyaev S. Moscow: Intellektualnaya Literatura, ch 16-18.

[33] Trefilova (2017), *supra nota 29*, 135-143.

[34] Vogel (1997), *supra nota 16*, p 22-30.

[35] Rohatgi, R. (2007). *Basic International Taxation*. 2nd ed. Vol.1. Richmond: Richmond Law & Tax Ltd., p 18 and 32.

[36] Brownlie, I. (1979). *Public International law*. 1977. 3rd ed. Oxford: Oxford University Press, p 424 and 631.

[37] Petryshkin, A. (1999). Primenenie Soglashenii ob Izhbezhanii Dvoinogo Nalogooblazheniya. - *Journal of Zakonodatelstvo,* No 8, 42-45.

The existing international tax treaties define the rules of differentiation of the rights of each of the state on tax issues of organizations of one state having the object of taxation in another state, however, the methods of implementation of these provisions establish domestic rules of tax law.[38]These agreements are bilateral and based on the Model Convention of the organization for Economic Cooperation and Development on Income and Capital Taxes.

The OECD Commentary is an approach to accomplish common terms and rules for tax assessment to be interpreted in a similar way. As the result of the acknowledgement of the Commentary is an aid to construe treaties in order to adjust international collaboration between EU and Russian Federation. In this regard, there has been an achievement as far as utilization of the OECD Commentary and a developing practice of courts in referring tax treaties to interpretation cases[39].

In the framework of cooperation between the Russian Federation and European countries, it is necessary to use not only the most successful experience of reforming national legislation, but also the experience of modernization of the secondary legislation of the European Union, including issues related to the avoidance of double taxation.[40] As a result, there is a convergence of not only political, but also tax legal systems between Russia and the EU Member States. In the future it is possible for Russian lawyers to participate in the joint development of tax legislation relating to the international character between Russia and the EU, which in turn can expand investment and economic relations.

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[38] Seluzhitskaya T. (2005). Nalogooblazhenie Inostranih Organizatsii. - *Journal of Nalogovoe Planirovanie*, No 4. 9-20.

[39] Thuronyi (2003), *supra nota 27*, p 100-109 and 112-120.

[40] Perov A. (2000). *Nalogi i Mezhdunarodnye Soglasheniya Rossii*. Moscow: Jurist', p 24, 138 and 213.

3. The development of formation on the avoidance of double taxation

In order to define the development trend on the formation of double taxation the prevention of double taxation shall be followed. First, it should be properly explained what is essentially double taxation. In correspondence of OECD double taxation is fundamentally unreasonable excessive taxation. Legal double taxation emerges when the same object is a subject to different taxation several times or under taxation of a single object fall in different subjects. The economic double taxation of the same income or property is a subject to charges in more than one country.[41]

3.1 Methods of elimination of double taxation between the EU and Russia

Nowadays quite an amount of business analysts has identified different causes for the occurrence of international double taxation. During my research, I consider that some of them provide the best explanation and analysis of the tendency of international double taxation. As for instance, A. Shakhmametyeva considers that the double taxation results from the reasonable execution by various states of claims to acquire share of the income from international economic activity[42].

Allegedly to L. Polejarova, preconditions of international double taxation is either the absence of harmonisation between national tax laws of the states in acknowledgment of a resident under the national legislation of several states or taxation of the same object in several of the states or taxation in several states, the income from the source.[43]

Respectively, double taxation in international economic relations may occur in relation to either income tax from natural persons or corporate income tax or property tax (individuals and legal entities, real estate tax and other laws).

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[41] Lazareva, N. (2014). *Nalogovoe Pravo Zarubezhnih Stran*. Habarovsk: Tihookeanskij Gosudarstvennyi Universitet, p 32-47.
[42] Shakhmametyev, A. (2006) Mezhdunarodnoe Nalogooblazhenie i Mezhdunarodnoe Nalogovoe Pravo. - *Journal of Finansovoe Pravo*,No 3, 24-31.
[43] Polejarova, L. (2010) Osnovnie Aspekty Ustraneniya Mezhdunarodnogo Dvoinogo Nalogooblazheniya. - *Journal of Finance*, No 5, 47-56.

The agreements on avoidance of double taxation envisage methods of its eradication. In European Union and Russia, usually allocate the next technique to abolish international double taxation: tax exemption, tax credit and tax deduction.[44] In general, these agreements on avoidance of double taxation are based on the OECD Model Convention and its 1977 version.[45] Russia and most Member States of EU have unilateral rules for overcoming double taxation for residents earning foreign income. Both unilateral measures for the avoidance of double taxation identified to the standards of national tax legislation and multilateral measures actualized through the applicable international agreements and conventions are imposed.[46] However these rules do not affect cases where both states assume the same person to be a resident and rules depend on each country possess various source rules.

Countries have different rules to initiate worldwide taxation and a person for this reason could be an entity to taxation in more than one state. Therefore, this issue could be very reasonable in applying DTT within national legislation. In relation to this statement, the question appears as to whether existing treaties concluded between European Union and Russia could be construed consequently as to concentrate on avoidance of double non-taxation as well. If such comprehension is not permissible under the formulation of a specific treaty, it forms controversial whether there are any domestic legislation eliminating non-taxation of a specific part of trans border income and in that time whether such regulation could reject international agreements. Though made proposal in the Partnerships' Report could be still be recognized by the European Union and Russian administrative practice in the absence of *fraus legis* principle.[47]

The basic purposes of the OECD Model Tax Convention to Partnerships are the elimination of double taxation and prevention of non-double taxation[48]. In this case, it may be relevant to apply the national legislation of the both countries to solve this problem.

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[44] Ilina, L., Popova, N. (2012). Problemi Nalogooblazheniya Pribyli Uchastnikov Vneshneekonomicheskoi Deyatelnosti. - *Vestnik*, No 4, 92-113.
[45] Fransberg, E. (2003). Avoidance of double non-taxation in Finland. *Avoidance of Double Non-taxation.* (Ed.) M., Lang. Vienna: Linde Verlag, 353-370.
[46] Viktorova, N. (2010). *Nalogovoe Pravo. Kratkii Kurs.* 2nd ed. Saint-Petersbourg: Piter, 97-125.
[47] Helminen M. (2003). Avoidance of double non-taxation in Finland. *Avoidance of Double Non-taxation.* (Ed.) M., Lang. Vienna: Linde Verlag, 73-87.
[48] OECD (1999): The Application of the OECD Model Tax Convention to Partnerships. Issues in International Taxation No 6. Paris: OECD, adopted by the OECD Committee on Fiscal Affairs on 20 January 1999.

3.2 Different mechanisms for a relief from double taxation

Tax treaties are summoned to remove all feasible situations of double taxation that may originate in the position between the Contracting States. In order to establish how the agreement eliminates double taxation, first the methods of European Union tax law system should be emphasized.

The most efficient methods of international taxation are distinguished by international agreements and conventions: the principle of exemption, unilateral acts of national legislation, tax credit, tax relief.[49]

The method of tax exemption assumes that if, under the terms of the relevant tax agreement, certain income may be taxed at source, and the state of residence of the recipient of income is obliged to exclude this income from the total taxable base of the taxpayer. The only exception is income in the form of dividends or interest to be included in the taxable base. However, their taxation deducts from the amount of tax liabilities of the recipient of income taxes that he had withheld in the country of income within the limits not exceeding the tax rates on similar income, provided for by the national tax laws of the state of residence of the taxpayer. In situations where, under the terms of a double taxation avoidance agreement, a certain income is not taxable at source, the tax exemption method does not apply and the taxpayer's state of residence has the right to tax the significant income without restrictions in accordance with the requirements of its national law. Consequently, in principle, the solution of this issue is additionally provided by the OECD Model Convention, which gives the state of residence of the taxpayer the right to consider for tax purposes the income of the resident, in regard of which the agreement on avoidance of double taxation assigns exclusive tax jurisdiction to the state of tax origin. In practice, there is additionally another issue related with the essence that a Contracting State may qualify diverse are one and a similar income that leads to divisive addressing double taxation. This issue is a vivid sign of impedance of national and international legislation, as despite of recommendation of the model of OECD the concept of individual income is controlled by the national legislation of the state concerned.[50]

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[49] Zhuk, I., Kireeva, E., Kravchenko V. (2001). *Mezhdunarodnie Finansi: Uchebnoe Posobie*. Minsk: Belorusskyi Gosudarstvenyi Ekonomicheskyi Universitet, ch 6.2-6.4.

[50] OECD (1999), *supra nota 48*, 35-44.

It should be noted the method of tax credit implies a credit paid abroad for tax expense in domestic tax liabilities. Then the amounts of taxes paid in another state are deducted from the own tax. If a resident receives income or owns property that may be taxed in the Contracting States under the terms of the treaty, the tax on such income or property paid in the partner state will be deducted from the tax levied on such resident in Russia. This deduction, however, may not exceed the amount of tax on such income or property calculated in accordance with the laws of the Russian Federation.[51] In principle, Russian residents refer to their national tax laws when applying this method to corporate income tax and personal income tax.

In order to eliminate the burden of double taxation between Contracting States, Russia adheres to a three-stage system of eliminating double taxation when concluding tax treaties following the model of the OECD tax Convention.[52]

It should be acknowledged that the extent of the article on methods of eliminating double taxation between Russia and EU Member States is fairly more extensive than suggested by the authors of the OECD Convention. For instance, agreements with France, Belgium and the UK provide, in order to eliminate double taxation, for the reasoning from the taxable base of the permanent establishment of the amount of loans, salary costs; and under the agreement with France the cost of acquiring copyright and other costs necessary to ensure the activities of the establishment. Agreements with Germany and Belgium also provide for an unlimited deduction of certain types of expenses from the taxable base for enterprises with foreign investments. Under the agreement with Germany, such expenses include interest on loans and advertising costs, and under the agreement with Belgium is interest on loans, wages and other similar remuneration.[53]

Thus, summing up the conclusion under this section, unified norms for dividing tax income between EU and Russia provide foreign enterprises that have business cooperation with a country to avoid the burden of having to perform with the different tax systems of two countries. Having examined the tendency of using methods to avoid double taxation agreements, exemption method is more commonly used in multilateral agreements and conventions as, in turn, the tax credit is used for unilateral acts of the national legislation. Thus, it can be seen that

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[51] Gusev, V. (2000), *supra nota 2*.

[52] Ilina, Popova (2012), *supra nota 44*, p 92-113.

[53] Baev, S. (2007). *Soglasheniya ob Izbezhanii Dvoinogo Nalogoolazheniya mezhdu Rossiei i Gosudarstvami Chlenami ES: sravnitelno-pravovoe issledovanie.* Moscow: Walters Kluwer, p 12-18, 120-135 and 168-173.

the primary goal of international tax agreements is to guarantee the adjustment and consistency of national tax legislation with the recommended framework of the international Convention of the OECD. I would also like to mention that particular tax regimes are ubiquitous in most EU countries. In this way, the regime in which facilitated and attributed taxes are applied has been widely used. It is likewise conceivable to apply a simplified tax regime of income declaration. The first two years of tax exemption are valid for newly established start-ups. One of the approaches to solve issues regarding double taxation is collaboration of states with their dissimilar tax systems, sometimes in something comparable, endeavour to discover conciliation and reciprocal agreement, confirmation of which will be increasing number of ratification of international tax agreement.

4. Problems of application of the OECD Model Tax Convention

National businesses of the state widely use foreign companies for optimization of finance, ownership of business and accumulation of the capital outside the country. There is no consensus on the comments to the OECD MC, as the commentaries are a non-binding source of meaning in interpreting the Convention and applying them to national legislation. However, in the case of application of the tacit consent of the Member States of EU, becoming binding and mandatory. Further, I would like to address some of the significant problems that may arise in the application of the Convention by Contracting States of the Convention, namely EU states.

One of the most controversial areas of application of the definition of 'person' and 'company' in the OECD MC is the problem of taxation of partnerships in cross-border transactions. The OECD Committee on fiscal affairs have repeatedly addressed this issue in official publications, for example in the OECD report, 1999 "Application of MC to the OECD partnerships"[54]. The root of the problem of international legal classification of partnerships lies in the different interpretations of this type of person in national tax systems, which inevitably leads to difficulties in applying tax treaties to them. Therefore, a number of countries treats partnerships as taxable entities, similar to the companies, while other countries classify partnerships as transparent formation, i.e., as the taxpayer is not considered the partnership as a whole and the partners are taxed on their share of income from partnerships. However, the main problem is not the qualification of the partnership as a person, but whether it falls under the concept of 'resident of a contracting state' in the sense of Article 4 of the OECD MC, since it also suggests that the person should be 'taxable' in the state. If a partnership is treated as a transparent entity under national law, it shall not be considered as a tax resident of the state for the purposes of the Convention.[55] Then, from a formal point of view, the Convention cannot be applied to a partnership unless the Convention itself contains special rules on partnerships. Since the income of the partnership is distributed among the partners who a subject to taxation on the income of the partnerships, which, in principle, in itself can create a situation of incorrect implementation and because of the double non-taxation.

[54] OECD (1999), supra nota 48, p 10-31.

[55] OECD (2014): Model Tax Convention on Income and on Capital: Condensed Version. Paris: OECD Publishing, p 26 and 86-88.

When the problem occurs due to the involvement of three states in the transaction involving partnerships. For instance, if the partner is a resident of one state, the partnership is created in the second state, and the income is derived from the third state. In this case, the partner may demand the application of the benefits of the tax convention between the state of his residence and the third state from which the income arises, to the extent that the income of the partnership is subject to allocation in his favour for taxation in the country of his residence. This is the most obvious problem when the application of the tax agreement to the partnership, which requires revision and specificity in relation to its definition.[56]

K. Vogel introduced a system-wide external methodology for the use of an international tax treaty. The nature and functions of tax treaties, according to Vogel, are set out in an analytical model that includes three stages. The first is the fulfilment of the conditions for the applicability of the tax agreement; the second is the substantive requirements for the applicability of a tax Treaty and the third is legal consequences in the form of elimination of double taxation.[57]

The conceptual scheme proposed by K. Vogel and consisting of three stages is not only a method of consistent application of the rules of an international treaty, but also a method of its interpretation in specific cases based on the place of a practical issue within the model.

The above-mentioned mechanism of application of the tax agreement may also help to resolve problems related to the operation of distributive norms, for example, in conflicts of qualification, I mean, contradictions caused by differences in the meaning of terms of agreements and national laws.[58] Tax treaties only limit the application of the national tax laws of both states by modifying the national tax rules.

[56] Vogel (1997), *supra nota 16*, p 27-29.

[57] Vogel, K. (1986). *Double Tax Treaties and Their Interpretation.* Berkeley: Berkeley Journal of International Law. Vol. 4. Issue 1, p 26-30.

[58] Gidirim (2017), *supra nota 22*, p 110-111.

5. Occurrence of double non-taxation

Cross-border activities periodically prompt to double non-taxation. Neither the state of the source, nor the state of residence of the recipient of an income may tax the income. A taxpayer may totally avoid paying taxes by exploiting this probability. Cross-border transactions may be organized not to result in tax consequences.[59] With respect to taxation on income, the tax treaty defines the principle of generality: a resident of one state can be taxed only when the resident is a permanent representative in the second state.

Notwithstanding the bilateral treaties conclusion based on Model Convention companies seek prospects in the use of schemes with the participation of companies from other jurisdictions and as a result, I focus on the gaps in the scope of the treaty on avoidance of double taxation between states. Besides, there are sufficient situations what should be mentioned when the treaty on avoidance is either not concluded between countries or has not yet entered into force between contracting states (Russia-Estonia). With that countries Russia does provide no exchange of information for tax purposes, as well as burdensome taxation of legal entities and individuals in the context of international economic relations occur. Which in turn it negatively affects the development of international trade and the domestic economy of the state and can cause a decrease in state budget revenues, an increase in tax offenses, as well as the growth of the shadow economy.

In this situation, countries should apply national legislation to eliminate double taxation between countries, as well as through unilateral exemption or tax credit granted in the country of residence. (In addition, what to do if both countries levy a profit tax at source or do countries characterize the same profit differently?)

As Russia is not a member of OECD and don’t need to allude to the Commentary when imposing and interpreting its bilateral tax Conventions that are based on the OECD Model, it could enforce a sufficient difference in implementation treaty into national legislation and its correlation with other domestic tax systems. A fine example of the execution of the DTT and the relationship of the Double Taxation Convention (DTC) with domestic legislation for an aim of avoidance of double non-taxation is realized in Czech Republic. One of the primary prerequisites in order to benefit from a DTC and avoid non-taxation is to be a resident in one contracting state

[59] Helminen (2003), *supra nota 47*, p 73-87.

for tax purposes. The only entity generally exempt from income tax liability is the Czech National Bank. Peculiar regulations can be found in DTCs that restrict the taxation rights of the source country. There are some view of the crossover the DTC and national tax act in Czech legislation, if the Czech National Bank receives the interest income. If Czech Republic and the other Contracting State (Russian Federation) are regarding the individual subject to unlimited tax liability, then the provision of Article 4(2) of DTT will come into force. For example, if a resident and a national of Czech Republic possesses house there, but Russia believes that person is a resident of its country as that person has immovable property in Russia and he is a resident more than 183 days. The relevant action adopted in Czech Republic, so he is a subject to only limited tax liability on the income obtained from sources in the Czech Republic and is not recognized to be liable to tax there. Article 4 is imposed with the intention that a person has to be a resident in one state to be competent for treaty benefits. It does not necessarily indicate that a person has to be efficiently taxed in the state of residence. It is essential if the individual or entity was subject to unlimited tax liability in the state of residence allegedly its law.[60]

As indicated by the section 17 of the Income Tax Law relevant to companies, the concept 'liable to tax' is used for legal entities that are not individuals. Taxpayers, who have their place of establishment or place of effective management in the Czech Republic, are subject to tax on their income derived from the Czech Republic and on their worldwide income. (So the issue what I try to establish in that section on the occurrence of double non-taxation in the scope of OECD Model Convention and its implementation into national tax law wouldn't be arisen anymore, but still the double taxation could appear. Moreover, this would be considered based on DTCs). Taxpayers that do not have their place of establishment in the Czech Republic are liable to tax only on their income obtained from the sources in the Czech Republic. Nevertheless, as these legal entities are not regarded to obtain a place of establishment in the Czech Republic, they cannot be guaranteed the privilege under the act pertaining to Czech residents. There is no perfect system, so there are some questions in tax issue of Czech Republic. The problem of refusing tax benefits under the act in the source state (Czech Republic) to taxpayers who were not actually taxed in the state of residence depends on whether can provide the certificate of

[60] Dado, J. (2003). Avoidance of double non-taxation in the Czech Republic. *Avoidance of Double Non-taxation.* (Ed.) M., Lang. Vienna: Linde Verlag, p 51-73.

residence issued by their state of residence. If they cannot provide this certificate, they are taxed without granting benefit under the act.[61]

Unintentional double non-taxation because of the application of treaties is practically improbable in the Czech Republic as of how the provisions of the Article 23 (1) OECD model are applied. As already noted, the Czech Republic always applies these provisions to income derived from foreign sources, even if such income is exempt from tax under the law of the state of source or under the DTC with the state of source. The provision of the Article 23 (1) should apply to income derived from the foreign sources, even if such income is exempt from tax by the act in the state of source. This is done by applying the exemption with progression method, where a foreign source of income is included in the standard tax base and is taxed at ordinary tax rates or by applying the ordinary credit method where tax paid in the other contracting state is deducted from total tax liability.[62]

Likewise, other conceivable method for emerging of non-taxation is when treaty is concluded between countries, the Contracting States have embraced «subject-to-tax» clause, and this would be characterised in two countries in unexpected way. Non-taxation is a consequence of the application of existing guidelines of law in a legitimate situation and hence cannot be considered substandard. On the other hand, whether it is conceivable to examine that kind of circumstance reasonable and transparent. From the economic point of view, non-taxation is undesirable for the economic proficiency and stability of the state. That kind of situations concerns those who can profit from the gaps of the particular provisions of DTC and not all entities with the same kind of income, but derived under different conditions. Concerning that example, I would like to consider how DTT is realised in domestic legislations of Finland and Russia and affects theirs economic relations.

Occasionally the effects of tax treaties, which were originally concluded to avoid double taxation, exceed double taxation. Tax treaties may lead to non-taxation if either the source state or the state of residence does not exercise its taxing right with respect to certain items of income, in a situation where the applicable tax treaty impedes the other state from taxing the item. Double non-taxation may be the result of the provisions of the domestic tax laws of states concerned. Good example would be shown in the domestic tax law of Finland where it is not

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[61] *Ibid*
[62] *Ibid*

allowed taxing Finnish source capital gains of non-residents from movable property. The capital gains thus remain totally tax-exempt, if the taxpayer is a resident of a state, which does not tax capital gains.[63] In its turn, the tax legislation of Russia does not contain any rules aimed at avoiding double non-taxation of a particular item of income either. Russia uses the system of an ordinary credit method to avoid double taxation, according to which income taxes paid abroad are credited against the domestic tax liability. If the source state does not exercise its taxing rights in respect of a particular item of income (how it applies aforementioned situation in Finland), the tax liability will comprise domestic income taxes as there is no foreign income tax to be credited. I would like to summarize that the purpose of any Russian tax treaty is limited only to the avoidance of double taxation.[64]

Another example would be the tax treatment of foreign source employment income of Finnish residents. If the foreign source employment income falls under the scope of the special Finnish domestic law provision of TVL, Income Tax Act of Finland, section 77, six-month exemption rule, the income may be exempted in Finland, even though the income had been exempted also in the state where the employment was exercised in. That would be reasoning to tax the foreign income in Finland, but it is exempted based on. With the respect of tax treatment of domestic income derived by a non-resident of Russia, the legal situation is not so much transparent. Russian tax authorities overcome cases of effective double non-taxation. The application to be used by the foreign income recipient in a refund procedure contains a check-the-box clause with respect to the taxability of Russian source income in the state of foreign taxpayer's residence. As no explanation on filling in the form are provided in the materials of the tax administration, it is unclear whether refund will be denied in cases of effective non-taxation or whether a distinction will be made between non-taxable income, income that is effectively not taxed or exempt income. For Russian source income that is effectively not taxed no guidance exists as to whether a difference will be made between income that has been reduced by a loss carry forward and income that is not taxed as a result of a qualification conflict. The domestic subject-to-tax clause contradicts the law as no such requirement is mentioned in article 312 (2) TC.[65]

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[63] Helminen (2003), *supra nota 47*.

[64] Polivanova-Rosenauer T. (2003). Avoidance of double non-taxation in Russia. *Avoidance of Double Non-taxation.* (Ed.) M., Lang. Vienna: Linde Verlag, p 295-319.

[65] *Ibid.*

According to K. Vogel, a tax treaty, as a rule, does not create in itself a new tax liability, which is not established by national tax law, as well as cannot change or expand the existing rules[66]. Nevertheless, the national tax legislation of the state may provide that if the tax treaty permits the collection of tax, which does not otherwise occur due to the action of national legislation, the rules of tax treaties in this situation automatically become part of the national law such as in France[67]. By virtue of special provisions in national laws on the location of the source of income, the provisions of tax treaties may replace rules on the origin of the source of income. Such rules moving the source of income to the payer's country of residence, in fact, create a new tax obligation, not provided by national tax law and more onerous taxation in comparison with the situation, as if there was no tax agreement. In the Swiss tax literature, this approach is referred to as the negative effect of tax treaties. This approach is considered unacceptable because, according to the Swiss Constitution, taxes can only be imposed by referendum, and tax agreements do not provide for it. In Germany, constitutional rules restrict the operation of international treaties in the same way - agreements cannot impose more onerous taxation than is provided for by national law.[68]

Non-taxation in the relation between Finland and Russia may also be the result of a classification conflict. The tax authorities of the source state and the state of residency may apply two different income type articles of a tax treaty and may therefore both regard them to be not allowed to tax the item of income concerned. For example, the source state may treat a liquidation distribution from a company as a capital gain, which may be taxed only in the recipient's residence state. At the same time, the recipient's state of residence may treat the liquidation distribution as a non-taxable direct investment dividend or return capital. It would occur the double taxation whether the situation would be upside down. However, in the situation where such an income would not be taxed in Finland it would be otherwise taxed in Russian Federation, as domestic tax law of Russia would apply. If the income should be taxed in Russia, but on the base of different classification of income it could be taxed in Finland as well, as it would be imposed the domestic legislation. Otherwise, non-taxation would occur if the taxpayer were not a Russian resident, so the national tax law would not be in usage any longer.

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[66] Helminen (2003), *supra nota 47*.

[67] Vann, R. J. (1998). *International Aspects of Income Tax. (Ed.) Thuronyi V.* Tax Law Design and Drafting. Vol.2.Washington D.C.: International Monetary Fund, p 718-811.

[68] Gidirim (2017), *supra nota 22*, p 98-107.

The situations of non-taxation arising from the application of the DTC, it can be divided into two parts. The first one is intentional, in which the income is exempt from the provisions of the specific DTC. I suppose that this kind of non-taxation cannot be considered as undesirable.

According to Belgium Tax Code for the purposes of Art.156 ITC 92, a provision granting unilateral tax relief in Belgian domestic tax legislation for income acknowledged and taxed abroad. The case law and the Belgian tax administration agree that the word 'taxed' defines that the essential income must have been subjected to its normal tax regime in the country of origin. Income will be then considered as 'taxed' even if, by virtue of the applicable foreign law, taxation occurred on a lump-sum basis, or if certain parts of the income, which would have been taxable in Belgium, are exempted abroad or even if the whole income is explicitly exempted from tax. In other words, exempted income is regarded as equivalent as taxed income. Only the income, the regime of which is not determined by tax law, will be regarded as non-taxed. As an exempt with respect to Belgian resident, Belgium must exempt the income arising in the other country, except dividends, interest and royalties to the condition that this income has been taxed, but with respect in the other country. For instance, the wording 'may be taxed' still used whether a difference in meaning has arisen. In decision of 19 September 2000, the Court of Appeal of Antwerp decided that the words 'may be taxed' in the DTC with Korea could mean 'non-deductible'. A Belgian resident had received alimonies from her ex-husband resident in Korea. It was not disputed that this kind of income was subject to the 'other income' provision of the Korean-Belgian DTC. Said provision grants the power to tax to the beneficiary's state of residence, but also allows the source state to tax said income. The court then considered article on the elimination of the double taxation of DTC, under which Belgium must exempt income; which must be taxed in Korea'. It appeared that the debtor of the alimonies was not able to deduct said payments from his income. The court inferred that the sufficient income had been taxed in Korea, but in the reality, it was not, then it was no longer taxable in Belgium.[69]

The other issue whether that kind of situation is unintentional, is more complicated, because of the distorted subject-to-tax provision or the fact that the income is attributed to the different taxpayer under the domestic tax law of the state of residence as it is under the tax law of the source state, as in the Finnish example.

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[69] Bertin, O., Bosma, H. (2003). Avoidance of double non-taxation in Belgium. - *Avoidance of Double Non-taxation.* (Ed.) M., Lang. Vienna: Linde Verlag, p 33-51.

What are consequences if, initially, taxes are levied in one state and the other state therefore does not have any taxing rights, and the after a successful appeal the tax authorities of the first mentioned state change their assessment and refund the taxes. Does it mean that the other state now have the right t tax? What happens if due to domestic timing limits, the tax authorities of the other state are prevented from the levying taxes? In case of any dispute in connection with taxation power for an item of income or in case of doubt in this respect, it is likely that both tax authorities will assess tax 'out of security' in order to prevent their assessment from being time-barred. If this were not the case, nothing would prevent tax authorities of state from establishing an additional assessment in hands of the taxpayer who obtained tax refund in the first state, and therefore become taxable in the second state on the item of income concerned by virtue of the application of DTC. This could be considered like possible solution of avoidance of double non-taxation. [70]

In my perspective on account of conceding to subject-to-tax clauses in the treaty that the Contracting States expect to keep away from double non-tax assessment. Utilization of subject-to-tax clauses regarding conclusion with such tax treaties containing these provisions may be reasonable in solving this issue of double non-taxation. The fact that there are various definitions of subject-to-tax clauses in Austrian tax treaties, for instance, seems risky. This leaves gaps in the interpretation of these clauses, consequently, leading to ambiguities for taxpayers. The question also emerges whether there can be a standard interpretation for all these clauses, the formulation of a uniform subject-to-tax clause and a general definition of how this term should be interpreted. The provision of the Article 23 of the OECD Model Convention must not serve as a model; since there are legitimate doubts, as to whether this provision should be considered a subject-to-tax clause.[71] All above-mentioned reasoning lead to improvement of state actions against opposition of these effects. Situations of double non-taxation and schemes of artificial transfer of taxable profit from the jurisdictions where such income is actually formed to other jurisdictions, which, again, contributes to the achievement of zero or low taxation, provide the necessities to take some actions.

In order to eliminate and reduce the objectively unfair tax obligations of the residents of the Contracting States at the international level the principles of distribution of tax rights between

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[70] *Ibid*

[71] Herdin, J., Schilcher, M. (2003). Avoidance of double non-taxation in Austria. - *Avoidance of Double Non-taxation.* (Ed.) M., Lang. Vienna: Linde Verlag, p 13-33.

the source state and the recipient state have been developed. In some cases, only one such state has the right to levy a tax. In other countries, double taxation is still allowed, but the income tax rate is limited by certain restrictions. Developed and studied BEPS plan by the OECD should promote the settlement of conflict situations between the countries and to have an impact on domestic legislation and international commitments of a wide range of countries including countries that are not members of the OECD. Preventing the provision of contractual benefits in inappropriate circumstances is a central and crucial element of the BEPS action plan.[72]

In cases where companies registered in countries with tax treaties with the source country play a technical role, transferring all or a significant part of the income to third and especially to offshore jurisdictions. It is currently accepted abuse of tax agreements.[73] Manipulation of the rules of international treaties limiting the tax rate at the source of payment or exempting from it leads to the fact that the profit of an economic entity is actually formed in one country, but for fiscal purposes is concentrated in another. There is an artificial displacement of the profit centre (usually in tax-free or low-tax jurisdiction). As a result, the benefits of tax treaties are actually enjoyed by persons who do not actually have rights to do so who are not residents of the countries participating in the agreement, which in BEPS plan terminology is called ‘treaty shopping’.[74]

In order to counteract these practices BEPS proposes the sixth action plan:

1. develop model regulations and recommendations for States to prevent the provision of benefits under international tax treaties in inappropriate circumstances (e.g., for improper purposes, to improper entities);
2. indicate that international tax treaties are not intended to create situations of double non-taxation. This purpose should be directly included in the texts of tax treaties and taken into account in their interpretation;

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[72] *OECD BEPS Action Plan - Moving from Talk to Action.* KPMG e-Journal. Accessible: https://home.kpmg.com/xx/en/home/insights/2015/10/oecd-beps-action-plan-taking-the-pulse-series.html - article, 1 November 2017.

[73] *Russia issues new version of draft law on BEPS Action 13 Implementation.* Ernst & Young Global Limited. Accessible: https://www.ey.com/Publication/vwLUAssets/Russia_issues_new_version_of_draft_law_on_BEPS_Action_13_implementation/$FILE/2016G_02786-161Gbl_TP_Russia%20issues%20new%20version%20of%20draft%20law%20on%20BEPS%20Action%2013%20implementation.pdf , 9 September 2016.

[74] *OECD BEPS Action Plan (2017), supra nota 72.*

3. complement the OECD Model tax Convention on taxes on income and on capital and general anti-abuse rule, limitation of benefits rule and principal purpose test.[75]

Since 1 January 2015, BEPS plan has begun to implement into Russian tax code. It has been amended to clarify the procedure for the application of double tax treaties. In particular, the notion of ‘person with an actual right to income’ was introduced. For the lawful use of incentives and exemptions of double tax treaty, a foreign organization (recipient of income) must provide the withholding agent paying the income the confirmation of the fact that this organization has the actual right to receive the corresponding income. These measures are intended to limit the use of transit schemes, in particular, during paying dividends, interest and royalties[76]. The law on countering illegal financial transactions adopted in Russia, the planned introduction of the concept of unjustified tax benefit into the Tax Code of the Russian Federation and the Criminal Code of the Russian Federation - liability for its receipt until the confiscation of property, tightening the principles of double taxation. In order to disclose the final beneficiary can seriously undermine the foundations of mechanisms to ensure the economic security of offshore business. With regard to the Russian Federation testifying information on income received by foreign organizations, and the amounts of taxes withheld from the largest taxpayers by the interregional Inspectorate of the Federal Tax Service, a significant proportion of funds transferred abroad is sent to low-tax jurisdictions in the form of dividends, loan repayments, interest on loans, coupon payments and royalties.[77]

I obtain some hypothesis concerning the issue of double non-taxation and BEPS plan. In my opinion, if profits in a contentious issue between countries avoiding double non-taxation was taxed in favour of a country with a lower tax regime, it could create an economic deficit and a kind of offshore relations to countries where the tax rate is lower. What in turn a loss of profits in countries may incur where the tax rate is higher. In order to avoid double taxation, it is necessary to take into account not only the country with a low tax regime, but also beneficiary and pay taxes in the country where the tax activity is registered.

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[75] *Action Plan on Base Erosion and Profit Shifting.* OECD Publishing. Accessible: https://www.oecd.org/ctp/BEPSActionPlan.pdf , 19 July 2013.

[76] *Plan BEPS i ego Znachenie dlya Rossiiskoi Nalogovoi Reformi.* TaxHouse e-Journal. Accessible: http://taxhouse.ru/articles/beps-action-plan/ , 18 June 2018.

[77] *Ibid*

Double taxation could also be excluded by a significant increase in the number of bilateral treaties between the EU Member States on avoidance of double taxation. However, given huge number of such agreements that are needed to solve the problem, that is not the most effective solution. I believe that more global solution at the EU level is a multilateral agreement or a single agreement within the EU and partner countries. The first option is the creation of a single agreement with a common tax rate between the countries-EU members and changes of internal legislation of the EU with the creation of created a uniform Tax Fund (created specifically for the distribution of taxes between countries). As well as through the introduction of one agreement with third countries regarding the avoidance of double taxation and double non-taxation, in practice, taxes coming to the EU from income or from persons of tax residents of EU countries would go to a single Tax Fund (created by a special institution of the EU). That fund will distribute tax share to the country where the economic activities was provided. Certainly, on the one hand, the interest in doing business can be sharply reduced in one particular country due to, for example, the lower economic situation in the country. However, it can stimulate lower tax rates in this country, in order to attract potential partners and additional investments, as well as for the development of cooperation in the economic sphere between entrepreneurs and enterprises of different countries. Yet speaking about the creation of a single treaty with third countries should apply to a certain group of people and work on a certain category of taxes (direct taxes). Paragraphs of the same single contract should not provide for changes in respect of 'indirect' taxes (for example, VAT).

I believe that this Treaty will help to unify taxation between the EU and third countries will open wider opportunities for the EU in the framework of global cooperation, and since the OECD Model Convention is unified, the implementation of a single agreement will not be burdensome.

In addition, the second option is when the contract is one, but the tax rate of each EU country with third countries remains independent of the fixed tax rate between the EU Member States. Moreover, a multilateral agreement will require considerable effort on the part of the various EU domestic institutions. In the opinion of the commission of experts, their efforts are better spent on changes in legislation. Another one could be based on OECD Model Convention. Regards the taxation of the other income and in case that one state doesn't have capacity to tax that other income on the basis of its domestic legislation, that should automatically mean that the other state of that DTC should have taxing power on that other income and this should be implemented on the national tax legislation.

6. Taxation of E-Commerce

The use of Internet technologies expands business opportunities, and today it becomes how the Internet develops economic space. By means of modern technology, people sell goods and earn money, which means that Internet transactions must be subject to taxation. How to do it? What forms of Internet space control do exist and what are their disadvantages? The digital market is divided into three segments as financial Business-to-Business transactions; retail transactions Business-to-Consumer and transactions between final users Consumer-to-Consumer. In scope of the specifics of digital commerce, the problems arose both at the national and at the international level. According to the OECD, tax systems can be damaged to such an extent that it can lead to a situation where governments cannot meet the legitimate demands of their citizens for social services.

6.1 Digital taxation as a future instrument of tax system

The problem of the impracticability of tax authorities to track down electronic transactions in this case abides unsettled either for EU and Russia. The shortage of accurate mechanism creates a situation where tax evasion potentiality seem to me infinite. Consequently, the formation of lately schemes that enables tax authorities to identify and monitor transactions in cyberspace is indispensable.

This concerns the taxation of digital intangible goods and online services in the segment Business-to-Consumer and Consumer-to-Consumer. E - Commerce is complicated to regulate as the identity and place of residence of the buyer can now be established often only according to a bank card, and if payment is made through an electronic payment system, it becomes impossible at all. In addition, there is a fundamental change in the mechanisms of payment. During the emergence of digital currency - cryptocurrency and its purchases on anonymous unidentified portals, for transactions, which cannot be traced, internet commerce has become even more transparent. Already now it can be exchanged for ‘material’ money, for it, you can buy real objects and products of IP, as well as some organizations have already introduced a system of quotas and incentives, as well as partially pay salaries to their employees through crypto

currency. Then the question arises as to how to tax in the digital world that in fact in the real world does not exist either in fact or in legislation?[78]

6.2 Problems of adjustment of taxation digital economy and domestic tax laws into digital economy of the EU Member States and Russia

As what concerns the EU the BEPS plan largely solves and regulates the problems of tax regulation of the digital segment. As regards to Russia, there are still a lot of issues.

EU legislation indirectly defines digital and electronic products as electronically supplied services and provides an indicative list of such services. Transfer of digital goods is considered as a certain type of services in all member states of the EU. Considering that the European digital tax assessment basis works successfully in practice and correspond to the OECD approach, such rules could be introduced into the Russian tax legislation, where necessary to define the concept of 'Internet trade' or 'e-commerce', and there is no classification of digital products and place of delivery.[79]

The common issue for both EU and Russia is the inconsistency of national taxation at the international level, as the interests of different countries are still too contradictory. The collection of taxes is based on the belief that each state has the right to decide for itself how much it collects taxes from businesses and individuals in its territory.[80] In connection with which most states are engaged in the development of their own legislation for the taxation of digital market, but so far this does not work, because the Internet is the basis for international trade, for the effective regulation of which requires international rules. The only solution to this problem could be unification of tax legislation.

Digital taxation is becoming an increasingly pressing issue today. In a time when states at the national and international level trying to solve the problem of the absence of the user in tax

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[78] *Nalogooblazhenie Tcifrovoii Ekonomiki of Evrope: Novie Nalogi i Uvelichenie Otchetnosti.* OffshoreWealth. Accessible: https://offshorewealth.info/tax-optimisation/taxation-of-the-digital-economy-in-europe-new-taxes-and-increased-accountability/ , 5 March 2018.

[79] ECOFIN: *Presidency Issues Note for the informal ECOFIN Tallinn. Discussion on corporate taxation challenges of the digital economy.* Accessible: https://www.eu2017.ee/sites/default/files/2017-09/Ecofin%20Informal_WS%20II_digital%20economy_15-16.Sept_.17.pdf , 16 September 2017.

[80] Karpova, V. (2016). Taxation in the digital economy. - *Journal of State University of Saint-Petersbourg*, 176-181.

jurisdiction within digital world and the passage of time, this issue will become a matter of priority and as natural as taxation of passive and active regularly income. There will be new international issues that will require resolution, such as the emergence of multiple tax liabilities between countries on digital services that need to be developed in the near future. Not to mention the fact that in addition to the above problems, there are problems copyright (taxation) law, such as illegal posting of other people's music photos, as well as other intellectual property products. Again, the solution to these problems may take a long time, as well as mandatory analysis and study of the digital segment and as a solution to the introduction of new taxes on digital commerce.

Conclusion

This thesis deals with the problem of double taxation of foreign persons in economic relations between the EU and the Russian Federation, as well as the problem of avoiding of such taxation, occurrence of double non-taxation and covers some issue concerning digital taxation.

The collaboration of national tax frameworks can in some cases result to an overlap and double taxation. As we as know- no two tax frameworks are precisely the same. The privilege to assess lies with a purview on a definite jurisdiction. However, the collaboration can additionally leave gaps which outcome the income not being levied anywhere, purported double non-tax collection. Specifically the impacts of expanding globalization and the digital economy establish prospects for organizations to develop the potential outcomes of double non-tax assessment. In the previous years, the concentration has been to evade double taxation as well as double non-tax collection. Therefore, the OECD has defined a 15-point activity BEPS plan. The activity design endeavours to control issues that offer ascent to BEPS and guarantees to empower the refreshing of global tax rules from the single principle of avoiding double taxation and abolishing of BEPS by covering gaps for double non-taxation

The substantial issue occurs for the reason of difficulties of double non-taxation. Taking into account the resemblance between double taxation and double non-taxation, what have to be assessed as resulting in certain cases and contingent environment in the law of the state. It is clear that the double non-taxation is in no way appropriate to the concept of international taxation. The initiative put forward by the EU on a global scale is planned to allow countries to apply their domestic tax rules outside their borders in the fight against double non-taxation. The ongoing tax crisis is inexorable, so some states' actions can be justified in the face of flagrant abuses. Introducing specific domestic rules against tax evasion and non-taxation is the most optimal outcome so far.

Tax evasion in digital Commerce is still one of the open and not very resolved issues. Tax regulation should be in a priority, especially at a time when the digital market is gaining the most influence and even may displace the "real" world market in the future. Given the fact that the Russian legislation is far behind the EU, the integration into the legislation of rules of the European digital tax assessment can be the best and most beneficial situation in the private sector. That will assist the further issues of cooperation between the EU and Russia to build

more transparent economic relations with Russian Federation. In the future, the possible creation of unified tax legislation for the entire digital world, in my opinion, can completely prevent tax fraud, identity theft, cross-border illegal transactions and potential money laundering. Nevertheless, this solution will face sufficient challenges in its realization.

Today, because of the development of the economy and interstate relations, many companies operate on the territory of two or more Contracting States. Therefore, for many enterprises, the state of the tax system of the state in which they want to engage in entrepreneurial activity is relevant. If the government wants to attract foreign investment, strengthen the flow of economic relations with other countries, it is necessary to take care of the improvement of their tax legislation from the point of view of dealing with such situations when one and the same object.

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