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Interpretation of the Convention about human rights protection principles in Ukraine's court practice on tax disputes

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Nowadays 47 countries are parties of the Convention about human rights protection and basic freedoms, signed on November, 4th, 1950 in Rome only by 10 European states. Adoption of this Convention has become a revolutionary event in international law of those days, however it didn't only established a certain index of people's rights and freedoms, resembling the General declaration of human rights, but also created special institutions, authorized to carry out court and quasicourt control after following its principles and examine the claims of individuals versus the states. Naturally, the Convention about people's rights protection and basic freedoms doesn't contain any additional or special rights and freedoms for tax payers. But, a tax payer as a person, enjoys in tax disputes the Convention protection. One can affirm, that the expression "taxation and people's rights" – is oxymoron. We, personally, are of the opinion, that human rights are a fundamental tax aspect.

Human rights are an instrument, which limits governments in their activity and decisions, influencing their citizens. Accordingly, human rights are an instrument, which limits governments in their activity concerning tax payers. Now we are at an interesting stage of development, when we have an opportunity to observe an expansion of main principles of fundamental human rights protection into tax sphere.

Though the European Court on people's rights ascertained in the "Ferradzini vs. Italy" case, that tax disputes as those don't fall under the protection, stipulated by article 6 of the Convention about human rights protection and basic freedoms (the right for equitable justice)[1], but this rule doesn't apply to the suit in the cases about tax or other financial law violation, when a person is fined or his property and money being exacted in indisputable order, in particular. In this context, an interesting is the case "Sidov vs. Sweden" as well, where the Court regarded a private person's deed-poll to pay maximum rate tax as a criminal accusation[2]. In general, analising the Court's practice on all fours, one can make a conclusion, that, as tax penalties cover a great quantity of people, they meet the nature of criminal accusation according to article 6. On the other hand, to meet the criterion, the form and seriousness of legal consequences for the addressee, extent of responsibility, which stipulates imposition of a fine, must play the role of a threat, preventing repeated commision of offence. This doctrine is well reflected in the "Ussil vs. Finland" case decree[3]. Its essence is in the fact, that while solving the question on the application of the Convention's article 6 about human rights and basic freedoms protection to specific legal relationships, which belong to the sphere of procedural law and connected with a person's call to legal account, the Court must decide whether there are any grounds to equate

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[1] Рішення Європейського суду з прав людини у справі "Феррадзіні проти Італії" (Заява №44759/98), "Практика Європейського суду з прав людини. Рішення. Коментарі" 2002, №1.

[2] Von Sydow v. Sweden, 08/10/1987, appl. no. 11464/85, . 9.

[3] Постановление Европейского суда по правам человека по делу "Юссила против Финляндии" (жалоба №73053/01), "Права человека. Практика Европейского суда по правам человека" 2007, № 6, p. 17–27.

the parties relations with those, being formed during criminal cases jurisdiction. It's worth noting, that most part of the European Court on people's rights decrees, concerning tax questions, are adopted as a result of national courts decrees consideration in criminal cases. E. g., decrees in the cases "Merit vs. Ukraine"[4], "Kurt Nielsen vs. Denmark"[5], "Muren vs. Germany"[6] and others.

Indubitably, numerous European Court on human rights decrees, concerning the use of article 1 of the Convention about human rights and basic freedoms, and article 1 of the First protocol to it, conveying diversified content of "equitable justice right" and "amicable property possession right", should be investigated, analised, and practically realized during tax disputes discussion. First of all, the question is about such aspects of "equitable justice right", as "court access right", "the right to consider cases during reasonable term", "reasoned court decision right", "the right to demand witnesses' examination " etc. In its decrees, concerning the noted by declarants violations of article 1, First protocol of the Convention about human rights and basic freedoms protection, the European Court on human rights worked out approaches to practical understanding of such most important legal categories, as the "principle of proportionality and balance of interests guarantee", "effective and dynamic interpretation principle", "quality and foreseeable law principle", "legal distinctness guarantee principle", "certain freedom of national discretion guarantee principle", "autonomous interpretation principle", "consideration of universally recognized standards and international law regulations principle", "ensuring minimal guarantee of people's rights and freedoms principle"[7].

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[4] Рішення Європейського суду з прав людини у справі "Меріт проти України", "Вісник Верховного суду України" 2004, №7, p. 26.

[5] Рішення Європейського суду з прав людини у справі "Курт Нільсен проти Данії": http://eurocourt.in.ua/Article.asp?AIdx=173 (access: 1.12.2017).

[6] Рішення Європейського суду з прав людини у справі "Мурен проти Німеччини": http://taxlink.ua/ua/court/sprava-myren-proti-nimechchini/ (access: 1.12.2017).

[7] М.В. Мазур, С.Р. Тагієв, А.С. Беніцький, В.В. Кострицький, *Тлумачення та застосування Конвенції про захист прав людини й основопо-*

Human rights, as well as tax payers', are protected on three different levels: normative-legal, constitutional, legal-international. The Convention about people's rights and basic freedoms protection has a strong impact on legislation and legal application, including court practice of the countries, which ratified it. But, the meaning of the Convention and European Court on people's rights practice is different in different countries and depends mostly on the level of experience and ability to practical use by its national courts and practicing lawyers.

On July 17th, 1997, the Supreme Rada of Ukraine ratified the Convention about human rights and basic freedoms protection of 1950, which became valid for Ukraine on September 11th, 1997. Since then the role of the European Convention and European Court practice on people's rights in Ukrainian legal system begins to attract attention of scientists, both individual publications and complex dissertation works are dedicated to it. This problem is in the focus of modern state policy, including court and law-enforcement system reformation, legal education reformation, and is a priority support direction on the side of leading international organizations and their centres in Ukraine – Council of Europe Office in Ukraine, OSCE projects Coordinator in Ukraine and others. On a state level this problem is watched over by a Government authorized person in European Court on people's rights. Ministry of justice through the Government authorized person in European Court on people's rights represents Ukraine in European Court when the questions of following the Convention on people's rights and basic freedoms protection are considered and reports about the process of the European Court's decisions fulfilment in the cases vs. Ukraine are taken into account.

In accordance with article 1, Ukraine's Law "About the ratification of the Convention on people's rights and basic freedoms protection of 1950, First protocol and protocols No. 2, 4 7 and 11 to the Convention", Ukraine completely recognizes the efficacy of article 25 on its territory, Convention about people's rights and

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ложних свобод Європейським судом з прав людини та судами України, Навчальний посібник, Луганськ 2006, p. 131.

basic freedoms protection of 1950, concerning the acknowledgement of European Commission's on people's rights competence to accept a statement from any person, nongovernment organization or group, addressed to Council of Europe Secretary General about violation by Ukraine the Convention rights, and article 46 of the same Convention of 1950, concerning the recognition of (being obligatory and without any special agreement) the European Court on human rights jurisdiction, in relation to the interpretation and application of the Convention. Later laws of Ukraine, facilitating the ratification of separate Protocols to this Convention were adopted.

To solve the question about the place of European Court on human rights practice in national law and order of Ukraine a separate law was adopted – the Law of Ukraine "About fulfilment of decisions and use of European Court on human rights practice" of February 26th, 2006. Article 2 of this Law fixed the fact, that Court decisions were obligatory in accordance with article 46 of the Convention. Deliberate non-compliance with the European Court decisions by an official in Ukraine is a crime and stipulates a criminal responsibility according to article 382, part 4 Criminal Code of Ukraine.

But, the decisive role of European Convention and Court practice in national legal system is stipulated not only by the force of Court decisions in the cases vs. Ukraine, but also by juridically acknowledged possibility to use the European Court practice by Ukrainian courts of all jurisdictions during justice administration According to article 17, Law of Ukraine "About fulfilment of decisions and use of European Court on human rights decisions", while considering the cases, the courts make use of the Convention and Court practice as a source of law. This legal codicil is a certain novelty in national legislation, since it establishes the fact, that alongside with Convention legal norms, which national courts should use in their practice as a source of law (a rare event nowadays), the principles of the Court decrees on this or that specific case, being a source of law for Ukrainian lawyers, are fixed as well. This basic principle is developed in other acts of national legislation, either. Thus, administrative legal procedure Codex of Ukraine from June 6th, 2005 stresses directly the fact, that "the Court uses law supremacy principle, taking into account European Court on human rights

practice". In accordance with Criminal-procedural codex of Ukraine of April 13th, 2012 "Supremacy of law principle in a criminal case is used with the consideration of the European Court on human rights practice". Those principles are a normative-legal basis for putting into effect theoretical conclusions about Court's interpretation of human rights practice.

Evidently, with the realization of the European Court on human rights significance as a Pan-European constitutional court by national government (judges included), it begins to pay more attention to the Convention and precedent law of the European Court on human rights. As a result – there appears better willingness to use the Convention directly. Courts in their activity must use the Convention, and judges must know it as well, as the Constitution of Ukraine and other state laws, direct their efforts to the European Court decrees and take them into account while discussing a certain category of cases.

At the same time, as concerns the Convention, the application of interpretational general rules should stipulate its specific character of the notion "collective security" of obligation fulfilment. This, in particular, stipulates the fact, that all the countries adequately adhere to the minimal European standard in questions, connected with human rights protection; this standard develops independently, trying to gain an absolute ideal, reflected in the Convention of 1950 Preamble, and that is why, there appears the necessity of its unified and progressive interpretation. Accordingly, all the countris-participants should use the Convention similarly, in the way it is interpreted by the European Court on human rights. It must be stressed, that the judgements are pronounced not only vs. Ukraine, but all the corps of the European Court judgements is pronounced vs. other countries-participants of the Convention. Otherwise, the revealed violations, having already been recognized by other states-participants, may remain uneliminated, if the Convention on human rights gives the possibility of "snap" improvement of those violations. Such a mechanism allows to realize completely Ukraine's engagements not only before the Council of Europe, but, first of all. before its own citizens. As the judge of the European Court on human rights from Ukraine A.Yu. Yudkivska notes, the

protection of human rights decentralization, the distribution of protection load between the European Court on human rights and national courts is the only adequate answer to those challenges the European Court on human rights meets today, and the guarantee of effective future court and all the mechanism of human rights protection[8].

The analysis of the general jurisdiction national courts practice testifies the experience of Ukrainian judges in the European Court on human rights practice. Though, references to the European Court practice are often general and brief, with not always mentioning the European Court specific decisions with their essential elements, not the less the practice of the European Court as a source of court's position substantiation is increasingly growing. Thus, in every third case for the last 5 years (fiscal agencies being one of the parties), references were made to the European Court practice. But, the questions of corresponding procedures and legal grounds of the European Court on human rights practice, used by Ukrainian courts, are an important and complicated problem. V.V. Onopenko remarks, that there are two ways of the mechanism of such application: first – direct use of the European Court practice, limited only by the Convention standards and the Court decrees on Ukraine, second – legal European Court positions use in court practice of Ukrainian courts[9]. In addition to those two means, we can distinguish the third, so-called "dispatching"one, which only implicitly reminds of the availability of certain European standards on points at issue and doesn't specify it, i.e. without any reference to specific Convention articles and the European Court decrees.

It is essential to pay attention to the principles of the Supreme Administrative court of Ukraine plenary session resolution "About court decision in an administrative case" of May 20th, 2013 No.7, which says, that references to the European Court decrees may also

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[8] А.Ю. Юдківська, *Деякі проблеми застосування практики Європейського суду з прав людини в Україні*, "Право України" 2011, No 7, p. 79.

[9] В.В. Онопенко, *Механізм захисту прав людини в Україні потребує суттєвого удосконалення (виступ на Міжнародній конференції)*, "Право України" 2011, No 7, p. 66.

be used in the motivational part of the decision by administrative court. The court must take into consideration, that reference in itself to the principles of legislation, in motivational part, without proper motives of certain norms use or other norms disuse, referred to by the party, grounding its demands, can't be of proper juridical qualification[10]. In other words, the courts must give grounds for the references to the European Court decisions expediency in every specific case. Here appears the necessity to determine criteria of such a reference expedience, namely, the Convention and the European Court on human rights decisions should be used under following conditions: in case of inconsistence between national legislation and the Convention principles and its Protocols; when there are "legal" gaps, concerning human rights and basic freedoms, determined in the Convention and its Protocols, in national legislation; to understand better the principles of national legislation, which were changed or supplemented on the basis of the European Court decisions; for practical realization of such main principles of the Convention, as supremacy of law, justice, correct balance, fair satisfaction, as those are new categories in Ukrainian legislation.

Let's take as an example the period of the first years of transport tax application in Ukraine[11]. The docket analyses shows, that in courts of the first instance the taxpayers appealed against notifications on transport tax approximately in 40% of the cases, and in courts of appeal approximately 50–60% of such actions were to be satisfied. The foundation for such quantity of appeals was laid by lawmakers. First, the lawmakers, trying to reduce the quantity of taxes and having not included it into the list of local taxes, fixed by article 10 of tax code of Ukraine as an independent element, put in doubt the very lawfulness of its jurisdiction. Second, the introduction of transport tax didn't meet the Codex decisions on local taxes introduction by local councils.

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[10] Постанова пленуму Вищого адміністративного суду України "Про судове рішення в адміністративній справі" від 20.05.2013р. № 7:http://zakon2.rada.gov.ua/laws/show/v0007760-13 (access: 1.12.2017).

[11] И.И. Бабин, *Современная система местных налогов и сборов Украины*, "Societas et Iurusprudentia" 2016, Volume IV, Issue 3, p. 28–29.

The Supreme administrative court of Ukraine, considering the case of transport tax charge, used to disputable legal relationships (in its finding of August 30th, 2016, case No. K/800/8077/16) the European Court decrees in the cases "Serkov vs. Ukraine" and "Shchokin vs. Ukraine". Those decrees revealed the violation of article1, First protocol to the Convention, since public authorities showed preference for the less favourable national legislation interpretation, which lead to imposition of additional tax obligations on the declarant. Taking into consideration the European Court on human rights practice, which had formed on the basis of imperative rule about taking a decision for the benefit of taxpayers, while interpreting such taxpayers' rights and obligations ambiguity, and the European Court decrees role as the source of law in Ukraine, the Supreme administrative court of Ukraine panel of judges considered it unlawful to impose a transport tax obligation for 2015 on transport means owner[12].

The above mentioned example as to the Convention principles use and the European Court practice isn't universal and exhaustive. But the European Court practice use by Ukrainian courts proves the fact, that the courts are able to ensure equitable court protection, directed to: to gain balance between people's rights and freedoms – on the one hand, and observation of these rights by the state – on the other hand; high level jurisdiction to guarantee people's right for equitable justice; support of essential legal potential of the Convention principles and the European Court on human rights decrees.

At the same time, the analysis of court practice allows to say, that there are a lot of cases of one and the same European Court decrees ambiguous interpretation by national courts of Ukraine. Different interpretation of the same legal European Court positions appears in the decrees of the same national courts of Ukraine. Thus, in the Resolution of January 31st, 2011 No. 14/11 in the

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[12] Постанова Вищого адміністративного суду України "Про визнання протиправним та відміну податкового повідомлення-рішення" від 30.08.2016р. № 826/22028/15, K/800/8077/16: http://search.ligazakon.ua/l_doc2.nsf/link1/AS160241.html (access: 1.12.2017).

case on ZAT "Mukachivskyi lisokombinat" action against Mukachiv amalgamated state tax inspection in Transcarpathian region about the acknowledgement of the notification being invalid, the Supreme Court of Ukraine made a conclusion, that "valid legislation of Ukraine doesn't consider the dependence of a taxpayer's right for tax credit from the observation of tax legislation regulations by other object of economic activity, which wasn't a supplier of goods without surplus value, included by a taxpayer into tax credit." The Supreme Court of Ukraine stressed in its decree, that such a conclusion "correlates with the European Court on human rights practice. So, in the case of "Bulves AD vs. Bulgaria" (writ No. 3991/13) the European Court in its decree of January 22nd, 2009 stressed, that a taxpayer mustn't feel the consequences of a supplier's inability to fulfil his tax obligations and, as a result, to pay the fine and the surplus value tax for the second time. In Court's view, such demands became an excessive load for a taxpayer, and it frustrated the equitable balance between public interests demands and proprietary right demands"[13].

But, in the resolution of January 26th 2016 in the case No. 21-4781a15, 2a-15327/12/2670 on TOV "Inbud-XXI" action against state tax inspection in Solom'yanskyi region, Main Board of State Fiscal Service of Ukraine in Kyiv, about cancellation and recognition tax notifications as those being unlawful, the Supreme Court of Ukraine changed essentially its legal position in the cases, concerning the endorsement of tax credit on fictitious nature operations with counteragents. The Supreme Court of Ukraine emphasized the fact, that "a fictitious enterprise status is incompatible with entrepreneurial activity, even with formal affirmation of its basic documents. Basic documents, having become the basis for tax credit formation and total costs, made out by a counteragent, whose fictitious entrepreneurial activity is established by Court, can't be recognized as properly drawn up and signed by plenipotentiaries report documents, which certify the fact of acquisition of goods,

[13] Єдиний державний реєстр судових рішень: http://reyestr.court.gov.ua/ (access: 1.12.2017).

activities, services, and that's why it's groundless to ascribe the surplus value tax sums in them to tax credit"[14].

The reasons for the situation may be divided into objective and subjective. Objective reasons are connected with the guarantee of an adequate interpretation of the European Convention principles and content nuances of the European Court on human rights decrees into state language, especially in the part of notional categories reproduction, peculiar to legal systems of the European Council states-members. Subjective reasons consist in the Ukrainian judge's will to inculcate European standards on human rights in home court practice, and it demands a corresponding level of professional sense of justice.

It's worth stressing, that the problem of the European Court decrees high quality translation really exists. According to article 18, Ukrainian Law "About the implementation of the decisions and practice of the European Court application", the courts should make use of the official European Court decree translation, printed in an official edition, or, in case of its absence – original text. But, there's not enough information about courts' providing with the European Court decrees official translations. A publishing house, vouching for the full text translation of the European Court decrees is chosen by the Ministry of Justice on a competitive basis, But, in fact, an official translation of the Court decisions is stipulated only for the decrees in the cases vs. Ukraine. Official translations of the decisions in the cases, concerning Ukraine, are printed in an Official Bulletin of Ukraine and published on an official Ministry of Justice Web-site. At the same time, the Ministry of Justice doesn't ensure the Court decrees translation in the cases vs. other countries. In this connection the courts must consult the original texts of the European Court decrees. The parties may appeal to interpreters, when they refer to the European Court decisions. Then translation adequacy is notarized, or attested by a special translation firm. But not always have judges the opportunity to

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[14] Єдиний державний реєстр судових рішень: http://reyestr.court.gov.ua/ (access: 1.12.2017).

check the translation, whether it corresponds to the original text. Though such practical tendency solves the translation problems of the European Court decrees in the cases vs. other countries, it's dubious to some extent. What is more, in practice lawyers came across ambiguous interpretation and courts references to the European Court on human rights.

Another problem of the Convention principles and the European Court decrees interpretation is the quality of their citing by home courts. Court practice monitoring on administrative courts tax disputes with the purpose to use by them the Court legal positions allows to make a conclusion, that the quality of references to the European Court decisions leaves much to be better. There's no substantiation in the ways of the use of references to the Court legal positions, alongside with incorrect application of legal positions themselves, on the basis of actual resemblance of the cases' "plots", excluding all the complex of juridically significant circumstances. Not the Court decree itself is the source of law for Ukrainian judges, but only its part – *ratio decidendi*, containing legal interpretation of the Convention norm. It's the incapability of Ukrainian judges to single out (among the quantity of them) the Court decisions, which belong to its permanent practice and contain *ratio decidendi*, where the Court doctrinal approaches to the Convention rights and freedoms interpretation are concentrated, that is one of the key reason of the Court practice inappropriate use on national level. Though the supreme courts use European standards of people's rights in their documents, but they don't try to widen the application of these standards by the courts of lower instance. It's an obstruction in the way of the process of standards unification in the sphere of human rights and freedoms, and it doesn't contribute to the lower instance courts' orientation to the right and correct Court positions during legal procedure; in the end, it prevents the realization of the purposes, upon which the ratification of the European Convention and jurisdiction of the Court recognition were directed.

STRESZCZENIE

Interpretacja postanowień Konwencji o ochronie praw człowieka w ukraińskiej praktyce sądowej dotyczącej sporów podatkowych

W artykule przeprowadzono analizę specyfiki inerpretacji postanowień Konwencji o ochronie praw człowieka i podstawowych wolności w praktyce sądów ukraińskich, dotyczącej sporów podadtkowych. W celu praktycznego i skutecznego wprowadzenia postanowień niniejszej konwencji przez państwo, społeczeństwo i organizacje międzynarodowe do krajowego porządku prawnego przeprowadzono zmiany systemowe. Stworzona została podstawa normatywna, która określa obowiązek sądów krajowych w zakresie stosowania prawa, z uwzględnieniem praktyki Europejskiego Trybunału Praw Człowieka, a także korzystania z niego przy interpretacji przepisów dotyczących praw i wolności. Problemy interpretacji postanowień Konwencji i praktyki Trybunału można zredukować do subiektywnych i obiektywnych czynników. Problem o charakterze subiektywnym jest brak odpowiedniego wykształcenia prawniczego i odpowiedniego poziomu świadomości treści decyzji Trybunału, a także zasad i doktryn, na których są oparte. Problem o charakterze obiektywnym obejmuje brak na poziomie polityki państwa odpowiednich instrumentów wdrażania europejskich standardów praw człowieka w systemie prawnym Ukrainy.

Słowa kluczowe: Konwencja o ochronie praw człowieka; podstawowe wolności; Europejski Trybunał Praw Człowieka; interpretacja; praktyka sądowa; spory podatkowe; Ukraina

SUMMARY

Interpretation of the Convention about human rights protection principles in Ukraine's court practice on tax disputes

The article offers an analysis of the specificity of interpreting the Convention for the Protection of Human Rights and basic freedoms in judicial practice as regards tax disputes. Powerful systematic changes have been made towards practical and effective implementation of the Convention principles into national legal order by the state, civil society and international organizations. A normative-legal basis has been created to determine the national courts' duty to use law, with the consideration of the European

Court of Human Rights practice, and to use law while interpreting the principles related to rights and freedoms. At the same time, the carried out analysis of court practice on tax disputes is evidence of insufficient influence of Court standards, superficial and "ritual" application of legal Court positions concerning different human rights, prevailing absence of the references to principles developed by the Court and doctrinal approaches for the appreciation of the situation and promulgation of legal decree. The problems of interpreting Convention principles and the Court practice may be reduced to subjective and objective factors. The problems of subjective nature consist in the absence of appropriate legal training and corresponding level of awareness concerning the Court decrees content, and also the principles and doctrines, on which they are based. The problems of objective nature are those concerning the lack of a proper (not formal) vision of appropriate instruments for implementing European remedial standards in the legal system of Ukraine on the level of state policy.

Keywords: Convention for the Protection of Human Rights; basic freedoms; European Court of Human Rights; interpretation; court practice; tax disputes; Ukraine

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