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EDITORIAL POLICY

The Technical Cooperation Agreement signed by CIAT and the State Secretariat of Finance, the State Agency of Tax Administration (AEAT) and the Institute of Fiscal Studies (IEF) of Spain, provided for the commitment of editing a review that would serve to disseminat the different tax approaches in force in Latin America and Europe.

An Editorial Board formed by CIAT officials (the Executive Secretary, the Director of Tax Studies and Research, the Director of Training & Human Talent Development and Head of the Spanish Mission) is responsible for determining the topics and selecting the articles for each edition of the Review.

The articles are selected, through a public announcement made by the CIAT Executive Secretariat for each edition of the review. It is open to all officials of the Tax, Customs Administrations and/or Ministries of Economy and Finance of the CIAT member countries and associate member countries. Likewise, those members of the MyCiat Community not belonging to any of the aforementioned entities may also participate, following evaluation by the Editorial Council.

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Content

4 Editorial
MÁRCIO FERREIRA VERDI

5 The punishability of companies as a form of social reparation for tax offenses committed
GUSTAVO GINO COLU NERY / TEREZINHA DE SOUZA LOPES BARBOSA

15 Principles of tax law
CARLOS BURITY DA SILVA

27 The unjustified patrimonial increase as an instrument to tax hidden assetsa
SUSSY CALVO SOLÍS

45 The competent authority to declare tax avoidance in Chile and in comparative law
FELIPE RODRIGO CONEJEROS SAAVEDRA

71 Inequality and income taxation in Brazil: A comparative analysis and reform proposals to achieve greater equity
RAFAEL FERNANDO DE CASTILHA ALVES

91 Environmental taxes in Honduras, a taxation perspective and their effects on climate change
EDGARDO ESPINAL

107 Remote review and auditing procedures. Regulations necessary for their integral implementation
CAROLINA GONZÁLEZ GONZÁLEZ / ALESKA PÉREZ GARCÍA

129 The human capital of tax administrations in the exponential era
RODRIGO LUIS GONZÁLEZ CAO

145 Anti-BEPS tax reforms and the WTO: Addressing global tax challenges
ANTONIO LOPO MARTINEZ

157 Deductibility of financial expenses and their tax incidence. International comparison
MARLON MANYA ORELLANA

171 Factors affecting the voluntary use of electronic tax documentation in Chile. Case: Electronic sales and services ticket
MAURICIO ANDRÉS MARÍN ESCOBAR

187 Tax havens: “Tax Quarantine” in domiciles of convenience and base companies. A Peruvian approach
SONIA JACKELINE MIRANDA ÁVALOS

205 Tax reform in Paraguay: Evolution, reforms and challenges. Period 2018-2022
OSCAR ALCIDES ORUÉ ORTIZ / DIEGO DAVID DOMÍNGUEZ VERÓN

219 Subjects without operational capability (SSCO) the effective procedure to combat fictitious operations. New legislation applicable in Peru
ALAN AUGUSTO PEÑARANDA IGLESIAS

239 DeFi regulation proposal: Stimulating financial innovation with transparency and tax liability
VINICIUS RODRIGUES REGGIO

255 Tax and customs compliance risk management and institutional risk management: Concepts, similarities, differences and integration with strategy
ANDRÉ LUÍS THERESA

Editorial

Dear Readers,

We are pleased to present to all the tax administrations officials of the members and associates member countries of our organization and, in general, to the entire international tax community, the Tax Administration Review that is published as part of the Technical Cooperation Agreement that CIAT maintains with the State Secretary of Finance, the Institute of Fiscal Studies (IEF) and the State Agency for Tax Administration (AEAT) of Spain.

This edition presents sixteen (16) articles: The punishability of companies as a form of social reparation for tax offenses committed; Principles of tax law; The unjustified patrimonial increase as an instrument to tax hidden assets; The competent authority to declare tax avoidance in Chile and in comparative law; Inequality and income taxation in Brazil: a comparative analysis and reform proposals to achieve greater equity; Environmental taxes in Honduras, a taxation perspective and their effects on climate change; Remote review and auditing procedures. Regulations necessary for their integral implementation; The human capital of tax administrations in the exponential era; Anti-BEPS tax reforms and the WTO: addressing global tax challenges; Deductibility of financial expenses and their tax incidence. International comparison; Factors affecting the voluntary use of electronic tax documentation in Chile. Case: electronic sales and services ticket; Tax havens: "Tax Quarantine" in domiciles of convenience and base companies. A Peruvian approach; Tax reform in Paraguay: Evolution, reforms and challenges. Period 2018-2022; Subjects without operational capability (SSCO) the effective procedure to combat fictitious operations. New legislation applicable in Peru; DeFi Regulation Proposal: Stimulating financial innovation with transparency and tax liability; Tax and customs compliance risk management and institutional risk management: concepts, similarities, differences and integration with strategy.

We appreciate the great reception given to the call to submit contributions for this edition of the Tax Administration Review.

We reaffirm our commitment to disseminate information of interest that contributes to learning and stimulates the transfer of useful knowledge for the international tax community.

Márcio Ferreira Verdi
Director of the Review

The punishability of companies as a form of social reparation for tax offenses committed

Gustavo Gino Colu Nery
Terezinha De Souza Lopes Barbosa

SYNOPSIS

This paper analyses the punishment of companies, as way of social reparation for damages caused by tax crimes. It analyzes the termination of the punishment for tax crimes through the payment of tax debts and the closure of criminal actions as a result. It compares the Brazilian model to the models of other countries. The study concludes pointing to the need of creating a more modern and efficient tax criminal legislation that can discourage the practice of tax crimes and to hold companies responsible directly with its assets for harm done to society.

KEYWORDS: Tax crimes, Punibility, Criminal action

CONTENT

Introduction
1. The problem of tax crime
2. Tax crime in Brazil
3. Extinction of the penalty and suspension of the punitive claim
4. Comparison with models in other countries

Conclusion

References

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INTRODUCTION

According to the Federal Constitution, the Brazilian State has as its fundamental objectives the construction of a free, fair and solidary society, guaranteeing national development, reducing social and regional inequalities and promoting the good of all, in addition to having the constitutional duty to guarantee the basic conditions and social rights of education, health, housing, transportation, public safety and social security, among others. (BRAZIL, 1988).

The State needs economic and financial resources for the creation and maintenance of an adequate institutional structure, the development of its essential activities and the provision of public services to society as a whole. These resources are obtained, for the most part, through the collection of taxes and social security contributions. However, many individuals and companies deliberately act fraudulently to omit, suppress or reduce the payment of their due taxes.

The aforementioned illicit practices constitute tax crimes, which must be combated by the State and widely rejected by society. Much more than that, these crimes should not remain unpunished by the State, nor by the society. They must be charged with penalties that effectively discourage their occurrence and make their repetition impossible.

The process of determining responsibilities and punishing the agents responsible for tax crimes involves many stages, from the formalization of the tax representation in criminal matters, by the Brazilian Tax Agency (Brazilian Federal Revenue Service), through the denunciation offered by the Public Prosecutor's Office (Federal Public Prosecutor's Office) and the investigations by the National Police (Federal Police), culminating in criminal actions. Criminal actions constitute the main mechanism of the Brazilian State for the sanction of crimes committed against the tax system and social security.

However, this current Brazilian system, besides being very costly, in fact, has not been able to punish those responsible for tax crimes, much less repair the damage caused to society. Taxes evaded by companies end up being diverted to third parties or applied to the company's own assets, in the form of investments and other undeclared financial contributions. It is very common for directors, accountants and representatives of the company to be replaced over time, which hinders the process of determining the responsibilities of the agents in charge and the attribution of the offenses to those actually responsible.

The results of the research in this study point to the main factors that contribute to tax evasion and address the problem of impunity for tax crimes in Brazil, which occur as a result of an inefficient and obsolete model, with legal provisions and regulations that exclude penalties and with legal precedents that protect and shield those involved. The comparative study of the Brazilian model with models from other countries shows the reality of other tax administrations, how the sanctioning system works in these countries and what successful measures they have adopted.

The study concludes by presenting proposals for the revision of Brazilian tax and criminal tax legislation, as well as sanction alternatives, considered to be much more modern and effective, which could be applied in Brazil, and the possibility of direct compensation promoted by the companies involved, as a form of specific reparation for the damage caused to society.

1. THE PROBLEM OF TAX CRIME

The Brazilian State has created a State Taxation model, in which the main instrument for financing its structure is the collection of taxes and social security contributions. With the revenues from these taxes, the State obtains the financial resources to make the necessary investments and promote public policies that are indispensable to change the social reality in a country like Brazil, with so important inequalities.

In this State model, failure to contribute to social solidarity, as provided for in the Constitution and tax laws constitutes a crime which, depending on the situation and conduct, becomes a crime under the law, and is therefore subject to criminal law. The tax crime is born in this context, in which the State depends directly on tax collection to finance its activities, as well as to comply with its prescribed constitutional objectives.

Conceptually, tax offenses can be divided into administrative and criminal offenses. The administrative infraction is the act derived from the non-compliance with the legal rules and constitutes an infringement of the tax legislation, object of the Tax Law. The agent, in this case, is punished with pecuniary sanctions (fines) and administrative sanctions. On the other hand, the tax offense results from a fraudulent conduct of the agent, who acts in an omissive or fraudulent manner, contrary to the law, and may even be practiced in collusion. The unlawful conduct of those who violate the law is a crime, object of Criminal Law, and must be investigated and punished with criminal law actions.

It can be seen that there are two spheres of action, each with a specific object and procedural treatment. The acts practiced in the tax sphere may even have some repercussion in the criminal sphere - as an aggravating or mitigating factor in the penalties - but they can never interfere in the criminal process to deconstruct the material fact of the crime, as if it had not been committed.

The criminal process, object of Criminal Law, applied to a fraudulent act, in the field of taxation, must continue with independence and autonomy, considering that the unlawful act, in fact, occurred and was not a legal fiction, as a hypothetical situation and conditioned to future events, or even, a “crime in theory”, as pretended by some defend.

2. TAX CRIME IN BRAZIL

Brazil is a huge country, with a new economy and enormous potential. Compared to other countries, Brazil is still a very new country, but it occupies a privileged position of growth in the world economy. However, the country still has ample structural problems and big challenges ahead.

Statistics show high rates of tax evasion, which together with impunity, divert economic and financial resources that are indispensable for national growth and development. This combination of tax evasion and impunity creates a vicious circle of tax evasion and tax crimes, which implies a loss of reliability in the system and compromises government investments.

It is very important to emphasize that tax crimes only persist and continue to be practiced, systematically and recurrently, because tax evaders know that they will not face sanctions. They are in a comfortable position to continue practicing illicit tax fraud and tax evasion, in the knowledge of their impunity. It is at this point that the need arises for the State to intervene, firmly and forcefully, to combat these crimes.

The first criminal law that dealt with offenses, their classification and the penalties applied was the Criminal Code of 1940. However, the legislator did not criminalize certain conducts, such as embezzlement, as it understood that tax offenses depended on their own criminal classification.

The legal figure of tax crimes first appeared in 1960, with Act 3.807/60, which equated the crime of tax embezzlement with that of embezzlement provided for in the criminal code. Shortly thereafter, Act 4.729/65 instituted a series of tax crimes generically referred to as tax evasion, thus creating the tax crime in Brazil.

However, it was Act 8.137/90 that drafted the regulation of tax crimes in Brazil, providing for tax evasion crimes. The crimes against the tax order correspond to the crimes of tax evasion, embezzlement and fraud, provided for in articles 1 and 2 of Law 8.137/1990. Subsequently, crimes against social security were included in the Penal Code, typified in Articles 168-A and 337-A.

3. EXTINCTION OF THE PENALTY AND SUSPENSION OF THE PUNITIVE CLAIM

The possibility of extinguishing the penalty by payment of the tax is present in the legislation of many countries, which has long been known as self-reporting releasing the penalty. This possibility arises when the voluntary regularization occurs before the tax authority becomes aware of the fact.

In Brazil, the possibility of extinguishing the penalty appears, in the form of a law, from the first allusion to a tax offense. Law 4.357/64, in its article 11, equated certain constitutive facts to tax embezzlement, in an initial reference to the crime of embezzlement. This same law provided for the extinction of the penalty for the payment of the debts, prior to the administrative decision of first instance.

Law 4.729/65, which typified the crime of tax evasion, established several types of tax penalties, and this same law, in its article 2, provided for the extinction of the penalty for paying the tax, prior to the initiation of the tax proceeding in the administrative sphere. Shortly thereafter, this term was extended, by Decree-Law 157/1967, until the first instance sentence. Years later, Law 8.137/90, in its article 14, provided for the extinction of the penalty for payment prior to the introduction of the complaint. However, the aforementioned article was repealed by supervening law - by article 98 of Law 8.383/91.

A few years later, the benefits were extended in Brazil, through several special installment payment programs to allow the suspension of the punitive claim during the installment payment of the tax debt.

In 2000, Law 9.964/2000 instituted the tax recovery program - REFIS. This law regulated the fractioning of debts and the suspension of the punitive claim by the State, which would occur as a consequence of the fractioning. In 2003, Law 10,684/2003 instituted a new debt fractionation plan - PAES - and extended the application of the suspension of the punitive claim to all types of fractionations of tax debts. However, in 2009, Act 11.941/2009 clarified that the payment of the debt would only suspend the punitive claim of the State, and that it would only be extinguished with the full payment of the debt.

Subsequently, Law 12,382/2011 modified the wording of Article 83 of Act 9,430/1996, to establish that the suspension of the punitive claim by the State would only occur if the request for payment in installments was duly formalized prior to the receipt of the criminal complaint. Consequently, the application of the institute of extinction of the sanctioning ability of tax crimes was more restricted and limited to the moment prior to the receipt of the complaint, as provided for in Article 34 of Act 9249/95.

Finally, in accordance with the jurisprudence of the Supreme Court, (Federal Supreme Court - STF), HC 81.929/RJ and HC 116.828/SP, and the Court of Justice (Superior Court of Justice - STJ), HC 362.478 - SP (2016/0182386-0), it was provided that the penalty for tax offenses is extinguished by the payment of the tax debt at any time, i.e., regardless of when it is made. This is because Article 9, paragraph 2 of Law 10.684/03 provides that the payment of the debt extinguishes the penalty, without establishing any time limit.

It is interesting to note that the Brazilian legislator has maintained a more or less uniform position over time, varying relatively little, but always providing for the possibility of extinguishing the punishability of tax offenses through the payment of tax debts. It is almost inconceivable to imagine that the payment of a tax, omitted, suppressed or evaded, would be sufficient to nullify a crime and archive the process.
It is very important to remember that tax crimes have direct implications on tax collection and broad social repercussions.

In this sense, we consider that the legislator makes a serious error by granting the agent of a crime the possibility of ending the criminal action, unilaterally, with the payment of an outstanding tax debt. Indeed, the payment of a tax debt should never give rise to the cancellation of a criminal action, which seems to be a direct interference in the independence and autonomy of the Judiciary, which has exclusive competence to judge its judicial actions.

It is important to highlight that the object of the tax enforcement action is the tax debt and that the action ends with the payment of the debt. On the other hand, the object of the criminal action is the tax offense, and the action ends with the punishment of the offense committed. There are, therefore, two distinct and separate actions, admitting, at most, that the eventual payment made in the first one is considered as mitigating the penalty applied in the second one. It is noted that the tax offense is the result of an unlawful and fraudulent conduct and should not be confused with the full payment of the tax debts determined in the infraction report.

Now, when the person is injured by fraudulent means, the Penal Code admits the possibility of reducing the penalty, if there is reparation of the damage or restitution of the thing but does not provide for the extinction of the penalty, by paying the damage caused. However, for cases of tax evasion, which harm society as a whole, the legislator set an absurd precedent by allowing the total extinction of the penalty for those responsible for the simple payment of debts.

Another key point is found in Order (Ordinance) RFB 1750/2018, which establishes the rules of tax representation in criminal matters related to crimes against the tax order and social security. This normative device establishes, in its article 1°, that the facts ascertained by the tax authority and denounced in the tax representation process constitute a “crime in theory”, which only become a crime, in fact and in law, after the complaint is filed by the Public Prosecutor’s Office (Federal Public Prosecutor’s Office) and criminal action is initiated.

It happens that, according to section 2, article 10, paragraph 2, of this same normative provision, “if the tax debt, corresponding to the criminal offense, is totally extinguished by administrative resolution or payment, the tax representation in criminal matters shall be filed”. Aware of this, when the Public Prosecutor’s Office (Federal Public Prosecutor’s Office) is about to submit a complaint, the persons or companies involved pay the tax debt and can definitively rule out the opening of the criminal action.

This regulatory provision sets a very serious precedent that, in practice, renders useless all the work of the

tax authority and the effort invested in the tax action with the verification of facts, audits, notifications, tax inspections, collection of evidence, analysis and interpretation of data, which are dismissed and discarded with the summary presentation of the process of tax representation in criminal matters.

As a result, tax evaders do not feel intimidated and continue to commit tax crimes, since they know that, even if they are subject to tax assessment and convicted of a tax crime, they can pay the tax at any time, that punishment for the crimes, committed is automatically rescinded upon payment. Tax evaders, aware of the deficiencies of the system and the ease of getting away with criminal action, prefer to take their chances and not collect the taxes owed, practicing tax evasion and tax crimes, with increasing brazenness and the use of sophisticated mechanisms to evade federal audits and auditing.

Individuals or companies committing tax crimes in Brazil are assured impunity, since the current case law allows for the extinction of the penalty for payment of the tax debt at any time. The extinguishment of the penalty for payment of the debt, added to the benefits granted in installments, cause a drop in revenues and, consequently, a decrease in public investment in activities and services essential to society.

It is evident, therefore, that the Brazilian criminal tax system does not fulfill its function of dissuading people from conducting tax offenses, on the contrary, it allows and encourages tax evasion. Therefore, it is of no use for the government to invest so many resources, with a structure of personnel and equipment, with the inspection bodies, with the entire Tax Administration, with the Public Prosecutor's Office and the Judiciary, to end all this enormous work and joint effort, with a simple payment in discharge, without achieving its main objective, which is the protection of the legal common good protected by the Criminal Law.

4. COMPARISON WITH MODELS IN OTHER COUNTRIES

In more developed countries, criminal tax offenses are treated very differently from what happens in Brazil. The penalties applied in these countries are much more severe, there is no suspension of the punitive claim for the payment of the tax debt, nor extinction of the punishability of the tax offense for the payment of the tax debt, i.e., the administrative scope. It is not confused with the criminal area, which are autonomous (CAMPOS, 2022).

The Tax Inspector (Tax Auditor) Flávio Vilela Campos (2022) conducted an important study, in which he compares the criminal tax model in Brazil with models in other countries, in order to study the different models of penalties applied to tax offenses. He systematized these models into 4 different groups:

- "**A** - Countries where there is independence between the payment of the tax and the crime of tax evasion, which may, in certain situations, characterize a mitigating factor or cause for reduction of the penalty. (Campos,2022, p.29)".

  Examples include: Angola, Australia, Belgium, Chile, Finland, France, Japan, New Zealand, Sweden, Uruguay.

- "**B** - Countries where the penalty is extinguished whenever the payment occurs spontaneously before the initiation of the tax action, similar to the spontaneous reporting in Brazil (Campos,2022, p.29)".

  Examples include: South Africa, Germany, Argentina, Austria, Spain, the United States, the Netherlands, Ireland, Italy, Norway, Poland, Switzerland.

- "**C** - Countries in which the penalty is extinguished by the payment of the tax (or institutes with similar effects, such as suspension and subsequent extinction), however, establishes situations and criteria to allow the application of the institute. (Campos, 2022, p.29)".

  Examples include: Cape Verde, Canada, China, Hungary, India, Indonesia, England, Paraguay, Russia.

- "**D** - Countries where the penalty for the payment of the tax is extinguished even after the filing of the "complaint" by the criminal prosecution body (Public Prosecutor's Office). (Campos, 2022, p.29)".

  Examples include: Colombia, Malaysia, Mexico, Panama, Portugal, Czech Republic, Singapore.

This study focused on the characteristics of the countries in group B, in which the countries apply the extinction of the penalty for the tax offense only if the self-reporting occurs prior to the initiation of the tax proceedings. In particular, two countries stand out: Germany and Spain.

In Germany, in addition to self-reporting, by application of the institute for the extinction of the punishability of the tax offense, the agent cannot commit crimes considered serious, such as, for example, withholding taxes above a certain amount per act, practicing tax evasion through a criminal organization crime, repeatedly falsifying tax documents and involving the participation of two public officials of the Tax Administration. In addition, in Germany, the penalty for crimes considered serious is up to ten years imprisonment.

In Spain, the penalties for tax offenses are up to 6 years imprisonment, a fine of up to six times the amount of tax evaded and restriction of other rights for individuals or legal entities. If the tax evasion offense falls under any of the assumptions provided in the Spanish regulations, such as the amount evaded exceeds a certain amount, the practice of tax evasion is carried out through a criminal organization and using intermediary persons, tax havens, zero taxation territories and concealing the identity of the person responsible for the tax, the offense, the amount evaded and the assets of the person responsible for the offense. The fine applied is twelve times the evaded amount.

In addition, Spain has some peculiarities, such as that judges or courts may reduce the penalty up to two months after the judicial summons of the incriminated agents if these agents pay the tax debt and judicially recognize their crimes. The reduction of the penalty also applies to the agents involved in different crimes, related to the tax crime, if they actively and reliably collaborate in the location of other criminals and their assets.

In general terms, considering the models presented and based on the research conducted in this paper, it is clear that the treatment given to tax crimes in Brazil is completely contrary to that which has been given by most of the more developed countries.

It is evident, therefore, that the way in which the Criminal Tax Law is applied in Brazil is very deficient since the criminal prosecution does not achieve its main objective of repressing tax crimes and punishing the agents responsible for these crimes. This shows that the model adopted in Brazil does not pay attention to the importance of the protection, by the Criminal Tax

Law, of a legal asset of such transcendence, financed by taxes, as are the social rights protected by the Federal Constitution (Brazil, 1988).

It is common knowledge that companies that practice tax crimes, in addition to not complying with the law, enjoy unfair competition with companies that comply with their tax duties. That is to say, companies that pay their taxes often cannot survive and end up closing their doors or are forced to also practice the same tax crimes.

Therefore, it is understandable the urgency of updating the referred laws, so that society has at its disposal an effective, adequate and combative Criminal Tax Law in the prevention and repression of crimes against the tax order and against social security, which are conducts that violate the values contemplated in the Federal Constitution and that prevent the achievement of social justice and, consequently, of the Democratic State of Law itself (Zanella, 2022).

Therefore, it is necessary to review the current Brazilian model and modify the criminal tax legislation, including the normative acts that regulate the matter, as well as to adopt measures similar to those of more developed countries, such as Germany and Spain. The tax laws and penalties of these two countries provide for sanctions such as operating restrictions for companies, increased penalties for agents responsible for the most serious and persistent conducts, which prevent the repeated practice of tax offenses, as well as the practice of serious infractions or use of companies in tax havens.

CONCLUSION

The system of criminal prosecution and punishment of tax crimes is still very inefficient in Brazil, showing itself incapable of preventing the commission of crimes against the tax order and social security and of fulfilling its duty to protect the protected legal assets. It needs to be reviewed and updated to eliminate the gray areas and deficiencies that prevent the State from achieving its objectives and promoting tax justice.

The comparative study of the Brazilian model with the models applied in other more developed countries showed that it is possible to create a much better system, with co-responsibility and participation of all, seeking the common good of society. The improvement of the Brazilian criminal tax legislation, as well as the development of more modern and efficient mechanisms, are decisive for the development of a fairer and more egalitarian tax model.

Liability for tax offenses and the reimbursement of losses must be borne by the company and directly affect its own assets, regardless of the penalties that may eventually be imposed on the agents and others responsible for the offenses committed, in any subsequent process or procedural stage.

The profits obtained illicitly through tax evasion should be totally reverted and applied to projects aimed at the neediest population and maintenance of essential services, such as the purchase of ambulances, police vehicles, construction, expansion and renovation of health centers, opening of new hospital beds and purchase of school canteens for day care centers and public schools, as a form of social reparation.

These resources should be allocated to the purchase of supplies, equipment and other goods for the population in need, with mechanisms of direct compensation and concrete reparation for the damages caused to the State and society, with wide visibility, to demonstrate that the laws must be respected by all, that the State is present and fulfilling its role.

As a way of discouraging tax crimes, and depending on the criminal conduct, the judicial authority could also apply the suspension of the activities of the companies involved in these crimes, for a determined period, as well as the restriction of their operations.

Last but not least, the fines and sanctions applied by the judicial authority, in criminal cases, must be maintained, without the possibility of any type of amnesty or subsequent reduction, in order to give greater credibility and reliability to the system, putting an end to the privileges and impunity of tax crimes in the country.

It is necessary to improve the criminal prosecution system and punishability of tax crimes in Brazil, especially by improving existing laws and creating new mechanisms to combat tax evasion, which contributes so much to the growth of inequalities in the country and causes irreversible damage to society.

REFERENCES

Brasil. Orden RFB 1750 de 12 de noviembre de 2018. Disponible en: http://normas.receita.fazenda.gov.br/sijut2consulta/link.action?idAto=96434 Consultado el: 07 de octubre de 2022.

Brasil. Tribunal Superior de Justicia. Quinta Clase. HC 362.478/SP (2016/0182386-0), Relator Min. Jorge Musi. Disponible en: https://www.stj.jus.br Consultado el: 28 de septiembre de 2022.

Brasil. Tribunal Supremo Federal. Primera clase. HC 116.828/SP, Relator Min. Días de Toffoli. Disponible en: http://redir.stf.jus.br Consultado el: 28 de septiembre de 2022.

Brasil. Tribunal Supremo Federal. Primera clase. HC 81.929/RJ, Relator Min. Cézar Peludo. Disponible en: http://redir.stf.jus.br Consultado el: 28 de septiembre de 2022.

Brasil. Tribunal Supremo Federal. Segunda clase. RHC 128.245/SP, Relator Min. Días de Toffoli. Disponible en: http://redir.stf.jus.br Consultado el: 28 de septiembre de 2022.

Brasil. Código Penal brasileño. Disponible en: http://www.planalto.gov.br/ccivil_03/decreto-lei/del2848.htm Consultado el: 07 de octubre de 2022.

Brasil. Ley 8137, de 27 de diciembre de 1990. Disponible en: http://www.planalto.gov.br/ccivil_03/leis Consultado el: 07 de octubre de 2022.

Brasil. Ley 10.684, de 10 de abril de 2003. Disponible en: http://www.planalto.gov.br/ccivil_03/leis/2003/L10.684.htm Consultado el: 07 de octubre de 2022.

Brasil. Ley 11.941, de 27 de mayo de 2009. Disponible en: http://www.planalto.gov.br/ccivil_03/_ato2007-2010/2009/lei/l11941.htm Consultado el: 07 de octubre de 2022.

Brasil. Ley 12.382, de 25 de febrero de 2011. Disponible en: http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/l12382.htm Consultado el: 07 de octubre de 2022.

Brasil. Ley 5172, de 25 de octubre de 1966. Código Fiscal de la Nación. Disponible en: http://www.planalto.gov.br/ccivil_03/leis/L5172.htm Consultado el: 07 de octubre de 2022.

Campos, Flavio Vilela. Estudio Comparativo sobre Extinción de la Pena y Elementos Fundamentales de los Delitos Fiscales: paralelo entre la experiencia internacional y el modelo adoptado en Brasil, CIAT, São Paulo, 2018. Disponible en: https://biblioteca.ciat.org/opac/book Consultado el: 25 de febrero de 2022.

Constitución de la República Federativa de Brasil, 1988. Disponible en: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm Consultado el: 07 de octubre de 2022.

Zanella, Everton Luiz. Protección Penal Deficiente en Delitos Contra el Orden Fiscal, Centro de Apoyo Operativo Penal del Ministerio Público del Estado de São Paulo. São Paulo, 28 de octubre de 2015. Disponible en: http://www.mpsp.mp.br/page/portal/cao_criminal/Articles Consultado el: 07 de octubre de 2022.

Principles of tax law

Carlos Burity da Silva

SYNOPSIS

The academic work on the principles of tax law aims to deepen the knowledge about these principles, their application in Angolan tax law and their contribution to collective needs. The study covers the origin, identification and evolution of tax principles, as well as their functions and essence within the constitutional sphere. The conclusions point out that the effective application of the principles adopted by the State is essential for the advancement of Community tax law.

KEYWORDS: Constitutional law, Tax law, Principles

CONTENT

Introduction

1. Framework
2. Functions of the principles
3. Fundamental constitutional principles
4. The principles of tax law

Conclusion

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INTRODUCTION

Bearing in mind that a page limit has been set, we will be as direct and brief as possible in addressing the elements that we consider most relevant to a better understanding of the matter at hand.

This work consists of an analytical study of the principles of tax law, with the aim of understanding, analyzing and trying to identify the main principles of our tax legal system.

The central object of the research study will be addressed under two sections, the first of which will focus on the main functions of the principles and their essence at the constitutional level and the second will briefly address the main principles of tax law in general terms, as well as their applicability in some cases in our legal system.

For this work we have chosen the inductive method, which at the beginning reflects something particular, such as the case study of our research, the fundamental principles and will culminate in broader conclusions in the course of the study on the topic we have proposed to study.

The Constitution of the Republic of Angola deals with tax matters in a generic manner and its most complete form is found in the supplementary law, known as the General Tax Code.

There is a remarkably close relationship between tax law and constitutional law, especially with regard to individual rights.

1. FRAMEWORK

"(…) Both rules and principles are legal norms because they both say what ought to be. (...) The distinction between rules and principles is, therefore, a distinction between two kinds of norms". Robert Alexy (1993).

Principles can be considered the foundations of the norm, the basis from which the direction to be followed by a certain order is extracted, they are conceptions and intentions for the creation of other norms, the moment when a thing originates.

We consider that the subject at hand has great political, social and, above all, academic relevance. In the political field, there is still an interest of each citizen in the organs of justice in analyzing their "rights" in relation to the status of certain tax credits/payments that they have or may have.

In the social sphere, considering that the principles guide a standard that must be met to ensure greater integrity and when analyzed it will be in a satisfactory and impartial manner.

In academia, the analysis and applicability of these principles to ensure tax justice.

The word principle comes from the Latin principium and means beginning, starting point. In philosophical language, Anaximander introduced the term with the meaning of foundation, cause. It does not indicate the thing, but the reason for the being[1].

In the realm of science in general, principles are "fundamental truths or judgments, which serve as the foundation or guarantee of certainty for a set of judgments, ordered in a system of concepts relating to a given portion of reality"[2].

1 Carvalho, Kildare Gonçalves. Direito Constitucional – Teoria do Estado e da Constituição Direito Constitucional Positivo. 14 ª edição. DelRey.Belo Horizonte. 2008. Pág. 628.

2 Carvalho, Kildare Gonçalves. Direito Constitucional – Teoria do Estado e da Constituição Direito Constitucional Positivo. 14ª edição. DelRey.Belo Horizonte. 2008. Pág. 629.

The Legal Principle, in the conception of Celso António Bandeira de Mello, is “the core commandment of a system, its true foundation, a fundamental disposition that radiates over different norms, composing their spirit and serving as a criterion for their exact understanding and intelligence, precisely because they define the logic and rationality of the normative system, in what gives it its harmonious tone and meaning”[3].

One of the most difficult tasks is to identify a legal principle. Whereas the term “identify”, here in a broad sense, encompasses formulation, *validation* and *application*.

The first difficulty lies in formulating a principle.

Considering the complexity of doing so, some authors present criteria that must be observed in order to identify a principle.

For Josef Esser, principles are “discovered” from a concrete problem, “so that it is the problem, and not the ‘system’ in a rational sense, that constitutes the center of legal thought”[4]. Once formulated, principles must be validated in the light of historical experience[5]. Once formulated and validated, the same principles should be applied to other data so that their existence can then be confirmed in the practical consequences of their application[6]. This is what some call the criterion of fecundity of the principle[7].

Today, to solve each and every problem, we have a principle as a basis, so recognizing, in a way, the task of defining principles is not easy.

We can also recognize here that the term principle has been used in various contexts and with different meanings, and several authors are unanimous in this sense.

However, it is always good to take a look at the story in order to clarify its phases and distinctions.

This time, in order to reach a modern understanding of the applicability of the principles, we identify the following phases: naturalist, positivist, and postpositivist.

In the natural law phase, it was understood that principles had no normativity. They were considered only as guidelines of justice without applicability.

In the positivist phase, principles were derived from laws, but without normative force, they merely filled gaps and helped interpret the law. The Holocaust and various abuses during the Second World War contributed to the twilight of that phase, as the Germans justified their actions in orders based on valid laws since, at that time, law was dissociated from morals and values, consolidated in strictly formal legality.

3 Mello, Celso Antônio Bandera de Curso de Direito Administrativo. 5ª edição. Pág. 450.

4 *Principle and Norm in the Jurisprudential Elaboration of Private Law*, p.9

5 “The first and fundamental basis of proof for the demonstration of the existence of the principle is a behavior observable either in the actual community or in a historically determined class of communities, including the one in consideration, or even, at the limit, in every human society” (Vincenzo Panuccio, Saggi di metodo legale, p.46).

6 Vincenzo Panuccio, ob. cit., p. 41

7 Vincenzo Panuccio hace referencia to the criterion of the fecundity of principles, affirming that “a principle that you do not know is fruitful of juridical consequences (even apart from the effects expressly foreseen) is not, strictly speaking, a juridical principle” (ob. cit., p. 62). The idea is also mentiioned by Boulanger, as Guido Alpa narrates: “But the iron rule that Boulanger observes is the following: a proposition of general tenor has no value and character of principle except when its application can lead to a solution of positive law. [...]. Boulanger therefore sees in the principles an indispensable technical means for the solution of legal problems: verbatim “an indispensable element of fertilization of the positive legal order” (The General Principles, pp. 109-110).

In the post-positivist era, at the end of the 20th century, the theory of principles became especially important, that is, principles became normative, the right to values and morality gained space, being norms from which principles and rules could be extracted. Paulo Bonavides recalls Dworkin's teaching, identifying him as the greatest exponent of this phase:

"(...) Dworkin points out the need to treat principles as law, thus abandoning the positivist doctrine and recognizing the possibility that both a constellation of principles and a positively established rule can impose a legal obligation, (...) contrary to what the classics of positivism did, prejudiced against the legality of principles and, therefore, fully embracing a woefully impoverishing perspective of the theory on the normativity of law"[8].

Over time and with the evolution of law, the principles were recognized as true norms with legal efficacy and direct and immediate applicability (Barroso; Barcellos, 2003, p.149). They ceased to be mere guidelines and became mandates endowed with effectiveness and legality. These commands must be obeyed by all and serve as the basis for the immediate realization of subjective rights.

Principles, as general guidelines of the legal system, are intended to inform and interpret other norms. They emanate from political, economic, and social aspects experienced in society, as well as from other sources of order.

Humberto Ávila clarifies that "principles are not identified with values, since they do not determine what should be, but what is best. Likewise, in the case of a collision between values, the solution does not determine what is due, it only indicates what is best. Instead of the deontological character of principles, values have only an axiological character"[9].

2. FUNCTIONS OF THE PRINCIPLES

Of course, for reasons of time, we will not be able to go into the material we have set out to do in depth and exhaustively but will confine ourselves to the basic aspects that constitute the pillars of the whole edifice of principles that we consider to be the most fundamental.

According to Cláudio Bonatto and Paulo Moraes (1998, p.28), the principles that govern the legal system are seen as a means of better understanding and applying the law in legal relations.

Among the functions performed by principles, the most obvious is the managerial function, which refers to the circumstances in which principles are directed by the entire normative system to achieve a specific objective and can take various facets such as: social, economic, religious, cultural or any other.

Naturally, for reasons of time, we will not be able to delve exhaustively and intensively into the material we are proposing, on the contrary, we will only focus on the basic aspects that constitute the main pillars of the whole edifice of principles. that we consider to be more fundamental.

In addition to these functions, the normative species analysed play a limiting role. Paulo Bonavides explains that "the principle requires that both the law and the administrative act respect their limits and that, in addition, they have the same content, follow the same direction, carry out the same spirit"[10].

The principles also have an integrative or normative function, in the sense of filling legal gaps and, in case of legislative omission, applying the principle as a way of achieving the right.

8 On. Cit. Pág. 238.

9 Ávila, Humberto.A distinção entre princípios e regras e a redefinição do dever de proporcionalidade. Revista Diálogo Jurídico, Salvador, CAJ - Centro de Atualização Jurídica, v. I, nº. 4, julho, 2001. Available in: http://www.direitopublico.com.br

10 Op. Cit. Págs. 258-259

The function of principles is to underpin the legal system in which they are inserted, being one more instrument that acts as the root of the basic ideas that underlie positive law.

In the area of taxpayer guarantees, some principles are essential so that it can be governed fairly. Some principles are constitutional in nature, others are inherent in tax procedure.

In terms of principles, the constitution occupies an important place in tax law, that is, it creates limits on the power to tax, all based on the idea of the public interest.

Luis Roberto Barroso (1998, p.148) points out that: "The starting point of the interpreter must always be the constitutional principles, which are the set of norms that reflect the ideology of the Constitution, its basic postulates and its purposes. In short, constitutional principles are the norms chosen by the constituent assembly with essential foundations or qualifications of the legal order it establishes".

Constitutional principles arise from the basic values of the legal order, which include political-constitutional (fundamental) principles and legal-constitutional principles.

The political-constitutional principles guide the organization of the state, they are the values of the democratic rule of law (respect for fundamental rights and guarantees).

The principles entail a high degree of imperativeness, which to a certain extent denotes their normative, forceful character, imposing an obligatory observance, the violation of which will contaminate the act of the non-conforming public authority with illegality or unconstitutionality.

"Tax Law has a direct relationship with Constitutional Law since it represents the trunk of the legal tree from which all legal branches originate"[11].

It is important to note here that constitutions, as a general rule, have an introductory chapter with the designation of "fundamental principles" in which essential aspects are defined, the characterization of the State, the objectives it advocates, citizenship, etc. Angola's Constitution is no exception to this rule.

3. FUNDAMENTAL CONSTITUTIONAL PRINCIPLES

In the legal relationship, the relationship between the State and the Taxpayer must be developed within pre-established rules and principles. Constitutional tributary principles emerged for humankind in 1215, with the institution of Magna Carta, which imposed limits on the powers of King John, the so-called "landless" of England. The thirteenth century A.D., therefore, represents the beginning of the tax system that is established today, considering that it was from the promulgation of the English Magna Carta that legality ascended as a guiding principle of tax relations, imposing on King John the Landless the duty to respect the limits for the creation of taxes.

Centuries later, in 1628, England published the *Bill of Rights*, proclaiming that "from this date no citizen would be obliged to grant any gift or loan to the sovereign, or to pay any tribute, without the approval of Parliament"; it should be noted that it was the embodiment of the principle of legality, embodied in the categorical imperative of "*taxation without representation*", an expression that was even widely used by Americans during the American Revolution.

11 Harada, Kyoshi, Direito financeiro e tributário.. 7 ed, p.242

A little later, in the Constitution of 1824, the principle of contributory capacity was already contemplated, as established in its article 179 § 15 where "*no one shall be exempt from contributing to the expenses of the State in proportion to his property*". This meant that everyone would have to contribute according to their resources.

Therefore, we can say that the general principles of law were essentially principles of natural law, which the Constitutions accepted and developed in a limited way.

The principle of constitutionality asserts subordination to constitutional norms, so the courts must also obey constitutional principles that are not written in the constitution.

Tax Law, in its functionality, has a relationship of subordination to Constitutional Law.

From our classical understanding of the tax system, we can say that it refers to the set of taxes existing in a given area, referring above all to the regulatory field, that is, to tax legislation, a meaning that appears present in article 101 of the Constitution of the Republic of Angola, when it states that "The purpose of the tax system is to satisfy the financial needs of the State and other public entities, to ensure the implementation of the economic and social policy of the State and to proceed to a fair distribution of income and national wealth", inspired by article 103 of the Constitution of the Republic of Portugal.

Traditionally, the main constitutional requirement is the requirement that general laws on the essential aspects of taxation be created by Parliament or by the executive, with the explicit authorization of Parliament as the representative of taxpayers, as provided for in Article 165(o) of the Constitution (principle of self-taxation, "*no taxation without representation*"). In other words, the creation of taxes and the taxation system is a matter of relative competence of the National Assembly, as set out in Articles 102(1) and 165(1)(o) of the Constitution, and the executive may legislate on taxation by legislative authorization.

We consider Angola's constitution, compared to Portugal's, to be fiscally non-interventionist, which to some extent is understandable given that for decades the country survived on oil revenues to meet collective needs.

- **Principle of legality**

The first and most important principle to be mentioned is the principle of legality, which underpins and permits the existence of all other constitutional principles.

The principle of legality has two subdivisions: precedence of the law and prevalence of the law; the first guarantees that the actions of the Public Administration are based on a previous law and the second prohibits the Public Administration from conducting acts contrary to the law and implies the invalidity of acts that go against it.

It is known that the first official document that clearly contains proof of legality in tax matters is the English Magna Carta of 1215, of King John the Landless, where the nobles and commoners met and drafted a document that contained, among the petitions to King John, the approval of a statute prohibiting the unrestricted taxation by the Crown. without the prior participation and consent of their subjects.

Consequently, due to its antiquity, it can be found in various legislations throughout the history and development of human beings and, consequently, of the State itself.

On the basis of various events from different periods of history, it is possible to dare to affirm that the concept and formation of the State are possible only thanks to the principle of legality, since it serves as a pillar of legal certainty and justice.

In tax law, the principle of legality guarantees taxpayers that no tax can be created or increased except by law, as reflected in Article 102 of our Constitution.

The principle of legality establishes the rights and duties of all citizens.

"The principle of legality generates a subjective public right of citizens to demand that the application or increase of any tax can only be effected by a law approved by representatives of the people elected by direct, secret and universal suffrage. All other acts are excluded. In Tax Law, the principle of reservation of formal right is in force, which consists of a real guarantee for citizens against State interventions"[12].

- **Principle of legal certainty**

Security is one of the basic needs of human beings; Rights can only be exercised if there is security. The fundamental objective of societies that have evolved in terms of democracy is the defense and protection of the rights and freedom of citizens and the consequent disapproval of those who perform acts or fail to look after the interests of the community.

Having a stable and predictable system, in which any person (natural or legal) feels secure in his or her rights and duties, is precisely the perspective that fulfills the principle of legal certainty.

The principle of legal certainty should guide all legal relationships, including those in the business sphere. The State plays an important role in acting as responsible for guaranteeing the fundamental rights of citizens through a solid legal system that ensures the predictability and stability of relations.

Angola is already undergoing modernization and improvement in the provision of public services in terms of organization, including safeguarding security and ensuring that citizens can exercise all other fundamental rights enshrined in law.

- **Principle of legal protection**

The principle of legal protection is based on the idea most favourable to the worker when applying the legal rule. It is one of the most fundamental and protective principles of labour law, and states that protection must be given to the worker based on his or her position as a disadvantaged person in the employment relationship. This principle is divided into three types: the principle of doubt, pro-worker, the principle of application of the most favourable rule and the principle of the most favourable condition, according to which (if there are two rules in the company, the worker can adhere to the more beneficial rule).

It is understood that the legislator wanted to guarantee the minimum level of dignity of the employer, without being subject to the wishes of the employer.

- **Principle of equality**

This principle is reflected in the requirement for equal treatment, i.e. equal treatment of taxpayers in the same income group (horizontal equality), and different treatment, which differentiates taxpayers from different income groups in the socio-economic spectrum (vertical equality).

- **Principle of the Welfare State**

The principle of the Welfare State means that every individual is entitled, from birth to death, to a set of goods and services, which must be provided by the State or indirectly through its power to regulate civil society, for example by guaranteeing rights to citizens such as education, health and security.

The State, as an institution, has the obligation to organize a nation's economy and provide citizens with access to basic services.

12 Meyer-Pflug, Samantha. Curso de Direito Tributário (cood. Ives Gandra da Silva Martins) Curso de Direito Tributário. 13ª ed. São: Saraiva, 2011, p.

4. THE PRINCIPLES OF TAX LAW

It is important to note that the current tax system in Angola originated from Portugal in 1975 as a colonizing country under a one-party socialist regime, where Art. 12 of the Constitutional Law of the Republic of Angola establishes "the tax system based on the principle of progressive taxation of taxes...,"

The tax system of Angola as a whole is made up of a set of legal norms, both inscribed in the Constitution, as we saw above, and dispersed in various Codes and other separate legislation on tax matters, of which we can highlight the following: Constitution of the Republic, General Tax Code, and individual pieces of legislation such as the IRT, VAT, IVM, IP, etc., a set of legal provisions in which the tax system aims to meet the financial needs of the State and other public entities, in order to guarantee the realization of the economic and social policy of the State and to carry out a fair distribution of income and national wealth.

For this reason, there are fundamental principles of tax law, where these correspond to the essential values or rules of an abstract nature that define the main guidelines of the legal-tax system, structuring it and inspiring the respective legal rules in which the following principles stand out.

The set of principles linked to the tax field is overly broad, but we will only mention those that we consider basic.

- **Principle of neutrality**

The principle of fiscal neutrality states that taxes may not alter supply and prices in the market, except for social policy purposes, i.e. they must not interfere with the allocation of market resources through tax collection.

This principle implies that taxation should not cause distortions in the sector of the economy.

In tax theory, the goal is to ensure that certain taxpayers are subject to the same taxation for a taxable event, regardless of where the income is earned. By way of example, the tax transparency regime is one of the situations in which fiscal neutrality is sought to be guaranteed.

- **Principle of fairness**

The word "equity" comes from two Latin terms: Aequitas and aequus. In fact, the word "Equus" means "equal, just", coming from it "Aequitas" which, in turn, has the meaning of "equality, conformity, symmetry".

Equity consists in the willingness to recognize the right of each person equally. It is the way to apply justice to a specific case.

In law, the word "equity" has the same semantic meaning as in common language, but it only conveys a legal status. It is based on equality combined with justice, which prevails over the law to the letter or lack thereof.

Equity is intricately linked to the perspective of material justice and can also be described as the bridge linking the moral universe with the legal universe[13].

Equity should therefore guide the development of rules aimed at allocating the power to tax among States and eliminating international double taxation.

The principle of equity refers to such a wide variety of aspects that it is important to separate two different approaches: inter-nation equity and inter-nation equity.

13 Klaus Vogel, Worldwide vs. source taxation of income – A review and re-evaluation of arguments (Part III), Intertax, nº 11, 1988, p. 393

Each of the above-mentioned aspects of the principle of equity involves specific concerns and extremely specific problems, and their separate approach is therefore warranted.

The principle of equity aims at a fair distribution of income through a progressive tax on it (vertical equity). Those who earn more pay more taxes.

- **Progressivity**

A tax system is regressive when proportionately more is collected from those who earn less.

A progressive tax system is considered when more can be collected from those who actually have more resources, more income and assets, that is, when it is decreed exclusively in the interest of collection, taking into account the ability to contribute.

Most countries, in relation to taxes, tax those with greater fiscal wealth the most. Individuals in general are subject to proportional taxation.

It is considered a progressive tax whenever the tax burden of each taxpayer is higher the higher their income, i.e., the concentration of income is compared with the concentration of the tax burden.

- **Principle of non-discrimination**

This principle is based on the concept of equality and establishes the identification of criteria and reasons why discrimination should not be allowed, i.e. the idea of equity prevails, since discriminatory treatment harms the most basic ideas of justice.

This principle emphasizes the fact that States should avoid discriminating against certain categories of taxpayers for tax purposes.

The general principle of non-discrimination aims to ensure equal treatment for all people in society, regardless of nationality, sexual orientation or disability (Canotilho 2011).

In short, discrimination on the grounds of race, sex, origin or ethnicity, religion, language, political or other opinions, membership of a national minority, etc., is prohibited.

- **Principle of territoriality**

It is known that States exercise their fiscal jurisdiction over all goods, persons and transactions related to their territory, this is the principle of territoriality in a non-fiscal context, that is, the State intends to delimit its sovereignty and the effectiveness of its law in relation to other States in a given territory.

In the field of tax law, it can be said that the same concept applies, with the rule being valid only within the territory, while in our case it extends to the entire territory of Angola, it being understood that there is a limitation in the application of its own rules.

Its hypothesis involves the geographical scope of tax laws on tax relations belonging to a given legal system.

In the classical conception, it is understood that the applicability of tax rules in the territory of the legal system in which they occur does not take into account the criteria of nationality, tax residence or domicile of the person subject to the tax relationship.

- **Principle of residency**

According to the principle of residence, the relevant connection to corroborate the taxing power of a state is the residence in its territory of the holder of the income, this time it is understood that the state has the right to tax the income of its residents.

The term “resident of a Contracting State” means that any person, under the law of that State, is subject to taxation by reason of his domicile, residence, place of incorporation, place of address or any other criterion of a similar nature and applies to that State and its political or administrative subdivisions or local authorities.

- **Principle of nationality**

In the general area of taxation, this principle means that the State of nationality exercises full tax jurisdiction over the taxpayer, i.e. income earned in other States is also taxed by the State of nationality of the taxpayer. Nationality is more than just being born in a place, it is the legal link between the nation and the citizen.

- **Principle of transparency**

Transparency is the result of the democratic rule of law and is a fundamental principle of the idea of democracy. In the relationship between the State and taxpayers and civil society, there must be mutual collaboration and understanding when it comes to fiscal policies. The state needs to collect taxes in a way that respects the rights of citizens and taxpayers, so there must be an ethical framework in place for this link to be consolidated.

Fiscal transparency is an obligation imposed by law and through it we know what the State charges us, as well as the origin and destination of taxes.

This principle implies that, no matter what you pay, whether for services or products, you must be clear about what taxes are collected, their incidence and fees applied.

“A tax system that aspires to be transparent and simple should minimize exceptions and eliminate the number of specific or case-by-case exceptions, as well as the granting of tax advantages to certain taxpayers or specific transactions”[14].

By way of example, in Angola we have the legal regime for invoices and documents of a similar mandatory nature and the applicability of their requirements (Presidential Decree No. 292/18).

- **Principle of reciprocity**

When goods, businesses or valuables are transferred from one country to another with a tax already paid, upon arrival in the country of destination they must be exempt from a new tax on the same legal factor, considering that there is a tax equivalence between the two places. Therefore, this principle applies exclusively at the international level.

“Reciprocity can be general, covering the tax system as a whole or the specific treaty considered as a whole, targeting a specific type or category of income. It can also be formal or effective. In the latter case, there is an equality of effective tax burdens”[15].

- **Principle of efficacy**

This principle is defined as the approval of tax policies with legal mechanisms and instruments capable of generating development and tax justice, with tax collection being a mere natural consequence.

14 Teixieira. Gloria. Manual de direito Fiscal. Editora Almedina. 2ª Edição.

15 Teixieira. Gloria. Manual de direito Fiscal. Editora Almedina. 2ª Edição

The State has the obligation to use public resources in the most appropriate way possible in favor of society, both in its management capacity (correct use of revenues) and in fiscal justice, in order to generate development and greater efficiency in its services.

- **Principle of ability to contribute**

The principle of ability to pay is intended to achieve tax justice. Roque António Carraza[16] states:

> "The principle of ability to pay is within the precepts of the principle of equality and helps to make republican ideals a reality in the field of taxation. Indeed, it is fair and legal that those who have a lot in economic terms should pay proportionately more taxes than those who have little. Those with more wealth should, proportionately speaking, pay more taxes than those with less wealth. In other words, they should contribute more to the maintenance of public affairs. Therefore, people should be taxed in proportion to their assets, i.e., their level of wealth".

Thus, the ability to pay is intricately linked to the principle of equality.

This principle proposes that, whenever possible, the legislator should check the taxpayer's ability to pay when setting taxes. In this way, those who have greater economic capacity to pay taxes should pay more and those who have less should pay less. As an example, the new IRT table reflects this fact, given that those who earn a higher salary contribute more to the value of the tax.

Each taxpayer should only be required to pay taxes to the exact extent of his or her ability to do so. Ability to pay is based on income, wealth and consumption.

16 Course de Direito Constitucional Tributário, p. 94.

CONCLUSION

The recognition of the normative force of the principles is now unique. With the process of constitutionalizing the law, normativity has been reinforced and principles have seen their role renewed as norms alongside rules (post-positivism).

For Karl Larenz, legal principles are described as "guidelines for legal regulation which, by virtue of their own conviction, can justify legal decisions". And, as material juridical ideas, they are special manifestations of the idea of law, as it presents itself in its degree of historical evolution. For this reason, some principles are expressly enshrined in the Constitution or other laws.

The concept of principle is related to the principle of something, following the Latin term principium, which means "origin" or "proximate cause."

Principles are legally recognized sources that function as an important interpretative and normative vector, when enshrined in the domestic system (constitution, laws and regulations) or in an international agreement, the principles of tax law have a wide scope.

The principles are at the top of the normative pyramid and form the foundation of the entire legal system in force. Principles have become the supreme norms of the entire legal system, serving as a criterion for establishing the normative content of all norms. The constitutionalizing of the principles of law represents their positivization at the highest level.

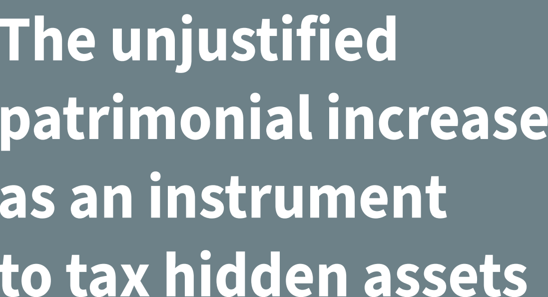
Some principles have been more pronounced in our legal system to increasingly cement justice and democracy, as is the case of the principle of equality, where it is possible to spread greater confidence in this principle in the fight against injustice. Bearing in mind that there are increasingly unequal people, some enlightened, invoking justice, and others covered with the veil of ignorance. As for the principle of equality in Angolan laws and in the Constitution, it has gradually evolved, starting from a merely fictitious and illusory consecration in the first law, in which the ideology and the system adopted contradicted the materialization of this fundamental constitutional principle, the interests of the State were above those of the citizens.

The Angolan Constitution is not very interventionist from a fiscal point of view, which is understandable from the outset for two fundamental reasons: the country lived for many years with a fledgling tax administration and there was a misconception that the country did not need taxes because it has oil, which is much easier to administer and it does not have, Strictly speaking, the satisfaction of collective needs is a sine qua non.

This work leads to the conclusion that the principles are normative and effective and can be applied directly without the need for a norm to materialize them. The norm is the genus of which principles and rules are species.

Principles are norms with a high degree of abstraction that express a fundamental value of a given society and being at the basis of its legal system, limit the rules that refer to it and integrate legal gaps.

The principles are used as drivers of justice, transferring to the legal world the values enshrined by society.



The unjustified patrimonial increase as an instrument to tax hidden assets

Sussy Calvo Solís

SYNOPSIS

The purpose of this analysis is to bring to light a figure of great utility for the Tax Administration that may have ceased to be applied due to lack of clarity in its regulation.

The unjustified patrimonial increase is a relevant instrument that should be strengthened as a means to ensure the taxation of the real economic capacity of a taxpayer, individual or legal entity.

KEYWORDS: Unjustified patrimonial increase, Relative legal presumption, Illicit activity, Tax crime

CONTENT

Introduction

1. Analysis of the figure of the unjustified increase in net worth
2. The unjustified patrimonial increase is configured as taxable income
3. Compatibility between the unjustified net worth increase and the taxation of illicit income
4. Imputation of the tax crime for unjustified patrimonial increase

Conclusion

References

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INTRODUCTION

Under the generality of a tax system and following the majority international structures, every Tax Administration seeks to know and delimit the real estate of a person, whether natural or legal, since, in principle, their economic capacity subject to taxation will depend on it.

In itself, the net worth can be conceptualized as that set of rights and obligations that a person exercises as the owner, whose essential character is precisely the susceptibility to being economically valued (Calvo Vergez, 2012, p.107). In addition, it is subject to constant variations, typical of its conformation, so it could be said that it fluctuates with the passage of time.

Thus, the constituent elements of the net worth, or estate, will be, both the assets, rights or credits, as well as the obligations that a person possesses; its conformation is then composed of positive and negative aspects, which will be in constant variation, depending on which possible gains or losses will be obtained that alter the value of the assets of its owner.

For Calvo Vergez (2012) patrimonial gains or losses are considered those variations in the value of the net worth, on the occasion of any material alteration in its composition. Its generation, therefore, originates when real variations take place and not on mere latent surplus values and, moreover, they are projected on any manifestation of wealth, including those of unknown origin, such as unjustified wealth gain (pp. 21-23).

When net worth gains arise, they are consequently constituted as expressions of wealth, which imply a manifestation of economic and contributory capacity, being considered as income susceptible of being taxed with specific taxes. In this regard, not every net worth increase will be considered by the legislator as taxable income, there will be categories that will be explicitly and voluntarily excluded as such, according to the corresponding legislation.

Therefore, in general, for tax purposes, when the transfers come from onerous transactions, this means that the acquisition of the property or right was managed with pre-existing income that should have been declared by the taxpayer. The opposite case occurs with lucrative transactions, where the recipient only has to fully justify such a situation. In any of the cases, if the owner of the assets increase fails to identify the origin of those profits, tax-related closing instruments of a residual nature have been established that enable the taxation of such income, we refer to the figure of the unjustified net worth increase, which will be analyzed below.

Initially, the scope of this figure, its nature and essential elements for its application will be assessed, followed by its primary consequence, which is the taxation of such income, considering whether this can occur when it is known that the origin comes from illicit activities and the possibility of charging this figure as a tax crime.

1. ANALYSIS OF THE FIGURE OF THE UNJUSTIFIED INCREASE IN NET WORTH

The quantitative increase in the value of a person's net worth, whether physical or legal, made either by an increase in their assets or a reduction in their liabilities, without its owner being able to reliably prove the source that originated it, is constituted in doctrine and in many tax legislations, as an unjustified enrichment, in Spanish *incremento patrimonial no justificado* (IPNJ), Unjustified patrimonial increase.

In itself, the IPNJ is that wealth, visualized in terms of assets, rights and even non-existent debts, which are not consistently related to the tax situation reflected in the corresponding return, that is, it is the materialization of the increase in the value of the estate, potentially translated into taxable income, because it is not justified by the tax return submitted by the obligor.

Thus, the IPNJ is nothing more than the finding of an increase, it could be said excessive or disproportionate

to what was declared, in the value of the assets of an individual or legal entity - that had not been disclosed to the Administration, and that the latter, by virtue of the powers of control, discovers, the holder not being able to reliably justify the source that originated it, leaving therefore, the Administration empowered to tax those incomes.

According to Chico de la Cámara (1999) when the Tax Administration, based on its control tasks, discovers an asset, right, or even a non-existent debt, inconsistent with the declarations of the obligor, or when hidden patrimonial elements emerge, the acting officials are empowered by law to conclude that these are income for the period in respect of which they are discovered (p.155).

In this regard, it should be considered that, during a control process, the Administration focuses on assessing and analyzing the generic accounting equation of *"Assets = Liabilities + Equity"* therefore, in short, the reported income must be consistent with the expenses incurred and the assets owned, so that any deviation in this equation must be justified.

In general, this figure can be classified as a kind of residual mechanism, in such a way that all those hidden incomes whose source is unknown will be attracted and absorbed by this tax figure, thus fighting against the concealment of wealth, and ensuring that no taxable income escapes or ceases to be taxed due to ignorance of its true tax nature.

It can then be indicated that, through the IPNJ, the aim is to prevent, as far as possible, certain income hidden from escaping taxation, by taxing it when it becomes apparent or becomes known. The doctrine points out that this concept is nothing more than a tool granted to the Administration, in order to tax all that income that could have been kept hidden, but that is subsequently discovered through some control or verification process, configuring itself as a mechanism for attracting hidden or undeclared income, the legislator deciding to tax them, in the period in which they are discovered (Casado Ollero, 2008, p.284).

This is then, before a decision of the legislator, who confers the qualification of "current" income to a previous income or incomes that were kept hidden and that through the investigation of the Tax Administration are discovered through certain acquisitions of assets, or through incongruent expenses, which do not correspond to the declarations of the obligor. It is, in short, a mechanism in the hands of the Administration, capable of attracting any undeclared income or asset, to the current scope of tax subjection.

As Sanchez Rojas (2013) states, there are two essential moments in the genesis of the IPNJ: the first is the concealment for tax purposes of part or all of the income obtained; the second is the externalization of these hidden assets, when due to their discovery, the Administration can tax them, if the holder fails to reliably justify them (p.32).

An additional aspect that requires special mention is framed in delimiting the nature of the figure of the IPNJ, in this sense, the majority doctrine does not hesitate to conceptualize this institute as a legal presumption, established by the legislator in order to facilitate the task of the TA in its verification and control activity. The scope of this legal presumption is materialized in that the norm expressly establishes as a basic fact, the existence of an increase in the assets of the obligor, the origin of which cannot be justified, and consequently, it is inferred that this increase in assets is due to income from their activity, which were kept hidden in order not to subject them to taxation.

Criterion that is endorsed by Pérez Royo (1999) who affirms that it is indisputable that the figure of the IPNJ is, in short, a juris tantum legal presumption, which the Administration may apply in order to tax all those incomes that remained hidden, and that, by virtue of the verification process, are discovered, the obligor not being able to justify their origin (p.244).

With this relative legal presumption, the legislator intends to cover all that income that could have been hidden evading the tax obligation, and that by virtue of a control process is detected by the Administration. In this line, by giving it the character of a relative presumption or juris tantum, the IPNJ always admit proof to the contrary, allowing the obligor to provide an explanation and documentary evidence supporting the non-taxable origin of the discovered increase.

By affirming that the IPNJ has the nature of a relative legal presumption, this has led to the consideration that with its application there is a reversal of the burden of proof, and it is up to the obligor to prevent the application of the figure, by providing strong evidence that proves the origin of the increase and justifies its non- taxation. However, another perspective of analysis in relation to the issue is to delimit that far from being an instrument by means of which the burden of proof is reversed, I personally believe that it should be visualized that in reality there is no such investment, and that on the contrary, what operates is the exercise of the right of defense that assists the obligor in order to provide evidence that contradicts the conclusions of the Administration.

In such a sense, the IPNJ would not imply sine qua non the reversal of the burden of proof; on the contrary, its application would result in the obligor having a stage where it can defend itself. Precisely, the IPNJ is a legal figure from which any increase in the assets of the obligor, whose origin or source he cannot demonstrate, is assumed taxable. Thus, the Tax Administration is only obliged to prove the existence of the net worth increase, so it can never presume it; if it is reliably demonstrated that there was an increase, the application of the tax is assumed, as long as the obligor does not prove that the income is already taxed, exempt, not subject or prescribed, this is where the exercise of his right of defense belongs to the obligor, who must prove the source or origin of the increase.

It is at this point where it is also important to mention that, precisely as its name indicates, the increase in assets is an increase in the obligor's assets, which once detected by the Administration, cannot be justified.

Precisely, in this regard, the following questions arise: How could the taxpayer attack the presumption of IPNJ? What would be the means of proof available to disprove this presumption? To answer such questions, we will initially start as mentioned above, in that the presentation of these justifications is not framed as an investment in the burden of proof, but as the full exercise of the right of defense that every taxpayer has, against eventual determinations that the Tax Administration intends to make.

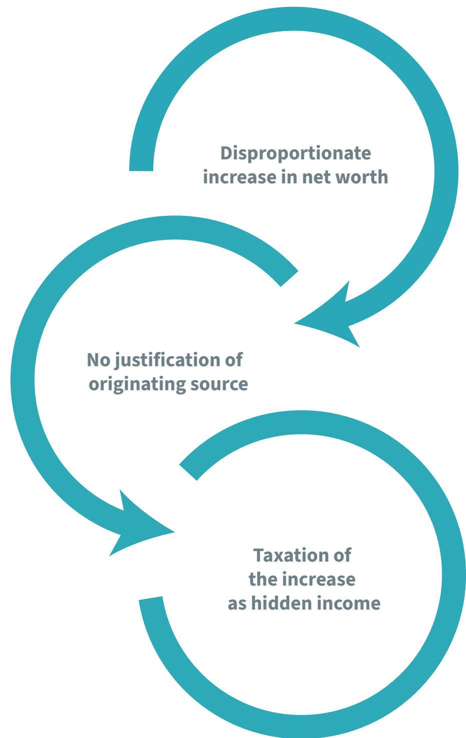
However, delving into the matter, Chico de la Cámara (2015) is clear by referencing that the measures to be deployed by the taxpayer must be aimed at proving, either the absence of ownership of the alleged net worth increases imputed by the Administration, or the existence of this income, but that it does not have the character of being taxed, because it corresponds to exempt or non-taxable income. Likewise, the taxpayer may try to show that, although these incomes do correspond to him and are taxed, they originated in a tax period that is already prescribed, so the Administration lost the possibility of making any determination on it (p.209-2013).

It is indisputable to state that if the obligor manages to prove that the discovered assets do not belong to him (that is, he does not have ownership of the reference assets), or that they were acquired in already prescribed tax periods, or that they are due to elements exempt or not subject to income tax, this hinders the possibility of the Administration to keep applying the presumption.

In this regard, the Administrative Tax Court of Costa Rica, by ruling No. 259-2015 of September 29, 2015, states: *"The contrary evidence that refutes the presumption is not supported by mere justifications and arguments, but must be supported by documentary evidence that demonstrates the following: a.- The precise source that supports, for example, the acquisition of said assets, the real existence of liabilities, or the capital contribution that it declares. To demonstrate only the existence of the net worth*

increase does not constitute a justification. b. That the increase charged by the Tax Administration has already been declared by the taxpayer as stipulated by the law. c. That one of the cases of exclusion - non-taxability - of gross income is presented, for example those established in Article 6 of the LIR. d.- It is an income exempted by law. e.- That the rent was produced in a prescribed period (...)." In short, any justification that the obligor intends to use to undermine the application of the IPNJ must be duly proven and the documentation must supports the allegations affirmed, otherwise it will not have the necessary validity to disprove the presumption.

Precisely, one of the essential elements is that the detected patrimonial increase, which is not consistent with the economic situation evidenced to the treasury, cannot be justified by the obligor, assuming therefore that they are elements or past income that were not declared.



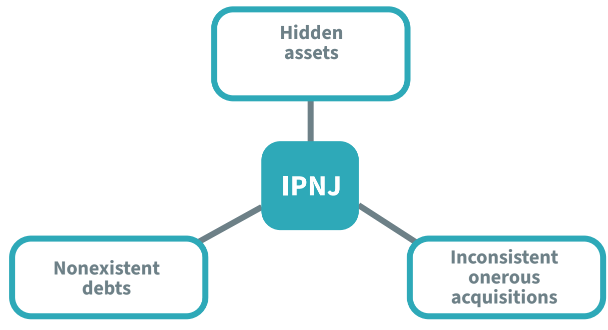
Source. Own elaboration.

Taking into consideration the above, it can be estimated that the IPNJ has been implemented as a tool to combat fraud, evasion and tax evasion, through which it seeks to attract as taxable income, that economic capacity that emerges and that does not have a clear source of origin. In this regard, it cannot be lost from view that the taxpayers who have developed some maneuver to evade the payment of taxes must later somehow reintegrate the undeclared income into their economy and on which they have not been taxed, so that, in such cases, when those incomes "come to light" the application of the IPNJ is enabled.

That is why the maneuvers of wealth concealment, from the grossest to the most elaborate and planned, can be discovered at the time of reinserting the income into the coffers of the taxpayer, so that the use of bank accounts abroad, of merely interposed companies - both nationally and internationally - of front men, the possession of goods by means of interposed individuals or legal entities, excessive consumption and other acts tending to wealth concealment, come to yield to the economic reality that the administration can discover and prove.

2. THE UNJUSTIFIED NET WORTH INCREASE IS CONFIGURED AS TAXABLE INCOME

As Chico de la Cámara (1999) refers, the increases in wealth can usually be detected by means of concrete facts or modalities, according to the following scheme (pp.24 and 92):



Source. Own elaboration.

The materialization of the IPNJ by means of hidden patrimonial elements means that the Administration, through its control faculties, discovers the ownership of goods, movable or immovable, which do not correspond

to what was declared. This situation therefore requires that the value of the asset or the discovered right has not been able to be covered with income from the declared assets until then (Pérez Royo, 2018, p.234). However, it is important to consider that the mere detection of an "unknown" asset for the Administration, cannot ipso facto generate the application of the IPNJ, because the apparent concealment discovered, may in fact not be such, and have various justifications, which leads to establish that not necessarily all concealment of assets has as its origin or source income or benefits obtained by virtue of a non-declared economic activity developed.

With regard to incongruous onerous acquisitions, these imply a breakdown in the logic of *"you can only spend what you have, so you can't buy something if you don't have the solvency to do it"* therefore, this modality arises when the income and wealth declared by the obligor are incongruent with the level of wealth externalized through savings and consumption of the tax period. With this typology, when elements or indications of an economic capacity or a high lifestyle are detected, the Administration can at least question and inquire about the origin of such resources. Chico de la Camara (1999) correctly states that unjustified capital gains are based on the fact that the declarations of the obligor are not consistent with his lifestyle. (p.44).

Sanchez Rojas (2013) mentions that the signs of wealth can be measured from the acquisition of goods such as houses, vehicles, motorcycles, to the ostentation of jewelry, trips, art collections, services such as aesthetic operations and even any consumption that is disproportionate to the status of life evidenced in the corresponding tax returns (pp.62 and 63). However, it is important to consider that onerous acquisitions are not what is subject to taxation, but the manifestation of wealth that leads the Administration to presume that income has been hidden in previous declarations; the tax is therefore focused on the hidden income that materializes through sums of money saved, investments or consumption itself.

According to the above, the application of the IPNJ is based precisely on the existence of income or rents that were obtained and that were not brought to the attention of the Administration, but that are subsequently used as part of consumption, causing inconsistencies between the assumed and the declared standard of living.

Finally, by means of the registration of non-existent liabilities, it is possible to reveal income that had been kept hidden, simulating that these come from an apparent financing, which allows to continue with its concealment for tax purposes. Therefore, the detection of this modality supposes the study and exploration of the economic and accounting situation of the obligor, basing the analysis on the registered liabilities and the reality that supports them, since if it is discovered that the established records constitute mere accounting notes and do not have a real support, the Administration concludes that its generation is intended to disguise the existence of income that has not been declared.

It is clear that the accounting record of non-existent liabilities, that is, of amounts that were not really entered, is an option to bring to light income that has been kept hidden from the Administration, and thus justifies the obtaining of economic means that allow the acquisition of goods or rights, under the cover of a simulation of liabilities.

In another order of ideas, in the application of this modality, a core aspect must be taken into consideration, and emphasis is placed on distinguishing the presence of a false liability to cover up the existence of income hidden from the TA, and the existence of false liabilities used solely for the purpose of reducing the taxable base on which the tax rate is applied and that originates the material tax obligation borne by the obligor. This is because the first situation is the one that enables the determination of the IPNJ while the second only entails the ignorance of the registered expenses without support. In this regard, the doctrine outlines that, if the debt is completely false, and its inclusion in

the return is not intended to justify a hidden income, but to reduce the fee to be paid, it is obvious that in this case there will be no unjustified gain of assets, but false deductible items that must be corrected by the Administration (Pérez Royo, 2018, p.235).

Accordingly, the application of the figure of the IPNJ can be generated or detected by any of these three options that have been detailed, which does not mean that it can only subscribe to these, because the conducts and forms of evasion or avoidance that are used turn out to be changing and adaptable to new methods that allow hiding their income generation in any way.

Under this understanding, the hidden net worth elements, the non-existent onerous acquisitions and the non-existent debts or liabilities previously referred to are nothing more than mere references that both doctrine and administrative reality have detected as means of applying the IPNJ, and others may also exist.

Now, it is possible to reiterate that in order to apply the aforementioned figure, the Tax Administration must comply with a series of acts that allow it to verify some specific facts on which the origin or not of the IPNJ will depend, delimiting them in such a case as applicability requirements, which must be specified in the regulations that establish the application of this figure.

Thus, the figure of the IPNJ indisputably supposes that the Tax Administration manages to reliably demonstrate the existence of some net worth element that reflects differences between the amounts declared by the obligor and the real net worth detected. Therefore, in practice, when the Administration intends to apply the IPNJ, it is obliged to prove the holding, possession, and/or acquisition of a good or right, which is disproportionate to the declared income and assets, and for effect, once proven, it will automatically be presumed the existence of a past income that was not subject to the tax and that should be imposed.

It could be stated then that the demonstration of the objective factual assumption of the IPNJ consists precisely in evidencing goods, rights or consumptions, made by the obligor and that do not correspond to the reality of the declared income.

In this regard, the Costa Rican Administrative Tax Court has decided that as long as the Administration manages to demonstrate the existence of such an increase and that it is not related to taxable income, what is appropriate is to apply the figure of the IPNJ, this has been established in ruling No. 460-2017 of August 30, 2017: *"(...) in fact, the Auditing Section, as a finding of its investigation, determined, as mentioned in the preceding lines, assets in the possession of the auditee, not declared for the period 2008, consisting of medical equipment put into operation in the professional activity conducted by the auditee, whose origin has not been reliably demonstrated (...)"*.

In addition, the need for the discovered assets to be disproportionate to the declared income is indisputable, because otherwise - if they really were in line with the income declared by the obligor - there would be no justification for trying to apply this figure.

Another aspect to consider is that the Administration must also identify the owner or generator of such net worth elements, being necessary to establish a link of the detected assets with someone who exercises their ownership, delimiting that their owner is exactly the obligated one. This imputation is completely indispensable, because if the discovered patrimonial elements cannot be imputed to the obligor, then the figure in reference could not be applied.

In accordance with the indicated, for the application of the IPNJ, it is not only required to demonstrate the existence of the disproportionate patrimonial element, in addition, it must be evidenced who exercises ownership over the detected patrimony, which is materialized only with the domain that a person can exercise over the goods, visualizing it as that right of use, enjoyment and, in some cases, on scenarios of mere possession, which could imply an expectation of ownership, and therefore do not materialize in a real patrimonial increase.

This demonstration of the ownership of the increase is an aspect that is not always evident in the regulations that the IPNJ establishes, however, this remains an essential aspect for its application.

In short, the figure of the IPNJ, as a legal presumption that it is, establishes as an indispensable requirement for its application that the Administration demonstrates: 1) the existence of patrimonial elements; 2) that these patrimonial elements are attributable to the obligor, and 3) that they are disproportionate to the income declared.

Thus, once the Tax Administration has demonstrated the acquisition of the patrimonial element, its disproportion with the declared income and the ownership of these with respect to the wealth of the obligor, it is consequently up to the taxpayer to distort such considerations, so he must prove that there is a relationship between the acquisition of such resources and the means from which they were taken, or that the discovered elements were acquired with non-taxable, exempt or previous income on which the limitation period has occurred; or, that he has even already been taxed according to the law, exercising their right of defense, justifying the detected increase. For the above, the administration must transfer the revealed facts to him, so that the obligor has the possibility of demonstrating that the origin of the detected patrimonial elements is not hidden income; otherwise, the factual budget is configured in its entirety to apply the legal presumption corresponding to the IPNJ.

Therefore, the obligor has the duty to justify the origin of the increase if it wishes to rebut the aforementioned presumption, and in the exercise of his right to contradict, he must rebut the conclusions reached by the Administration It is therefore accurate to indicate that the application of the increase will depend on whether or not the obligor manages to justify the origin of these assets, an aspect that is typical of the relative legal presumption or juris tantum that was previously assessed, and he must demonstrate that the corresponding amount has been taxed, or that he is exempt or not subject to paying taxes, or that the statute of limitations has expired. If none of the above conditions is fulfilled, the tax agency applies the consequence of the regulated legal presumption.

From the above, it can be concluded that the application of the legal presumption by IPNJ does not occur automatically, since in order to reach the legal effect of taxing the detected patrimonial increase, it must be demonstrated with reliable proof, first, the existence of a patrimonial increase, and secondly, that the obligor has not been able to justify the origin that generated it. And in those cases, the Administration is empowered to apply the legal consequence or effect of the rule, to calculate the unjustified increase as part of the taxable income, affecting the period in which it was found.

At a general level, in any legislation where the application of the figure of the IPNJ has been implemented, its consequence is to consider such unjustified elements as part of the taxable income. However, in order to be able to impute the patrimonial elements discovered as part of the taxable income, they must be valued and taken as part of the ex officio determination practiced by the Administration, which requires the delimitation of means or procedures for quantifying these elements.

On the subject, from a general overview, two specific methods of quantifying the value of the IPNJ have been developed, either the “Balance plus consumption” and the “Acquisitions plus disbursements.” Sanchez Rojas (2013) establishes that the balance plus consumption method consists of adding to the patrimonial variations of the tax period, the consumptions made. In both the method of acquisitions and disbursements, implies the summation of all those acquisitions of estate, either for consideration or free, cash deposits, expenses, consumptions and disbursements in general made during the respective period (pp.101-104).

Depending on this, if the detected increase corresponds to monetary sums, these will be the ones that, without more, are included as part of the taxable income. In those cases, in which the increase is detected through the possession or acquisition of real or personal property or services, the doctrine has outlined that: *"In the case of hidden assets, a series of operations must be conducted until the estimate of the defrauded income is determined. We consider that the amount to be fixed as the value of the asset will be different depending on whether we are dealing with an acquisition or holding situation. // If the acquisition of this is discovered, the price set by the parties to the transaction must be set as the value. (...) // (... On the other hand, if the possession of the property is discovered, the Administration may value the aforementioned element at the market price in the fiscal year in respect of which it is discovered".* (Chico de la Camara, 1999, pp.309-310).

In this order of ideas, when the acquisition of a good or service is detected, the increase will be quantified by the amount reported in such acquisition, be it the price of the sale or of the corresponding transaction, the one actually paid. On the contrary, if it is a question of the mere possession of an asset, for these purposes it will be necessary to resort to experts, normally appraisers, who value the asset and assign a value to it, which must correspond to the market value of the asset.

Once this procedure for quantifying the increase has been completed, the value assigned to it will form part of the taxable income as appropriate in each tax system.

However, this imputation must respect the corresponding limitation periods, so the Administration may not include these elements if the obligor manages to prove that the NJPI comes from periods over which the prescription has already occurred. In this regard, Pont Mestres (1992) has been insistent and reiterative in indicating that the *"wealth concealments and undeclared income constitute a portion of the tax base, but with the time limit of the prescription of the Administration's right to determine the tax debt".* (p.123).

In this regard, it should be brought up that the application of the IPNJ requires a temporary imputation, that is, to link said patrimonial increase to a specific tax period.

Regarding the temporary imputation implied by the application of the IPNJ, the doctrine has opted for two clear options:

1. Impute the increase to the fiscal period in which it is discovered (the one that is being controlled).

2. Attribute the increase to the tax period in which the wealth emerges (dates of acquisition and consumption).

If the first option is taken, it should be noted that this is the most favorable application for the Administration, since it ignores the assessment of the true temporary origin of the increase detected, limiting itself to simply discovering the increase, determining that it has no justification and therefore proceeding to tax it. However, taxing the increase in the tax period that is discovered could be violating some legal certainty that was consolidated over time.

In this sense, as García Novoa (2015) points out, one of the main manifestations of legal security is framed in the interdiction of arbitrariness, clearly subordinating the actions of the Administration to what is legally regulated, respecting for this the original legal institutes, as it could be for the specific case, the prescription (pp.28-29).

Taking into consideration the aforementioned, taxing the increase in the period in which it is discovered, without making a real assessment of the temporal moment in which it was acquired would be violating one of the fundamental rights of the obligor, namely the legal security that is provided with the institute of prescription, which imply that the action of the Administration could be highly questioned. Notwithstanding the above, it is important to mention that several legislations have bet on this determination

of the tax period, assuming that the IPNJ is imputed to the period in which it is discovered, however, said legislations require that this determination must respect the statute of limitations, which to some extent remedies the major criticism that can be attributed to this possibility.

With regard to the second option mentioned, imputing the IPNJ to the fiscal period in which the wealth had arisen or surfaced would imply that the imputable period of the taxable event corresponds to the dates of acquisition of the assets, realization of consumptions and expenses, so the temporality would be transferred to the dates of emergence of the expression of economic wealth; constituting an adequate and practical measure, which ensures the determination of the economic reality of the obligor, and that even further, implies that the Administration should be even more to the terms of the previously indicated tax prescription, so that it can only tax such an increase, as long as it is not prescribed.

It is therefore feasible to conclude that once the IPJN has been demonstrated, the fiscal period in which it is charged has been defined and its value has been quantified, the effect on the increase in equity will be delimited as taxable income.

3. COMPATIBILITY BETWEEN THE UNJUSTIFIED NET WORTH INCREASE AND THE TAXATION OF ILLICIT INCOME

As indicated, the figure of the IPNJ implies the discovery of assets or acquisitions that do not correspond to what was declared and by virtue of this, the rule allows to infer that these assets or acquisitions have their origin in the activity managed by the obligor, for which they are imputed as part of his taxable income. However, this application should be analyzed, since it could enable the possibility of subjecting to taxation those economic returns that have no known origin or source, so that their origin is uncertain, insecure and could even be illicit. This situation has led to the question of whether, with the application of this institute, it would be at some margin legalizing income that has eventually been obtained with the management of illicit activities.

The taxation of funds derived from illegal acts has been an issue of great relevance at the doctrinal level, and on which, to date, there is still no fixed position; however, we will try to highlight the different trends in a summarized way, so that an appropriate criterion can be generated.

In this regard, initially it should be noted that there is a difference between really ignoring the origin or source of the income that gave rise to the increase in assets discovered -which is in fact the spirit and objective of the IPNJ- and being certain that such income originated in illicit activities and still subjecting it to taxation.

In the first instance, the taxation of income whose origin is unknown is precisely the basis for having implemented the figure of the IPNJ. The application of this figure admits the impossibility of the Administration to determine the source that gave rise to these revenues, as well as their legality or illegality. In this sense, what is taxed is the existence of an increase in assets, the origin of which cannot be justified by the obligor, nor can the Administration verify it, presuming that the product of the economic activity developed has been generated and that it has been kept hidden for all tax purposes.

In reality, as stated by some authors, the verification of the legality or illegality of the source that generated the income is no longer a resource for the Tax Administration, since it is considered that this transcends its powers, which specifically focus on ensuring adequate taxation while respecting the constitutional tax principles. In itself, the existence of the patrimonial increase is what enables the application of the IPNJ, without requiring the Administration to confront the illegality or legality of the source that originated it, considering that precisely preventing the tax on these monetary sums where their origin is unknown, could be more burdensome and even violate the constitutional tax principles of equality and generality (Bravo Cucci, 2004).

However, a different situation arises when, in fact, the Administration is already aware that the existing income comes from illegal activities. In such a case, the framework of action of the Administration changes profoundly, because one would no longer be faced with income whose origin is unknown, but on the contrary, one would have full knowledge of its source, and that it even comes from an illegal activity. Faced with such a scenario, it is appropriate to ask: what would happen if the Administration, by virtue of some control process, discovers that in reality those revenues do come from an illicit activity such as money laundering, drug trafficking, human trafficking, among others?, in this scenario would the Administration still be empowered to tax that income?

To answer this question, in general, the doctrine has opted for two options, the first affirms that income from illicit activities can be taxed, while the second leans the opposite, pointing out the impossibility of taxing them.

Under this line, a key aspect of the taxation of income from illegal activities is precisely to assess and assess whether taxing this income implies complicity or “immorality” on the part of the State, or, if it can simply be seen as a mere tax imposition more, which subjects all wealth to the duty of contributing to the support of public expenses with criteria of equality, regardless of its source or origin.

Those who support the taxation of income, regardless of its legal origin or not, base their position on an aphorism that is interesting to bring up: peculia non olet, which, by means of a metaphor, validates the perception of money regardless of its origin (Sanchez Rojas, 2014, p.121). In such a case, they defend the possibility of taxing the proceeds of illicit activities and affirm that the ultimate objective of tax law is to obtain the necessary resources for the State to satisfy the public needs of society, providing access to public services that are enjoyed by all, both those who develop licit and illicit activities, so it is considered that not imposing taxes on those who carry out the latter would in some way violate the equality and generality advocated by the same tax system, then passing the illegality to a “second plane”.

The apparent violation of the principles of equality and generality are therefore the fundamental pillars that support the feasibility of taxation on income from illegal activities. The opposite case would imply applying an ”exemption” to criminals, while citizens who do respect the legal system are imposed the tax burden. In this regard, it is considered sufficient to notice the existence of a manifestation of wealth that evidences contributory capacity, so that it can be subject to taxation, the lawfulness or unlawfulness of the activity that generates such wealth remaining outside the Tax Law, and therefore being considered irrelevant for the constitution of the taxable event and the emergence of the tax liability.

In follow-up to this last position, several tax legislations have already explicitly adopted the State power to tax the remuneration derived from illegal activities, such is the case of Italy, the United States, England and France.

On the contrary, those who maintain the opposite thesis, base their position on a not only technical but also moral aspect, under the latter view, both normative orders, law and morality, translate into duties that must be respected not only by citizens, but by the State itself, a situation that leads to questioning the taxation of illicit activities. In this line, those who consider that the proceeds of illegal activities should not be taxed, argue that the Administration is prevented from doing so initially due to a moral aspect.

This oppositional current is known as a classical, moralistic position, referred to by the doctrine as *“State Accomplice or Protector of the illicit”*, which is based on repelling the possibility of taxation of illegal acts considering that with this action it could be visualized

that the State would be somehow "protecting" such illegal behaviors, and could even become an "accomplice" of them by receiving benefits from their realization (Bravo Cucci, 2014).

This tendency, therefore, is framed in delimiting precisely that the State should not actively participate as a recipient of taxes that are based on activities that are declared by the same State as illegal. It is a matter of that *"the same fact cannot be and cease to be for the Law"*, an aspect that introduces another valid argument for those who support the theory of not taxing the proceeds of illegal activities, applying a vision of unity that the legal system possesses, so that within it there could be no contradictions that conflict with the general content that is regulated.

Bravo Cucci (2014) and Oscar Diaz (2006) agree that there can be no such legislative inconsistency, where on the one hand one segment of the legal system classifies a certain activity as illegal, framing it as an illegal conduct punishable by a penalty, and another segment of the same system, in total dissonance, considers that conduct as a taxable event and even provides for the generation of legal consequences derived therefrom.

Another of the arguments put forward by those who define the inadmissibility of taxing such items, focuses on a more technical aspect than moral or legal, and is based on the fact that through an illegal act a subject cannot really increase his wealth, because the one who commits the crime is not the owner of the proceeds of his illegal act, which is why it could not be argued that he increased his wealth and therefore also does not show taxable contributory capacity.

It is not possible to put a concept of contributory capacity on assets that lack a valid legal title that supports the holder thereof, this because it seems indisputable for those who support this thesis, that the fruit of an illicit activity cannot enter *de iure* in the sphere of the subject, which implies that there is no legal availability on it and therefore it cannot be considered an increase in assets subject to taxation.

Sanchez Rojas (2014, p.127) presents the issue evidencing that, although there is a material seizure of the goods resulting from the illicit activity, with this act all the necessary elements are not fulfilled, since it is also required that this transfer of dominion be validly recognized by the legal system. In the case of a patrimony obtained as income from an illegal act, despite constituting a patrimonial increase, it must be classified as fictitious and transitory, obtained against the legal order, so it is invalid, making it impossible to consider it as a real and effective patrimonial increase.

In the same line of thought, Chico de la Cámara (1999, pp.266-267) considers that the responsibility arising from the commission of the crime therefore prevents the birth of the tax obligation, this because the reparation or restitution of the injured legal asset would eliminate the foundation of the taxable event of the tax, the real manifestation of an economic capacity susceptible of being taxed, and which ceases to exist when the State eliminates the economic effects of the crime through the proclaimed civil liability measures.

This issue is connected with the application of criminal seizure, which regulates in general all repressive legislation and where the confiscation of illicit proceeds functions as a means of restitution and compensation for the damage caused, which subtracts these products of the real character of taxable assets (Oscar Díaz, 2006, p.318).

It is indisputable that the position that defends the impossibility of taxing this type of income is concretely based not on mere moralistic aspects, but more than anything technical tax, by indicating that the apparent wealth generated by illegal acts, ceases to represent taxable contributory capacity, when it is subject to confiscation or retention by the State.

Personally, I am more inclined to the second position, betting on the impossibility of the Administration to tax income obtained through illicit activities, subscribing to the words of the Peruvian author Bravo Cucci (2014): *"(...) Whoever commits a crime is not the owner of the*

proceeds of his illegal act, which is why it could not be argued that he increased his wealth, and therefore shows a contributory capacity susceptible of taxation. (...)".

Bringing these considerations to the figure of the IPNJ, it is relevant to make the following distinctions. The application of this figure precisely supposes that the Administration ignores the origin or source of the income that allowed the increase in assets, so, as long as this remains the case, the IPNJ institute has full capacity to be invoked by the Administration. However, when there is already knowledge that these revenues come from illegal activities, this means that the source or origin that produced them has already been proven, so the regulations on the IPNJ could not then be applied.

In conclusion, the application of the IPNJ proceeds as long as the origin or source that gave rise to the discovered patrimonial increase is really unknown. As soon as the Administration becomes aware of this source, there is no longer an IPNJ, because it just happens to be a justified patrimonial increase, taking into consideration that this justification could imply the knowledge that this increase in patrimony is born due to the performance of illicit activities, in which case the analysis and valuation focus on whether or not it is legally appropriate to tax income from illicit activities, an aspect that will be peculiar to each tax system.

However, an essential aspect that must be taken into consideration is that the fact that the Administration had taxed the discovered patrimonial increase, under the figure of the IPNJ, this does not prevent the assessment by the competent bodies, to delimit if those sums could come from illegal acts, that is, the fact that the Administration taxes them as an IPNJ, does not imply that they are "legalized" for all purposes. Therefore, it could be the case that some IPJN taxed by the Tax Administration is later questioned by other bodies, for coming from illicit activities such as drug trafficking, money laundering or human trafficking, among others.

In this sense, it should be remembered that the Tax Administration is not obliged to prove the legality or illegality of the source that originated the detected patrimonial increase, on the contrary, precisely because the origin of the same is unknown, it is appropriate to employ the institute in question. However, once the IPNJ has been applied, this would not be enough for the obligor to be able to validate or justify the origin of the assets that allowed him to make the patrimonial acquisitions in other investigative instances.

4. THE IMPUTATION OF THE TAX CRIME FOR UNJUSTIFIED NET WORTH INCREASE

The application of the IPNJ brings in addition to the questioning regarding the taxation of licit or illicit revenues, an aspect that should also be analyzed, and that specifically refers to the possibility that this figure is taken as a tax crime prosecutable to criminal instances. The question goes through the analysis and acceptance of applying a legal presumption to impute to a taxpayer his failure to comply with the duty of having taxed as ordered by law, making that conduct reprehensible in criminal proceedings.

Before delving into the specific issue, it is necessary to visualize that, in the generality of tax systems, legislation regulates and implements a whole sanctioning development that seeks to some extent to repress those behaviors that do not comply with what is ordered by tax regulations. This is because, of the non-compliance with the tax regulations, according to the behavior committed, the implementation of the repressive apparatus of the State could be activated, acting on the sanctioning faculty that is based on the Ius Puniendi of the State, either in the power held by the State to punish, both in administrative and judicial headquarters.

Based on this *State Ius Puniendi* there is a necessary identity between those criminal and administrative offenses, an identity that is also reflected in the procedure

and the rules that regulate them, an ontological identity being felt between these (Pérez-Piaya Moreno, 2008, pp.30-33). Taking this into the tax field, there are therefore illegal tax acts, which the different legal systems have come to distinguish into two broad categories, administrative offenses and tax crimes.

The main difference between these categories basically lies in the body that applies them, as well as in the consequences regulated by the legal system for each of them. Thus, with regard to administrative offences, the competence to apply any sanction lies with the Tax Administration; while in the second, tax crime, this competence is transferred to judicial instances, specifically in the criminal area.

Despite this, since there is the same origin and foundation, which lies in the *Ius Puniendi of the State* and since there is such an ontological entity, it is also acceptable that both procedures that regulates the imposition of these sanctions is governed by the same principles, which must be common for both the administrative and the criminal field. As indicated by Pérez-Piaya Moreno (2008), this ensures the same guarantee regime, regardless of which sanctioning body the punitive process is followed before (pp.36-40).

Taking this into consideration, it is relevant to mention and reiterate that the legal delimitation of a tax offense, legally configured, implies the development of a criminal process whose competence falls on the criminal judicial agency, so that by linking the tax sanctioning system with the tax criminal matter, the duty to apply all the principles that prevail in the latter arises. The process is therefore impregnated with the constitutionally regulated criminal principles such as criminal legality, typicity, *non bis in idem*, guilt, presumption of innocence, right to be informed, right to evidence, right not to testify against oneself, among others.

Going even deeper into the figure of the tax crime, it can be pointed out that as such, it constitutes a crime of result that for its effective application requires a real and palpable damage, that is, it is necessary to consummate an economic damage basically suffered by the State, who is personified through the Tax Administration. This damage is materialized through the non-payment of taxes.

However, as Oscar Díaz (2006) states, in the criminal dogma of tax crime, what is actually pursued is the conduct that evidences the deformation of the tax bases, with the intention of deceiving the treasury. Thus, the two essential elements arise, the subjective, manifested through the purpose of deliberately not fulfilling the duties required by the tax laws, and the objective, evidenced by the material breach concretized with the non-payment of the due tax (p.3).

The concrete problem arises precisely when the IPNJ intends to be classified as a tax crime, this is because there is a large part of the doctrine that sees great difficulty in demonstrating the presence of this subjective element in the figure of the IPNJ, jumping practically automatically the question of whether the IPNJ can be taken to criminal instances and be the subject of a tax criminal process. This difficulty arises when linking the legal presumption that the IPNJ has with the respect for the principles of criminal law, specifically with respect to the presumption of innocence.

The non-acceptance of the IPNJ as a tax crime could be based on the fact that the reversal of the burden of proof that the application of the IPNJ apparently entails prevents the judge from having a valid value judgment that allows him to issue a criminal conviction, also evidenced that the presumptions show a procedural fragility to be considered valid in order to impose the sanctions or penalties that are intended (Chico de la Camara, 2008, p.91).

To adequately elucidate the issue, it must be borne in mind that the principle of presumption of innocence is considered as a guiding principle of the criminal process, of inescapable observance that establishes that any person accused of committing a crime must be considered innocent until his guilt is legally established within a criminal process, through a final sentence.

The presumption of innocence is, therefore, one of the maximum guarantees of the accused and one of the pillars of the accusatory criminal process. It is a principle that governs without exceptions in the sanctioning system and must be respected in the imposition of any sanction, whether applied in the administrative field as in criminal; reason the punishability of the subject is conditioned to an adversarial procedure where the "game" deprives of the proof.

In this sense, one of the consequences of its application is precisely that the burden of proof regarding the punishable act is assumed directly by the accusing party, who must prove the commission of the act classified in the norm as a tax crime, being admissible for this the use of direct and/or indicative evidence obtained within the framework of the law, and that allow applying reliability criteria that dilute any "reasonable doubt" (Pérez-Piaya Moreno, 2008, pp.63-64).

By contrasting what is established above regarding the presumption of innocence with the legal presumption of the IPNJ, there is a risk of misinterpreting what some consider to be a contraposition of the figures, due to an apparent inversion of the burden of proof on the obligor.

Within the analysis of the IPNJ figure, it was established as a requirement for its application that the existence of the increase in assets be reliably demonstrated, and that these were under the ownership of the obligor, so that, once the unjustified increases in assets were proven, the element directly conforming the notion of income established by law could be considered proven, without there being any legal presumption of any kind. In view of this, it must be clear that the burden of proof, regarding the existence and ownership of the assets increases, undoubtedly corresponds to the Tax Administration, who must supply, collect and provide the evidentiary elements that demonstrate the factual assumption typified in the norm, with the obligor being fully empowered to disprove the elements provided.

There is actually no reversal of the burden of proof in its proper sense, what arises is a possibility of justifying the origin of that patrimonial increase, the obligor being the one who can best know its cause and origin. Precisely what originates is the application of the contradictory principle, where in front of the proof provided by the Administration, the obligor has full faculty to provide evidentiary elements that distort those offered by the Administration.

In this way, no violation of the principle of presumption of innocence is visible, because the obligor is allowed a right of reply - existing in any legal process -, where he will be able to distort the proof of charge with which the Administration bases its determination. In the event that the subject achieves a minimally reasonable explanation in criminal proceedings, the institute of "reasonable doubt" would operate and consequently it would be resolved in his favor by applying the in dubio pro reo, a situation that is justified because he can only be condemned under a firm conviction.

From the above, the presumption of innocence does not actually oppose that the judicial conviction in a criminal proceeding may be forged by circumstantial evidence, which must be clearly demonstrated, explaining the logical reasoning used to arrive at the conviction that the subject committed the conduct typified in the norm, in itself it is necessary to specify the evidence and the reasoning by which we came to disclose the commission of the facts constituting the crime.

However, in matters of the IPNJ, the accreditation in criminal proceedings will not only be of the increase in assets, but also the fraudulent intent must be proven, which may be evidenced through inferences derived from the acts, it being clear that the subjective state of the offender is difficult to prove through direct evidence, being necessary to resort to indirect evidence for this purpose.

In this sense, it is important to note that in Spain, as in other countries, there have been pronouncements issued by the criminal courts and related to unjustified capital increases, which have allowed the establishment

of jurisprudence in the matter, through which minimum criteria can be extracted on which the application of the IPNJ should be based, having among them: first, the acceptance of admitting that the institute is supported by juris tantum presumptions; secondly, that the IPNJ is based on a plurality of indications that all point in the same direction, constituting unequivocal evidence and therefore, proof of charge; thirdly, that those previously referred to indications are clearly accredited (Lario Parra, 2015, pp.144-116).

Consequently, it is necessary to visualize that in a criminal case, the evidence seeks the accreditation of facts, seeking to arrive at a real or material truth, depending on the evidentiary elements that are available, and they may be direct or indicative. In the latter case, he circumstantial evidence has the same character and value as that which is qualified as direct, there being full constitutional legitimacy to establish the constitution of facts by means of evidentiary casts based on indications, as long as those facts constituting a crime can be deduced from the indications presented, through a logical mental reasoning and in accordance with the rules of sound criticism, leading to a qualification that supports the fact typified as a tax crime (Chico de la Camara, 2008, pp.88).

As mentioned by Lario Parra (2015), the Spanish jurisprudence has established that, in order to reach a conviction about the guilt of a subject by indirect means, the irrefutable accreditation or demonstration of a plurality of indications; this because it is considered that a single indication is by definition equivocal regarding the knowledge of the fact it indicates, while the plurality of indications, all pointing in the same direction, can become unquestionable evidence, eliminating any reasonable doubt that could be raised (pg. 115).

Also, accepting the radical position that the IPNJ cannot be brought to criminal proceedings would cause a margin of impunity and even inequality among those obliged, because it would amount to an "exoneration" of criminal responsibility, leaving unpunished the tax fraud committed in this way. However, it must be made clear that its application must unquestionably be subject to criminal principles, visualizing that in reality there is no violation of the presumption of innocence that stands in criminal matters.

Costa Rica still has progress pending on this issue; however, in 2017, the first criminal sentence was issued, vote No. 354-2017 issued by the Criminal Court at fourteen o'clock on September eight, two thousand seventeen, where the detection of an IPNJ is condemned: *"(...) The audit procedures and tests conducted in the present case, allow establishing unjustified assets increases in the analyzed fiscal periods, based on the debugging of the credit movements shown in the Group's current bank accounts. (...) // (...) Consequently, the Unjustified Patrimonial Increase was established from the movements of the bank statements and an increase in the taxpayer's patrimony was identified, which has no justification in duly registered and declared income and which, as provided for in the third paragraph of article 5 of Law 7092 (Income Tax Law and its Regulations), are part of the taxpayer's gross income... Also in point 4.3.2 of Report No. 277-DEF-567-04/08, it was indicated that the analysis carried out by this Section was aimed at determining the possible difference between the deposits registered in the bank accounts of the members of the Group, and the income declared by that Group, which constitutes a patrimonial increase that has no justification in the income duly registered and declared. (...)"*

The sentence referred to is clear and categorical, in that it expressly establishes the existence of a tax crime originated through the institute of the IPNJ, which is well established by the sentence, if it was fully demonstrated by the corresponding units, through the analysis of bank accounts and the consequent income that was reported in each of them, as well as the comparison of the same with the respective tax declarations.

It is therefore correct to affirm that an IPNJ can be a figure that allows the application of the tax crime, as long as the essential facts of demonstration of the patrimonial increase without any justification are supported by proof, direct or indicative.

CONCLUSION

- The unjustified patrimonial increase - IPNJ by its acronym in Spanish - is a legal mechanism by which the tax obligation is presumptively determined, to the extent that it considers taxable income the quantitative increase experienced by a subject in his goods, assets, rights or in his consumption or expenses in a given year, so that it does not correspond to what was declared and without it being able to be duly justified.

- When the Administration intends to apply the figure of the IPNJ, one of the essential requirements that it must demonstrate is precisely the existence of elements that have increased the value of the general assets of the obligor and that this increase does not correspond to the declared one. In this line, there are three basic aspects that must be proven by the Administration, the first framed in highlighting the existence of the discovered patrimonial element; the second, delimiting who enjoys its ownership; and finally, that, with its detection, the discovered real patrimony turns out to be different from the declared one.

- The IPNJ is a legal presumption of a relative nature or juris tantum, so it admits proof to the contrary. Doctrinally and in comparative law, in order to undermine the application of the IPNJ, the obligated party must focus his defense on trying to demonstrate one of the following aspects: that the fact on which the presumption is based is not real, that is, to demonstrate that the patrimonial elements detected by the Administration do not actually belong to him, are not his property; that the detected increase corresponds to items that are exempt, not subject or that have already been declared; or that the discovered increase originated in a prescribed fiscal period.

- The IPNJ does not imply an investment in the burden of proof, but on the contrary what it enables is the full exercise of the right of defense, where the taxpayer can provide the corresponding proof to justify the reference increase and thereby disable its application, so this phase is the reflection of an adequate right of defense, prior to issuing the act of determination of the tax obligation.

- In relation to the quantification of the IPJN, it can be given by its nominal value, in the case of money, or, according to market values, if it is goods or services.

- The belief that the IPNJ enables the taxation of income obtained from illicit activities should be discarded. When it is certain that these incomes come from this type of activity, the application of the IPNJ would not be possible, firstly because the source that gave rise to the increases would already be known and secondly, since the assets are the object of a confiscation, there would be no economic capacity to tax. A contrario sensu, if the Administration does not have knowledge of the source or origin that gave rise to the detected patrimonial increases, this is precisely the assumption typified for the application of the IPNJ, an aspect that also does not prevent a subsequent investigation by competent bodies, which could define the illicit origin of those revenues.

- The management of an IPNJ in the sanctioning field can be assessed as both an administrative offense and a tax offense. In the latter case, for all intents and purposes, an evidentiary demonstration by the Administration of the basic fact that supports the application of the IPNJ is required, in such a way that sufficient circumstantial evidence is provided to forge a reasonable conviction, by means of logical reasoning, a situation that is not considered to violate the principle of presumption of innocence, as postulated by some authors.

REFERENCES

Bravo Cucci J. (Octubre 2004). Los actos ilícitos y el concepto de renta, Ponencia presentada en las Jornadas Nacionales de Derecho Tributario, Instituto peruano de Derecho Tributario, Lima.

Calvo Vergez J. (2012). La tributación de ganancias y pérdidas patrimoniales en el IRPF, Pamplona, Editorial Aranzadi.

Casado Ollero G. (2008). Ganancias Patrimoniales no justificadas y delito fiscal, Justicia y Derecho Tributario – Homenaje al profesor Julio Banacloche Pérez, Banacloche Palao J., Banacloche Palao B., Banacloche Palao C. (Coords.), Madrid, La Ley.

Chico de la Camara P. (1999). Las ganancias no justificadas de patrimonio en el IRPF, 1999, Madrid, Marcial Pons-Instituto de Estudios Fiscales.

Chico de la Camara P. (2008). "Compatibilidad de los derechos fundamentales a la tutela judicial efectiva, a la intimidad y a la presunción de inocencia en relación con el delito fiscal derivado de ganancias no justificadas de patrimonio", Urresti E.J., Comes F.L. (Dirs.), El delito fiscal, aspectos sustantivos, procesales y constitucionales, Buenos Aires, Editorial AdHoc.

Chico de la Camara P. (2015). "SSTC6/2007, de 15 de enero: Compatibilidad del derecho a la tutela judicial efectiva con la imputación penal de un delito a través del expediente administrativo de las ganancias no justificadas de patrimonio en el IRPF", Crónica Tributaria N°154.

García Novoa C. (2015). "Aplicación de los tributos y seguridad jurídica", Derecho & Sociedad 27. Asociación Civil.

Lario Parra (Marzo 2015). "Los incrementos de patrimonio no justificados y el delito fiscal. Posición jurisprudencial", Gaceta Fiscal N°350.

Oscar Díaz V. (2006). Ilícitos tributarios, Perspectivas jurídica y económica, Buenos Aires, Editorial Astrea.

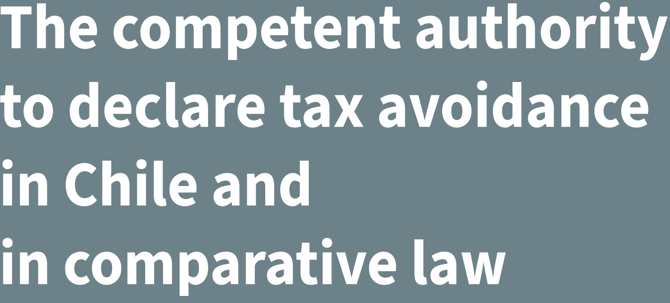
Pérez-Piaya Moreno C. (2008). El Procedimiento sancionador tributario: Especial referencia a su tramitación separada, Madrid, Tirant lo Blanch.

Pérez Royo I., Manual del Impuesto sobre la Renta de las Personas Físicas, 1999, Madrid, 3ª Edición, Marcial Pons Ediciones Jurídicas S.A.

Pérez Royo F. (Dir.), Curso de Derecho Tributario. Parte Especial, 2018, Madrid, 12ª Edición, Editorial Tecnos.

Pont Mestres M. (1992). Los incrementos de patrimonio y la prescripción en el impuesto de sociedades, Madrid, Editorial Civitas S.A.

Sanchez Rojas O. (2013). Incremento patrimonial no justificado, Lima, SUNAT - INDESTA.



The competent authority to declare tax avoidance in Chile and in comparative law

Felipe Rodrigo Conejeros Saavedra

SYNOPSIS

This article deals with a subject that has been little debated but is of relevance for the different countries of the world and especially for Chile, which is related to who is the competent authority to declare tax avoidance: the Tax Administration (TA) or the Courts of Justice.

The objective is to examine the exceptional character at a comparative level of the administrative and judicial procedure to declare tax avoidance in Chile, making a brief review of comparative law through a table showing the number of countries belonging to the Organization for Economic Cooperation and Development (OECD) that have a general anti-avoidance rule (GAAR), and who is the competent authority to declare avoidance.

KEYWORDS: Tax avoidance, Declaration of avoidance, General anti-avoidance rule, Procedure for declaring avoidance

CONTENT

Introduction

1. Tax law and sanctioning administrative law
2. Jurisprudence of the constitutional Court and the Supreme Court of Chile in relation to sanctioning administrative law
3. Competent authority and procedure for declaring tax avoidance in Chile
4. Competent authority to declare tax avoidance in OECD member countries
5. General anti-abuse clause in the European Union (GAAR Community

Conclusion

References

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INDEX

INTRODUCTION

The tax avoidance phenomenon has been a topic specially addressed and debated in recent decades among tax professionals and experts around the world, a product of the administrative and jurisprudential development that has arisen in emblematic cases that have not only national scope, but mostly international. This is due to the high complexity behind business schemes that have been questioned by tax authorities from different latitudes.

In Latin America and particularly in Chile, this development has been rather modest. Only in 2014 was a general anti-avoidance rule (hereinafter GAAR, "General Anti-avoidance Rule") incorporated in Chile.

By incorporating the GAAR into the Chilean Tax Code, the legislator has taken the decision to confront avoidance as a problem for tax law, as it violates the taxed events established in the Law, affects the equal distribution of public burdens and damages the national treasury. This decision is in line with the efforts recently developed by the member countries of the Organization for Economic Cooperation and Development (OECD) and the G20 to combat avoidance in the "action plan against base erosion and profit shifting" known internationally as the BEPS Project[1]. It is also in accordance with the European Union Anti-Tax Avoidance Directive (ATAD).

First of all, this article will analyze the nature of tax law and its relationship with other branches of law to understand the reasons that the legislator had to establish a general anti-avoidance clause in the Chilean tax legal system. Likewise, brief references will be made to rulings of the Constitutional Tribunal (hereinafter CT) and the Supreme Court of Justice of Chile that are related to sanctioning administrative law and that are relevant to understanding the heated debates that have originated, not only the establishment of an GAAR in Chile, but particularly the procedure for declaring avoidance, which, as will be seen, is quite exceptional in relation to the comparative experience.

Finally, we will review who is the competent authority to declare avoidance in Chile and in comparative law. Specifically, we will analyze if the avoidance declaration is made at the administrative headquarters applied directly by the Tax Administration[2] (hereinafter TA), or in judicial venue applied by the Courts of Justice.

It should be noted that this article will not analyze the content of the general anti-abuse clauses in their legal aspects, nor of the GAAR established in Chile, which have been lately investigated by various authors and, by the way, will continue to be controversial as more cases are presented and litigation increases.

1. THE TAX LAW AND THE SANCTIONING ADMINISTRATIVE LAW

Before getting into the background issue concerning the competent authority and the procedure for declaring tax avoidance, it is essential to go to the root of what we mean by tax law and how it relates to the other branches of law.

1 Circular 65 of 2015, Internal Revenue Service.

2 It should be clarified that in Chile the Tax Administration is formed of three different public services that act in coordination. The Internal Revenue Service, which is responsible for the application and control of all internal taxes currently established or to be established, fiscal or otherwise, in which the Treasury has an interest and whose control is not specifically entrusted by law to a different authority; The National Customs Service (SNA in Spanish), a public service in charge of monitoring and controlling the passage of goods through the coasts, borders and airports of the Republic, of intervening in international traffic for the purpose of collecting import, export and other taxes determined by law, and of generating statistics on such traffic through the borders, without prejudice to the other functions entrusted to it by law; and the General Treasury of the Republic (TGR), public service in charge of collecting, safeguarding and distributing fiscal funds and values, and in general, those of all public services, as well as paying the Treasury's obligations, and others entrusted to it by law. Information taken from articles 1 of the Internal Revenue Service Organic Law, DFL No. 7 of 1980, the National Customs Service Organic Law, DFL No. 329 of 1979, and the Treasury Service Organic Law, DFL No. 1 of 1994, respectively.

Massone (2016) tells us that "for some, tax law is placed in a difficult intermediate position between:

- *The civil law, since the tax debt can be classified among the obligations of legal source, on the determination of which the discretionary powers of the financial administration do not affect;*
- *The administrative law, in which the modalities of action of the financial administration and some characteristics of the acts emanating from it are inspired, although with the absence of discretionary powers regarding the determination of the tax*".

However, the same author tells us that "*as for the once debated question of whether tax laws belong to the field of public law or to the field of private law, the Modern doctrine today agrees to understand that, as a whole, the tax legal system belongs to the field of public law, although the fundamental notions of private law are applicable to it as regards the concept of the material tax obligation*[3]". He also points out that "*tax law is public law. It constitutes a part of public law, which in turn represents a sector of financial law. Financial law is administrative law, and the latter is a special field of public law*[4]".

This same conception of tax law as public law is developed more lately by Anguita (2017) when he addresses the legal-tax relationship as a limit to the autonomy of the will. In this work, the author, in turn quoting Hensel, points out that "*Whereas in the obligations of private law the content and scope of the service due are specified, as a rule, by means of reciprocal declarations of will of the debtor and the creditor, in the tax obligation this content and scope is derived from the law*". Reaffirming the above, he states that "*it is possible to argue that a first limit to the principle of the autonomy of the will in substantial tax law is defined by the very nature of the legal-tax relationship, which differs in its essential aspects from the civil obligation, since the elements of the tax obligation have their origin in the law and taxpayers are not allowed to modify them by private agreements*[5]".

What these authors point out is a way of approaching tax law, which differs in its essence from the approach taken by other authors and/or experts in the area, who generally defend the primacy of the autonomy of the will and contractual freedom, from civil law as a branch of private law, in front of the sphere of public law of tax law. This distinction is not minor and is precisely part of the origin and the substantive debate that has been taking place since 2014 with the introduction of the NGA to the Tax Code in Chile.

It has also been said that in civil law there are regulations that allow recourse to institutions such as abuse or fraud to the law. This would find a basis in the Chilean Civil Code, where fraud to the law would be recognized (article 11) and the principle of substance over form (article 1707)[6], in accordance with Article 1545 of the Civil Code which states that "*Every legally concluded contract is a law for the contracting parties and cannot be invalid except by their mutual consent or for legal causes*".

3 Massone Parodi, Pedro, Principios de Derecho Tributario, Cuarta Edición Revisada y Ampliada, (Editorial Thomson Reuters, 2016), págs. 62 and 63.

4 Idem, p. 33

5 Anguita Oyarzún (2017) "The Challenges in the Application of Anti-Abuse Clauses by Latin American Tax Administrations and the Lessons of the Spanish and European Experience", CIAT, IEF, AEAT.

6 Watch Analysis Workshop "The Anti-avoidance Standard: Does it respond to our challenges? https://www.youtube.com/watch?v=w4_FZwRC4Sw&ab_channel=TVSENADOCHILE

However, there are other authors who point out that the exercise of a civil action for annulment due to simulation or fraud against the law is a procedure that can last many years[7]; in addition, that the SII would have no legally recognized interest in requesting such nullity[8].

Behind this predominant approximation of the autonomy of the will and contractual freedom, we also find a way of interpreting tax law known as literal interpretation. This interpretation criterion is supported by those who conceive of tax law as a conservative sector of the system; a sector in which certainty should be pursued as a top priority, with the dual purpose of ensuring the stability of the state budget and the guarantee of taxpayers[9].

However, Anguita (2017) reminds us of the jurisprudence of the Supreme Court of Chile that has maintained that "*the principle of the autonomy of the will and of free contracting creates a fiction that consists in assigning to the contract, legally concluded, the character of law, but for the contracting parties, that is, it is established that a contract has the same force as a law for them, but this force of law does not oblige the State or the courts regarding its content, who must, faced with a specific case, specify its scope. In the field of tax law, the law has provided clear and precise rules for the determination of the taxes levied, as in the present case, on certain transactions, precisely to remove from the private sphere the power to set an element such as the price, which is what determines the entity of this, since this would lead to individuals establishing for themselves, whether they should be taxed and in what amount, which as already said, is not acceptable*[10]".

As can be seen, the Supreme Court of Chile set a limit to the principle of the autonomy of the will and contractual freedom, consisting in that in civil matters taxpayers can act freely, but this cannot be extrapolated to tax law, where the law itself fixes the taxed fact, the taxable base and the respective rate, which cannot be handed over to the parties by their own will.

1.1 The sanctioning administrative law

In relation to administrative law and tax law, Massone (2016) notes that "*The taxation activity is a public service activity: object of general interest, conducted by public agencies, use of prerogatives of public power; thus, the most traditional and indisputable criteria are met. It is therefore not surprising to find in the study of tax legislation the essential aspects of administrative legality: unequal situations framed by the law*[11]".

Cordero (2019) indicates that there are two ways of understanding sanctioning administrative law in tension. On the one hand, from a purely optional, unilateral and careful perspective of individual rights, so Sanctioning Administrative Law should be understood as a regime of guarantees that limits the punitive power of the Administration. On the other hand, from a perspective that appreciates the administrative sanction as part of

7 Aedo, Sandra and Mánquez, Manuel (2015). "Reforma Tributaria. Filosofía, objetivo y principales cambios introducidos por la Ley Nº20.780 al sistema de impuestos en Chile". Editorial Thomson Reuters. (Pag. 201)

8 Saffie, Francisco (2021). "¿Por qué fiscalizar la elusión mediante una cláusula general antielusión? Historia de su establecimiento en Chile y los debates políticos que genera". Page. 141

9 Cipollina, Silvia" "Elusione Fiscale", Rivista di Diritto Finanziario e Scienza delle Finanze, Mar. 1988, pg.131, as cited in MASSONE (2016) p. 385.

10 Her Excellency the Supreme Court of Chile, judgment of January 24, 2002, Paper No. 4.426-00, as cited in Anguita (2017) p. 7.

11 Massone Parodi, Pedro, Principios de Derecho Tributario, Cuarta Edición Revisada y Ampliada, (Editorial Thomson Reuters, 2016), págs. 59 and 60.

the set of tools that the Administration has to guarantee the objectives of public interest, so that moving purely and simply the category of the ius puniendi affects the very content of public management[12]. The same author points out in the case of Chile "*the Administrative Law built after the military coup of 1973 and the Constitution of 1980, buried the past of a Public Law of institutions and transformed it into a mechanism of control of powers to guarantee natural "rights". At that time, the important thing was to establish a system of strict judicial control of discretion, to provide "legal certainty" through the theory of "acquired rights", constitutionally reprimanding any purpose of expansion of public intervention and strictly controlling the punitive powers of the Administration, relying for this purpose on the guarantees of the criminal order*[13]". Consequently, this author concludes that "*The need to address the social problems of modernity was translated into a set of legal reforms that since 1990 changed the face of administrative intervention and redesigned the State organization, which required constitutional, judicial and administrative jurisprudence to progressively model, at times with a delay of more than fifty years in comparative terms, the essential institutions of national Administrative Law. That is partly what underlies the way in which we have debated in the last time about the Sanctioning Administrative Law*[14]".

What is the relevance of highlighting the nature of tax law and the understanding of sanctioning administrative law in relation to tax avoidance? The answer is found in the arguments put forward by the detractors to include an GAAR and even more so to give the SII the power to administratively declare the avoidance, as well as in some judgments of the Constitutional Court of Chile (hereinafter CCC) that we will see below.

2. JURISPRUDENCE OF THE CONSTITUTIONAL COURT AND THE SUPREME COURT OF CHILE IN RELATION TO THE SANCTIONING ADMINISTRATIVE LAW

The Political Constitution of Chile, in its article 93 N° 1°, gives the Constitutional Court the power to exercise the constitutionality control of constitutional organic laws, in a preventive and mandatory manner. Thus, we will see how the Constitutional Court has pronounced itself and also the Supreme Court in some judgments that address administrative law and the sanctioning power of State Administration bodies.

2.1 Regarding the violation of due process and the right to defense

In the context of a requirement of inapplicability due to unconstitutionality regarding the sole article, number 3º, of Law Nº18.320 (Law that originally granted a special benefit to those taxpayers with good behavior in case of revision in the matter of Value Added Tax), in relation to due process, the Constitutional Court pointed out "*That, by definition, the right to due process should be conceived as one that grants access to the jurisdiction, allows the process to take place with all the essential, rational and fair guarantees that contribute to an equitable and non-arbitrary procedure. The CCC defines it by holding that "the legal procedure must be rational and fair. Rational to set up a logical process and devoid of arbitrariness. And fair, to guide it to a sense that safeguards the fundamental rights of the participants in a process*[15]". The court also indicated that "*This Magistracy has referred on several occasions to the content of the constitutional guarantee of a rational and fair procedure provided for by the legislator,*

12 Cordero, Luis (2019), "El derecho administrativo sancionador y los sectores de referencia en el sistema institucional chileno", Revista Ius et Praxis, Año 26, Nº 1, 2020, pp. 240 – 265 ISSN 0717 – 2877, Universidad de Talca - Facultad de Ciencias Jurídicas y Sociales.

13 Ditto

14 Ditto

15 Judgment ROL 9854-2020 TC dated 17.11.2021). Considering eleventh, twelfth, fourteenth, twentieth.

contained today in Article 19, N° 3° sixth paragraph, of the Basic Charter, to which effect it has pointed out that although the Constitution itself did not list the elements that make up a rational and fair procedure, a task that corresponds to the legislator taking into consideration the nature and legal nature of the various processes, the constitutional requirement will be satisfactorily fulfilled to the extent that the procedure formulated allows any party or interested person to know the action or charges that are imputed to him, to have the appropriate means of defense that facilitate him to formulate claims and allegations in a timely and effective manner, discuss those of his adversaries, present evidence and challenge those that others present and file appeals, as the main elements; (STC 2628-14)[16]". Thus, the Court continues by concluding that "*The due process of the applicant is assured since the action of the S.I.I., which can be claimed before the Tax and Customs Courts, as a jurisdiction of first instance and before the Superior Courts, through the appeal or cassation, both instances that the petitioner has been able and will be able to distort or dispute, the qualifications that the Audit Service has made within the procedure in administrative courts, and then jurisdictional*". *It is obvious that respect for due process is protected in the terms required by the Fundamental Charter, bearing in mind that there are administrative and jurisdictional avenues of challenge, with a double instance, instruments responsible for protecting, as previously reasoned, the guarantee objected by the constitutional plaintiff of due process, sufficient reasons to reject such an argument*[17]".

In the aforementioned ruling, the court concludes that there is no violation of due process since due process is ensured, since the taxpayer can complain about the action before the ATC and the Superior Courts, through different appeals both at the administrative and judicial levels.

2.2 On the quality of judge and part of the Tax Administration

When reviewing the history of Law N°20.780 of the year 2014, the phrase "judge and party" is repeated 26 times[18]. This same phrase has been used insistently by many authors and/or experts in the tax area in Chile detractors of granting powers to the Tax Administration to declare tax avoidance administratively.

A particularly relevant ruling of the Constitutional Court in the field of sanctioning administrative law was that referring to the new attributions assigned to the National Consumer Service (SERNAC) of Chile.

The key considerations of the judgment mention, as relevant, the following: "*The declaration of unconstitutionality is based on the fact that the measures that include the power to judge on the part of SERNAC "can only be adopted by an independent and impartial tribunal, characteristics that it does not meet" (c. 34°). In fact, the SERNAC would function as* ***judge and party*** *inasmuch as it would exercise its supervisory powers (of an administrative*

16 Ditto

17 Ditto

18 See the history of Law No. 20.780, in https://www.bcn.cl/historiadelaley/nc/historia-de-la-ley/4406/

nature) and then apply a sanction (of a jurisdictional nature), with effects that go beyond a mere administrative sanction, which also contravenes the requirement of a rational and fair investigation and procedure (cf. 36° and 38°). Hence, the Constitutional Court declared that all those precepts that contained such jurisdictional power violated articles 76 and 19 N° 3°, fifth and sixth paragraphs, constitutional[19]".

This requirement of unconstitutionality was presented by the National Chamber of Commerce, Services and Tourism of Chile (CNC), which brings together 18 Regional Chambers of Commerce, 31 specialized Associations, 15 Bi-national Chambers of Commerce and 25 Companies[20] This same business association, together with other business guilds[21] they have been the ones who, through their tax teams, have supported arguments along the same lines to reject the GAAR being applied administratively by the SII.

The curious thing is that if one accepts this accusation, it will lead to questioning all administrative acts where sanctions are imposed, because then, all the agencies of the State Administration with such powers would be "judge and party," which, by the way, is not a plausible argument.

On the matter, the Supreme Court has also ruled, noting that "*...it is important to point out that the sanctioning power of an Administration entity is not jurisdiction, it is a terminal administrative act, which is the concretion of the legally recognized punitive powers, because the jurisdictional powers are exclusively reserved to the Courts of Justice, which is why it is known of the present arbitration*[22]". The court goes on to point out that "*In this way, what characterizes and is the raison d'être of jurisdiction is precisely the intervention of a third party that imposes on the parties a solution to the conflict raised and given its condition of impartial, must be outside the dispute. In this order of ideas, an official who executes part of the administrative power without being subject to the principles of impartiality and independence, lacks the essential qualities of a court, since he does not know the necessary observance of fundamental elements that make up the jurisdictional activity". Because of the foregoing, the Court reasons that "the assignment to the Administrative Authority of a supposed jurisdictional function, does not enjoy the necessary impartiality or independence that guarantee a true resolution of the conflict, suffering in certain cases from contradiction of claims when, for example, in tax matters it rotates and executes taxes, knowing and resolving the defenses deducted by the taxpayers; that is, when a body that has been assigned to execute public functions through the administrative procedure and, in turn, presents interests in the disposition of claims of the process that must be resolved, it cannot be considered to constitute a court, nor less jurisdiction, configuring, rather, a subject with the necessary aptitude to solve a conflict through a nominal jurisdictional function, which excludes the parties to the litigation to exercise such a function, noting an interest and partiality typical of administrative bodies manifested in the knowledge of the hierarchical claim, without forgetting that, the administrative authority, even fulfilling jurisdictional functions granted by the legislator, is still functionally destined, at least, to satisfy the goal of general interest pursued by the State" (CS Rol 24.994-2017, considering ninth. In the same sense, CS Role 30.291-2017)*[23]".

19 See Press Release of 18.01.2018, Judgment on the bill amending Law No. 19.496, on the Protection of Consumer Rights, corresponding to Bulletin No. 9.369-03. Role No. 4012-17. http://www.tribunalconstitucional.cl/wp-content/uploads/Comunicado-de-prensa.pdf

20 See https://www.cnc.cl/nosotros/socios/empresas/

21 Such as the Sociedad de Fomento Fabril (SOFOFA). See public hearings of the social dialogues conducted by the Ministry of Finance of Chile in the year 2022 https://dialogos.reformatributaria.cl/registro-de-instancias-participativas/audiencias-publicas

22 Judgment of the Supreme Court, 08.05.2018, Role 6051-2018

23 Ditto

This last cited ruling demonstrates the distance that exists in the legal reasoning to explain the legitimacy of Sanctioning Administrative Law between the Constitutional Court and the Supreme Court.

This author considers that the reasoning of the Supreme Court in the cited judgment is consistent with the perspective that appreciates the administrative sanction as part of the set of tools that the Administration has to guarantee the objectives of public interest, so that transferring purely and simply the category of the ius puniendi affects the very content of public management[24].

The curious thing is that in the matter of tax avoidance we are not facing a sanctioning procedure (although this idea has been tried to install), so all the arguments to invalidate the administrative declaration of the avoidance are groundless. In the reasoning of these people, the TA would be exercising jurisdictional powers by transferring the ius puniendi that guarantees due process with the standard of criminal law, which has no basis.

The constitutional court has also reasoned in the same way, pointing out that "*being the guarantees and limits al ius puniendi the counterweight to the affectation of rights that the sanction imports, the intensity of said guarantees and limits is greater to the extent that the sanctioning order implies greater punishment in terms of the rights involved, thus, in the criminal order is where they will have the greatest entity, density and significance, because the sanction can even become a deprivation of personal liberty for life. In administrative matters, the penalties are generally fines, not constituting deprivation of liberty, which means that the intensity and specificity of the guarantees is not the same, as the entity of the ius puniendi is different*[25]".

2.3 The principle of good faith and the rights of taxpayers

In the social dialogues for a new fiscal pact conducted by the Ministry of Finance of Chile in 2022, it was said that the principle of good faith and the rights of the taxpayer were violated by the mere fact that the avoidance declaration was made in administrative headquarters by the SII[26]. The American Convention on Human Rights (Pact of San José, Costa Rica) was even invoked, where due process is guaranteed in the tax field. In this regard, the CCC has ruled that "*in the present case, it is a company that invokes as violated norms of international human rights law contained in international treaties, specifically the American Convention on Human Rights. In this regard, it should not be forgotten that the Inter-American Court of Human Rights issued Advisory Opinion OC-22/16 on Ownership of rights of legal entities in the inter-American human rights system...*" concluding that "*it is clear that legal entities are not holders of conventional rights, so they cannot be considered as alleged victims in the framework of contentious proceedings before the inter-American system*". The ruling adds that "*the exercise of the right through a legal entity must involve an essential and direct relationship between the individual who requires protection by the inter-American system and the legal entity through whom the violation occurred, since a simple link between the two is not sufficient to conclude that the rights of individuals and not of legal entities are effectively being protected" and that "it must be proved beyond the simple participation*

24 Cordero, Luis (2019), "El derecho administrativo sancionador y los sectores de referencia en el sistema institucional chileno", Revista Ius et Praxis, Año 26, Nº 1, 2020, pp. 240 – 265 ISSN 0717 – 2877, Universidad de Talca - Facultad de Ciencias Jurídicas y Sociales.

25 TC Ruling Rol 8677-2020, nineteenth recital.

26 See public hearings Nos. 19, 26, 27 and 50. https://dialogos.reformatributaria.cl/registro-de-instancias-participativas/audiencias-publicas

of the individual in the activities of the legal entity, so that such participation is substantially related to the rights alleged to have been violated" (paragraph 119)", all of which makes it possible to dismiss the petitioner's allegations by invoking the American Convention on Human Rights in the specific case[27]".

Article 4º bis of the Chilean Tax Code recognizes the principle of good faith, and also indicates when there is no good faith. In our understanding, when the GAAR was established, the legislator was not thinking that all taxpayers are "bad" or are thinking about avoiding taxes. Otherwise, it would lead us to the absurdity of thinking that every time the legislator, both locally and internationally, establishes a special anti-avoidance rule (hereinafter SAAR) or a GAAR, he is thinking about taxpayers evading their tax obligations. What there is, in short, is a recognition by the legislator that tax avoidance, as a phenomenon that has had a long development in comparative law since the last century, is a challenge that must be faced to protect constitutional principles such as legality and equal sharing of public burdens. Having said the above, no violation of the taxpayers' rights is visible.

3. COMPETENT AUTHORITY AND PROCEDURE FOR DECLARING TAX AVOIDANCE IN CHILE

It should be noted that when we talk about the competent authority to declare tax evasion, we are referring to the headquarters, which can be **administrative**, through the Tax Administration - which in the Chilean case corresponds to the Internal Revenue Service-, **or judicial**, through the Courts of Justice - which in Chile corresponds to the Tax and Customs Court.

Ultimately, it will be the Courts of Justice who will decide whether certain acts or contracts concluded by taxpayers as evasive - and thus declared in the first instance by the TA - effectively correspond to tax avoidance.

3.1 On the objective nature of the application of the GAAR in Chile

Based on the above, it is necessary to indicate that the tax avoidance declaration is complex, basically because the application of an abstract and general rule requires a deep analysis where -eventually - objective and subjective criteria coexist to reclassify contracts or legal acts. In Chile, the legislature established two hypotheses of avoidance: i) the abuse of legal forms, and ii) simulation. Some authors point out that "*both the abuse of legal forms and simulation – as in Spain - are objective figures, that is, within their application budgets it is not necessary to determine a special mood that would have guided the taxpayer to avoid*[28]". That is, the TA would not have to prove, using subjective criteria - which are the most questioned and debated in the academy - whether one is facing avoidance or not, it would be enough to respond to certain objective criteria, such as, for example, whether the acts or contracts concluded were aimed solely at tax savings; or whether the economic or legal effect or results of the acts celebrated are relevant for reasons other than purely tax-related, among others.

In our opinion, a confusion is incurred by emulating a procedure of application of GAAR as a "sanction" (and, therefore, in the sphere of criminal law), considering that in tax avoidance the public law branch of tax law is essentially applied. The SII's Circular 65 of 2015 also reaffirms it by pointing out that "*It is obvious here that*

27 See judgment Rol 8677-2020 of the Constitutional Court of Chile.

28 Navarro Schiappacasse, María Pilar (2022): "On the objective character of the Chilean general anti-circumvention rules". Revista Ius et Praxis, Vol. 28, No. 1, 2022. Talca, Chile. pp. 141-161. Available at http://dx.doi.org/10.4067/S0718-00122022000100141

recourse to institutes belonging to other branches of law, or rather related to the areas of criminal or infraction law, such as, for example, malice or guilt, has nothing to do with it. What this GAAR does is not to classify crimes or infractions for which the administration should pursue the application of a penalty, but to protect the principle of tax legality, whose consequence is precisely the application of evaded taxes, which clearly cannot be qualified as a penalty." Other authors argue that "the purpose of the anti-avoidance rules is not to punish, but the correct fulfillment of the tax obligation, unpaid or underpaid by means of avoidance[29]".

We share that - in line with the above - in fact, the abuse of legal forms and simulation are objective figures where a penalty is not applied, but the evaded taxes are determined and collected, which is why, simply transferring the ius puniendi with a criminal law standard, does not seem reasonable.

3.2 Establishment of the GAAR in Chile and the competent authority to declare the avoidance

The following is a comparative table of the competent authority and the procedure for declaring the avoidance that was initially tried to establish in Chile in 2014 through the draft law on tax reform, message No. 24-362 dated 01.04.2014, how it was currently in the current law, and the draft law on tax reform towards a fiscal pact for development and social justice[30] of the year 2022, rejected in its first legislative procedure:

Bill No. 20,780 (2014)	**Law No. 20,870 (2014) * Current Regulations**	**Bulletin N° 15.170-05, Tax Reform Bill (2022)**
	Competent Authority	
Article 4d. The existence of the abuse or simulation referred to in Articles 4b and 4c, precedents, **will be declared administratively by the Service** in the corresponding liquidation, draft or resolution, with the prior authorization of the Regional Director, Director of Large Taxpayers or Deputy Director of Supervision, as appropriate…	Article 4d. - The existence of the abuse or simulation referred to in Articles 4b and 4c **shall be declared, at the request of the Director, by the competent Tax and Customs Court**, in accordance with the established procedure in Article 160 bis. This declaration may only be required to the extent that the amount of the tax differences provisionally determined by the Service to the respective taxpayer exceeds the amount equivalent to 250 tax units per month as of the date of the filing of the request.	Article 4d. - The existence of the abuse or simulation referred to in Articles 4b and 4c **will be declared administratively by the Service**, in the corresponding settlement, draft or resolution.

29 Cattaneo Escobar, I., & Burgos Arredondo, J. (2017). Tax avoidance. Journal of Tax Studies, (17), pp. 227-252. Retrieved from https://revistaestudiostributarios.uchile.cl/index.php/RET/article/view/46988

30 Bulletin N° 15.170-05, Bill establishing tax reform towards a fiscal pact for development and social justice, entered by presidential message to the Chamber of Deputies dated July 7, 2022.

Bill No. 20,780 (2014)	Law No. 20,870 (2014) * Current Regulations	Bulletin N° 15.170-05, Tax Reform Bill (2022)
	Procedure [31] [32]	
The authorization referred to in this article shall be granted by the officers indicated in the preceding paragraph, at the request of the unit of their dependency that is taking cognizance of the background or carrying out the respective inspection, after a report from the Legal Department or from the Legal Sub directorate in the event that the authorization corresponds to the Deputy Director of Inspection. The request for authorization must be based on the concurrence of the circumstances provided for in Articles 4b and/or 4c, and must be made before the settlement, draft or resolution is issued, as appropriate[33].	Prior to the request for a declaration of abuse or simulation and for the purposes of founding the exercise of this, the Service must cite the taxpayer in the terms of Article 63, being able to request the necessary and relevant background, including those that serve for the establishment of the fine of Article 100 bis. The deadlines set out in Article 59 shall not apply in this procedure. **The Director must request the declaration of abuse or simulation to the Tax and Customs Court within nine months following the response of the summons referred to in the previous paragraph**. The same deadline will be applied in case of no response, which will be counted from the respective summons. The aforementioned term will not apply when the remaining limitation period of the tax obligation is less, in which case the latter will be applied. After this period, the Director may not request the declaration of abuse or simulation regarding the case for which the taxpayer or advisor was summoned.	For these purposes, the Service must cite the taxpayer in the terms of Article 63, being able to request all the background information it deems necessary regarding the facts, acts or legal business under review. The Service must issue the corresponding settlement, draft or resolution, within a maximum period of nine months from the response to the summons referred to in this article. The same deadline will apply in case of no reply, counted from the expiration of the one-month period indicated in Article 63. This term will not apply when the remaining limitation period of the tax obligation is less, in which case the latter will apply. The corresponding settlement, draft and /or resolution must indicate the abusive or simulated legal acts, the factual and legal background on which the qualification of abuse or simulation is based, and the indication of the way in which the assumptions of Articles 4° ter and 4° quater of this law are fulfilled. The liquidation or draft referred to in this article shall be reclaimable in accordance with article 124 of this Law".

Source: Own elaboration based on the Tax Code of Chile D.L. 830 of 1974.

31 Due to the length of the procedure, the reader is suggested to review the details of this in Circulars 65 of 2015 and 41 of 2016 of the Internal Revenue Service.

32 See description of the administrative and judicial procedure developed with clarity and detail Toledo-Zúñiga, Patricia and Navarro-Schiappacasse, María Pilar (2023). "Procedural Aspects of the General Anti-Avoidance Rule. Comparative Analysis of the Cases of Chile and Spain,"Latin American Legal Studies, Vol. 11 No. 1, pp. 149-194.

33 See indications in Library of the National Congress (2014). See the history of Law No. 20.780, in https://www.bcn.cl/historiadelaley/nc/historia-de-la-ley/4406/ Page. 99

As can be seen, since the GAAR was implemented in Chile in 2014, it has been intended that the avoidance declaration be made at the administrative headquarters, in line with practically all countries in comparative law, as we can see below.

4. COMPETENT AUTHORITY TO DECLARE TAX AVOIDANCE IN OECD MEMBER COUNTRIES

The study of comparative law sets an international standard. Chile joined the OECD in 2010 and had to adapt part of its tax regulations and incorporate legislation that was in tune with those member countries of this body.

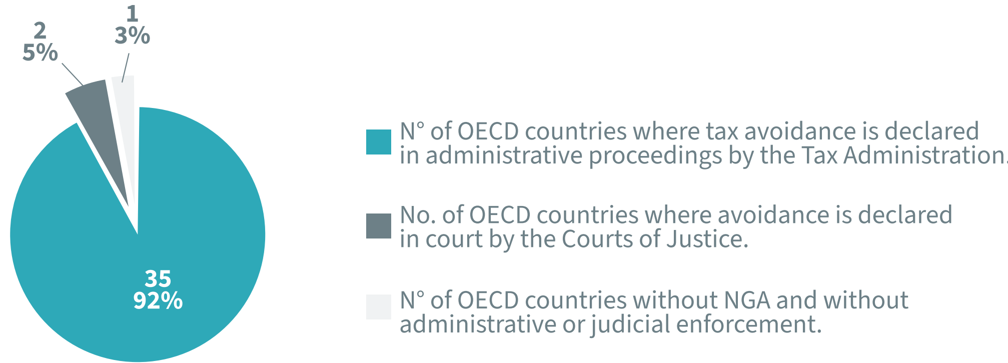
Massone (2016) notes that "*comparative law is one of the most important research fields in science today. It tries to reach the legal constants of the differences systems of Positive Law, in order to clarify the current law and offer useful and fruitful indications to the law that is being elaborated*"[34].

A summary of the competent authority for declaring tax avoidance in the 38 current OECD members is shown in Annex I.

As a summary, based on Annex I, the following graph is presented:

Figure 1

Summary of OECD countries with and without GAAR and competent authority to declare tax avoidance



Source: Own elaboration based on Annex I.

34 Massone Parodi, Pedro, Principios de Derecho Tributario, Cuarta Edición Revisada y Ampliada, (Editorial Thomson Reuters, 2016), pág. 82.

As you can see, in 35 of the 38 OECD member countries, tax avoidance is declared by the Tax Administration at the administrative headquarters, that is, 92%. The comparative experience, then, is overwhelming in relation to who is the competent authority to declare tax avoidance.

What is the reason for the above? This probably has to do with what Anguita (2017) points out by indicating that "*it should be remembered that the general anti-avoidance clause is, among others, one more faculty available to Administrations, an additional resource that allows the Administration to dismiss abusive or evasive acts and apply the correct taxation. In this way, the application of the general anti-avoidance rule occurs within the framework of the inspection and inspection procedure and the decision to apply it will be taken into consideration the factual background of each particular case*"[35].

The same author points out that "*In most countries, it will be the administration that will declare tax evasion and taking into account the principles of conflicting constitutional values, in particular the principle of legality and legal certainty, panels and commissions of experts have been planned to analyze the cases that may be declared as elusive*"[36]. Within the conclusions of this work, the author reminds us that "*it is the tax administrations, within their powers of verification and supervision, that are called to apply the anti-abuse clauses, which in any case must have an exceptional application, fully respecting the rights of taxpayers, and also taking into consideration that the burden of proof in these files will always be on the Administration, who must prove the abuse or simulation of taxpayers, both in administrative and judicial*"[37].

In this same line Toledo and Navarro (2023) point out that "*At a comparative level, it is commonplace to identify the declaration of avoidance, by application of a GAAR, as one more of the legal powers of control with which the Tax Administration is endowed. This applies not only for European jurisdictions but is also the rule in Latin America*"[38]. In the Latin American case, it is mentioned that the application of the GAAR is conducted by the Tax Administration in the cases of Colombia, Peru, Argentina, Mexico and Costa Rica[39].

Why is it that in Chile - unlike what happens in practically all countries at a comparative level - the declaration of avoidance is made at the request of the Director of the SII by the ATT? There is a common answer. For Navarro (2022) "*...this particular structure of the Chilean system has a historical reason: it avoided going back to a not-too-distant time when the SII was a judge and a party in the first instance of tax litigation*"[40]. In the same line Toledo and Navarro (2023) refer indicating that "the requirement that the declaration of avoidance be made by a ATT is also explained by the fact that, if the SII held this competence, it could devolve to the state before 2010, when the SII was a judge and a party to tax judicial proceedings, with the consequent violation of due process"[41].

35 Anguita Oyarzún (2017) "The Challenges in the Application of Anti-Abuse Clauses by Latin American Tax Administrations and the Lessons of the Spanish and European Experience", CIAT, IEF, AEAT. https://www.ciat.org/Biblioteca/BecadeInvestigacion/2017_VII_retos_aplicacion_clausulas_antiabuso_anguita_chile.pdf , p. 152.

36 Ditto Page. 150

37 Ditto Page. 165

38 Toledo-Zúñiga, Patricia And Navarro-Schiappacasse, María Pilar (2023). "Procedural Aspects of the General Anti-Avoidance Rule. Comparative Analysis of the Cases of Chile and Spain,"Latin American Legal Studies, Vol. 11 No. 1, pp. 149-194

39 Ditto

40 Navarro Schiappacasse, María Pilar (2022): "On the objective character of the Chilean general anti-circumvention rules". Revista Ius et Praxis, Vol. 28, No. 1, 2022. Talca, Chile.

41 Toledo-Zúñiga, Patricia And Navarro-Schiappacasse, María Pilar (2023). "Procedural Aspects of the General Anti-Avoidance Rule. Comparative Analysis of the Cases of Chile and Spain,"Latin American Legal Studies, Vol. 11 No. 1, pp. 149-194

As can be seen, we return to the statements of "judge and party" and "violation of due process." The terminal administrative decisions and acts of the TA in matters of avoidance are tax pretensions until, through a tax claim, the case is resolved in a judicial venue; then the alleged violation of due process is not noticed. Hence the importance of what was previously analyzed in this article on both topics. It can be noted, then, that there is no technical argument, but rather a political one.

In 2009, the Tax and Customs Courts were created in Chile by Law N°20.322 dated 13.01.2009. That is, for more than 14 years there have been specialized courts in tax and customs matters that control the acts and resolutions of both the SII and the SNA. To maintain - at this point - that granting the Chilean TA the power to declare avoidance is to go back to the state of affairs prior to 2009 is illusory.

In this way, it is clear that most countries have decided that declaring avoidance is part of the control procedure proper to the competencies of the Tax Administration. The foregoing is pointed out regardless of the discussion - which seems more reasonable - regarding the establishment of a special procedure to declare the avoidance that guarantees to respect the rights of taxpayers and due process.

For the same reason, the procedure for declaring avoidance should consider aspects such as:

- That a special procedure is defined in the Law that establishes how an NGA control procedure can be initiated.
- That the Law defines the mandatory citation of both the taxpayer and his/her advisor(s), if applicable.
- That the Law defines the deadlines for the proceedings and the effects that would have the non-presentation of antecedents, the partial presentation of antecedents, or the complete presentation of antecedents, both of the taxpayer, and of his/her advisor(s), if applicable.
- That the Law defines a committee composed of high-ranking officials within the TA, or a panel of experts is formed - similar to the United Kingdom - that is composed of people outside the TA or by a committee of officials of the TA and by academics. If the latter option is chosen, it is important to make possible conflicts of interest transparent, given that in Chile - unlike in the United Kingdom - academics who are not full-time usually practice their profession freely by providing advice, which can be counterproductive with the objective of relative impartiality that a body of these characteristics should observe.

5. THE CIAT TAX CODE MODEL

The Tax Code Model prepared by the Inter-American Center of Tax Administrations (CIAT) is a valuable tool that is made available to the Tax Administrations (TAS) of Latin America, whose objective is to serve as a frame of reference for the region's codification efforts. This document includes an approach based on the Ibero-American experience. The most recent version is from 2015, which was updated from the initial model published in 2006 and had the participation of a working group made up of representatives from Brazil, Mexico, Spain, Peru and Uruguay. The Model Tax Code was officially presented within the framework of the 49th CIAT General Assembly, held in Lima, Peru, from May 4 to 7, 2015[42].

Having said the above, the 2015 MTC of CIAT contains in its article 10° a norm on the qualification of facts and simulation. For its part, Article 11° includes a general anti-avoidance clause.

The comments to Article 11° of the CIAT MTC indicate, as pertinent, that "*the various legal systems in the world*

42 View and download the CIAT Model Tax Code at https://www.ciat.org/nueva-version-del-modelo-de-codigo-tributario-del-ciat/

tend to react by incorporating general anti-avoidance clauses into their legislation, which is a tool that allows Tax Administrations to combat elusive behaviors and tax law fraud". The comments also state "*these types of measures are covered by the OECD's Joint Action Plan against Base Erosion and Profit Shifting (BEPS). This plan establishes, in particular, the need to design internal rules that prevent the granting of the benefits derived from an International Tax Law Convention in inappropriate circumstances*". The comments continue to indicate that the adoption of an GAAR in the legislations of the countries "*…it does not imply openness to arbitrariness, on the contrary, it will be up to the Tax Administrations to support, with evidence that the legal system admits, the improper, inadequate or artificial nature of the operations conducted by the taxpayers, as well as the absence of a purpose other than pure and simple tax savings*". As a result, it concludes by stating that the TAS "*shall be responsible for applying not only the collection of the evaded tax or decrease or eliminate the tax advantage, but also the corresponding penalty*".

Article 14 of the CIAT's MTC on presumption of legality is even more clarifying, as it states that "*The acts and resolutions of the Tax Administration will be presumed legal and will be enforceable without prior intervention of the Judicial Power, without prejudice to the actions that the law recognizes to the taxpayers for the challenge and, where appropriate, suspension of the effectiveness of those acts or resolutions".* The comments to Article 14 of the CIAT MCT state that *"the presumption of validity or legality of the acts or resolutions of the Tax Administration, is of the essence of administrative acts; it is a rule that provides efficiency to the tasks of the Tax Administration and that is recognized mostly by the tax legislations of the countries.* ***In this sense, it is not necessary for the Judiciary to rule on the legality of the administrative function as a prerequisite for the collection of the tax debt****. However, this is not an absolute presumption, so the right is recognized to the taxpayers to discuss the aforementioned legality through different resources…*" administrative and judicial. In this last comment lies the heart of the topic discussed in this article: the origin of the TA having to appeal to the Judiciary (in our case the ATT) to request its "approval" and receive an "order" in compliance with the judgment that may qualify or not tax avoidance. In accordance with the above, the ATT has pronounced stating that "*Thus, since the tax audit is an exclusive power of the SII, the jurisdictional instance should be a review of the actions taken by the Tax Agency in the administrative stage, and not an audit instance, since, by legal mandate, it is the competence of the latter*"[43]. Moreover, Toledo and Navarro (2023) point out that "*the relevant thing at this point is that the tax audit and the consequent determination of the tax difference, or the correction of the tax result will not be conducted by the SII. In fact, such a declaration will be made by a judicial body with tax jurisdiction, after the judicial procedure of the existence of abuse or simulation has been processed…*"[44]. Paradoxically, the one who ends up being "judge and party" is the ATT.

This author considers that the above procedure is not only ineffective, but in line with the foreword of the Head of the Spanish Mission to the CIAT, Juan Redondo Sánchez, of the research paper "The Challenges in the Application of Anti-Abuse Clauses by Latin American Tax Administrations and the Lessons of the Spanish and European Experience" by Christian Anguita Oyarzún, "*It is useless to have an anti-abuse clause in the tax rules if the procedure for its application is not agile and expeditious or there are no instruments for the identification of risk operations, their selection and control…*"

43 See sentence RIT N°: GR-17-00286-2016, RUC N°: 16-9-0001537-6, dated 28.04.2023 handed down by the Third Court Tax and Customs of the Metropolitan Region.

44 Toledo-Zúñiga, Patricia And Navarro-Schiappacasse, María Pilar (2023). "Procedural Aspects of the General Anti-Avoidance Rule. Comparative Analysis of the Cases of Chile and Spain,"Latin American Legal Studies, Vol. 11 No. 1, pp. 149-194

However, despite being an inefficient procedure, it was widely criticized that since the establishment of the GAAR in Chile in 2014, this regulation had not been applied. In the Tax Compliance Management Plan (TCMP) of the year 2023, regarding the management of the year 2022, the SII reported that 6 requirements have been submitted to the ATT for avoidance[45]. In addition, 78 consultations were reported within the framework of Article 26 bis of the Chilean Tax Code, and taxpayers have been urged to use the tools provided by the tax regulations to provide certainty, through the binding or non-binding consultations established by said article.

According to a press release in Chile[46], from July 29, 2021 to February 2023, 56 GAAR control processes have been initiated, and of that total, in 16 cases taxpayers paid the evaded taxes, so the SII withdrew the requirement before the ATT.

Due to the above, it could be ruled out that the fact of establishing a cumbersome procedure could have been a reason for its inapplicability. However, it remains to be seen how the ATT respond to a possible massification in the application of this regulation.

45 View SII Tax Compliance Management Plan year 2023 https://www.sii.cl/destacados/pgct2023.pdf

46 Anti-avoidance rule: 16 taxpayers have given up and paid taxes owed to the SII. Article published by Diario Financiero https://www.df.cl/economia-y-politica/df-tax/norma-antielusion-16-contribuyentes-han-desistido-y-pagaron-los

CONCLUSION

As we have seen throughout this article, several authors point out that the application of tax avoidance in administrative and judicial courts is an exceptional procedure in Chile with respect to comparative law. It was also found that the competent authority to declare avoidance in almost all OECD member countries is at the administrative headquarters of the Tax Administration.

The following questions arise for us:

Why was an administrative and judicial procedure established in Chile where the ATT is the one who declares the avoidance? The truth is that - as already mentioned - there is no answer based on technical or legal arguments.

In what position will a taxpayer be in the hypothetical case that, after requesting the declaration of avoidance due to simulation or abuse of legal forms by the Director of the SII to the ATT, the latter declares that any of these avoidance hypotheses are actually configured? This author considers that the taxpayer will be in a much worse position than if such a declaration is made in administrative headquarters and subsequently questioned before the ATT and Higher Courts.

Will there be an adequate level of specialization in tax avoidance by the country's Higher Courts?

The effects of judgments in Chile are relative. In other words, the ATT of the Tarapacá Region can apply a different interpretation criterion to the ATT of the Magallanes Region, which is why we ask ourselves, what level of certainty can taxpayers have in the face of the -eventual- different criteria adopted by the ATTs in terms of avoidance?

This author considers that, in view of everything stated in this work, the competent authority to declare avoidance is the TA, because not only comparative experience has understood this, but the fight against avoidance is carried out within the framework of the competition review procedures of the TA, without prejudice to the fact that, in short, it will be the Courts of Justice who will have the last word.

Finally, if the current state of affairs is maintained, it is foreseen that there will be excessive litigation in these cases, which will affect both the taxpayers, who will incur higher defense costs, and the Treasury, which will have to deal with the delay in the collection of any taxes evaded.

REFERENCES

Aedo, S. y Mánquez, M. (2015). "Reforma Tributaria. Filosofía, objetivo y principales cambios introducidos por la Ley Nº20.780 al sistema de impuestos en Chile". Editorial Thomson Reuters.

Anguita, O. (2017) "Los Retos en la Aplicación de las Cláusulas Antiabuso por las Administraciones Tributarias Latinoamericanas y las Lecciones de la Experiencia Española y Europea", CIAT, IEF, AEAT.

Biblioteca del Congreso Nacional (2014). Historia de la Ley N° 20.780, en https://www.bcn.cl/historiadelaley/nc/historia-de-la-ley/4406/.

Cattaneo Escobar, I., & Burgos Arredondo, J. (2017). Elusión tributaria. Revista de Estudios Tributarios, (17), pág. 227–252. Disponible en https://revistaestudiostributarios.uchile.cl/index.php/RET/article/view/46988

Cordero, L. (2019), "El derecho administrativo sancionador y los sectores de referencia en el sistema institucional chileno", Revista Ius et Praxis, Año 26, Nº 1, 2020, pp. 240 – 265 ISSN 0717 – 2877, Universidad de Talca - Facultad de Ciencias Jurídicas y Sociales.

KPMG (2020), "EU Country Profiles", [en línea] <https://kpmg.com/xx/en/home/services/tax/regional-tax-centers/eu-tax-centre/eu-country-profiles.html> [consulta: 19 de Junio de 2023]

Massone Parodi, P. (2016). Principios de Derecho Tributario, Cuarta Edición Revisada y Ampliada, (Editorial Thomson Reuters, 2016), p 97.

Navarro Schiappacasse, M.P. (2022): "Acerca del carácter objetivo de las normas generales antielusivas chilenas". Revista Ius et Praxis, Vol. 28, Nº 1, 2022. Talca, Chile. Disponible en http://dx.doi.org/10.4067/S0718-00122022000100141

Orbitax - Country Chapter, [en línea] https://www.orbitax.com/taxhub/countrychapters, [consulta: 20.06.2023]

Saffie, F. (2021). "¿Por qué fiscalizar la elusión mediante una cláusula general antielusión? Historia de su establecimiento en Chile y los debates políticos que genera", en Atria, Jorge y Otero, Cristóbal (edits.), Impuestos justos para el Chile que viene. págs. 253-276.

The Legal 500 – Guides, Tax Chapters, [en línea] https://www.legal500.com/guides/guide/tax/, [consulta: 20.06.2023]

Toledo-Zúñiga, P. y Navarro-Schiappacasse, M.P. (2023). "Procedural Aspects of the General Anti-Avoidance Rule. Comparative Analysis of the Cases of Chile and Spain", Latin American Legal Studies, Vol. 11 Nº 1, pp. 149-194.

ANNEX I

OECD MEMBER COUNTRIES WITH AND WITHOUT NGA AND COMPETENT AUTHORITY TO DECLARE TAX AVOIDANCE

	OECD Member country	Has a general Anti-Avoidance rule (GAAR) or similar	Competent authority to declare the avoidance (Headquarters)	Remarks
1	Germany	Yes	Tax Administration	According to the German GAAR, tax laws cannot be avoided by abusing the structuring options available within the limits of the law. There is abuse when an inadequate legal structure has been chosen that, compared to an adequate structure, results in a tax benefit for the taxpayer or for a third party not contemplated in the law. This does not apply when the taxpayer can prove valid non-tax reasons for the structure.
2	Australia	Yes	Tax Administration	The general anti-avoidance provisions allow the Commissioner (CEO) to set aside any tax benefit that a taxpayer has obtained from an agreement, if it can be concluded that a person (not necessarily the taxpayer) entered into or carried out the agreement for the sole or predominant purpose of allowing the taxpayer and other persons, to obtain a tax benefit. The Multinational Anti-Avoidance Law applies to multinational companies with annual global revenues of at least AUD 1 billion and extends the general anti-avoidance rules to schemes that aim to "limit a taxable presence in Australia."
3	Austria	Yes	Tax Administration	A general anti-avoidance rule is included in the Austrian Tax Code which implements a "substance over form" principle. Amendments have been made regarding the wording of the definition of "abuse" in order to fully comply with Article 6 of the Anti-Tax Abuse Directive (ATAD). The wording combines the main aspects of Article 6 of ATAD with the main features of the Austrian GAAR as interpreted by the Administrative Court and the tax authorities.
4	Belgium	Yes	Tax Administration	The Belgian general anti-avoidance rule states that if the tax authorities have a presumption or any other evidence that there is tax abuse in a transaction, the transaction is reclassified/denied. The taxpayer must demonstrate that the chosen legal qualification is justified for reasons other than tax avoidance. If the taxpayer fails to prove his case, the tax authorities will be able to determine the taxable base and the calculation of the tax as if there had been no tax abuse.
5	Canada	Yes	Tax Administration	General Anti-Avoidance Rule, Article 245 of the Income Tax Law. For more than 30 years, the GAAR has been applied by the Canada Revenue Agency (CRA) as a comprehensive rule to deny tax benefits obtained by taxpayers through what it considered abusive tax avoidance transactions. It is an exception to the principle that taxpayers have the right to sort out their affairs in order to minimize the tax.

6	Chile	Yes	Tax and Customs Court	The Director of the Internal Revenue Service (SII) has the power to request the avoidance declaration from the Tax and Customs Court (TCC). It is an administrative and judicial procedure.
7	Colombia	Yes	Tax Administration	The Colombian Congress introduced the General Anti-Avoidance Rule in its fiscal statute, through Law 1607 of 2012 in article 869. Article 869-1 establishes the administrative procedure for declaring avoidance that is based on the Tax Administration (DIAN).
8	South Korea	No	Tax Administration	Korean tax law has a "substance over form" principle, which functions as a general rule against avoidance. The principle of substance over form applies to both domestic and cross-border transactions. When an investment structure or transaction results in a favorable tax result for the taxpayer or when the benefits of the treaty are believed to have been exploited, the tax authority often uses the substance-over-form principle to collapse the form of the transaction and/or attribute Korean-origin income to foreign subsidiaries of the actual recipient of the income. While the tax authority has aggressively applied the principle of substance over form, the courts have generally taken the position that it should only be applied in limited circumstances when (i) the acts of the parties involved were fictitious, (ii) the form of the transaction was chosen solely on the basis of tax considerations, or (iii) if there is a detailed provision in the law that allows the transaction to be disregarded.
9	Costa Rica	Yes	Tax Administration	In 2018, Costa Rica incorporated Article 12 bis into its Code of Tax Rules and Procedures (Tax Code) N° 4755. This clause states: "When acts are performed that, individually or as a whole, are artificial or improper for obtaining the achieved result, the tax consequences applicable to the parties that have intervened in said acts will be those that correspond to the usual or proper acts for obtaining the result that has been achieved." "The provisions of the previous paragraph will only apply when the artificial or improper acts do not produce relevant economic or legal effects, with the exception of tax savings".
10	Denmark	Yes	Tax Administration	The Danish law contained a general anti-avoidance rule that had to be declared by the courts of law. Without prejudice to the foregoing, applying the OECD criterion, a new regulation entered into force on January 1, 2019, which handed over these powers to the Tax Authority.

11	Slovenia	Yes	Tax Administration	Slovenia has implemented a new general anti-avoidance rule (GAAR) and rules on controlled foreign companies (CFCs) in compliance with the EU Anti-Tax Avoidance Directive. The new rules are implemented by amendments of the Slovenian Corporate Tax Law. The new GAAR establishes that when determining a taxpayer's tax liability, and in particular the recognition of a tax benefit or right under the Law, the tax authority may disregard an inauthentic mechanism or series of agreements if the main objective or one of the main purposes was to obtain a benefit not in accordance with the object and purpose of the Law. For the purposes of the rule, a tax benefit or right is one that reduces the taxable base, such as the use of a loss, deduction, exemption or other benefit provided for under the Law. An agreement or a series of agreements is considered inauthentic if it is not established for valid commercial reasons that reflect economic reality. The new GAAR and CFC rules came into force and apply from 1 January 2019.
12	Spain	Yes	Tax Administration	Tax evasion or fraud to the law (until 2003). Conflict in the application of the standard (from 2003 to the present). Qualification (art. 13 LGT); Simulation (Art. 16 LGT); Fraud of law or Conflict in the Application of the Norm (Art. 15 LGT). In order for the Tax administration to declare the conflict in the application of the tax rule, the previous favorable report of the Advisory Committee referred to in Article 159 of the LGT will be necessary.
13	United States	No	Tax Administration	There are several judicially developed doctrines that are comparable to a general anti-abuse rule, such as ”substance over form“, ”staggered transaction“, ”economic substance“, ”commercial purpose“ and ”sham transaction". All of these doctrines generally have a similar purpose: to look beyond the form of a transaction and refuse applicable tax benefits if the transaction violates the spirit of the law. In addition, the doctrine of economic substance was added to the Internal Revenue Code and carries a penalty for non-compliance of 20%, which can be increased to 40% if the transaction is not properly disclosed.
14	Estonia	Yes	Tax Administration	As of January 1, 2019, the amendments based on the anti-tax avoidance rules of the European Union (EU) Anti-Tax Avoidance Directive (ATAD) 2016/1164 were transposed into Estonian legislation. These amendments introduced controlled foreign company (CFC) rules, a new general anti-avoidance rule (GAAR) and undercapitalization rules.
15	Finland	Yes	Tax Administration	If a transaction has been given a legal form that does not correspond to its actual nature or meaning or if the legal form of the transaction does not correspond to the actual behavior of the taxpayer, GAAR or SAAR may be applied, and taxes may be re-assessed as if the actual form of the transaction had been used. The case law on the application of GAAR and SAAR has, in several cases, covered scenarios in which a number of transactions have been conducted that have been the subject of a new characterisation, especially when appropriate commercial reasons for the transaction have not been demonstrated.

16	France	Yes	Tax Administration	The French tax authorities have the right to conduct tax reclassifications based on the abuse of the right (fictitious transactions or exclusively/mainly based on tax effects). In accordance with the Anti-Tax Avoidance Directive (ATAD), GAARS have been introduced by the Finance Bill in 2019. As of January 1, 2019, artificial or improper schemes established with the main objective, or as one of their main objectives, to obtain a tax advantage that goes against the object or purpose of the applicable tax law, may be ignored by the tax authorities. An agreement is defined as artificial or improper if it is not established for valid commercial reasons that reflect the underlying economic reality.
17	Greece	Yes	Tax Administration	Under the Greek Tax Procedure Code, a GAAR has been adopted. According to this standard, which has been updated to align with ATAD I, the Greek tax authorities may ignore a mechanism or a series of agreements that, having been established with the main objective or one of them, of obtaining a tax advantage that defeats the object or purpose of the applicable tax law, are not genuine with respect to all relevant facts and circumstances (non-genuine agreements).
18	Hungary	Yes	Tax Administration	The general anti-avoidance rules apply in a national and cross-border context. Hungary uses both the substance-over-form principle and a generic anti-avoidance rule when the main objective of transactions is tax avoidance. There is also a new anti-hybrid rule (post-2015) that triggers a change to the (exemption) credit method in certain double taxation relief situations.
19	Ireland	Yes	Tax Administration	Ireland has an elusive general rule; Section 811C of the ATC, the applicability of which was examined by the Irish Supreme Court in O'Flynn Construction Limited & Others v The Revenue Commissioners. Section 811C applies when the TA forms an opinion that a transaction gives rise to a tax advantage for the taxpayer, was not made for any other purpose but to obtain that advantage and would be a misuse or abuse of any relief requested by the taxpayer. Article 6 of the EU ATAD Directive also introduces a broad general anti-avoidance provision. However, the current Irish general anti-avoidance provision in section 811 is considered to be broader than that contained in section 6 and, accordingly, it is considered that no further amendment to section 811C is envisaged at this time.
20	Iceland	Yes	Tax Administration	Transactions structured in a way that differs significantly from common practice may be discarded for tax purposes. According to established case law, the tax authorities are obliged to prove that the transaction was conducted between related parties and for little or no commercial purpose other than tax avoidance. The parties have extensive obligations to inform the tax authorities, including with respect to foreign subsidiaries or affiliates. Failure to comply with these obligations can be used against a party when assessing the facts.

21	Israel	Yes	Tax Administration	As a general rule, Section 86 of the Income Tax Ordinance contains a general anti-avoidance rule that allows the tax auditor to ignore a transaction considered artificial or fictitious, or one whose main objective is the avoidance or undue reduction of tax.
22	Italy	Yes	Tax Administration	The definition of "abuse of the law" is incorporated in Law No. 212/2000. It applies to all income taxes and indirect taxes, except customs duties. The abuse of right arises when the following elements are met: (i) The transaction (or series of interconnected transactions) has no economic substance (that is, although it is valid on paper, it is an inappropriate way to achieve the stated business objective); (ii) An undue tax advantage is obtained, even without violating any tax rules; (iii) The tax advantage is the essential effect of the transaction.
23	Japan	No	-	Japanese tax regulations do not contain a general anti-avoidance rule. However, the Japanese tax legislation includes special anti-avoidance rules for a family business (i.e. a company where more than 50% of its shares are held by three or fewer shareholders and certain related persons). Japanese tax law also has specific anti-avoidance rules involving corporate reorganization operations and filing of consolidated tax returns. In addition, there is an anti-avoidance rule for transactions related to income attributable to a permanent establishment of foreign companies.
24	Latvia	Yes	Tax Administration	Until 2012, the Latvian tax law did not contain a general anti-avoidance rule; the structure of the tax law was based only on specific anti-avoidance rules, such as transfer pricing provisions, undercapitalization rules, arm's length principle and others. With the amendments to the Taxes and Duties Act of December 13, 2012, section 23 “Adjustment of the Amount of Tax Payment” was amended by paragraph 14 consisting of a general anti-avoidance rule of the following wording: “The tax administration will determine the amount of tax liabilities based on the economic nature and substance of the individual transaction or a set of transactions performed by the taxpayer and not solely on the basis of its legal form”.
25	Lithuania	Yes	Tax Administration	The Lithuanian Law on Corporate Income Tax contains a general anti-avoidance provision. General provisions of substance on form also apply.

26	Luxembourg	Yes	Tax Administration	With effect from 1 January 2019, Luxembourg amended its general anti-avoidance rule (GAAR) in accordance with the Anti-Tax Avoidance Directive (ATAD). The GAAR focuses on all artificial transactions (not conducted for valid commercial reasons that reflect reality) conducted at the local or cross-border level. It applies to transactions that, having been made for the main purpose or one of the main purposes of obtaining a tax advantage, violate the object or purpose of the applicable tax legislation and are artificial considering all the relevant facts and circumstances. Luxembourg tax authorities will ignore transactions that are considered abusive, and taxes will be calculated on the basis of the actual transaction with respect to all relevant facts and circumstances. The Luxembourg tax authorities will first have to prove that the constituent elements of an abuse are identified. It would then be up to the Luxembourg taxpayer to provide sufficient valid business reasons justifying the transaction.
27	Mexico	Yes	Tax Administration	The general anti-avoidance rule allows tax authorities to ignore or re-characterize the tax effects of transactions that presumably lack a commercial purpose. In general terms, the lack of business substance can be presumed by the tax authorities: (a) when the tax benefit obtained from the operation is greater than the present or quantifiable future economic benefit that results from it; or (b) if the same economic benefit could have been obtained with fewer legal acts that would have resulted in a greater tax liability for the taxpayer.
28	Norway	Yes	Tax Administration	Norway recently codified its general rule against evasion (GAAR). The GAAR had been in existence for more than a century and had been developed by the Supreme Court through numerous rulings. The provision was intended to codify existing practice, without introducing major modifications to the rule itself. Previously, Norway did not have a GAAR coded. The main reason for the proposed rule was that the Ministry of Finance disagreed with some of the assessments made by the Supreme Court in anti-avoidance cases regarding three particular judgments: Telenor, Hydro Canada and ConocoPhillips III.
29	New Zealand	Yes	Tax Administration	New Zealand has a combination of general and specific anti-avoidance rules. Under the general anti-avoidance rule, transactions are void if they contradict the purpose and intent of New Zealand tax law (i.e. have a tax avoidance purpose or effect). Application since 1889 by case law.
30	Netherlands	No	Courts of Justice	It is not considered necessary to include a GAAR, since the doctrine of abuse of the Law would cover all possible scenarios. The tax authority has no requirements to invoke this doctrine, but the burden of proof rests on it. The courts apply the concept of fraud to the law (fraud legis doctrine).

31	Poland	Yes	Tax Administration	A general anti-avoidance rule came into force on July 15, 2016. These rules give the tax authorities the right to determine the amount of tax to be paid without taking into account transactions that were made primarily to obtain a tax benefit (or such tax benefit was one of the main objectives of the transaction), and which in the given circumstances would be contradictory to the spirit and intention of the tax law or a particular provision thereof and has an artificial character.
32	Portugal	Yes	Tax Administration	Portugal had a general anti-avoidance rule which was modified in accordance with the ATAD directives.
33	United Kingdom	Yes	Tax Administration	A general anti-avoidance rule came into force on July 17, 2013. However, the UK courts have not yet been asked to decide on its application to a transaction. One of the reasons for this is that, before invoking GAAR, the Tax Administration (HMRC) must ask an independent advisory panel for its opinion on whether GAAR should be applied (although it can use the Panel's opinion provided in a case to counter the "equivalent arrangements" used by other taxpayers). The majority of the Panel's views to date have been in favour of HMRC. The ATAD Directive includes an anti-avoidance rule that is broader than the UK GAAR, but the UK has not implemented it.
34	Czech Republic	Yes	Tax Administration	The Czech Code of Tax Procedures was amended as of April 1, 2019 to include a new provision of general rule against avoidance (GAAR), which states that the tax administration will not take into account legal acts and other matters relevant to the tax administration, the main purpose of which was to obtain a tax advantage contrary to the meaning and purpose of tax legislation.
35	Slovak Republic	Yes	Tax Administration	The GAAR as a rule dedicated to the prevention of tax evasion and avoidance entered into force in the Tax Code of Slovakia from January 1, 2014, following international initiatives in tax matters of prevention of tax evasion and fraud. According to the Explanatory Report of Law no. 435/2013, the reasons for the amendment are represented by i) measures proposed by the Analysis of payments for goods, services and other forms of payment made by taxpayers for the benefit of persons established in non-cooperative and offshore jurisdictions; and ii) Commission recommendations of 6 December 2012 on aggressive tax planning.

36	Sweden	Yes	Tax Administration	A transaction can be considered an act of avoidance and, therefore, dismissed for tax purposes if the following conditions are met: i) The transaction, alone or in conjunction with another transaction, results in a significant tax benefit for the taxpayer; ii) The taxpayer is, directly or indirectly, a party to the transaction; iii) Such a tax benefit is assumed to have been the predominant reason for the transaction; and iv) Taxation on the basis of the transaction would be a violation of the spirit of the law. In addition, there is an exit rule that states that when an asset or service is withdrawn from business it is taxed as if it had been sold at market value.
37	Switzerland	No	Tax Administration	Switzerland does not have a general rule against avoidance in its domestic tax legislation. Consequently, the Swiss Federal Supreme Court has intervened and developed an anti-abuse doctrine applicable to all types of Swiss taxes, to counteract abusive tax planning. According to this judicially developed anti-abuse doctrine, the tax authorities have the right to tax the taxpayer's legal structure based on its economic substance, provided that such structure has an unusual and inappropriate character; it can only be explained by tax reasons and will lead to significant tax savings if the tax authority recognizes them.
38	Turkey	Yes	Tax Administration	A key factor when considering tax avoidance in Turkey is a legislative provision that stipulates that the event that produces the tax and the actual nature of the event are the essence. Article 3 of the Tax Procedure Law No. 213 contains the general anti-avoidance rule, which specifically establishes as an objective to prevent or reduce tax evasion and abusive practices. This is commonly known as the principle of the economic approach (substance over form), which is applied in other legislative provisions and mechanisms, and which means that it is the essence and economic content of a transaction that determines whether it constitutes tax avoidance, rather than how the transaction appears in its form. The economic content of a transaction is more important than its form.

Source: Own elaboration based on different sources.

The following sources were used:

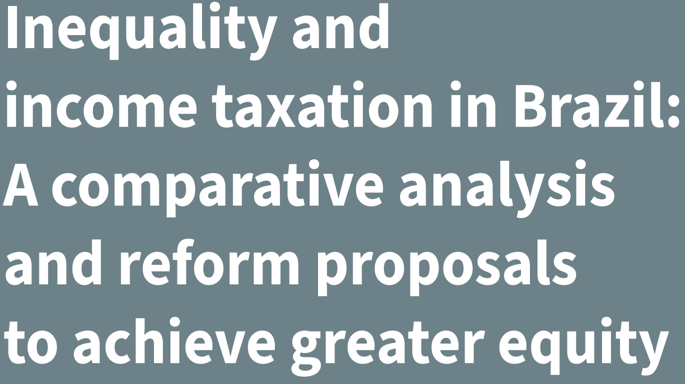
- Presentation by Alfredo Ugarte to the Senate Finance Committee, dated 17.10.2019, [online] https://www.senado.cl/appsenado/index.php?mo=tramitacion&ac=getDocto&iddocto=7146&tipodoc=docto_comision, [accessed: 20.06.2023]

- KPMG EU Country Profiles - KPMG Global, [online] retrieved from https://kpmg.com/xx/en/home/services/tax/regional-tax-centers/eu-tax-centre/eu-country-profiles.html, [accessed: 19.06.2023]

- KPMG Asia Pacific Country Tax Profiles - KPMG Global, [online] https://kpmg.com/xx/en/home/services/tax/regional-tax-centers/asia-pacific-tax-centre/guides-resources.html, [accessed: 20.06.2023]

- Orbitax - Country Chapter, [online] https://www.orbitax.com/taxhub/countrychapters, [accessed: 20.06.2023]

- The Legal 500 - Guides, Tax Chapters, [online] https://www.legal500.com/guides/guide/tax/, [accessed: 20.06.2023]



Inequality and income taxation in Brazil: A comparative analysis and reform proposals to achieve greater equity

Rafael Fernando de Castilha Alves

SYNOPSIS

The objective of this work is to identify the reasons for the low potential for collection and redistribution of personal income tax in Brazil, giving priority to the research of tax statistics of national and international agencies and organizations, as well as the analysis of technical documents on the subject. It is shown that the result of tax action on inequality is extremely low, especially that resulting from direct taxation, and that a decisive factor in this context of low progressivity is the exemption granted to dividends distributed to partners and shareholders. Finally, proposals are presented to reduce income inequality

KEYWORDS: Tax, Income, Inequality, Progressivity, Dividends

CONTENT

Introduction

1. The concentration of income and the effects of tax measures
2. The tax structure in Latin America, OECD countries and Brazil
3. Corporate profits taxation and personal income taxation
4. Inequality revealed by Brazilians' income tax returns
5. Proposals for tax measures to reduce inequality

Conclusion

References

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INTRODUCTION

The construction of a free, just and supportive society, the eradication of poverty and the reduction of social inequalities are fundamental objectives set out in the third article of the Constitution of the Federative Republic of Brazil of 1988 and, as such, should guide all the action of the legislator. To achieve these objectives, progressive income taxation plays a decisive role, since, on the one hand, (i) it is mainly aimed at the incomes obtained by the richest strata and, on the other, (ii) it allows reducing the taxation on the consumption of goods and services, preserving the disposable income of the social base.

The Brazilian Constitution, in its article 145, is quite clear in the sense that, as far as possible, taxes should be demanded depending on the economic capacity of the taxpayer. With regard, in particular, to income tax, Article 153 establishes that such a tax must meet the criteria of generality, universality and progressivity.

According to the principle of generality, as long as they have the ability to pay, everyone should be subject to income tax, with some exceptions. In turn, the principle of universality determines that this tax falls on all types of income. Finally, the principle of progressivity consists in applying higher rates for the highest incomes, which constitutes a redistributive mechanism aimed at reducing income inequalities.

The principle of equity, in general terms, consists of a guideline that promotes that taxation respects the contributory capacity of citizens. From a vertical perspective, this principle leads to unequal treatment of the unequal, to the extent of their inequality; from a horizontal perspective, it leads to equal treatment of equals, regardless of the origin of their income, labor or capital.

We can recognize two basic functions of a tax system: collection and redistribution. To guarantee these functions, efficiency, fairness, reduction of compliance costs and transparency are established as system-wide objectives, accompanied by certain aspects such as neutrality, simplicity and stability.

We do not ignore the weight that some tax principles such as efficiency and neutrality usually have, related to the defense of the non-influence of taxation on the decisions of economic agents. However, we understand that such principles cannot be considered absolute laws that, at the limit, could clash even with redistributive policies, whose beneficial results for society are widely known; we believe that a certain tax complexity will always be defensible in the search for a more just and progressive system.

For the desired reduction of social inequalities, tax systems can play a very prominent role, either by financing public spending, public investment and social protection mechanisms, or by demanding more progressive taxes. A synthetic assessment of Latin American tax systems, including that of Brazil, corresponds to the prevalence of indirect taxes, combined with the weak collection of the personal income tax, which lead to a low redistributive impact of the aforementioned tax systems (OECD, 2022).

The level of fairness of the tax system, as well as its degree of progressivity, are strongly influenced by the way in which the tax pressure on labor and capital income is distributed. In the countries of the Organization for Economic Cooperation and Development (OECD), the appropriation of a relevant part of corporate profits in the form of taxes is common. The taxation of dividends distributed to individuals is the general rule in these countries (OECD, 2022), although integration mechanisms are adopted between corporate income tax (CIT) and personal income tax (PIT). Brazil, on the other hand, concentrates the taxation of corporate profits on the legal entity, completely exempting the dividends distributed to individuals.

For the development of this article, the analysis of the aggregated data of the personal income tax returns (PIT) published by the Special Secretariat of the Receita Federal of Brazil (RFB) becomes relevant, through which it is possible to verify the unequal way in which the taxable income, income subject to exclusive or definitive taxation and exempt and non-taxable income are obtained by Brazilian taxpayers.

Regarding the formulation of the problems addressed in this paper, we can mention identify the aspects that lead to the general regressive character of the Brazilian tax system; identify the main reasons why the personal income tax in Brazil is not sufficiently progressive; investigate the perspectives through which income inequality manifests itself.

This work tries to determine the possible redistributive and tax collection effects of the scenarios that can expand the progressivity of the personal income tax. More specifically, it aims to: estimate the different effects of tax measures on income inequality; compare the Brazilian tax structure with the structures observed in Latin America and the OECD countries; point out the different manifestations of income inequality based on the tax return; elaborate proposals and recommendations that contribute to a personal income tax design that promotes greater equity and that is oriented to efficiency.

This work will be conducted by researching the tax regulations and statistics of national and international agencies and organizations, as well as by analyzing technical documents on the subject.

1. THE CONCENTRATION OF INCOME AND THE EFFECTS OF TAXMEASURES

According to World Bank data (2022a), Brazil calculated a GDP of 1.87 trillion dollars (US$) in 2019, with a GDP per capita of US$8,876.10 in the same year. According to the same institution, the GDP per capita values in 2019 calculated in South Africa, Mexico, Argentina, Spain and Germany were, respectively, US$ 6,624.80, US$ 9,950.20, US$ 10,076.40, US$ 29,554.50 and US$ 46,794.90. In the same year, in Somalia, the GDP per capita was US$419.40, while in Norway it was US$75,719.80. Somalia is considered a low-income country, while Spain, Germany and Norway are high-income nations. Brazil, South Africa, Mexico and Argentina are considered upper-middle income countries.

These average indicators give an idea of income inequality between countries; however, they say little about internal realities, especially in relation to less developed countries, where social inequalities are more pronounced.

A good parameter to assess the level of income concentration is to check the proportions of income appropriated by the upper and lower strata of a country's income distribution. Based on the World Bank database (2022b), it is possible to visualize the relative income shares of the richest 10% (10MR) and the poorest 10% (10MP) of 160 countries.

If we calculate the ratio (R) between the income share of the richest 10% and the income share of the poorest 10%, R = 10MR/ 10MP, we see that developed countries such as Norway, Germany and France have low levels of income concentration (R <= 8.34), with the exception of the United States, which would be at an intermediate level in this regard (R = 17.11). On the contrary, Latin American countries, with the exception of Uruguay, have high levels of income concentration, keeping company with African nations in the last positions of the ranking. Specifically, in relation to Brazil, the richest 10% appropriated 39.4% of income in 2020, while the poorest 10% only obtained 1.6%, so the ratio between these percentages (R) was 24.63.

To get a more precise idea of the level of income concentration in Brazil, we can turn to the study of Silveira et al. (2020) that, based on the data of the Family Budget Survey (POF) of the Brazilian Institute

of Geography and Statistics (IBGE) for the period 2017-2018, evaluated the structure of income distribution in this country. One of the conclusions of this study is that the concentration of income in Brazil is even more pronounced than the data consolidated by the World Bank suggest. Considering the monetary and non-monetary monthly returns, the average per capita income of the poorest 10%, R$ 212.05, represented only 2.75% of the corresponding average per capita income of the richest 10%, R$ 7,717.58; in addition, when all income deciles are considered, the average total family income per capita, R$ 1,808.46, was only reached in the 73rd percentile.

Regarding the distribution of income, it is usual to refer to the evolution of the Gini index, which varies from 0, a situation of perfect equality, to 1, a situation of maximum inequality. It is important to determine the effects of (i) monetary transfers and (ii) direct taxes on market income. We can say that the stages of the revenue are as follows:

- **primary income:** corresponds to the market income, that is, all the income obtained before receiving public transfers or deducting direct taxes, such as income received in the labor market, income from rentals and sales, donations, alimony, in addition to the profits obtained in the financial market;

- **initial income:** corresponds to primary income added to monetary transfers granted by the public authorities, such as social security, educational and labor benefits;

- **available income:** corresponds to the initial income (after transfers) less direct taxes on income and wealth.

For the period around 2014, Hanni and Martner (2017) showed that the impacts of tax-related actions are much more relevant in the countries of the European Union (EU) than in those of Latin America (LA), with average Gini index reductions of 42.6% and 5.7%, respectively. Specifically, with regard to the mitigation of inequality through direct taxes, the authors identified an average reduction of the Gini index of 12.5% in 28 EU countries and only 2.0% in 18 LAC countries. In the case of Brazil, there was a reduction of 9.5% due to monetary transfers and 2.8% due to direct taxes, so that the consolidated reduction of 12.1% was higher than the Latin American average, but much lower than the European average.

Based on the data from the POF 2017-2018, Carvalho et al. (2020) and Silveira et al. (2020) also show that, in Brazil, public transfers are the main drivers of reducing inequality, which is not the case with direct income and wealth taxation, which has a low redistributive impact.

The Gini coefficients calculated by Carvalho et al. (2020) were as follows: for primary income, 0.642; for initial income, 0.568; and for disposable income, 0.557. Therefore, monetary transfers caused a reduction of the aforementioned index of 11.53%, much higher than that caused by direct taxation, which only reached 1.94%. In summary, Brazil has one of the worst Gini indices in the world, which is little affected by direct taxes, and that is reflected in the contrast between the pockets of poverty and wealth in this country.

2. THE TAX STRUCTURE IN LATIN AMERICA, OECD COUNTRIES AND BRAZIL

When it comes to respecting the taxpayer's ability to pay, we usually think about direct taxes, which are levied on income, profits and capital gains, wealth, as well as social security contributions. However, in order to ensure sufficient public financing, tax administrations also have to resort to indirect taxes, which tax the production and consumption of goods and services; the fact is that, as a rule, these indirect taxes are regressive and, from the point of view of fairness, they should have a lower collection burden than direct taxes.

In the databases of the OECD global income statistics (2022), we have collected data on the tax revenues collected in the OECD countries and Latin America and the Caribbean (LAC), in their respective average values, as well as in Brazil, between the years 1990 and 2019. The consolidation of the data was done both in relation to GDP and in relation to the total tax pressure (TTP).

The average total tax pressure (TTP) in Latin America and the Caribbean (LAC) as a whole has increased sharply over the last three decades, rising from 15.7% of GDP in 1990 to 22.7% of GDP in 2019. Despite the average growth in the region, the TTP is still much lower than that of the most developed countries. In OECD countries, there has been a subtle increase in the tax burden, from 30.8% in 1990 to 33.4% in 2019. In Brazil, the TTP has increased from 27.8% of GDP in 1990 to 32.5% of GDP in 2019, which is remarkably close to the average level currently observed in OECD countries.

Regarding the taxes on goods and services in relation to GDP, there have been mild increases in all the countries analyzed. In 1990, the percentages of these taxes in the OECD countries, Brazil and LAC were 9.9%, 13.5% and 8.7% of GDP; in 2019, the percentages reached 10.8%, 14.2% and 11.2% of GDP. When we check the evolution of these same taxes in relation to the total tax burden, the outlook is very stable in the OECD countries, with a 32.6% share of the TTP in 2019. In Latin America and the Caribbean, as well as in Brazil, a gradual reduction trajectory is observed; despite this, the proportions of these taxes in relation to the TTP in 2019 were still 43.6% in Brazil and 49.7% in LAC.

On the other hand, it is observed that taxes on income, profits and capital gains have been especially important in OECD countries, with a gentle recovery since 2010, reaching 11.3% of GDP again in 2018 and 2019. For the LAC countries, and also for Brazil, there was a smooth upward trajectory between 1990 and 2019; despite this, these taxes reached only 6% of GDP in Latin America and the Caribbean and 7.3% of GDP in Brazil in the last year of the series. In proportion to the TTP, the great importance of these taxes is also observed in the OECD countries, which represented 34% in 2019; RegardingLAC and Brazil, although these income taxes have increased their participation in the selected years, in 2019 they only reached 26.6% and 22.4% of their respective total tax burdens.

At this point, the income tax, profits and capital gains of individuals (1100), companies (1200) and the non-assignable part (1300) are segregated for the OECD countries, LAC and Brazil.

In the case of companies (1200), since 2002, the income tax collection curves have oscillated above 2.7% of GDP for both OECD countries and Brazil, having reached, respectively, 3.0% and 2.8% of GDP in 2019. In LAC, the ratio of corporate income tax (CIT) in relation to GDP was 3.6% in the last year analyzed. The collection curves of this tax in relation to the TTP followed close trajectories for Brazil and the OECD countries; in 2019, the collection of the CIT in relation to the total burden reached 9.6% on average in OECD countries and 8.6% in Brazil, while in the LAC countries as a whole, between 2005 and 2019, the proportion was around 16%.

In the case of individuals, the difference is significant. While in the average of the OECD countries the share of personal income tax (1100) in relation to GDP has always been above 7.2% since 1990, reaching 8.0% in 2019, in Brazil and LAC countries this share has always been below 3.0% of GDP over 30 years; this index was reached in Brazil only in 2019, a year in which the share of personal income tax in relation to GDP in LAC was only 2.2%.

And the difference is still quite pronounced when comparing shares in total revenues over the years. While in the average of the OECD countries the share of personal income tax in the total collection has always been above 22% since 1990, standing at 23.5% in 2019, in Brazil and the LAC countries this share did not even reach 10% in the same period, reaching 9.2% of the TTP in 2019 in this region (see Table 1).

Table 1

Latin America and the Caribbean (LAC), OECD countries and Brazil: tax structure, 2019

(as a percentage of GDP and total tax revenue)

OECD statistical code	Description of the tax group	As a percentage of GDP			As a percentage of total income		
		LAC	OECD	Brazil	LAC	OECD	Brazil
1000	Income tax	6.0	11.3	7.3	26.6	34.0	22.4
1100	Personal income tax	2.2	8.0	3.0	9.2	23.5	9.2
1200	Corporate income tax	3.6	3.0	2.8	15.8	9.6	8.6
1300	Not assignable	0.4	0.3	1.5	1.8	0.9	4.5
2000	Social security contributions	3.9	8.9	8.4	17.3	25.9	25.9
3000	Payroll taxes	0.2	0.5	0.6	1.0	1.3	1.8
4000	Property taxes	0.9	1.8	1.5	3.8	5.5	4.6
5000	Taxes on goods and services	11.2	10.8	14.2	49.7	32.6	43.6
6000	Other taxes	0.4	0.2	0.6	1.7	0.5	1.7
	Total	**22.7**	**33.4**	**32.5**	**100.0**	**100.0**	**100.0**

Source: Own elaboration, with data from the OECD (2022)

Structurally, in a comparison of total tax revenues in 2019, the main revenues in LAC, as well as in Brazil, were derived from taxes on the consumption of goods and services, followed by income taxes (OECD, 2022). In the OECD countries, on the other hand, there is a greater balance between the different sources of tax revenue.

As can be seen in Table 1, the most notable difference between the tax systems corresponds precisely to the level of income tax collection. The same table shows that, in LAC, the shares of direct and indirect taxes are practically equivalent; in 2019, in approximate relative values, they reached 49% and 51% of the total collected, respectively. In the OECD, the scenario is much more progressive; in 2019, direct taxes accounted for approximately two thirds of total revenue, compared to one third of indirect taxes. In Brazil, the shares of direct and indirect taxes are closer to the respective Latin American averages than to the averages of OECD countries; in 2019, in approximate relative values, these shares reached 55% and 45% of the total collected, respectively.

3. CORPORATE PROFITS TAXATION AND PERSONAL INCOME TAXATION

If, on the one hand, the profit on which the corporate income tax and personal income tax fall is approximately the same, in the form of profit obtained by the company or dividends received by the individual, on the other hand, taxes are different, and companies and partners

or shareholders are still different taxpayers, with, in principle, unmistakable assets, so the discussion about what has come to be called "double taxation" makes more sense from an economic point of view, but not from an accounting or legal point of view.

The fact that OECD countries adopt integration mechanisms between the aforementioned taxes, partially exempting dividends, does not mean that they renounce the taxation of individuals. At the level of these countries, the taxation of dividends distributed to natural persons, after the taxation of profits on the legal person, is the norm; by 2021, only Estonia and Latvia maintained a regime of total exemption from dividends.

As shown in Table "II.4" of the OECD (2022), when the incidence of the (i) tax on corporate profits and the (ii) tax on dividends distributed to individuals is evaluated together, it is observed that the member countries of this organization appropriate a considerable part of corporate profits, ranging from 20% in Estonia to 59.4% in Korea, going up to an average of 41.9% in 2021. This level is slightly higher than the 34% that is taxed in Brazil exclusively to legal entities, distributed to 15% of the corporate tax, with an additional 10% from a certain amount, plus a 9% social contribution on net profits.

Due to the imputation credits or the lower rates exclusively at source, the effective tax incidence of dividends is lower than that which could be obtained by including them in the progressive income tax tables without any adjustment. By 2021, excluding the two OECD countries that do not tax dividends, the tax incidence on these profits distributed to members and shareholders ranges from 5% in Greece to 51% in Ireland, with an average of 24.7%.

In summary, the OECD countries still have an overall level of taxation on companies and individuals higher than that observed in Brazil, a country with high nominal rates on company profits, but which completely exempts dividends distributed to individuals.

In relation to the international context of personal income taxation, the evolution of marginal personal income tax rates over the twentieth century in countries such as the United States, the United Kingdom, Germany and France has been described by Piketty (2014). In general, it can be said that these rates fluctuated widely during the period, highlighting the significant increases that occurred during and immediately after the two world wars, and that all the marginal tax rates of the selected countries were higher than 50% between 1937 and 1986. This means that the substantial increase in these rates was not only due to the military conflicts in which these countries participated, or the economic crises that occurred during the period, but mainly due to the financing of their high levels of social welfare for decades.

Between 1953 and 2000, Germany and France showed an oscillation of marginal personal income tax rates between 51% and 70%, followed by a mild decline until 2013, when they reached 45% and 53% respectively. In the United States, after the significant fall of the late 1980s to 28%, the marginal rate recovered in the early 1990s, fell again in the 2000s and recovered slightly in 2013, when it reached 40% again. In the UK, after two decades of stability at the 40% level, the marginal tax rate rose to 50% in 2010 and dropped slightly to 45% in 2013.

For more recent data on the maximum marginal personal income tax rates, we can refer to the table showing the current rates in 2021 in the OECD countries (2022), called table "I.7", which shows that these rates easily exceed 45%, as is the case with Germany, Australia, Belgium, Canada and Spain, and even exceed 55% in some countries, such as Austria, Denmark, France and Japan. If all the maximum rates adopted in the 38 countries of the organization, including the lowest, are considered, the average remains higher than 39%.

In Latin America, since the 90s, after adherence to the measures proposed by the Washington Consensus, there has been an expansion of tax bases and a moderation of marginal tax rates, which led to an increase in the regressivity of tax systems in this region.

There is no doubt that the level of fairness of the tax system, as well as its degree of progressivity, are strongly influenced by the way in which the tax burden on labor and capital income is distributed. There is also a reasonable consensus that the wealthiest strata tend to concentrate the largest share of capital income. In this context, the adequate taxation of this upper strata is an important mechanism to strengthen the progressivity of personal income tax. For the treatment of these incomes, it can be said that there are basically two models or systems, with some variations according to the peculiarities of each country.

In the first of them, broad or global, all the incomes of labor and capital are computed together, in a table of progressive tax rates. This more equitable system values the taxpayer's ability to pay, but it also makes administrative management more complex and implies a greater risk of tax evasion due to higher marginal rates. In the second system, known as dual, which has been more widely used in recent years, labour and capital income are taxed separately; as a rule, a progressive table is used for labour income and a single or lower proportional rate is used for capital income.

It is known that, as a general rule, dividends are initially taxed as company income, to then be taxed later as personal income, when they are distributed to shareholders, so the integration between the amounts paid by the legal entity and the individual is a primary issue to define the applicable rates at each stage of taxation.

Gil Maciá (2007) describes the three main groups of integration systems between personal income tax and corporate income tax (CIT). At one extreme, there is the so-called "classic system", of zero integration, in which total independence is assumed between the company and its partners, so that the double taxation of dividends fully occurs. At the other extreme is an administratively onerous, fully integrated system, in which double taxation is completely eliminated, so that the CIT becomes a kind of "payment on account" of the partner's income. The intermediate solution, of partial integration, corrects part of the double taxation; given the possibility of obtaining a reasonable balance between the level of correction, the collection capacity and the simplicity of management, this mechanism has proved to be the preferred one by many countries.

Among the partial integration systems, Gil Maciá (2007) argues that the quantitative exemption system with fixed-rate taxation in personal income tax is a good system to mitigate the double taxation. This system not only corrects the double taxation of taxpayers with higher incomes, but also mitigates the double taxation of those with medium and low incomes, in the face of the planned exempt amount; in addition, it conforms to the EU Community principles and is easily understandable. However, the most widely adopted integration system in recent years is to tax dividends at a fixed rate on personal income tax, due to its ease of management.

Regarding the Brazilian experience, the so-called General Income Tax was instituted on December 31, 1922. Based on the RFB data, it is possible to trace a history of the minimum and maximum personal income tax rates in Brazil since 1923. Between the period after the Second World War and the end of the 1980s, the maximum marginal rates approached 50%, that is, Brazil has already had marginal rates remarkably close to those practiced in the OECD countries. From 1988 until the following year, the maximum rate was drastically reduced, from 45% to 25%, and after 1998 it stabilized at a mere 27.5%.

To get an idea of the discrepancy in relation to OECD countries, the average annual marginal income in

Brazil, at the average exchange rate of 2021, was only US$ 10,375, on which the maximum rate of 27.5% was applied. This combination of low maximum rate and low marginal income corresponds, in practice, to a weak progressivity since the high incomes that are taxed suffer the same incidence as the average incomes in Brazil.

An important issue in income taxation in Brazil is the need to correct the table of ranges of bases for calculating the PIT, which presents an accumulated lag in relation to inflation measured by the National Broad Consumer Price Index (IPCA). Faced with this gap, more Brazilians are being subjected to higher tax rates, despite not having obtained real profits, even those millions of taxpayers who could be not only subjected to a zero rate, but also exempt from filing an adjustment declaration.

In this move away from the progressivity of income tax, two important changes introduced in the legislation at the end of 1995 deserve mention.

With regard to corporate taxation, there was a reduction in the calculation bases of the corporate income tax and the social contribution (CSLL) through the possibility of deducting interest on own capital, instituted by Law No. 9,249, of December 26, 1995 (Brazil, 1995). In short, Brazilian legislation authorizes such a deduction and determines the withholding of the tax at source at a rate of 15%, which is much lower than the sum of the corporate income tax rates of 15% and an additional 10% for the largest companies, and the CSLL, which starts from a general rate of 9% and reaches 15% or 20% in relation to financial institutions. For large companies, the tax savings are at least 19%, and can reach almost 30%.

The same Law Nº 9.249, of 1995, granted privileged treatment to profits or dividends paid or credited by legal entities, which, since 1996, are not subject to income tax withholding or form the basis for calculating the beneficiary's tax, whether a natural or legal person, domiciled in Brazil or abroad.

In order to guarantee a similar level of financing for the State, this tax reduction had to be compensated, on the one hand, by restricting the adequate updating of the income tax brackets in relation to inflation, and, on the other, by increasing the tax burden on the consumption of goods and services. The result was an increase in the tax incidence on the middle and poor layers of the Brazilian population, in direct affront to the principle of contributory capacity.

4. INEQUALITY REVEALED BY BRAZILIANS' INCOME TAX RETURNS

The analysis of the aggregated data of the personal income tax returns (DIRPF) published by the RFB becomes relevant for the development of this article, through which it is possible to verify the unequal way in which taxable income, income subject to exclusive or definitive taxation and exempt and non-taxable income are obtained by Brazilian taxpayers, from the point of view of gender, income brackets, among other approaches. In addition, these aggregated data also make it possible to evaluate aspects related to the assets of the filers.

Regarding the general aspects, the obligation to submit the DIRPF has been linked to criteria of income, perception of capital gains, operations on stock exchanges and the like, exercise of rural activity, level of assets and rights, and inclusion in the status of resident. For the year 2020, the table of calculation base brackets and rates to be used in the calculation of personal income tax in the annual adjustment return presented the following values: up to R$ 22,847.76, zero rate; from R$ 22,847.77 to R$ 33,919.80, 7.5%; from R$ 33,919.81 to R$ 45,012.60, 15%; from R$ 45,012.61 to R$ 55,976.16, 22.5% and; more than R$ 55,976.16, 27.5%.

As detailed in Decree No. 9,580, of November 22, 2018, which regulates income tax in Brazil, for the purposes of calculating the annual personal income tax base, the taxable income obtained is initially taken into account, from which the taxpayer can deduct, among others, expenses with: dependents, provided that the dependent's income, payments and assets are included, with an annual limit per person; health, of the holder and his dependents; education, of the holder and his dependents, with an annual limit per person ; public social security contributions; private or supplementary pension plans, with a limit of 12% of the taxable base; alimony; self-employed activity, recorded in the cash book. Instead of the previous deductions, the taxpayer can opt for a simplified discount that, in 2020, corresponded to a deduction of 20% of the annual amount of taxable income, limited, however, to R$ 16,754.34.

For 2020, the analysis of the aggregated data released by the RFB (2021) shows that 31.6 million Brazilian residents declared a total income of 3,403.14 billion reais (R$), or 660.06 billion dollars (US$), which represented an average annual income of R$ 107,575.69, or US$ 20,864.98. Taxable income totaled R$ 1,975.43 billion, or US$ 383.15 billion, 58.0% of total revenues; income subject to exclusive or definitive taxation reached R$ 331.60 billion, or US$ 64.32 billion, 9.7% of total revenues; and exempt and non-taxable income totaled R$ 1,096.11 billion, or US$ 212.60 billion, the 32.2% of total revenue.

The most relevant exempt and non-taxable income were the profits and dividends distributed by the companies, which totaled R$ 384.27 billion, equivalent to 35.1% of these exempt and non-taxable income. It should also be noted the donations and inheritances, which totaled R$ 110.32 billion in 2020, equivalent to 10.1% of exempt income.

Also, in relation to the large personal income tax figures for the year 2020 (RFB, 2021), the total taxable base was R$ 1,554.93 billion, or US$ 301.59 billion; as a percentage of taxable income, this base reached 78.7%. In addition, the tax due in the same year was R$ 204.84 billion, or US$ 39.73 billion, which represents an average annual tax due per filer of R$ 6,475.14, or US$ 1,255.89, corresponding to an average tax rate of only 10.4% of taxable income.

Regarding the assets registered in the personal income tax declaration in 2020, the filers reported assets and rights that reached R$ 11,134.52 billion, as well as real debts and liens that totaled R$ 841.69 billion; they therefore reported a net wealth of R$ 10,292.83 billion, or US$ 1,996.36 billion. On average, each filer accumulated a net worth of R$ 325,363.71, or US$ 63,106.35.

At this point, we proceed to analyze the **gender inequality** found in the personal income tax declarations in 2020 (RFB, 2021), which show that inequality begins in the comparison between the amounts obtained by men and women, and that it widens when the nature of each declared income is checked. Having represented 56.5% of the filers, men received 62.1% of the total income; in this context, women received, on average, R$ 93,642.41, which is equivalent to 79.2% of the average total income calculated for men, of R$ 118,308.64.

In addition, it is observed that the percentages of taxable income are different; the one calculated for men, 54.3%, is below the general average, 58.0%, while the one calculated for women, 64.1%, is above. On the other hand, it is observed that the percentages of exempt and non-taxable income are also different, being the one calculated for men, 35.2%, above the general average, 32.2%, while the one calculated for women, 27.3%, is below.

We now turn to analyzing the **inequality by total income brackets**. In 2020, the calculation base subject to the zero-rate corresponded to an annual base of less than R$ 22,847.76, which, considering the value of the minimum wage (MW) in force in that year, R$ 1,045.00 or US$ 202.68, was equivalent to 21.86 MW per year, or 1.82 MW per month. At the 2020 exchange rate, therefore, the Brazilian who calculated an annual calculation base, after deductions, of more than US$ 4,431.47, was already

subject to the first income tax aliquot of 7.5%. On the other hand, the calculation base subject to the maximum rate, 27.5%, corresponded, and continues to correspond, to an annual base of more than R$ 55,976.16, which was equivalent, in 2020, to 53.57 MW per year, or 4.46 MW per month. Thus, the Brazilian taxpayer who calculated an annual taxable base exceeding US$10,856.93 was subject to the maximum tax rate.

In the large personal income tax numbers, the RFB usually divides the filers into groups by monthly minimum wage (MW) ranges, with great variation in the number of taxpayers per range. Of the 17 groups segregated by RFB, ranging from those receiving up to 0.5 MW to those receiving more than 320 MW per month, those with the highest proportions of filers received total income of 2 to 3 MW, 3 to 5 MW and 5 to 7 MW, corresponding to 15.9%, 26.1% and 13.6% of filers, respectively.

Starting from the range of 15 to 20 MW towards the upper part of the distribution, which receives more than 320 MW a month, we have only 10.61% of filers, but they concentrate 51.2% of the total declared income. Making the cut of the range from 60 to 80 MW towards the same cap, we have approximately 1% of the filers, which in turn account for 22.3% of the total income. And when we select only the last band, above 320 MW, we see that it does not reach 0.1% of the filers, but it still concentrates 10.9% of the total declared income. In the range of 3 to 5 MW, the average annual income was R$ 48,767.02, that is, 45.33% of the general average annual income of R$ 107,576.00; on the other hand, in the richest stratum, the average annual income was equivalent to 123 times the general average income.

When we analyze the variation in the composition of income according to the income bracket, we see that inequality is accentuated even more. For all income brackets above 30 MW per month, the percentages of taxable income were below the global average of 58%, decreasing from 55.5% in the bracket from 30 to 40 MW to a mere 9.6% in the bracket over 320 MW; and these same upper income brackets presented percentages of exempt and non-taxable income above the general percentage of 32.2%, growing continuously from 35.2% in the bracket from 30 to 40 MW up to a considerable 69.4% in the stretch above 320 MW. In the first ten income groups, the opposite movement occurs; all of them had proportions of taxable income higher than the respective global average, as well as exempt and non-taxable income lower than the corresponding global average (see table 2).

Table 2

Brazil: composition of income reported in the personal income tax return, segregated by monthly minimum wage brackets, 2020

(in relative numbers of filers, in billions of reais and in percentages of total income))

Tax returns filers		In billions of reais (R$)			In percentages of the total revenue earned by each range of the monthly MW		
Monthly minimum wage (MW) range	As a percentage of the total number of filers	Taxable income	Income definitively taxed at source	Exempt and non-tax vable income	Taxable income	Income definitively taxed at source	Exempt and non-taxable income
Up to 1/2	5.07%	1.11	0.15	0.26	73.0%	9.9%	17.1%
From 1/2 to 1	1.83%	4.98	0.24	0.70	84.1%	4.1%	11.8%
From 1 to 2	8.71%	43.66	1.62	6.50	84.3%	3.1%	12.6%
From 2 to 3	15.85%	135.86	8.80	15.27	84.9%	5.5%	9.5%
From 3 to 5	26.12%	322.63	26.22	54.11	80.1%	6.5%	13.4%
From 5 to 7	13.65%	245.95	22.02	50.87	77.1%	6.9%	16.0%
From 7 to 10	10.18%	249.14	24.44	62.36	74.2%	7.3%	18.6%
From 10 to 15	7.99%	269.86	29.51	85.20	70.2%	7.7%	22.2%
From 15 to 20	3.69%	165.21	20.68	66.46	65.5%	8.2%	26.3%
From 20 to 30	3.39%	197.20	28.40	100.13	60.5%	8.7%	30.7%
From 30 to 40	1.46%	110.54	18.53	70.14	55.5%	9.3%	35.2%
From 40 to 60	1.08%	94.56	21.74	88.54	46.2%	10.6%	43.2%
From 60 to 80	0.37%	35.20	12.39	53.80	34.7%	12.2%	53.1%
From 80 to 160	0.39%	42.14	21.57	102.30	25.4%	13.0%	61.6%
From 160 to 240	0.10%	13.99	10.28	50.33	18.8%	13.8%	67.5%
From 240 to 320	0.04%	7.78	7.14	31.94	16.6%	15.2%	68.2%
More than 320	0.09%	35.64	77.87	257.19	9.6%	21.0%	69.4%
Total	**100.00%**	**1,975.45**	**331.60**	**1,096.10**	**58.0%**	**9.7%**	**32.2%**

Source: Own elaboration, with data from the RFB (2021)

In general terms, we can say that the concentration of the stock of net wealth is even more accentuated than the concentration of the income stream. If we look at the five income brackets above 60 MW, we have approximately 1% of the filers, but they account for 32.4% of the total net wealth. In the range from 3 to 5 MW, the average net wealth was R$ 98,319.46, that is, 30.2% of the global average net wealth, of R$ 325,363.71; on the other hand, in the richest stratum, above 320 MW, the average net wealth was equivalent to 187 times the general average net wealth.

Another analysis that can be done is to assess the donations and inheritances received, which are exempt from personal income tax. The concentration of this income is also remarkable. To illustrate, from the range of 60 to 80 MW towards the top of the distribution, we have approximately 1% of the filers, who concentrated 68.9% of the outstanding exempt income.

If, on the one hand, donations and inheritances are exempt from personal income tax, on the other hand they are subject to a tax that is the responsibility of the States and the Federal District, namely the Tax on Patrimonial Transfers and Donations (ITCMD). According to the Brazilian Constitution, the Federal Senate must set the maximum rates of this tax; some time ago, the Senate set a maximum tax rate for the ITCMD of eight percent, much lower than in OECD countries, where the maximum rates easily exceed 30%.

5. PROPOSALS FOR TAX MEASURES TO REDUCE INEQUALITY

In the context of the low participation of direct taxes in the composition of the Brazilian tax structure, there is certainly room for a significant expansion of social protection, provided that the respective financing results from more progressive taxation.

An interesting aspect when thinking about income transfer mechanisms is to check whether such instruments could contribute to economic recovery. Using the data from the POF 2017-2018, Toneto et al. (2021) attest to the hypothesis that the propensity to consume has a significant drop from the bottom up; they also show that certain redistribution mechanisms can indeed increase the level of aggregate consumption. In the model simulated by these authors, every R$ 100.00 transferred from the richest 1% to the poorest 30% would generate an expansion of R$ 106.70 in the economy. In this case, the multiplier effect resulting from the combination of taxes on the richest and transfers to the poorest would be decisive for achieving this growth.

A pertinent question is: what mechanisms can be used to make this increase in effective tax rates viable for the highest strata of the income distribution? The answer seems to point, above all, to the following measures: increase the marginal rate and expand the personal income tax base by including capital income that is still exempt in Brazil, such as dividends.

From the static simulations on the taxation of dividends in Brazil, those recorded by Gobetti and Orair (2016) deserve special mention. Based on the personal income tax structure in force in 2013 - which generated an income of R$ 149.7 billion and a reduction in the Gini coefficient of 2.78% - and using a base formed by personal income tax declaration data supplemented with adjusted information from the IBGE's National Household Survey (PNAD), the authors simulated four different scenarios.

In scenario 1, dividends are taxed again exclusively at the source with a rate of 15%, which would generate an additional collection of R$ 43.1 billion and reduce the Gini index by 3.67%. In scenario 2, dividends are taxed interchangeably with other income by the same progressive personal income tax table, with rates from 0% to 27.5%, which would produce an additional collection of R$ 58.7 billion and reduce the Gini coefficient by 4.03%. In scenario 3, in order to obtain the same increase in revenue as in scenario 1, the exemption from dividends is maintained and rates of 35%, 40% and 45% are introduced in the progressive table on still extremely low incomes; therefore, we consider it the

most inconvenient. Finally, Scenario 4 combines the introduction of a marginal rate of 35% for the highest incomes, above R$ 325 thousand per year, with the inclusion of dividends in the progressive income tax table, which would produce an additional collection of R$ 71.7 billion and reduce the Gini coefficient by 4.31%.

From here, we highlight the simulations promoted by Bottega et al. (2021), this time made from a base formed by the data recorded in the 2017 personal income tax declarations combined with the contents of the IBGE's 2017-2018 POF. The simulations of these authors estimate the amounts of tax collection deflated as of December 2021 and the redistributive impacts of Bill (PL) 2.337 of 2021, as well as two alternative scenarios proposed by the authors that, in addition to bringing the structure of personal income tax closer to the so-called dual model, also introduce higher marginal rates in the progressive table.

In PL 2.337 of 2021, there would be an update of the progressive table, with a recomposition still below accumulated inflation, a reduction of the simplified discount limit and the taxation, exclusively at the source, of dividends, at a linear rate of 15%, admitting some exemptions, which would generate an additional collection of R$ 10.7 billion and reduce the Gini index, in relation to the current scenario, from 0.615 to 0.613.

In Proposal I, there would be the inclusion of a marginal rate of 35% in the progressive table for annual income above R$ 322,295, as well as the taxation of dividends exclusively at source at the linear rate of 15%, without exemptions, which would generate an additional collection of R$ 47 billion and reduce the Gini index, in relation to the current scenario (0), from 0.615 to 0.612. In the Proposal II, a marginal rate of 40% would be included for annual income above R$ 322,295, as well as the taxation of dividends exclusively at source at the linear rate of 20%, without exemptions, which would generate an additional collection of R$ 63.5 billion and reduce the Gini index from 0.615 to 0.610.

The results in the inequality framework of the simulations of Gobetti and Orair (2016) and Bottega et al. (2021) are subtle, but in both cases the main contribution to the reduction of the Gini index comes from the taxation of dividends, and the redistributive part attributed to the new marginal rates of the progressive table are less relevant.

Given the persistent inflationary situation in Brazil, we understand that it is necessary, and possible, not only to increase the taxation on capital income, but also to start updating the progressive personal income tax table, so that, by way of example, the table of tax base brackets and tax rates for December 2020 includes at least one marginal rate and is adjusted to the following annual values:

- up to R$ 30,000.00, 0% tax rate;
- from R$ 30,000.01 to R$ 45,000.00, 7.5%;
- from R$ 45,000.01 to R$ 60,000.00, 15%;
- from R$ 60,000.01 to R$ 75,000.00, 22.5%;
- from R$ 75,000.01 to R$ 360,000.00, 27.5% and;
- more than R$ 360,000.00, 35%.

It is important to clarify that the proposed update for that table, from 31.3% to 34.0%, only corrects the accumulated inflation from April 2015, the date of the last update, to December 2020, which reached 31.9% according to the IPCA measured by the IBGE (2023). However, the inflation accumulated by the same index between January 2021 and December 2022 was higher than 16%, which shows that the update of the table, at this point, could already be more expressive. It should be noted that the table used until April 2023 only underwent a partial update of the exemption range from May of the same year, with the edition of Provisional Measure No. 1,171, of April 30, 2023.

In a simplified exercise, which is limited to the income data reported in the 2020 personal income tax returns,

we have carried out the simulation described below: partial update of the progressive table, mentioned above, and taxation of dividends, exclusively at source, at the linear rates of 15%, in Proposal “A”, or 20%, in Proposal “B”, without exemptions.

An approximation consists of taking the average values of the tax bases and the taxes accrued in each income tranche for subsequent extrapolation in order to obtain the respective total values of the aforementioned taxes, depending on the number of taxpayers in each tranche. It should be noted that this approach is conservative; in the previous comparison made between the total simulated tax debt before the correction of the table and the tax debt actually recorded in the personal income tax returns, there was an overall convergence of 92%, considered satisfactory for the purposes of the simulation.

With the changes in the progressive table proposed here, and before the exclusive taxation at the source of dividends, there would be a nominal global exemption from the tax of R$ 53.2 billion in 2020, despite the increase in the incidence that would occur in the last two, wealthier strata.

As a last methodological note, a linear percentage of 35.1% has been applied to the exempt and non-taxable income obtained by taxpayers in each income range, corresponding to the overall proportion of dividends declared in 2020 in relation to the total of exempt and non-taxable income, in order to obtain an estimate of the dividends received by filers in each range. The overall effect of the possible disparities between tranches on the estimated tax collection is null, considering that the rates proposed in the simulation would be applied linearly at source on dividends, without exemptions, regardless of the income tranche.

Taking into account the amount of profits and dividends declared in 2020, R$ 384.3 billion, the exclusive taxation at source at the rate of 15%, according to Proposal “A”, would already be enough to cover the nominal tax exemption resulting from the updating of the table, thus producing an increase in tax collection of R$ 4.4 billion in relation to the amount of tax actually declared. Alternatively, if these dividends were taxed at a rate of 20%, according to Proposal “B”, the increase would skyrocket to R$ 23.6 billion (see Table 3).

However, a reservation must be made regarding these amounts. Once the taxation on dividends has been instituted, an initial reduction in the volume of profits and dividends distributed by companies is to be expected, either by partial reinvestment of profits or by tax planning mechanisms; in this sense, Bottega et al. (2021) estimate a reduction of this volume of the order of 35%. Thus, in order to guarantee the necessary updating of the personal income tax progressive table without causing a great impact on public accounts, it would be wiser to opt for a 20% tax rate on dividends. In any case, the imposition of dividends would be very welcome in Brazil, even if other measures were necessary to maintain the balance of the public budget.

Table 3

Brazil: complete simulation with revision of the progressive table and taxation of dividends, 2020

(in billions of reais)

Data obtained from the large PIT Tax numbers 2020			Simulation with dividend taxation - Proposals "A" and "B"			Complete simulation - revision of the progressive chart and taxation of dividends	
Tax returns filers		Tax due	Estimated dividends by total income bands (tax bases)	Exclusive taxation at source - Proposal "A" (15%)	Exclusive taxation at source - Proposal "B" (20%)	Proposal "A"	Proposal "B"
Monthly minimum wage (MW) range	As a percentage of the total number of filers	In billions of reais (R$)	In billions of reais (R$)	In billions of reais (R$)	In billions of reais (R$)	In billions of reais (R$)	In billions of reais (R$)
Up to 1/2	5.07%	0.00	0.09	0.01	0.02	0.01	0.02
From 1/2 to 1	1.83%	0.00	0.25	0.04	0.05	0.04	0.05
From 1 to 2	8.71%	0.00	2.28	0.34	0.46	0.34	0.46
From 2 to 3	15.85%	0.40	5.35	0.80	1.07	0.80	1.07
From 3 to 5	26.12%	6.35	18.97	2.85	3.79	2.85	3.79
From 5 to 7	13.65%	12.34	17.83	2.68	3.57	6.78	7.68
From 7 to 10	10.18%	22.21	21.86	3.28	4.37	13.68	14.78
From 10 to 15	7.99%	35.29	29.87	4.48	5.97	28.23	29.72
From 15 to 20	3.69%	26.01	23.30	3.49	4.66	24.00	25.17
De 20 a 30	3.39%	34.47	35.10	5.27	7.02	34.53	36.29
De 30 a 40	1.46%	20.75	24.59	3.69	4.92	22.14	23.37
From 40 to 60	1.08%	18.47	31.04	4.66	6.21	21.39	22.94
From 60 to 80	0.37%	7.12	18.86	2.83	3.77	9.31	10.26
From 80 to 160	0.39%	8.89	35.86	5.38	7.17	13.58	15.37
From 160 to 240	0.10%	3.04	17.64	2.65	3.53	5.56	6.45
From 240 to 320	0.04%	1.71	11.20	1.68	2.24	3.44	4.00
More than 320	0.09%	7.78	90.16	13.52	18.03	22.57	27.08
Total	**100.00%**	**204.83**	**384.27**	**57.64**	**76.85**	**209.26**	**228.48**

Source: Own elaboration, with data from the RFB (2021).

In addition, the return of taxation on dividends would have a positive effect not only in relation to gender inequality, but also in relation to discrepancies between federal entities. This effect would be reinforced by the distribution of tax revenues determined by article 159 of the Brazilian Federal Constitution of 1988, which provides that 50% of income tax revenues are allocated to state participation funds (FPE) and municipalities (FPM) and to financing programs for the productive sector in the North, Northeast and Central-West regions.

We also advocate other measures in the field of income taxation, but of legal entities, such as ending the deduction of interest on capital (JSCP). For the period from 2016 to 2022, Gobetti and Orair (2016) estimated that the elimination of this deduction could generate annual revenues of around R$ 8.1 billion (in 2013 values). In addition, it would be advisable to condition the reduction of corporate tax rates to the due compensation in the taxation of the individual, which should preferably occur through the taxation of capital income that is still exempt from personal income tax in Brazil.

Finally, in relation to the existing donation and inheritance tax (ITCMD) in Brazil, we understand that there is scope for the establishment of a maximum rate higher than that provided for in Resolution No. 57/2019 of the Federal Senate, of 16%; by way of example, the institution of a maximum rate of 20%, combined with the revision of the exemption limits and the ranges of the calculation bases, could raise the tax's collection impact by 0.25% of GDP, as Carvalho Jr shows (2018).

CONCLUSION

In a country with an extremely high concentration of income like Brazil, there is no reason to justify abandoning more effective redistributive actions in the field of direct taxation. The contributory capacity of the taxpayer should always be considered in the modulation of the tax incidence, especially in relation to personal income, as a way for the desired fairness of the system. In Brazil, however, the principles of universality and progressivity of income tax have been inexplicably mitigated.

Regarding the main aspects that lead to the general regressivity of the Brazilian tax system, it was found that the prevalence of indirect taxes on production and consumption, combined with the collection weakness of the personal income tax, lead to a low redistributive impact of the tax system, which constitutes a determining tax scheme for the persistence and aggravation of economic and social inequalities.

Regarding the main reasons why personal income tax is not sufficiently progressive in Brazil, we can highlight the fact that the maximum tax rate in this country is relatively low, and a low marginal income is still taxed. Since the richest strata of the income distribution tend to concentrate the largest proportion of capital income, the proper taxation of dividends is an important mechanism to strengthen the progressivity of taxation in Brazil.

Regarding the perspectives through which income inequality manifests itself, Brazilians' income tax returns reveal that the distribution of income is quite unequal, especially from the point of view of gender and income composition.

Regarding the different effects of tax measures on income inequality, we have shown that in Brazil public transfers are still the main drivers of reducing inequality, which is not the case with direct taxes on income and wealth, which have a low redistributive impact.

After comparing the Brazilian tax structure with the structures observed in Latin America and in the OECD countries, we found that the main revenues in LAC, as well as in Brazil, come from taxes on the consumption of goods and services, followed by income taxes, while in the OECD countries there is a greater balance between the different sources of tax revenues. The most notable difference between the tax systems corresponds precisely to the level of income tax collection.

In this work, it was possible to demonstrate the desirability of increasing the progressivity of the personal income tax in Brazil, with emphasis on the return of the taxation of dividends, either by exclusive withholding or by inclusion in the progressive taxation table, as well as by the inclusion of marginal rates in the progressive table.

From the point of view of reducing income inequalities, the inclusion of dividends in the progressive table would have a somewhat more pronounced effect than their taxation exclusively at source at a lower linear rate; in addition, this inclusion would promote greater horizontal equity by treating labor and capital income equally. On the other hand, it is undeniable that taxation exclusively at source is easier to administer in the context of a dual model, as well as being more in line with the dynamics of international financial flows, which could recommend this form of dividend taxation.

In addition, it has been shown that there is a tax space to promote a revision of the personal income tax progressive table combined with the return to the taxation of dividends, which could even yield additional tax revenues.

In order to obtain a personal income tax design that promotes greater equity and is oriented towards efficiency, we have developed proposals and recommendations that can be summarized as follows:

- repeal of the total exemption from dividends received by partners and shareholders of legal entities;
- exclusive withholding tax at the source on dividends distributed to members and shareholders, at a fixed rate of at least 15%, or, alternatively, inclusion of such income in the income tax progressive table, and;
- revision of the progressive personal income tax table, by updating the incidence ranges in relation to accumulated inflation and the inclusion of higher marginal rates, above 35%.

REFERENCES

Banco Mundial. (2022a). World Bank Open Data. https://data.worldbank.org

Banco Mundial. (2022b). Income share held by highest 10% - Country Ranking. https://www.indexmundi.com/facts/indicators/SI.DST.10TH.10/rankings. Income share held by lowest 10% - Country Ranking. https://www.indexmundi.com/facts/indicators/SI.DST.FRST.10/rankings

Bottega, A.; Cardomingo, M.; Carvalho, L.; Fernandes, R. C.; Orair, R.; Ribas, T.; Silveira, F. G. (2021). Nota de Política Econômica MADE/USP Nº 015. A Proposta de Reforma Tributária para o Imposto de Renda de Pessoa Física e seus efeitos na desigualdade. https://madeusp.com.br/wp-content/uploads/2021/09/npe-015_11.pdf

Brasil. (1995). Lei no 9.249, de 26 de dezembro de 1995. Altera a legislação do imposto de renda das pessoas jurídicas, bem como da contribuição social sobre o lucro líquido, e dá outras providências. http://www.planalto.gov.br/ccivil_03/leis/l9249.htm

Carvalho, L.; Toneto, R.; Ribas, T. (2020). Nota de Política Econômica MADE/USP nº 001. Dos pobres para os paupérrimos ou dos ricos para os mais pobres? O impacto sobre a desigualdade de diferentes formas de expansão das transferências de renda no Brasil. https://madeusp.com.br/wp-content/uploads/2020/10/NPE001SITE-2.pdf

Carvalho Jr, P. H. B. (2018). O Imposto Sobre Heranças E Doações. En Associação Nacional dos Auditores-Fiscais da Receita Federal do Brasil (Anfip) e Federação Nacional do Fisco Estadual e Distrital (Fenafisco) (eds.), A Reforma Tributária Necessária - Diagnóstico e Premissas (pp. 457-474). https://plataformapoliticasocial.com.br/wp-content/uploads/2018/05/REFORMA-TRIBUTARIA-SOLIDARIA.pdf

Gil Maciá, L. (2007). Alternativas de Integración Irpf-Is para evitar la Doble Imposición de Dividendos en el Contexto Actual. https://www.ief.es/docs/destacados/publicaciones/documentos_trabajo/2007_09.pdf

Gobetti, S. W.; Orair, R. O. (2016). TD 2190 - Progressividade Tributária: A Agenda Negligenciada. https://www.ipea.gov.br/portal/images/stories/PDFs/TDs/td_2190.pdf

Hanni, M.; Martner, R. (2017). Impacto redistributivo das políticas fiscais na América Latina revisitado. En J. R. Afonso, M. Rocha Lukic, R. O. Orair y F. Gaiger Silveira (eds.), Tributação e Desigualdade (pp. 421-449). Letramento.

Instituto Brasileiro de Geografia e Estatística (IBGE). (2023). Inflação. https://www.ibge.gov.br/explica/inflacao.php

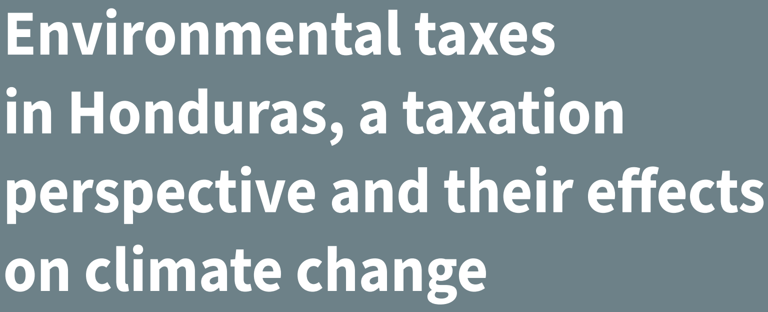
OCDE. (2022). OECD.Stat. Global Revenue Statistics Database. Tax Database. https://stats.oecd.org/

Piketty, T. (2014). O Capital no século XXI. Tradução de Monica Baumgarten de Bolle. - I. ed. - Rio de Janeiro: Intrínseca. https://www.intrinseca.com.br/ocapital/anexo-tecnico.html

RFB. (2021). Grandes Números IRPF – Ano-Calendário 2020, Exercício 2021. https://www.gov.br/receitafederal%22/pt-br/centrais-de-conteudo/publicacoes/estudos/imposto-de-renda/estudos-por-ano/gn-irpf-2021-2020.pdf

Silveira, F. G.; Passos, L.; da Silva, E. G.; Palomo, T. R. (2020). Nota Técnica No 89. Impactos Redistributivos das Transferências Públicas Monetárias e da Tributação Direta: Evidências Com A Pof 2017-2018. http://repositorio.ipea.gov.br/handle/11058/10229

Toneto, R.; Ribas, T.; Carvalho, L. (2021). Nota de Política Econômica MADE/USP nº 008. Como a redistribuição de renda pode ajudar na recuperação da economia? Os efeitos multiplicadores da tributação dos mais ricos para transferência aos mais pobres. https://madeusp.com.br/wp-content/uploads/2021/02/NPE008_site.pdf



Environmental taxes in Honduras, a taxation perspective and their effects on climate change

Edgardo Espinal

SYNOPSIS

The environmental crisis that the world is experiencing is a product of the collective actions of humanity and has been recognized by international organizations as a climate emergency. Efforts have been made to reduce environmental pollution, and one of the mechanisms to counteract are environmental taxes. This article delves into the case of Honduras, a country vulnerable to climate change, here it develops and analyzes environmental taxes according to Honduran regulations, and from a critical point of view, it assesses whether the taxes approved by Honduras are in line with the best practices in environmental taxation.

KEYWORDS: Environmental taxes, Honduras, Climate change, Green taxes, Environmental taxation

CONTENT

Introduction
1. The social market economy and the environment
2. Environmental taxes
3. Environmental taxes in Honduras
4. Environmental taxes: Germany case
Conclusion
References

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INTRODUCTION

Honduras is currently one of the countries most affected by climate change, as can be seen by the different phenomena that have affected the national territory in recent years. In particular the two hurricanes that hit the country hard at the end of 2020, Eta and Iota, according to (Inter-American Development Bank (IDB) and Economic Commission for Latin America and the Caribbean (ECLAC), 2021) in its report on the effects and impacts on these natural disasters, also refer that these phenomena with climate change tend to increase the recurrence and strength of these events, The same report also confirms that in 2020 the Atlantic hurricane season was the most active in history, with 30 tropical storms, 13 of which became hurricanes, demonstrating the dynamic risk that climate change imposes on the region, something that has been recognized and warned about by the Economic Commission for Latin America and the Caribbean (ECLAC) over the last 20 years.

Also, another difficult year for Honduras was 2022 with the tropical cyclone Julia, and another significant list of natural phenomena; as a result of the weakening of the ozone layer the country has also been affected by landslides and another of the most impacting is the loss of national territory by the Pacific Ocean that has been overlapping on the beaches of Cedeño (in the south of the country), losing approximately 40.62 meters of coastline (del Cid Gómez & Cáceres, 2017).

There are many national and international organizations that seek to improve the environment for a dignified life and an improvement in the quality of life of people. In this way the United Nations has been able to achieve that several developed and developing countries have signed the Paris[1] Agreement in 2015, which focuses on the parties (referring to countries) to commit to different actions for the improvement of climate change.

For some time now, solutions have been sought in the region to counteract the negative externalities caused by the different actions that economic agents conduct (in their productive processes) and that pollute the environment. To this end, governments must establish different public policies that contribute to the improvement of the environment and therefore the quality of life of people.

This essay proposes to identify a reference point for Honduras on the model to follow to create value in society and dignify the Hondurans and their environment.

One of the main international practices is the environmental sustainability, where different instruments are proposed to achieve this objective, among them the imposition of fees and taxes on pollution (environmental contamination), better known today as environmental taxes (or green taxes).

In this essay, an analysis of the tax policies that Honduras has established related to environmental taxation is made. We will analyze the taxes related to environmental management and will provide a point of view of the impact that these policies have had to combat climate change in a country so hard hit by this phenomenon. The tax bases, rates and collection of these taxes in public revenues and in relation to the country's Gross Domestic Product (GDP) will be analyzed.

Finally, a perspective is provided by analyzing the case of Germany, specifically on some of the principles of the Social Market Economy and the recommendation of green tax reforms for Honduras, so that they establish the dignity of the human person as the center of public policies and that these green tax reforms are equitable for the subjects of the tax obligation.

1 https://unfccc.int/sites/default/files/spanish_paris_agreement.pdf

1. THE SOCIAL MARKET ECONOMY AND THE ENVIRONMENT

Since the Social Market Economy (SME) is a socioeconomic order that revolves around the dignity of the human person, it can serve as a platform to create and improve public policies in Honduras, in its different areas of activity, especially in relation to the environment.

One of the principles of the SME, recently incorporated (Frisch, 2009) is environmental sustainability, which deals with the improvement of the environment so that future generations can enjoy a good or acceptable environmental quality. Therefore, one of the concerns of the SME is that the different economic actors should also be concerned about taking proper care of the environment, for which the SME proposes different measures to regulate the pollution of companies and individuals. One of these mechanisms are environmental taxes, which according to some thinkers of the SME should be considered in any environmental policy that is developed to dignify the human being.

For this, a perspective of the creators of the SME is given, where one of its most iconic passages that defines the SME is the one mentioned by Ludwig Erhard[2] , he said: "*I want to test my own strength, I want to take charge myself of the risks I face in my life, I want to be responsible for my destiny. I charge you, State, to create the conditions for me to be able to do so*". (Resico, 2010, p. 21).

This passage underscores that something that the SME seeks is a regulatory State, which interferes when necessary to establish rules and guidelines for the policies that the country needs. Anyone would say, well this is what a State should do, regulate. It turns out that regulation is something present in any rule of law, but it really must be put into practice, and adequately define public policies that centralize the ethics and morals of those who establish them, seeking social justice and equity among its inhabitants.

Another famous phrase in SME is "as much market as possible and as much State as necessary", a clear sign that the SME wants a solid, strong State, but one that intervenes only when necessary. Of course, in environmental policy, state intervention is essential to improve the quality of life of today's citizens and future generations.

Behind the SME is the current of thought of ordo-liberalism, this thought is profoundly democratic, and more than a government program, it helps to generate institutional governance in government entities, it is the basis for a new social contract and creates a networked intelligence. By believing in this thinking and adopting it as a way of life and political structure for the country, the biggest losers will be those who have captured the State, and the biggest winners standing out will be the consumers and the genuinely enterprising businesspeople, who want to invest and innovate. *Ordoliberalism*, in addition to being a political center, here highlights people who are willing to resolve conflicts and differences peacefully. Therefore, Ordoliberalism is a doctrine, capable of integrating left and right, setting clear limits before the extremists.

It is inescapable to mention the Sustainable Development Goals (SDGs), specifically goal number 13, "Climate Action", where there is international awareness that it is necessary to take action to improve environmental sustainability, especially in a country like Honduras, a low-income country, where the population still lacks awareness to improve the environment and that the State establishes a firm path to mitigate the risks to be faced on the abatement of society in the face of climate change in the national territory. On the other hand, the Constitution of the Republic in its Articles 145 and 274 mention the preservation and defense of the environment, with this it is observed that there really are principles of the SME in the maximum Law of the country, but it is necessary to visualize a greater applicability of this, for it a deep analysis will be made on the environmental taxes of Honduras, but before a general conceptualization of these.

2 German politician and economist, Federal Chancellor of West Germany between 1963 and 1966, considered the father of the SME.

2. ENVIRONMENTAL TAXES

Before discussing a definition of environmental taxes, a conceptualization of their origin will be developed. To do so, it is necessary to start from the basic concept of what taxes are.

Countries must decide what public goods and services will be provided to their citizens to satisfy their social needs, and they must also decide how the cost of the goods and services provided will be distributed among those same citizens. Thus, States use **taxes** as a financing instrument, which constitute part of the State's income to finance public goods and services, and account for the majority of a country's income. (Segura, 2006).

There is a wide variety of taxes and depending on (Segura, 2006) most of them can be grouped into two main categories: i) **financial taxes**, which are those that have been established purely for collection purposes and to finance different goods and services; and ii) **regulatory taxes**, which unlike the former, their collection purpose is secondary, since their main purpose is to change behaviors, conducts and/or decisions, and they are mainly aimed at reducing consumption and/or the conservation and protection of the environment. Therefore, environmental taxes are considered regulatory instruments or taxes.

Thus, environmental taxes, also called Pigouvian taxes or fees, can be defined as follows[3], as any tax charged to economic agents that generate negative externalities to the environment, under the precept of the polluter pays; but in reality it goes beyond this, because as explained above this tax is part of the category of regulatory taxes, and according to (Vera, 2019) by increasing the prices of environmentally harmful goods relative to other goods, consumers are encouraged to change their consumption patterns in a more sustainable direction, but also change the cost structure of business (through changes in the prices of production inputs) and thus induce producers to adopt environmentally friendly technologies in a more environmentally friendly manner. Consequently, the main objective of Pigouvian-type environmental taxation is not essentially to raise revenue, but to change behavior. Collection and its destination are secondary issues.

Taxes are levied on a taxable base, for practical purposes we can talk about the Income Tax of legal entities. In Honduras and in most countries, the taxable base of this tax is the income minus its costs and expenses in a given fiscal period, which consequently the result is the profit, the latter being the taxable base on which the tax will be calculated, i.e. the rate will be multiplied by the taxable base to generate the tax caused, this in terms of a direct tax.

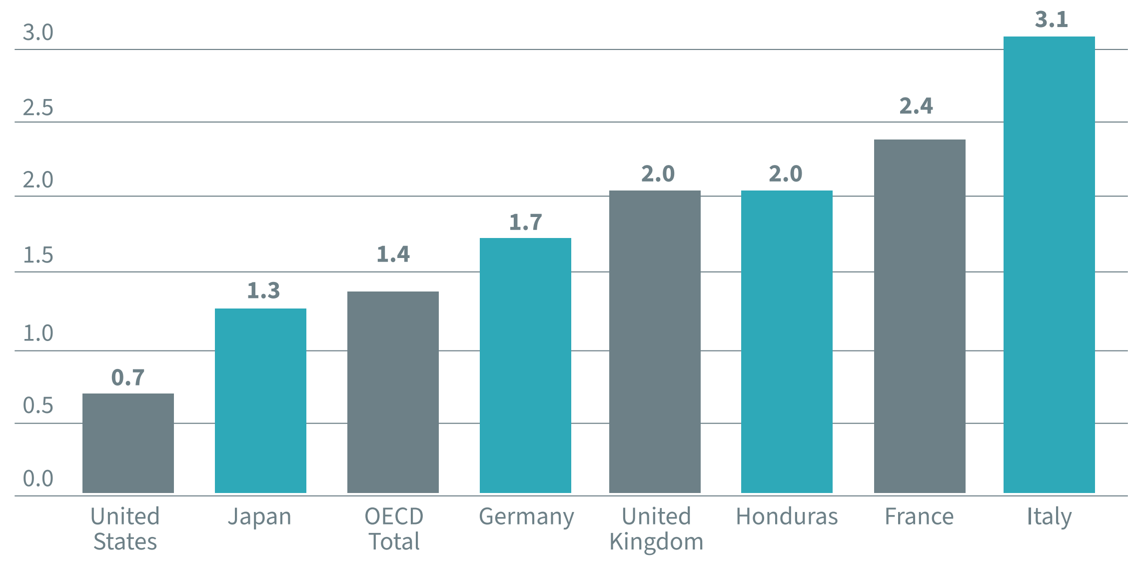
Therefore, for environmental taxes, the taxable base on which the tax liability will fall must be adequately defined, according to criteria of Vera (2019). In his research, this author speaks of various tax bases, some easier to understand and others that the tax policy maker will have to implement creatively, among some of the tax bases for environmental taxes are: (i) emissions into the air, (ii) ozone depleting substances, (iii) water effluents, (iv) diffuse sources of water pollution, (v) waste management, (vi) energy products (fossil fuels, for transportation, consumption and electricity production), (vii) transportation (vehicle imports, vehicle registration or use), (viii) resources (water catchment, raw material extraction).

As can be seen, there are a variety of options for environmental taxation, to try to change the behavior of consumers and producers, where they can be agents of change and better preserve the planet for future generations. It was previously mentioned that several countries, especially European countries, have been concerned about environmental taxation for several years. Therefore, the Organization for Economic Cooperation and Development (OECD) monitors the tax revenues obtained through environmental taxation, the indicator that is calculated is the tax revenue obtained through this type of taxation divided by the country's GDP.

3 Named after the economist Arthur Pigou.

In European countries, environmental taxes average between 1.4% and 2% of GDP. (OECD, 2020) something striking that can be seen in the Figure 1 is that Honduras collects 2% of GDP in environmental taxes, higher than Germany, Japan and the United States. This may seem strange, but it has its proper explanation, which will be discussed in more detail in the next section.

Figure 1
Environmental taxes as a % of GDP in 2020



Source: OECD.Stat, extracted from https://www.oecd-ilibrary.org/environment/environmental-tax/indicator/english_5a287eac-en

3. ENVIRONMENTAL TAXES IN HONDURAS

The following is a description of those taxes, fees or any other instrument that technically can be considered an environmental tax, identifying the taxable base in the Honduran legislation, who is liable for the tax obligation, its enabling legal framework, and considerations on the tax in question.

As mentioned in the previous section, Honduras is collecting 2% of GDP in this type of taxes, so some of the instruments that will be mentioned are mainly contributing to this figure, which is well above Latin America and the Caribbean.

3.1 Contribution to the Conservation of Road Heritage (ACPV)

This is the tax for which Honduras is considered according to (OECD, 2020) one of the countries with the highest tax collection from environmental taxes as a percentage of GDP.

The tax obligation arose from Legislative Decree No. 131-98 of May 1998, which established a tax on fuels (gasoline, diesel, bunker and Av Jet), the tax base being the gallon of fuel and the subjects of the tax obligation were individual or legal entities engaged in the production, transformation, refining or importation of fuels. (Republic of Honduras, 1998), The interesting thing is that the "consideration" that motivated this tax in the referred decree talks about the creation of this tax for the conservation and maintenance of the road infrastructure as a national asset and at no time was it considered for the environmental improvement that the country needs.

This tax was reformed through Decree 278-2013 of December 2013, being its payment as follows:

Figure 2
Payment of the reformed ACPV contribution

Product	Contribution in dollars
Super gasoline	1.4089
Regular gasoline	1.2416
Diesel	0.8606
Fuel oil (Bunker c)	0.4267
Kerosene	0.1500
LPG	
Upt to 25 liters	0.1500
More than 25 liters	0.1500
AvJet	0.0300

Source: Legislative Decree 278-2013.

In the opinion of the author of this essay, and supported by other research, such as that of (Vera, 2019) in relation to the taxation of fuels, it can be shown that in Honduras this contribution was created (as mentioned in the decree) for purely tax collection purposes and even a destination related to road maintenance in the country. In addition, there are two clearly marked distortions in this tax.

The first distortion is that a widespread policy of subsidies to these petroleum products, especially gasoline, has been proven; due to the costs that these subsidy programs represent for the countries, there is an opportunity cost, since government authorities could take advantage of the expansion of public spending on other priority programs instead of this type of spending (subsidy) that distorts the distribution of wealth and the subsidiarity principle of the SME. In addition, it has been identified that subsidies (in this case fuel subsidy) are regressive since a large part of those who benefit from subsidies are the wealthier groups (Lorenzo, 2016). In the case of Honduras this fuel subsidy policy has been historically implemented by all governments, in the year 2022 a new subsidy policy according to (Customs, 2022) has disbursed around L 2,238.1 million as of July of that year. In Honduras, this tax on fuels has a significant share of total tax revenues, according to the following figures (Secretary of Finance, 2020) un 13% on average over the last 10 years, see Figure 3; can also be seen in the Figure 4 tax collection specifically for the ACPV.

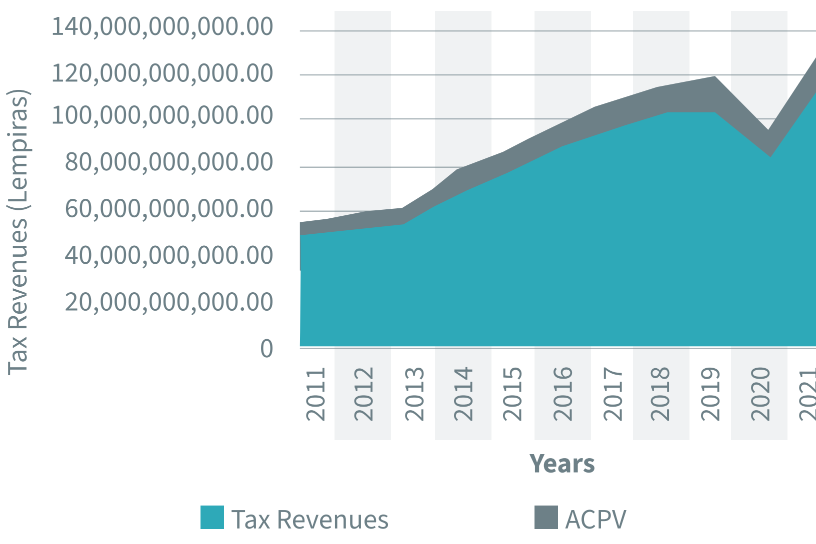
The second distortion is a broad policy of tax exemptions on ACPV for fossil fuel-based energy generators[4], as is already known, this activity is highly polluting due to greenhouse gas emissions that do not help climate change policies, because instead of being the activity on which this tax obligation should fall due to its high environmental pollution, it is an activity that does not pay the tax due to tax exemptions.

4 Exemption granted in 1994 by Decree 158-1994, which was amended by Decree 181-2012 and Decree 100-2020.

In Honduras, this tax on fuels has a significant share of the total tax collection, according to (Finances Secretariat, 2020) 13% on average over the last 10 years, see Figure 3; Figure 4 also shows the tax collection specifically for ACPV.

Figure 3

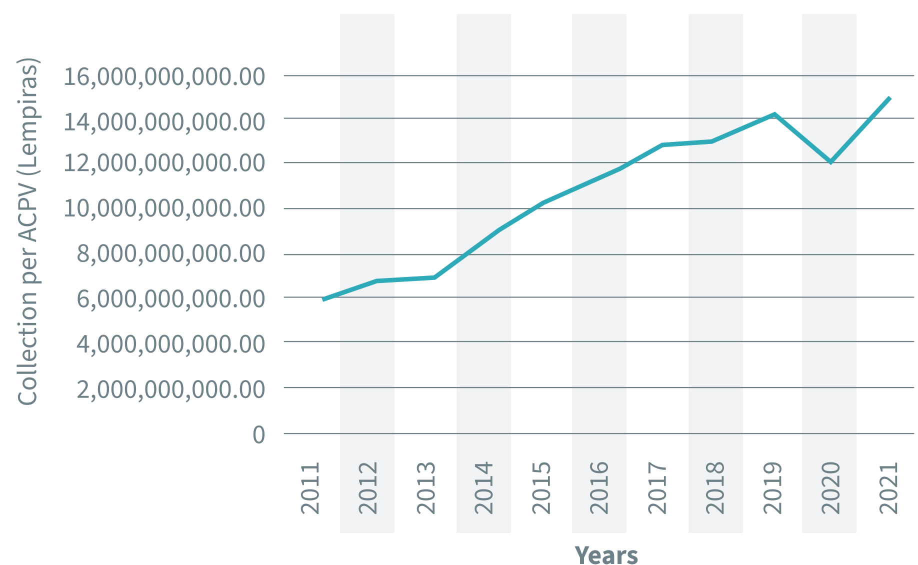
ACPV's share of tax revenues for the 2011-2021 period



Source: Prepared by the authors with data from the institutional memory of the Secretariat of State for Finance.

Figure 4

Collection by ACPV in the periods 2011-2021



Source: Prepared by the authors with data from the institutional memory of the Secretariat of State for Finance

As it can be observed, the ACPV was not created in Honduras for the protection and conservation of the environment, therefore, according to the criticism made in this essay to the current Honduran tax system, it should not be considered as an environmental tax. However, technically, in the taxonomy of environmental taxes, it could be considered a green tax because the taxable bases of this tax fall on the different types of fuels already detailed above; This same tax exists in the region and is handled in a very unique way to the Honduran experience, but extrapolating this regulation to countries like Europe or advanced economies, this type of tax was created particularly for the improvement of climate change, and therefore, it should not be understood as a practice equal to that of Honduras in relation to the taxation of ACPV, which even represents a good part of the country's tax revenue.

Next, we will review what other "green" taxes exist in the Honduran tax system; they will not be addressed as extensively as the ACPV, of course, this section was developed in this way because of the high importance and even dependence that exists in tax revenues from this tax.

3.2 Tax on forest industries

As detailed in the previous sections, some of the tax bases of green taxes were explained, one of them being the resources, such as water catchment and extraction of raw materials. It turns out that this tax should be considered as a green tax in the Honduran tax legislation. The tax obligation was born in Decree 57 of March 21, 1963, the taxable base is the commercial value of the natural resources exploited and extracted and its rate is 1%.

The tax obligation falls on individuals and legal entities, owners of sawmills or any other forestry industry, after obtaining the licenses as established in the Forestry Law (Servicio de Administración de Rentas (SAR), 2021), the tax is paid in March of each year.

Unfortunately, there is a lot of illegal logging (see Figure 5), so many (individuals or legal entities) that should pay this tax do not do so. Policy makers should update the regulations of this tax, so that it can really help the purposes of environmental taxes and broaden the taxpayer base that must pay for the extraction and exploitation of this natural resource; in the periods from 2011 to 2021, only L 3.6 million was collected from this tax.

Figure 5
Seizure of illegal timber harvesting in Guaimaca[5]

Source: Instituto Nacional Conservación Forestal (ICF).

3.3 Special contribution for the mining sector

Like the previous tax, this special tax is levied on the extractive industry, specifically on the mining sector. On this occasion it was created under the concept of a special contribution that according to (Segura, 2006) These are a consideration required from those who have benefited from a public work. In this case we are not talking about a public work but about a public good, which are the minerals extracted from Honduran soils or surfaces, and those who have benefited from this public good are those who have been authorized by the State through concessions or exploitation licenses. For this reason, these

5 https://icf.gob.hn/2022/10/13/5995/

benefited individuals are subject to the tax obligation as a special contribution, i.e., a payment to be made for the benefit granted to them by the State of Honduras for the exploitation and extraction of minerals. The special contributions are framed under the category of financial taxes, which is to say, with a merely collecting purpose rather than a regulatory purpose, therefore, there is a space of analysis for the legislator in order to identify improvements and give a more environmental face to this tax.

This special contribution from the mining sector was created in Decree 105-2011, which contains the Law on Population Security, and regulated by Agreement 1775-2011[6], Particularly in the special contribution of this sector, it was established that it was a transitory measure until the National Congress approved the Mining Law. (Republic of Honduras, 2011).

This Law established as taxpayers of the tax obligation individuals and legal entities engaged in the exploitation and commercialization of minerals in the country, the taxable base being the FOB value of the mineral. (*Free on Board*) of the export of minerals registered in the Goods Declaration, and in relation to the tax rate this was modified with the entry into force of the Mining Law (Decree 238-2012), in which Article 76 established a differentiation in the tax rate:

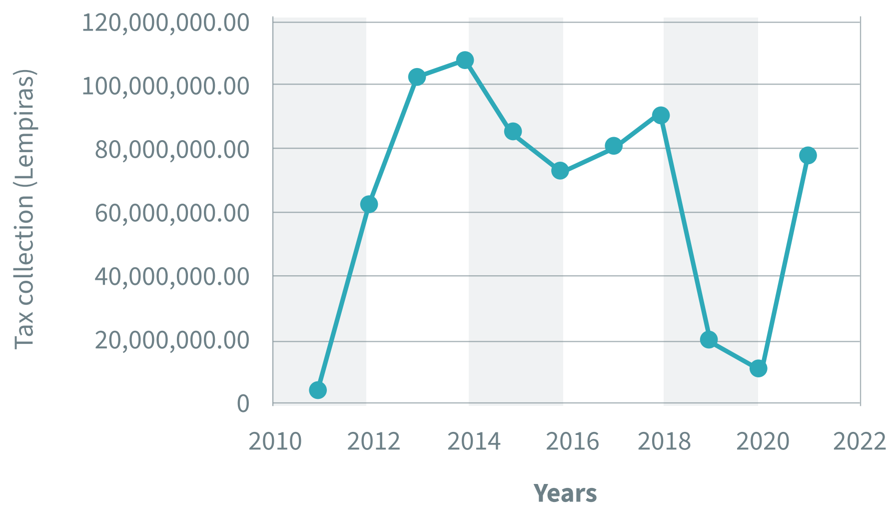
1. Non-metallic mining of an industrial nature and mining of gems or precious stones pay 1% as Security Tax.

2. Metallic mining, sulfide oxides (non-metallic), from which metals are extracted, pay 2% in Security Tax.

Figure 6 shows the tax collection for this special contribution.

Figure 6

Tax collection from the special contribution for the mining sector for the 2011-2021 periods



Source: Prepared by the authors with data from institutional reports of the State Secretariat of Finance.

6 As of Decree 31-2018 in Article 4, the special contributions were changed from transitory to permanent.

3.4 Taxation of vehicles

The determination of taxable income and a review of the research conducted by (Lorenzo, 2016) and (Vera, 2019), and also what has been explained in this essay, environmental taxes are considered to be those related to transportation, specifically to the sale, importation, registration and use of vehicles. Specifically, and reviewing the Honduran regulations, three taxes have been identified that coincide with the literature on green taxes, in particular, the Ecotax on the import of used vehicles, the Selective Tax on vehicles and the Single Annual Tax on vehicle registration. The following is an explanation on each of these taxes.

3.4.1 Ecotax on imports of used vehicles

Created in the Law for the Strengthening of Revenues, Social Equity and Rationalization of Public Spending (Decree 17-2010) in Article 21, where the payment will be applied only once and is cancelled at the time of importing the vehicle together with the liquidation and payment of the Single Customs Declaration (DUA). (Republic of Honduras, 2010). And its taxable amount is according to the CIF value[7] and the following scale:

Figure 7
Scale of payment of the Ecotax

CIF Value				Eco-Rate (L)
From USD $	1.00	Upt to USD$	15,000.00	5,000.00
From USD $	15,001.00	Up to USD$	25,000.00	7,000.00
From USD $	25,001.00	From now on		10,000.00

Source: Agreement 1121-2010 (Regulation of Decree 17-2010).

3.4.2 Selective on vehicles

Unlike the ecotax, this selective tax was not created, but it was modified in the same Decree 17-2010, in its article 20, defining the levy for this tax, which came from Article 1 of Decree 58-1982[8]. This selective tax for new or used vehicles is levied only once, on the following two generating events: i) on importation, when the vehicle is definitively imported into Honduran territory, or ii) on manufacture, when it leaves the factory or warehouse for sale or exhibition, (Republic of Honduras, 2010) and its taxable base is according to the CIF value, according to the following scales:

Figure 8
Selective vehicle fee schedule

New vehicles				
CIF Value				Rate
From USD $	0.01	Up to USD$	45,000.00	10%
From USD $	45,001.00	Up to USD$	60,000.00	20%
From USD $	60,001.00	Up to USD$	100,000.00	40%
From USD $	100,001.00	From now on		60%

Used vehicles				
CIF Value				Rate
From USD $	0.01	Up to USD$	7,000.00	10%
From USD $	7,001.00	Up to USD$	10,000.00	15%
From USD $	10,001.00	Up to USD$	20,000.00	20%
From USD $	20,001.00	Up to USD$	50,000.00	30%
From USD $	50,001.00	Up to USD$	100,000.00	45%
From USD $	100,001.00	From now on		60%

Source: Agreement 1121-2010 (Regulation of Decree 17-2010).

7 CIF value (*Cost, Insurance and Freight*).

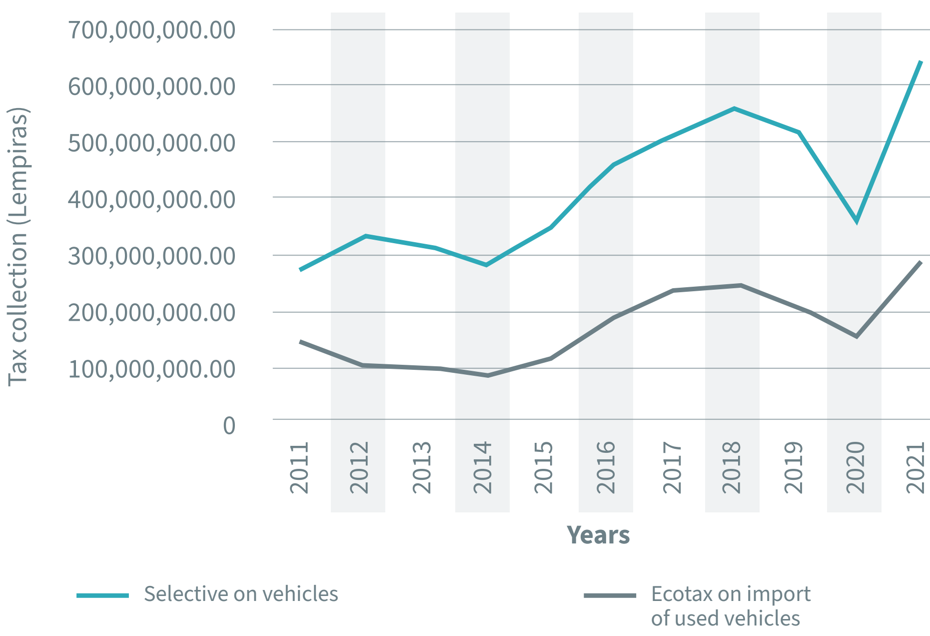
8 Selective Consumption Tax Law.

An interesting aspect of this selective tax in Decree 17-2010 is that hybrid vehicles that combine the use of fuel and electricity and vehicles that use alternative fuels to fossil fuels are exempt from payment, with the purpose of encouraging the purchase of more environmentally friendly vehicles.

A challenge for the legislator is to ensure that these two taxes (Ecotax and the Selective Tax) do not directly affect the working classes, since a significant amount of tax revenue is collected for these concepts, as shown in the following figure:

Figure 9

Tax collection from the Ecotax and the selective vehicle tax, in the period 2011-2021



Source: Prepared by the authors with data from the Decrees of the budgetary provisions.

3.4.3 Single annual vehicle registration fee

Created in Article 15 of Decree 18-90, containing the Law of Structural Ordering of the Economy, and subsequently reformed in 1998, 2002, 2003, 2004, establishing the payment of a single annual fee for the registration and review of the characteristics of the vehicle, this payment falls on any individual or legal entity who has the ownership of the motor vehicle; it is paid according to Decree 50-2016 in the second half of the year as follows:

- *In July*: vehicles with four wheels or more, with license plates ending in 0 and 1.
- *In August*: vehicles of four wheels or more, with license plates ending in 2 and 3.
- *In September*: vehicles with four wheels or more, with a license plate ending in 4 and 5.
- *In October*: vehicles with four wheels or more, with a license plate ending in 6 and 7.
- *In November*: vehicles with four wheels or more, with a license plate ending in 8 and 9.
- *In December*: vehicles of two or more, vehicles owned by the State of Honduras, vehicles exempted from importation.

The vehicle tax shall be paid as follows:

Figure 10
Vehicle rate by type of vehicle

Vehicles with rental plates	Description	Lempiras
To	2,500 cc	L.750.00
From	2,501 cc and upwards	L.1,200.00
Vehicles with private license plates	**Description**	**Lempiras**
To	2,500 cc	L.1,200.00
From	2,501 cc and upwards	L.2,200.00
Motocycles		L.200.00
Trailers, dredges and others		L.1,000.00

Source: Decree 50-2016.

3.5 Cigarette production and consumption tax

It is considered an environmental tax because it fulfills one of the fundamental purposes in environmental terms, to discourage its consumption. (Vera, 2019), In addition, due to the air emissions caused by cigarettes, according to (Superior Institute of the Environment, 2022) Tobacco smoke contains three types of greenhouse gases that pollute indoor and outdoor air: carbon dioxide, methane and nitrogen oxides.

In general, and from the point of view of this essay, the regulations of this tax should be revised to orient it more towards environmental taxation, because the tax base is on production and not on the pollution generated by cigarettes, in one way or another if the negative externality generated by the consumption of cigarettes is being internalized in the costs of the producer or importer.

Article 23 of Decree 17-2010 amends Article 1 of Decree 106 of 1955, which creates this excise tax on cigarettes, which will be applied in a single marketing stage, either i) at the manufacturing level; or ii) at the time of importation, the generating event is the sale by the local manufacturer or the nationalization of the product by the importer (Republic of Honduras, 2010).

The taxable base is calculated on the thousand or fraction of thousands of cigarettes sold or imported, regardless of the quantity of cigarettes per box, brand or presentation. This thousand or fraction of thousand is multiplied by a fixed amount[9] that will be updated as of fiscal year 2013 with the variation determined in the Consumer Price Index (CPI) determined by the Central Bank of Honduras (BCH) and this adjustment may not exceed 6% in any case.

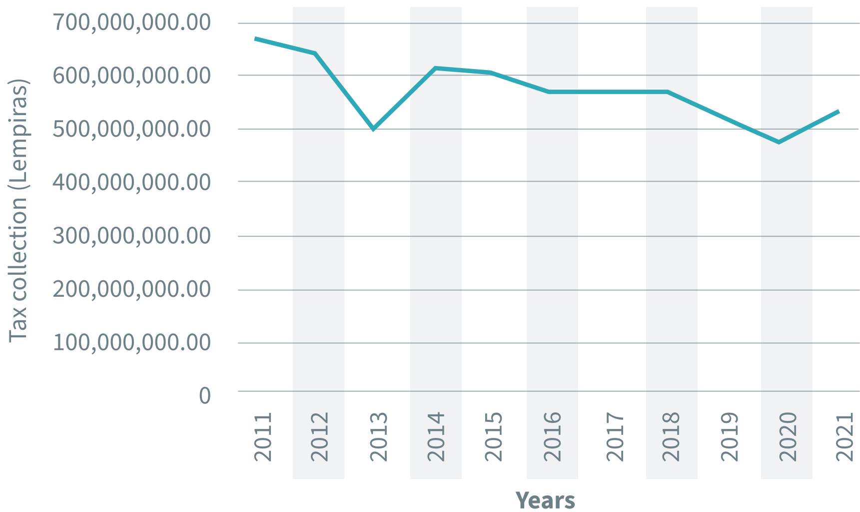
The liquidation of this tax is differentiated: i) in the case of domestic cigarettes, the sworn statement must be filed and paid within 10 days of the following month before the Tax Administration; and ii) in the case of imported cigarettes, the tax must be paid according to the provisions of the customs legislation and prior to the withdrawal of the merchandise.

The following figure shows the tax collection for this selective tax on cigarettes:

9 It began with a fixed amount of L 350.00 per thousand or fraction of a thousand and for the year 2022 it rises to L 539.00.

Figure 11

Tax collection from excise tax on cigarettes, in the periods 2011-2021



Source: Prepared by the authors with data from institutional reports of the State Secretariat of Finance.

3.6 Fee for water use

An intensive research showed that in the general provisions of the budget of Honduras an income for this concept is contemplated, a negligible amount was observed in relation to the resource it represents, it was expected to collect around L 2.5 to L 3. 0 million in the years from 2015 to 2019, this is created from the General Water Law (Decree 181-2009) specifically in Article 86 on the tariff framework, which talks about a fee for the concessions granted on this natural resource; later in 2021 in the Executive Agreement 002-2021 the Regulation of the General Water Law is approved, which creates the Canon for water use with a charge of L 0.0025 per cubic meter, this must be paid by the holder of the use annually in advance in the month of January of each year.

4. ENVIRONMENTAL TAXES: THE GERMAN CASE

According to (OECD, 2020) Germany's tax collection in environmental taxes in relation to its GDP is 1.4%, therefore, it is possible to analyze what lessons can be learned from this particular experience, being this country the proponent of the teachings and good practices of the Social Market Economy.

Germany started with its environmental fiscal reforms in 1999, where it aimed to increase energy taxes and introduce a tax on electricity consumption. Among the increases in tax rates, mineral fuels for transportation, natural gas and fuel oil were affected (Lorenzo, 2016).

In addition to other taxes on pollution and those already explained on energy, Germany demonstrated the usefulness of the double dividend that is discussed in the literature of environmental taxes; on the one hand it was able to change behaviors among its citizens and improve the environment and on the other hand with the revenue obtained from environmental taxes it managed to reduce the tax burden on other taxes, such as labor taxes and social charges (Lorenzo, 2016). (Lorenzo, 2016). This is achieved from analysis around the needs of its citizens, putting them as the center and end of its adopted public policies. Here one can really perceive the applicability of the SME in public policies.

CONCLUSION

- Conduct a comprehensive review of the commitments that Honduras has made under the Paris Agreement, and establish measurable and quantifiable goals, in addition to raising awareness of the support needed through civil society, academy, business and government, in order to comply with the improvement of climate change.
- Honduras is a country highly affected by the global depletion of the ozone layer, therefore, awareness must be created in the authorities, public policy makers, and citizens in general, for this clear strategies must be created to disseminate information on the effects of climate change and its harsh consequences for the Honduran population.
- As an alternative policy, the learning and practices of the Social Market Economy is proposed, so that those who have the professional and decision-making capacities can put the Honduran people, their human dignity and the environment as principles of public management.
- Honduras effectively has an environmental revenue of 2% of GDP, since the ACPV (fuel tax) generates a large amount of tax revenue, but as discussed in this essay, this tax was created for collection purposes and not really for environmental purposes.
- Tax regulations are notoriously outdated and have little or no revenue collection, and need to be reviewed and updated to contribute to the environmental purposes for which they are intended, specifically the tax on the forestry industry.
- Evaluate the impact of the tax reforms for the eco-tax and the selective vehicle tax, since significant revenue is received, but no change in behavior is perceived in the disincentive to purchase vehicles that use fossil fuels.
- The single vehicle tax has room for improvement, since the range of payment of this tax does not differentiate between the different vehicle engines, and a segregation could be made between vehicles of lower displacement and vehicles of higher displacement, to encourage the purchase of vehicles with low fuel consumption and offer a lower rate for these, since there is still no perceived infrastructure or platform in the country for vehicles that use alternative energy or fuels.
- The cigarette excise tax regulations should be revised to make them more environmentally oriented, because the tax base is on production and not on the pollution generated by cigarettes.

- A green tax reform should be proposed in Honduras, the country has a considerable number of regulations related to environmental taxes, but they are very oriented to a collection purpose and not to a regulatory purpose. There is room to improve existing “environmental” taxes and there are also perceived opportunities to design taxes on other tax bases not yet explored by Honduran legislators, such as air pollution, noise pollution, solid waste (bottles and plastic bags), drilling of water wells, among other sources of pollution that could be taxed. It is even possible to analyze what Germany did, which, based on the collection of environmental taxes, reduced the tax burden on labor taxes for the benefit of citizens.

REFERENCES

Aduanas. (2022). Aduanas. Obtenido de https://www.aduanas.gob.hn/aduanas-honduras-absorbio-2238-1-millones-de-lempiras-por-subsidio-de-combustible/

Banco Interamericano de Desarrollo (BID) y Comisión Económica para América Latina y el Caribe (CEPAL). (2021). Evaluación de los efectos e impactos de la tormenta tropical Eta y el huracán Iota en Honduras. Banco Interamericano de Desarrollo.

del Cid Gómez, J. A., & Cáceres, J. D. (2017). Variación de la línea de costa en la aldea de Cedeño, y cartografía de amenaza ante marejadas y ascenso del nivel del mar. Revista Portal de la Ciencia, No. 13.

Frisch, J. R. (2009). Economía Social de Mercado. Fundación Konrad Adenauer.

Instituto Superior el Medio Ambiente. (Junio de 2022). El impacto del tabaco en el Medio Ambiente. Obtenido de https://www.ismedioambiente.com/el-impacto-del-tabaco-en-el-medio-ambiente/#:~:text=Cada%20cigarrillo%20emite%2014%20gramos,metano%20y%20%C3%B3xidos%20de%20nitr%C3%B3geno

Lorenzo, F. (2016). Inventario de instrumentos fiscales verdes en América Latina. En F. Lorenzo. Santiago: Naciones Unidas.

OECD. (2020). Organisation for Economic Co-operation and Development (OECD). doi:10.1787/5a287eac-en

República de Honduras. (1998). Ley de Estímulo a la Producción, a la Competitividad y al Desarrollo Humano. Tegucigalpa: Congreso Nacional.

República de Honduras. (2010). Ley de Fortalecimiento de los Ingresos, Equidad Social, y Racionalización del Gasto Público. La Gaceta.

República de Honduras. (2010). Reglamento de la Ley de Fortalecimiento de los Ingresos, Equidad Social, y Racionalización del Gasto Público (Acuerdo 1121-2010). La Gaceta.

República de Honduras. (2011). Acuerdo 1775-2011 Reglamento de la Ley Seguridad de Seguridad Poblacional. La Gaceta.

Resico, M. F. (2010). Introducción a la Economía Social de Mecado. Konrad Adenauer Stiftung.

Secretaría de Finanzas. (2020). Memoria Institucional. Tegucigalpa.

Segura, J. V. (2006). Manual de Política y Técnicas Tributarias. Ciudad de Panamá: Centro Interamericano de Administraciones Tributarias (CIAT).

Servicio de Administración de Rentas (SAR). (2021). Servicio de Administración de Rentas (SAR). Obtenido de https://www.facebook.com/SARHND/photos/a.782328058575771/2158156054326291/?type=3

Vera, L. (2019). Impuestos ambientales y equidad: desafíos para América Latina y el Caribe. Bogotá: Friedrich-Ebert-Stiftung (FES).

Remote review and auditing procedures. Regulations necessary for their integral implementation

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SYNOPSIS

During the last few years, the different Tax Administrations have made progress in incorporating technologies to their review and auditing procedures.

In Chile, there has been a gradual incorporation of rules on the subject, mainly with the enactment of Law No. 21,210, allowing that, by 2020, in the review and auditing procedures carried out by the Chilean Tax Administration, the use of information technologies will be applied more intensively.

This article explains the current rules. It also raises the need for new adjustments that will allow crystallizing the existing advances.

KEYWORDS: Remote inspection, Electronic file, Remote communication, Technological administrative procedure

CONTENT

Introduction

1. Remote review and audit procedures. Concept.
2. Rules that allow the development of remote review and audit procedures.
3. Taxpayers' rights in the face of a remote review or audit procedure.
4. Necessary regulations for an integral implementation of the remote review or audit.

Conclusion

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INTRODUCTION

Tax administrations around the world are exploring the potential benefits of digitization to improve taxpayer service and increase revenue collection. Developing countries are no strangers to this trend and are currently developing innovative digital solutions to meet the challenges of the XXI century.

Digitization alone will not solve the difficulties faced by tax administrations and each administration must address the challenges of digitization according to its situation, needs and priorities, however, there is clarity that digitization in the different processes brings a number of benefits, as will be explained below.

In this context, it should be noted that the Internal Revenue Service guides its work in order to advance towards the fulfillment of its mission[1], which seeks to ensure tax compliance under fair and equitable conditions, focusing its efforts on the implementation of innovative solutions for the work of all employees and taxpayers, ensuring the quality and excellence of the services it provides.

To carry out its mission, the SII organizes its action around three Strategic Axes: The Integrated Tax Compliance Management Model (hereinafter referred to as MIGCT), the Data Governance Program to strengthen Tax Compliance and the Strengthening of the Organizational Culture at the Service of the Strategy.

In this sense, this planning for the following four years (2023 - 2027), incorporated the *SII Business Model* as a formal component within the Strategic Statements of connection, in which the Tax Compliance Management Model and the Taxpayer Service and Assistance Model were integrated, giving rise to the MIGCT. In addition, the Institutional Vision Statement was adjusted[2], in order to simplify its definition, facilitate its understanding and, mainly, to adapt it more precisely to the current strategic emphasis. Finally, the conceptualization of the Strategic Plan was complemented with a view that incorporated the institutional operation as an integral element of this representation, thus explicitly reflecting the role of strategic definitions as references for the alignment of institutional action. The relevance of institutional metrics as a mechanism for verifying strategic alignment and monitoring compliance with strategic objectives was also highlighted.

The MIGCT establishes the way to execute the daily tasks from the analysis of the causes, treatment and evaluation of these, therefore, it provides guidelines and orients the daily tasks, with the objective of being more effective in increasing the levels of voluntary compliance, developing services and digital products appropriate to the characteristics and needs of the taxpayers.

From a perspective of learning and growth of the Institution, this allows the development of capabilities, personal and organizational competencies, creating value for people and for institutional performance, for which the installation of innovation as an institutional culture is considered an organizational hallmark. Fostering an environment of creativity, experimentation and collaboration in which innovative ideas are valued and the team is encouraged to take risks and think outside the box. By fostering innovation, the institution can develop new services, improve existing processes, and find new ways to meet the needs of the taxpayers.

1 The mission of the Internal Revenue Service, hereinafter referred to as SII, is to ensure that each taxpayer fully complies with its tax obligations, applying and auditing internal taxes effectively and efficiently, with strict adherence to current legislation and seeking to facilitate compliance, within the framework established by the principles of probity, equity and transparency, in a work environment that promotes the integral development of its employees, in order to achieve a performance of excellence that contributes to the progress of the country. https://www.sii.cl/sobre_el_sii/acerca/mision.htm

2 To be an institution recognized as a worldwide reference, operating under an innovative culture of excellence, oriented to taxpayers and their full tax compliance, and ensuring an adequate, fair and equitable collection. Strategic Plan 2023, Internal Revenue Service. http://intranet_sii//especiales/plan_estrategico/plan_estrategico2023.pdf

In the same vein, digital transformation and data governance have been strengthened, for which its capacity to adapt to changes will be deepened, thus maintaining its leadership in digital management, positioning itself as an institution capable of managing its data as true organizational assets.

In short, the Institution is moving in the direction of complying with the social mandate of channeling the appropriate tax contribution to the Public Treasury, deepening its effectiveness for the good of the citizenry[3].

On this matter, digitalization also affects the different functions performed by the tax administrations, among which is the way of relating with taxpayers, be it in the area of facilitation, review or auditing, as appropriate.

In this context, it is a relevant challenge for the SII to advance in a complete and comprehensive implementation of remote review and auditing procedures, which in turn considers the implementation of different technologies, always looking at the taxpayers as the center of its actions, with special consideration of their rights, with emphasis on efficiency and cost reduction for both the tax administration and taxpayers.

1. REMOTE REVIEW AND AUDIT PROCEDURES. CONCEPT

In order to introduce the remote review and audit procedures, we need to define what this concept means.

In this regard, it should be noted that already in the 2021 Tax Compliance Management Plan[4], the SII stated the need for "*consolidate remote facilitation and auditing, making it possible for each taxpayer to comply with his tax obligations in a simple and easy way, without the need to go to the SII offices, thus reducing compliance costs for both the taxpayer and the tax administration*".

But what does it mean that the review and/or audit is carried out remotely, as a premise it should be noted that, within the review procedure of tax returns and/or their audit, and in order to meet the objective of such review procedure, the acts that compose it must be communicated to taxpayers, ensuring their support, forming what is called "administrative file". If this file is carried out electronically or technologically, it will imply the development of a system that allows to generate and manage all the information recorded, stored and requested by the SII to the taxpayer in the audit processes, as well as the administrative acts carried out during the development of the mentioned processes, such as; notifications, summons, resolutions, liquidations, among others; allowing in this way to receive and safeguard the information provided voluntarily, or provided by the taxpayer at the request of the auditing entity. Thus, if the support of the procedure is conducted digitally, we will speak of an "electronic file".

On the other hand, in the development of the aforementioned review and/or audit procedure, not only the support of the acts can be developed electronically, but this can also be applied to the form of communication between the administration and the taxpayers. In the case that the communication is carried out digitally, we will call it "remote".

Considering the above, in order for the procedure to be truly remote, both assumptions are required, i.e., remote communication and electronic file support or its equivalent.

3 Strategic Plan 2023, Internal Revenue Service. http://intranet_sii//especiales/plan_estrategico/plan_estrategico2023.pdf

4 Tax compliance management plan, 2021. https://www.sii.cl/sobre_el_sii/pgct2021_completo.pdf

So, when we say that the review and/or auditing procedures are conducted remotely, we understand that in their development, the tax administration official communicates permanently with the taxpayer through the most expeditious way, through means such as: telephone, e-mail, publication on the taxpayer's personal website, among other similar ways. The purpose of this communication is to facilitate and/or supervise compliance with tax obligations, simplifying interaction and thus reducing compliance costs for the taxpayer and the tax administration. Additionally, such procedures must be backed up at all stages in an electronic file or its equivalent.

In this context, the implementation of remote procedures requires, among others, a comprehensive approach that considers the participation of the different relevant stakeholders; that incorporates the establishment of internal protocols and indicators that allow measuring the different aspects of the procedure, as well as a permanent process of improvement in the technologies used. This comprehensive approach should be incorporated not only by the management teams of the tax administrations but should also be part of a state policy.

Indeed, when we speak of remote auditing, we must necessarily frame it within the concept of Electronic Government.

For the Organization of American States[5], Electronic Government is the application of information and communication technologies (ICT) to the functioning of the public sector, with the aim of providing better services to citizens and increasing efficiency, transparency and citizen participation. This concept considers technology as the solution to digitalize the delivery of an existing analog process, in search of efficiency gains, taking the implementation of technology as the focus. One step further, we can speak of Digital Government, which evolves in the sense that governments consider in this context the needs of citizens. This has been stated by the OECD, indicating that digital technology can not only improve the productivity of public officials, but can also significantly change the way in which the government plans and provides services, adapting better to the needs of citizens, being guided by the users, for example, through an ad-hoc design to their needs[6].

In the case of Chile, the relevance of Law No. 20.431 should be considered[7], whose message indicates that the proposed reforms to DFL No. 7 address, among others, the following aspect: "*expressly enshrining in the tax regulations the ratification of the option in favor of the use of all available technological tools to facilitate and streamline the relations between the Service and taxpayers. With this, it is intended to consecrate in a special way a "virtual platform" with national competence, as a form of interaction between the tax administration and the taxpayers or recipients of the services, thus advancing in the implementation of administrative procedures by electronic means, as established in Law No. 19,799, on electronic documents and electronic signature, and in Law No. 19,880, on the bases of administrative procedures*".

In the following section, we will discuss in more details the relevance of this regulation, which was born under the protection of a State policy.

5 http://portal.oas.org/Portal/Sector/SAP/DepartamentoparalaGesti%C3%B3nP%C3%BAblicaEfectiva/NPA/SobreProgramadeeGobierno/tabid/811/Default.aspx

6 https://www.chile.gob.cl/chile/blog/todos/gobierno-digital-en-chile-nuevo-reporte-ocde

7 Web page of the National Library of Congress. www.bcn.cl https://www.bcn.cl/historiadelaley/nc/historia-de-la-ley/4815/

2. RULES THAT ALLOW THE DEVELOPMENT OF REMOTE REVIEW AND AUDIT PROCEDURES

As mentioned above, a modern and efficient public administration requires, as a support to its management, the best use of the opportunities offered by the new information and communication technologies. Indeed, technological progress leads to the necessary incorporation and greater use of computer and digital media as strategic resources in communications between the administered and the administration, all obviously within the scope of a respective legal institutionality.

Currently, the Chilean legislation, both of general application and tax legislation, establishes a series of rules that allow the different auditing procedures to be carried out remotely and provide legality to each of their acts. In this sense, the primary rule that provides the legal framework that allows the SII to relate electronically with taxpayers is Article 4 bis[8] of the Organic Law of the Internal Revenue Service, Decree with Force of Law No. 7 of the Ministry of Finance, of September 30, 1980, incorporated by Law No. 20. 431 of April 30, 2010; Through the aforementioned provision, the legislator manifests a declaration of will that the SII may relate directly with taxpayers and these with the Service, through electronic means; adding that the procedures and actions carried out through such means will produce the same effects as if they had been carried out in the offices of the SII or at the taxpayer's domicile.

Thus, once this provision is approved and in force, progress is made in the implementation of administrative procedures by electronic means, as established in Law No. 19,799 on electronic documents and signatures, and in Law No. 19,880, on the bases of administrative procedures.

The aforementioned Law No. 19,799, in its article 1° regulates:

1. Electronic documents and their legal effects.
2. Their use in the electronic signature.
3. The presentation of signature certification services, and
4. The accreditation procedure or system to which the providers of such certification services may be subject, in order to guarantee the security of their use.

In this order of ideas, Article 3°, states that the acts and contracts granted or entered into by individuals or legal entities, signed by means of electronic signature, will be validated in the same way and will produce the same effects as those entered into in writing and on paper. That is, it homologates or equates in a general manner the documents and instruments traditionally supported on paper or written and signed holographically to perform acts or enter into contracts, with those subscribed by means of electronic signature.

Likewise, Articles 4° and 7°, second paragraph, specify that, in order for electronic documents to have the quality of public instrument, they must be signed by means of an advanced electronic signature, thus giving legal support to the actions conducted by these means.

Law No. 19.880 of May 29, 2003, which establishes the Bases of the Administrative Procedures that govern the acts of the bodies of the State Administration contains a series of provisions that allow the use of the available technological tools and, in this way, configure a remote procedure. Thus, Articles 5, 18, 19 and 59 expressly allow the use of electronic techniques and means in the administrative processes, thus configuring the electronic administrative procedure.

8 Article 4 bis, added by number 4) of Article 6 of Law No. 20.431, published in the Official Gazette of April 30, 2010.
Paragraph 1: The Internal Revenue Service may also relate directly with taxpayers and these with the Service, through electronic means, understanding as such those that have electrical, digital, magnetic, wireless, optical, electromagnetic or other similar capabilities. The procedures and actions carried out through such means shall produce the same effects as the procedures and actions carried out at the offices of the Service or at the taxpayer's domicile.

The aforementioned Law No. 19.880 was substantially modified by Law No. 21.180, on Digital Transformation of the State, which aimed to carry out a digital transformation of the State, incorporating electronic support and processing in the State's administrative procedures and document management. In this way, it is intended to digitalize procedures before public services, simplify and eliminate procedures that people conduct before the State. In addition, a digital National Archive will be created, which will register all the information of public services in a much more efficient way[9]".

In this sense, the changes that said law[10] incorporates to the Law on Administrative Procedures lead to the conclusion that, in the Public Administration, the general rule should be that the procedures and the administrative acts to which it gives rise shall be expressed in writing through electronic means, unless an exception is established by law (Article 5 of Law No. 19,880 as it currently stands).

It should be noted that such general rules of administrative procedures, in the event of the existence of a special rule expressly regulating any matter in the Tax Code, shall only be of supplementary application for the tax administration and consequently for taxpayers. Therefore, the principle of specialty enshrined in the Tax Code applies[11].

Considering the aforementioned principle of specialty, which implies that, if there is a rule in the Tax Code that regulates a particular procedure, it will take precedence over the rules of general application, it is necessary to analyze the different rules on the subject that are found in the Tax Code.

In this regard, we must distinguish the relevant topics that are regulated in said legal body, on the one hand, all the regulations associated with the form of communicating with taxpayers, the form of notifying them, including electronic notification and, in addition, all those related to the taxpayer's Personal Site, Tax Folder and Electronic File.

a) Regulations related to Notification by Electronic Mail

(Articles 11, 11 bis, 11 Ter and 13 Tax Code/Circular No. 34 of 2015/Circular No. 23 of 2016/Circular No. 12 of 2021).

Notification by e-mail consists of that form of notification, by virtue of which the tax administration informs the taxpayer of a certain administrative action, issued in due time and form, by sending it or a copy of it by e-mail.

This form of notification is expressly provided for in Article 11 bis of the Tax Code and was incorporated by the aforementioned Law No. 20,431 of 2010. Subsequently, it has undergone several adjustments[12] that have allowed consolidating this form of notification as one of more general application, although it is not mandatory for taxpayers. In effect, the legislator provides that, if the taxpayer does not request to be notified by e-mail, the SII must notify him/her according to the general rules, that is, through a personal notification, by letter mail or by registered letter. The taxpayer must expressly request or accept to be notified by mail or other electronic means established by law.

In practice, the rule on notification by e-mail works as follows:

- The taxpayer must carry out a formal procedure on the Service's website[13] , through the Electronic

9 https://www.bcn.cl/portal/resultado-busqueda?texto=Ley%2021180&dc_source=&npagina=1&tipo_recurso=

10 Whose initial validity is 09.06.2022. Having a rule of gradual validity until the year 2027.

11 Article 3 of the tax code.

12 The amendments have been made by Law No. 20,780, 20,899 and 21,210.N° 20.780, 20.899 y 21.210.

13 The Service's Web site, the domain www.sii.cl, regulated in article 8°, number 15 of the Tax Code.

Notification Registration System application, requesting to be notified by e-mail and establishing a valid e-mail address for such purposes.

- The taxpayer may accept to receive this type of notification, as a result of a proposal made by this Service, through the taxpayer's personal website[14], by expressing his/her agreement and completing his/her data with his/her e-mail address.

Currently, 41% of the taxpayers who have registered the beginning of their activities and are active[15], are registered to be notified by e-mail, hereinafter referred to as enrolled taxpayers, as of 07.07.2023.

Table 1

Taxpayers with start of activities and with electronic notification attribute

Number of active taxpayers	7.003.730
Number of taxpayers with active Start-Ups and requested to be notified by email	2.873.980
Percentage of taxpayers with active Start-Up and requested to be notified by email	41%

Source: Own elaboration

Note: Data extraction from the internal SAS system[16], which accesses the RIAC database[17].

The problem posed by the current regulation of notification by e-mail lies mainly in the fact that, as it is a completely voluntary option of the taxpayer, he may, at any time, revoke his decision to be notified by this method[18]. This, although it allows the taxpayer freedom in the area of notification and this is relevant, may be a difficulty or higher cost for the administration.

On this matter, it should be noted that the aforementioned Law on Digital Transformation of the State modifies the Law on Administrative Procedures, regarding notifications, establishing electronic notification as the general rule, providing that notifications will be made by electronic means based on the information contained in a single registry under the Civil Registry and Identification Service (Article 46 of Law No. 19. 880) and that, if the procedure is initiated at the request of a party, the interested party must indicate the "electronic means through which notifications will be conducted, providing for these purposes an e-mail address, in which case this will be understood as a valid address for notifications, which will be included in the registry indicated in Article 46". In both provisions it is established as an exception to indicate an alternative means of notification.

As indicated in the preceding paragraphs, Law No. 19,880 and its general application regulation in tax matters will only be of supplementary application when there is a special rule. In this case, the notification rule established

14 "Personal Site" means the electronic means that, after identification, allows the taxpayer or the administrator of an unincorporated entity to access the Service's website through a secure connection, in order to communicate with the Service, carry out personal procedures or become aware of the Service's actions. Regulated in article 8 number 16, first paragraph of the Tax Code.

15 The start of activities is the stage in which the Service completes the data with the main characteristics of a taxpayer, sufficient to identify the development of its economic activities and compliance with subsequent tax obligations. Therefore, it excludes taxpayers with termination of business. https://www.sii.cl/destacados/pgct2023.pdf

16 https://www.sas.com/es_cl/home.html

17 SII Internal database, called RUT, and start of activities.

18 In this case, in accordance with the provisions of Circular No. 34 of 2015, the taxpayer must communicate this determination to the Service in the manner established by the Service, preferably by digital means, and inform a valid address, in the terms of Article 13 of the Tax Code, for the purposes of subsequent notifications, which will be registered as the taxpayer's address in the Service's systems for these purposes.

in the Tax Code takes precedence over the regulation incorporated by the Digital Transformation Law; therefore, taxpayers will continue to voluntary register for the notification by e-mail.

b) Electronic File System

(Article 8 N°16, third paragraph/Law 19.880 Basis on administrative procedures governing the acts of state administration bodies/ Law 21.180 on digital transformation/Circular N°40 of 2015)

In the current Tax Code, the legislator incorporated some relevant definitions that allow implementing remote review and audit procedures. Thus, the concept of "personal site" is incorporated, which is understood as the electronic means that, after identification, allows the taxpayer to enter the Service's website through a secure connection, in order to communicate with the Service, conduct personal procedures or become aware of the Service's actions[19]. This site will host an "electronic tax folder" containing a database managed by the Service, which will compile, integrate and update the information related to the tax identity and existence cycle of a taxpayer[20].

Likewise, the taxpayer's personal site will house the "electronic files" which will contain the electronic record of writings, documents, resolutions, minutes of complaints and actions of any kind that are presented or verified in all administrative procedures related to the audit and actions before the Service[21]. All these records are registered and kept in their entirety in successive order according to their date of presentation.

The aforementioned not only grants rights to taxpayers, in the terms that will be explained in the following paragraphs, but also responds to the principles on Digital Transformation of the aforementioned Law No. 21,180, such as fidelity, in which all procedural actions will be fully recorded and preserved in the electronic file and interoperability, in which the electronic media must be able to interact and operate with each other within the State Administration. Being able to provide digital support, process administrative procedures electronically, ensuring a timely and efficient document management.

In this matter, the Chilean tax administration has been able to respond with high standards to the regulations of the Digital Transformation Law, promoting the appropriate internal and external use of electronic platforms, for the purpose of keeping electronic records, which must comply with security, interoperability, interconnection and cybersecurity standards.

In the same vein, the SII has instructed that the electronic file is not only a document management system, but it is a platform that must allow the entire procedure, from start to finish, to be carried out electronically, supporting both the submissions of the parties and the actions or pronouncement of the authority[22]. Likewise, there is an internal regulation on the use and obligatory nature of the procedure for reception, administration, custody and returns of documents in the electronic file system, always specifying compliance with the principle of legality and tax confidentiality[23], in relation to the administration and custody of taxpayers' documentation.

19 Article 8, number 16, section 1° of the Tax Code.

20 Article 8, number 16, section 2° of the Tax Code.

21 Article 8, number 16, section 3° of the Tax Code.

22 Circular No. 40 of 2015. Gives instructions on the amendments introduced by Law 20.780 to Article 21 of the Tax Code regarding the use of electronic records. https://www.sii.cl/normativa_legislacion/circulares/2015/circu40.pdf

23 Article 35, paragraph 2 of the Tax Code; the director and other officers of the Service may not disclose, in any way, the amount or source of income, nor the losses, expenses or any data relating thereto, which appear in their mandatory returns, nor allow these or their copies or the books or papers containing extracts or data taken from them to be known by any person outside the Service except to the extent necessary to comply with the provisions of this Code or other legal regulations. Nor may they disclose the contents of any audit process carried out in accordance with the tax laws, aimed at determining tax obligations or penalizing a taxpayer...

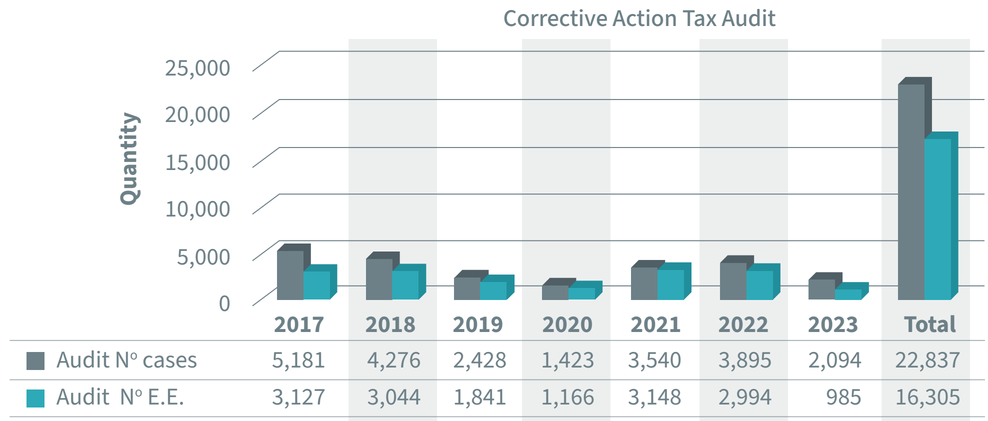
Finally, it should be noted that the incorporation of the electronic file in administrative proceedings does not affect the applicability of the substantive elements of the administrative act, such as the competence of the person issuing the act, the object or content of the act, the cause that motivates it and its purpose. The only difference between the electronic administrative act and the traditional one lies in the use of technological means as support.

Therefore, for taxpayers, the value of the acts and the legal certainty provided by a physical file versus an electronic file is identical. On the other hand, for the tax administration, the use of electronic files translates into a reduction in costs and the use of physical space, agility in communications with the interested parties if these can be done electronically, and less infrastructure requirements.

All of the above can be illustrated by observing the evolution in the use of Electronic Records, extensively on administrative actions, during the years 2017 to the present. Strengthening the timely and efficient contact with taxpayers.

Graph 1

Number of Corrective Actions[24]; Tax Audit and associated Electronic Files



	2017	2018	2019	2020	2021	2022	2023	Total
Audit N° cases	5,181	4,276	2,428	1,423	3,540	3,895	2,094	22,837
Audit N° E.E.	3,127	3,044	1,841	1,166	3,148	2,994	985	16,305

Source: Own elaboration.

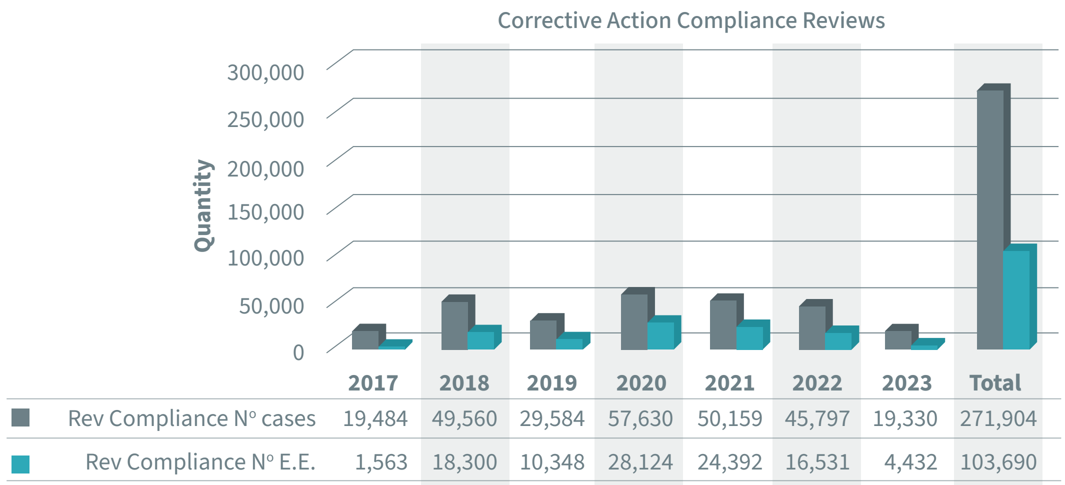
Note: information extracted from the audit management system[25], hereinafter SGF as of June 04, 2023. Electronic files, hereinafter E.E. associated to assigned cases, excluding returned and annulled cases. National Plan cases assigned to the Regional Directorates from the Sub-directorate of audit.

24 They are intended to correct a tax noncompliance. They are actions subsequent to the non-compliance of an obligation. The Tax Compliance Management Model is based on the knowledge of the taxpayer and the causes of non-compliance in order to design the appropriate treatment actions in each case.

25 SII's internal operational database, necessary for the management of corrective treatment actions. Such as: tax audit, compliance reviews. Oficio Circular No. 23 of 2017, Sub-directorate of Control, Internal Tax Service.

Graph 2

Number of Corrective Actions; Compliance Reviews and associated Electronic Files



	2017	2018	2019	2020	2021	2022	2023	Total
Rev Compliance N° cases	19,484	49,560	29,584	57,630	50,159	45,797	19,330	271,904
Rev Compliance N° E.E.	1,563	18,300	10,348	28,124	24,392	16,531	4,432	103,690

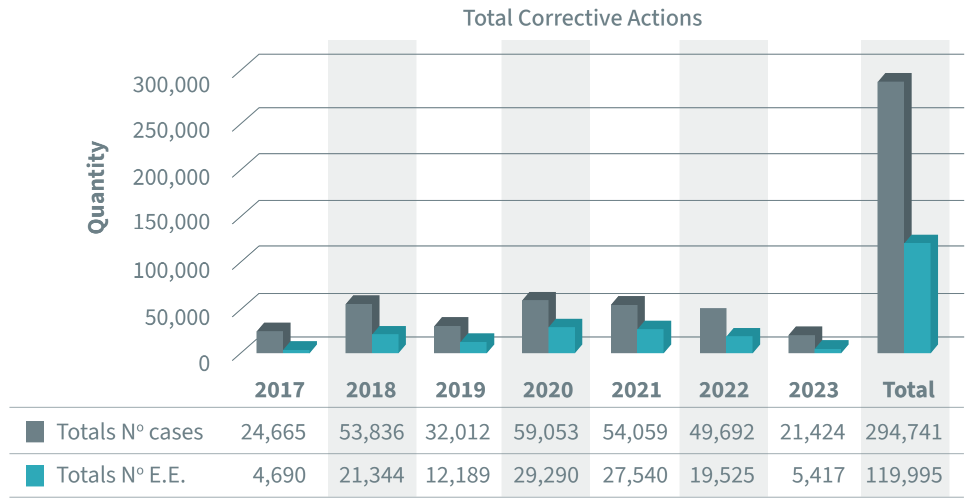
Source: Own elaboration.

Note: information extracted from the audit management system[26], hereinafter SGF as of June 04, 2023. Electronic files, hereinafter E.E. associated to assigned cases, excluding returned and annulled cases. National Plan cases assigned to the Regional Directorates from the Fiscalization Sub directorate.

26 SII's internal operational database, necessary for the management of corrective treatment actions. Such as: tax audit, compliance reviews. Circular No. 23 of 2017, Control Sub-directorate, Internal Revenue Service.

Graph 3

Total Corrective Actions; Tax Audit and Compliance Reviews and associated Electronic Files



	2017	2018	2019	2020	2021	2022	2023	Total
Totals N° cases	24,665	53,836	32,012	59,053	54,059	49,692	21,424	294,741
Totals N° E.E.	4,690	21,344	12,189	29,290	27,540	19,525	5,417	119,995

Source: Own elaboration.

Note: information extracted from the audit management system[27], hereinafter SGF as of June 04, 2023. Electronic files, hereinafter E.E. associated to assigned cases, excluding returned and annulled cases. National Plan cases assigned to the Regional Directorates from the Fiscalization sub directorate.

c) Tax Folder

(Article 8 N°16 Second Paragraph/Circular N°41 of 2021)

Continuing with the description of the elements that allow the development of remote review and audit procedures, it is important to highlight the concept of "tax folder" (also enshrined in the Tax Code), which will contain a database managed by the Service, which will compile, integrate and update the information related to the tax identity and existence cycle of a taxpayer[28].

The legal incorporation of this concept materializes and complements a process of technological incorporation to the tax systems gradually initiated several years ago by the SII; perfecting the digital relationship between the SII and the taxpayer[29].

The tax folder will contain the aforementioned data, which will be administered by the SII, especially ensuring that only the taxpayer, personally or through his representatives informed to the Service, has access to the information contained in said folder.

27 SII's internal operational database, necessary for the management of corrective treatment actions. Such as: tax audit, compliance reviews. Circular No. 23 of 2017, Control Sub-directorate, Internal Revenue Service.

28 Article 8, SII's internal operational database, necessary for the management of corrective treatment actions. Such as: tax audit, compliance reviews. Circular No. 23 of 2017, Control Sub-directorate, Internal Revenue Service.

29 Introduced by Article I, N°2, letter d), of Law N° 21.210, published in Diario Oficial 24.02.2020.

The aforementioned folder is available on the SII website and contains taxpayer data such as date of commencement of activities, economic activity, tax category, domicile, branches, latest authorized documents and tax observations, legal representative, formation of companies, participation in companies or related companies, data on real estate owned, summary of electronic fee slips issued in the last 12 months, VAT declarations, and the taxpayer's tax returns[30] of the last 24 monthly periods and Income Tax returns[31] of the last 3 annual periods.

On this matter, another of the amendments introduced by Law No. 21,210 and with a strong impact and impulse in the use of technology through the tax folder, corresponds to the variation introduced to Article 66 of Law No. 21,210[32] of the Tax Code, which established that the registration to the Single Taxpayer Number must be made through the electronic tax folder, in accordance with the provisions of Article 68 of the same legal body. This amendment consists of establishing that the registration in the Single Tax Number, hereinafter RUT, must be made through the electronic tax folder.

Likewise, another of the main innovations in this matter and with the use of the electronic folder, originates with the replacement of the fourth and fifth clause of article 68 of the Tax Code, which instructed the way in which the declaration of the beginning of activities and its modifications must be made by the taxpayers obliged to do so. The SII makes available in the tax folder a virtual form with all the necessary fields for the registration of the taxpayer in all the registries in which he/she must register, being able to attach the background information that must be included, and the SII must register the taxpayer declaring the start of activities in said registries once the application has been reviewed and accepted.

30 Value-added Tax, Decree law N°825 of 1974.

31 Income Tax, Decree law N°824 de 1974.

32 All individuals and legal entities or groups without legal personality and entities or groups without legal personality, but susceptible of being taxable persons, which by reason of their activity or condition cause or may cause taxes, must be registered in the Single Tax Roll in accordance with the rules of the respective Regulations.

The registration in the Single Tax Roll shall be made through the electronic tax folder in accordance with the provisions of Article 68. Article 66 of the Tax Code.

Table 2

Regarding start-up requests received by the SII during 2022:

Requests to start activities	450.000
Carried out via Internet	98,30%
2° category taxpayers[33]	60,60%
1st category taxpayers[34]	39,40%

Source: Own elaboration.
Note: information Public Account 2023, Internal Revenue Service.

Finally, and thus covering the entire life cycle of the taxpayer, Law No. 21,210[35] also digitalizes the notice of termination of business, using the same means of filing mentioned above. For these purposes, the tax folder makes available to the taxpayer a form with all the necessary enunciations to communicate the termination of activities.

Table 3

Regarding requests for termination of drawdowns, received by the SII in 2022:

Amount	106.870
Type	Terms of Trade [36]

Note: information from Public Account 2023, Internal Revenue Service.

d) Power to conduct the review and inspection actions by the most expeditious means and by inspection officials outside the scope of their jurisdiction

(Article 42, Decree with Force of Law No. 07 of 1980, Organic Law of the SII).

The development of remote review and audit procedures requires, on the one hand, the existence of a rule that allows an expeditious communication with the taxpayer, and ideally another one that allows the review and audit to be carried out by audit officials from any part of the

33 Second Category income is income which is obtained predominantly from work rather than from the use of capital. This type of income includes, for example: salaries, bonuses, wages, bonuses, pensions, etc. Income from the exercise of liberal professions or any other lucrative profession or occupation, among others. Second Category income is subject to the Single Second Category Tax or to the Global Complementary or Additional Tax, depending on whether it is classified in number 1 or 2 of Article 42 of the Income Tax Law.

34 In general terms, in the case of taxpayers who own or exploit agricultural or non-agricultural real estate, obtain income from movable capital consisting of interest, pensions, bonds, dividends, cash deposits, annuities, income from industry, commerce, mining, exploitation of marine resources and other extractive activities, airlines, insurance companies, banks, mutual fund management companies, savings and loan associations, investment or capitalization companies, construction, journalistic, advertising, radio broadcasting, television, automatic data processing and telecommunications companies, income obtained from the exploitation of marine resources and other extractive activities, airlines, insurance companies, banks, mutual fund management companies, savings and loan associations, investment or capitalization companies, construction, journalistic, advertising, radio broadcasting, television, automatic data processing and telecommunications companies, income obtained from the exploitation of marine resources and other extractive activities, mutual fund administrators, savings and loan associations, investment or capitalization companies, construction, journalistic, advertising, radio and television broadcasting, automatic data processing and telecommunications companies, income obtained by brokers, commission agents with an established office, auctioneers, customs agents, shippers, insurance agents, schools, academies, teaching institutes, clinics, hospitals, laboratories, entertainment and recreation companies, etc., are all classified by the Law of Taxation, are all classified by the Income Law as First Category income, paying a determined tax, according to the rules indicated in the text. Article 19 and following, and 42.

35 Pursuant to the fifth transitory article of the Law, amendments incorporated to Article 69 of the Tax Code.

36 Public account 2023 Internal Tax Service https://www.sii.cl/cuenta_publica/cuenta_publica_2023.html

country, with respect to taxpayers domiciled in the same or different geographic territory. The communication with the taxpayer is called Expedited Contact, and the review and/or audit, regardless of the unit where the functions are carried out, is called multi-jurisdiction.

In this regard, it should be noted that the power to make expedited contacts is currently regulated in articles 33 and 60 of the Tax Code, which allow SII officials to communicate with taxpayers. On this matter, the SII has decided[37] that the expeditious means to inform taxpayers of the notices regulated in article 33 and consequently in article 60, may be:

- E-mail.
- Contact and/or text message both via telephone.
- Contact and/or text messages via Teams, Zoom, Meet or other similar platforms.
- Publication on the taxpayer's personal website (misii.cl) on this Service's web page.

Communication with taxpayers through these expedited channels can be used for both preventive and corrective purposes, and it is precisely in the context of remote review and auditing procedures where it gains strength, allowing a fluid, immediate and efficient communication, always ensuring complete transparency towards taxpayers, with the delivery of adequate information and respect for all rights and guarantees enshrined in the Tax Code.

Table 4
Data on expedited contacts carried out by the SII in recent years:

Year or revenue	Number of cases
2020	33.480
2021	25.367
2022	28.197
2023	12.497

Source: Own elaboration.
Note: Data extracted on 31.12.2022.

In relation to the multi-jurisdiction power, it should be noted that, currently, in accordance with the provisions of letter B of Article 6 of the Tax Code, in accordance with Article 19 of the Organic Law of the Service, the Regional Directorates exercise their powers in the jurisdictional territory delimited by the geographical area of the respective region[38]. Likewise, the general rule is that the officers of a Regional Directorate shall exercise review and audit functions with respect to taxpayers domiciled in the jurisdictional territory of such unit. Exceptionally, they may exercise functions with respect to taxpayers in another jurisdiction.

The normative that regulate this claim of action of an official of the Service, with respect to taxpayers of another jurisdiction lies in the Organic Law DFL N°07 of 1980 of the Internal Revenue Service, which states in its article 42 that, "*The powers necessary for the application and supervision of compliance with tax obligations shall also be vested in the inspecting officers of the Service, who*

37 SII Ex. Res. 115 OF 08.10.2021, which sets the term and form in which this Service must make the notices to execute the preventive and collaborative measures contemplated in numeral iii. Article 33 of the Tax Code: https://www.sii.cl/normativa_legislacion/resoluciones/2021/reso115.pdf

38 Circular 41 of 2015. Gives instructions on amendments introduced by Law 21.210, to the Tax Code: https://www.sii.cl/normativa_legislacion/circulares/2021/circu41.pdf

may exercise them throughout the territory of the Republic, but in the case of actions outside their jurisdiction, they may only conduct out in compliance with the specific instructions of the Director or Regional Director to whom they report".

On the other hand, the Tax Reform Bill towards a fiscal pact for development and social justice, which was rejected in the first Constitutional procedure in the Chilean Congress[39], introduced modifications in several areas such as the Tax Code, in matters of avoidance and evasion, taxpayers' rights, and interaction between the taxpayer and the tax administration through the SII.

Some of the contents of this bill incorporated modifications to the Tax Code, such as the concept of Multijurisdictional, which would give new auditing powers to the SII, allowing Regional Directorates[40] to audit taxpayers in other jurisdictional territories, without affecting the taxpayer's rights.

The original proposal to introduce this new power to the Tax Code was based on the Preliminary Title, Paragraph 2 of the Tax Code, incorporating a new numeral 11 to letter B) of Article 6, which stated "*to conduct auditing or other procedures with respect to taxpayers domiciled in any jurisdictional territory of the country, which may be carried out through electronic or remote means, when instructed by the respective Director or Deputy Director*".

In this context, such broader legal proposal of multi-jurisdiction, which would generally empower SII officials to carry out corrective adjustment actions[41] with respect to taxpayers domiciled in any jurisdictional territory of the country, and which should necessarily be conducted through electronic or remote means.

3. TAXPAYERS' RIGHTS IN THE FACE OF A REMOTE REVIEW OR AUDIT PROCEDURE

The rights of taxpayers in Chile are currently enshrined in Paragraph 4 of the Tax Code, specifically in Article 8 bis, (however, at the beginning, they were regulated by an administrative instruction issued by the Internal Revenue Service. In fact, it is the Tax Administration itself that in 2006 issued Circular No. 41 of 2006, which systematized those essential rights that taxpayers have in their relations and procedures before the Internal Revenue Service). Paragraph 4, mentioned above, has been modified and updated by Law No. 21,210 of 2020, on Tax Modernization and regulated by Circular 12, of 2021.

The relevance of the fact that the aforementioned rights are currently regulated by law; on the one hand, it shows the importance of these rights for the legislator, establishing their existence independently from the Tax Administration; and on the other hand, it provides a normative protection against their infringement.

Thus, in the event of a violation of any of the taxpayers' rights enshrined in the legislation, either by an action or omission of any of the officials of the Tax Administration, the taxpayer is entitled to the following remedies:

- Appeal for protection for violation of rights, before the Regional Director or National Director, depending on who is the hierarchical superior of the official who committed the action or omission (Article 8 bis of the TC).
- Claim for violation of rights before the Tax and Customs Court (Article 155 and following of the TC).

39 Rejected from the Tax Reform Bill on 08.03.2023 https://www.camara.cl/cms/noticias/2023/03/08/camara-rechazo-el-primer-proyecto-de-la-reforma-tributaria-impulsada-por-el-ejecutivo/

40 SII Organizational Chart by Regional Directorate in the National Territory https://www.sii.cl/sobre_el_sii/organigrama/organigrama_dir_regionales.html

41 They are intended to correct a tax noncompliance. They are actions after the non-compliance of an obligation. The Tax Compliance Management Model is based on the knowledge of the taxpayer and the causes of non-compliance to design the appropriate treatment actions in each case.

Specifically, within the context of the development of a remote review or audit procedure, the SII must fully consider the following taxpayers' rights:

(a) Right to be informed about the exercise of their rights (numeral 1 of article 8º bis of the TC).

b) The right to be facilitated in the fulfillment of their tax obligations (numeral 1 of article 8 bis of the TC).

c) The right to obtain clear information on the meaning and scope of all proceedings in which he/she is interested (paragraph 1 of article 8 bis of the TC).

d) The right to receive clear information on the scope and content of the proceedings; to be informed of the nature and subject matter to be reviewed and the deadline for filing allegations or appeals; to be notified at the end of the proceedings in question, certifying that there are no pending proceedings with respect to the subject matter and for the period reviewed or audited.

The aforementioned rights must be crystallized in the development of any administrative review and/or audit procedure, but it seems even more relevant in a procedure conducted through remote proceedings, with support in an electronic file and notification by e-mail. This is because, in view of the possible reduction of a permanent contact with an official -a fact that naturally occurs with remote communications-, it is relevant that through the different technological mechanisms available, the taxpayer can be permanently informed about the beginning of the procedure, its development and its end, as well as the different interactions that arise during the procedure.

e) The right to be exempted from submitting documents that do not correspond to the procedure or that are already submitted to the Service and to obtain, once the case has been finalized, the return of the original documents submitted.

f) The right to make allegations and submit background information within the time limits established by law and to have such information incorporated into the procedure in question and duly considered by the competent official.

With the use of the electronic file, which is the basic tool used in remote actions, these rights are fully complied with. In effect, the tax officer who is reviewing a new case, by virtue of which it will be necessary to review background information already submitted by the taxpayer in a previous procedure, must refer to the file of the first case and thus obtain the respective background information. This is without prejudice to the duty to comply with the notification of the respective request for background information and provide the necessary information to the taxpayer.

Likewise, the taxpayer's right to have the information submitted by him/her incorporated to the procedure is automatically fulfilled, since the taxpayer will be the one who uploads the information to the respective electronic file.

g) The right to respect privacy and protection of personal data in accordance with the law in tax audits; and that tax returns, except in cases of legal exception, are confidential, under the terms provided for in this Code.

In relation to this right, it is relevant that through the different systems, such as the so-called Electronic File system, the protection and safeguarding of information is ensured, both in relation to the taxpayers' own information (for example, personal data of individuals or natural persons)[42], as well as information that is provided by taxpayers through their tax returns and/or that could reveal their income, and which is therefore protected by the duty of tax confidentiality[43].

42 Law Nº 19.628 on Personal data. https://www.bcn.cl/leychile/navegar?idNorma=141599

43 Article 35 of the Tax Code.

In compliance with these rights, currently the Electronic File system, as mentioned in previous paragraphs, allows the identification of who has access to the documents, guarantees the preservation of its data in the long term, allows the orderly filing of all documents, as well as the implementation of mechanisms that prevent the visualization of documents when appropriate or even the exclusion of documents from the same file when it refers to information that should not be visualized by the taxpayer because it corresponds to information of third parties.

h) The right to have the proceedings carried out without unnecessary delays, requirements or waiting and in the least costly way for the taxpayer, certified by the official in charge, the receipt of all the requested information and as long as it does not mean the non-compliance with the tax provisions.

Specifically in relation to this right, the Electronic File allows the system to certify receipt of the requested information when it is submitted to the taxpayer. On the other hand, it is considered that the fact of allowing to upload the background information to this electronic file and not having to submit copies to the Tax Administration, generates a lower cost for taxpayers. This is notwithstanding the fact that there are always technological improvements that may be necessary to apply to the systems currently in force.

4. REGULATIONS NECESSARY FOR THE INTEGRAL MATERIALIZATION OF THE REMOTE REVIEW OR AUDIT

The CIAT Model Code, year 2015, incorporates a Section 5, Title III, Chapter I, called Electronic Tax Administration, within which three concepts are regulated as follows: Article 96°, Use of electronic; computer and telematic technologies; Article 97°, Equivalence of documentary supports; and Article 97°, Electronic mailbox.

In relation to the use of electronic, computer and telematic technologies, the aforementioned Code highlights:

- “The Tax Administration shall promote as a general principle the use of electronic, computer and telematic techniques and means necessary for the development of its activity and the exercise of its competencies”.

- “with the limitations established by law”.

- “guarantees the identification of the taxpayers and of the officials or bodies of the Tax Administration”.

In the comments to the articles, it is stated that it is not possible to establish a rigid regulation, nor an exhaustive one, which is exhausted in the tax regulations. This is due to the fact that, being a matter subject to the vertiginous rhythms imposed by technological innovation itself, it requires changes at the same time; and to the existence of other general rules that support the regulation in these matters.

Regarding the Equivalence of documentary supports; the essential rule is that the documents issued, whatever their support, by electronic, computer or telematic means by the Tax Administration, or those issued as copies of originals stored by these same means, as well as the electronic images of the original documents or their copies, will have the same validity and effectiveness as the original documents. This is provided that their authenticity, integrity and conservation are guaranteed and, if applicable, their reception by the interested party, as well as compliance with the guarantees and requirements demanded by the applicable regulations (Article 97).

Finally, in relation to the electronic mailbox (Article 98), the CIAT Model Code, provides:

- "The Tax Administration may create an electronic mailbox system for the reception or output of requests, writings and communications that are transmitted by telematic means".

- It "shall allow the submission of requests, writings and communications every day of the year, 24 hours a day".

- Its receipt "shall have the same effects as those made by the other admitted means".

- General rule that delivers the framework "the Tax Administration will manage, administer and control the entire computerized process required by the electronic mailbox", which, "must be implemented under its own domain system".

In relation to this interesting article, in its comments it is stated that the Electronic Mailbox, also called "electronic tax domicile", will be the "place" where the taxpayers will be located and where they can comply with their tax obligations, submit documents and validly receive notifications. It is also noted that it provides advantages, both for the Tax Administration, in terms of time (displacement of officials), financial savings (no paper is used, and no mail is paid for), as well as savings in notification procedures, with greater certainty of their execution, and also for taxpayers, who will be able to reduce their time and money in complying with their tax obligations.

Thus, it is possible to glimpse from the CIAT Model Code[44], the importance that the Tax Code of each Tax Administration regulates the main elements that give shape to a remote, electronic administrative procedure, or in general terms, that in which electronic, computer and telematic technologies are used.

In this sense, and after a systematic review of the regulations in force in Chile, as well as of the comparative legislation, we believe that a legislation that supports the development of remote procedures should include the following topics:

i. for the Tax Administration to communicate with taxpayers at a distance and by the most expeditious means.

ii. Rule that establishes the equivalence of documentary supports.

iii. Rule regulating the electronic signature.

iv. Rule that establishes the existence of a personal site, electronic mailbox or its equivalent.

v. Rule that instructs that the registration obligations must be carried out online.

vi. Rule that regulates the characteristics of electronic files.

vii. Rule that regulates the appearance and taking of affidavits by telematic means.

44 https://www.ciat.org/Biblioteca/DocumentosTecnicos/Espanol/2015_Modelo_Codigo_Tributario_CIAT.pdf

viii. Rule that allows multi-jurisdiction.

ix. Rule that establishes electronic notification as a general rule.

x. Rule that allows access to computer systems in cases of audit.

xi. Rules that allow the different review appeals to be filed online.

xii. Taxpayers' rights specifically related to the subject matter.

For a successful implementation of the different regulations related to remote auditing, in addition to the existence of the mentioned regulations, a country context of digitalization is required, as well as a conviction on the part of each of the officials of the tax administrations of the benefits of developing review and remote auditing procedures.

Additionally, and a very important issue, is that each of the regulations have sufficient budget to be implemented by the Tax Administration in an innovative, efficient and technologically advanced manner.

In the following chapter, we will be able to conclude the existing challenges in relation to the regulations currently in force in Chile.

CONCLUSION

From the analysis of the current Chilean regulations that allow for the efficient and comprehensive development of a remote review and audit procedure, the following can be concluded:

- The current regulations are in line with the regulations expected by the different entities that are permanently supporting the countries in the design of tax policies. In fact, the current Chilean regulations are in line with those proposed by the OECD and CIAT.
- It is considered that the current regulation in the area of remote review and audit is sufficiently protective of the rights of taxpayers in this area, although there is no specific right in the Tax Code in relation to this type of review or audit.
- Within the current regulation, key concepts that allow the implementation of this type of procedures are expressly incorporated, namely: electronic file, tax folder, personal site, among others.
- We consider that a rule that establishes notification by e-mail as a rule of general application for all taxpayers would be more efficient from the point of view of the administration and would bring benefits for taxpayers, such as greater certainty in the notification, greater reserve at the time of notification of the actions, among others.
- The current regulation of the power to execute actions outside the territory of the official's jurisdiction is considered insufficient, so it is necessary to incorporate a specific multi-jurisdiction rule in the Tax Code, which regulates in a comprehensive manner the power of tax administration officials to review and audit taxpayers in another jurisdiction.
- Within the context of an ideal regulation, a rule could be incorporated in the Tax Code that expressly establishes the possibility of a digital relationship with tax intermediaries, in order to emphasize the relationship with these relevant actors in the taxpayer-administration relationship.
- Finally, it would be optimal the incorporation in the Budget Law that establishes a permanent budget for the development of the different technologies and adaptation of the different systems of the tax administration.

In addition to the various suggestions that would make it possible to crystallize the implementation of remote review and auditing procedures from the regulatory point of view, it is necessary to emphasize and bring to the forefront the change management actions associated with any regulatory change, which involve conveying the benefits of the change to officials. In addition, it is necessary to train officials in the different aspects associated with this type of remote procedures, training that does not necessarily refer to tax or procedural issues, but includes aspects such as how to interact, how to have difficult conversations, how to manage new technologies, among others.

Finally, in order to achieve a correct implementation of the different regulations, different actions are required to disseminate the new rules to taxpayers, also emphasizing the benefits of remote communication and review. The latter, bearing in mind that there will always be segments or groups of taxpayers who are more distant from the different technologies or who are reluctant or do not trust this type of relationship with the administration.

REFERENCES

Reyes G., Calijuri M., Santín O., Roca C., Cadena L., Barraza F., Marinkovic E. Transformación digital en las administraciones tributarias de America Latina: Chile. Publicación Banco Interamericano del Desarrollo.

Trujillo J. (2020). Modelos en línea de fiscalización y comunicación con contribuyentes. Publicado en Revista de Estudios Tributarios No24 (2020) ISSN 0718-9478 (Versión impresa) - ISSN 0719-7527 (Versión en línea). Centro de Estudios Tributarios Universidad de Chile.

Villalón V. (2020). Desafíos de la Administración Tributaria en la Cuarta Revolución. Publicado en Revista de Estudios Tributarios No24 (2020) ISSN 0718-9478 (Versión impresa) - ISSN 0719-7527 (Versión en línea). Centro de Estudios Tributarios Universidad de Chile.

Legislation:

“Decreto Ley aprueba texto que indica de la ley sobre impuesto a la renta”, Diario Oficial, Chile, 31 de diciembre de 1974, versión texto última versión de 15 de febrero de 2023 a 31 de diciembre de 2023, última modificación de 15 de febrero 2023, Ley 21.540.

“Decreto Ley Código Tributario”, Diario oficial, Chile, 31 de diciembre de 1974, versión texto última versión de 30 de junio de 2022.

“Decreto Ley sobre impuesto a las ventas y servicios”, Diario Oficial, Chile, 31 de diciembre de 974, versión texto última versión de 01 de enero 2023 a 31 de diciembre de 2026, última modificación de 04 de febrero de 2022, Ley 21.420.

“Ley que establece normas que incentivan la calidad de atención al contribuyente por parte del servicio de impuestos internos”, Diario oficial, Chile, 30 de abril de 2010, versión texto original de 30 de abril 2010 a 07 de julio de 2015.

“Ley de reforma tributaria que modifica el sistema de tributación de la renta e introduce diversos ajustes en el sistema tributario”, Diario Oficial, Chile, 29 de septiembre de 2014, versión texto última versión de 25 de febrero de 2023, última modificación de 24 de febrero de 2020, Ley 21.210.

“Ley de transformación digital del estado”, Diario Oficial, Chile, 11 de noviembre de 2019, versión texto única de 09 de junio 2022.

“Ley que moderniza la legislación tributaria”, Diario Oficial, Chile, 24 de febrero de 2020, versión texto original de 24 de febrero de 2020 a 01 de septiembre de 2020.

“Ley que simplifica el sistema de tributación a la renta y perfecciona otras disposiciones legales tributarias, Diario Oficial, Chile, 08 de febrero de 2016, versión texto última versión de 01 de marzo de 2020, última modificación de 24 de febrero de 2020, Ley 21.210.

“Ley sobre protección de la vida privada”, Diario Oficial, Chile, 28 de agosto de 1999, versión texto última versión de 09 de mayo de 2023, última modificación de 10 de noviembre de 2022, Ley 21.504.

Electronic References

Centro Interamericano de administraciones tributarias (2015), Modelo de código tributario del CIAT. Consultado el 06 de julio de 2023, disponible en: https://www.ciat.org/Biblioteca/DocumentosTecnicos/Espanol/2015_Modelo_Codigo_Tributario_CIAT.pdf

Ministerio de Relaciones Exteriores (2016), Gobierno digital en chile, nuevo reporte OCDE. Consultado el 06 de julio de 2023, disponible en: https://www.chile.gob.cl/chile/blog/todos/gobierno-digital-en-chile-nuevo-reporte-ocde

Organización de los Estados Americanos (2023), Mandatos y resoluciones de gobierno digital en las Américas. Consultado el 06 de julio de 2023, disponible en: http://portal.oas.org/Portal/Sector/SAP/DepartamentoparalaGesti%C3%B3nP%C3%BAblicaEfectiva/NPA/SobreProgramadeeGobierno/tabid/811/Default.aspx

Organización Mundial de la Salud, (2019), brote de enfermedad por coronavirus (COVID 19). Consultado el 06 de julio de 2023, disponible en: https://www.who.int/es/emergencies/diseases/novel-coronavirus-2019

Poder Ejecutivo (2023), Proyecto de Ley de Reforma Tributaria hacia un pacto fiscal por el desarrollo y justicia social. Consultado el 06 de julio de 2023, disponible en: https://www.camara.cl/cms/noticias/2023/03/08/camara-rechazo-el-primer-proyecto-de-la-reforma-tributaria-impulsada-por-el-ejecutivo/

Servicio de Impuestos Internos (2015), Imparte instrucciones acerca de las modificaciones introducidas por las leyes 20.420 y 20.780, al inciso primero del artículo 11 y por la ley 20.780, al artículo 13 del código tributario. Consultado el 06 de julio de 2023, disponible en: https://www.sii.cl/normativa_legislacion/circulares/2015/circu34.pdf

Servicio de Impuestos Internos (2015), Imparte Instrucciones sobre modificaciones introducidas por la Ley 21.210, al Código Tributario, en relación con las normas que regulan la relación de los contribuyentes con el servicio de impuestos internos, incluyendo normas sobre sitio electrónico, facilitación del cumplimiento tributario, ciclo de vida, fiscalización de los contribuyentes. Consultado el 06 de julio de 2023, disponible en: https://www.sii.cl/normativa_legislacion/circulares/2021/circu41.pdf

Servicio de Impuestos Internos (2015), misión, visión y valores SII. Consultado el 06 de julio de 2023, disponible en: https://www.sii.cl/sobre_el_sii/acerca/mision.htm

Servicio de Impuestos Internos (2015), Imparte instrucciones acerca de las modificaciones introducidas por la Ley 20.780, al artículo 21 del Código Tributario en materia de empleo de expedientes electrónicos. Consultado el 06 de julio de 2023, disponible en: https://www.sii.cl/normativa_legislacion/circulares/2015/circu40.pdf

Servicio de Impuestos Internos (2017), Imparte instrucciones para utilización de la aplicación sistema de gestión de fiscalización. Consultado el 06 de julio de 2023, disponible en: https//intranet_sii/administra/ocircu/2017/ocircu23.pdf

Servicio de Impuestos Internos (2021), Fija plazo y forma en que este Servicio debe realizar los avisos para ejecutar las medidas preventivas y de colaboración contempladas en el numeral iii. Del artículo 33 del Código Tributario. Consultado el 06 de julio de 2023, disponible en: https://www.sii.cl/normativa_legislacion/resoluciones/2021/reso115.pdf

Servicio de Impuestos Interno (2021), Plan de Gestión de Cumplimiento Tributario. Consultado el 06 de julio de 2023, disponible en: https://www.sii.cl/sobre_el_sii/pgct2021_completo.pdf

Servicio de Impuestos Internos (2023), Cuenta pública 2023. Consultado el 06 de julio de 2023, disponible en: https://www.sii.cl/cuenta_publica/cuenta_publica_2023.html

Servicio de impuestos internos (2023), Organigrama del servicio de impuestos internos por dirección regional. Consultado el 06 de julio de 2023, disponible en: https://www.sii.cl/sobre_el_sii/organigrama/organigrama_dir_regionales.html

Servicio de Impuestos Internos (2023), Plan estratégico 2023. Consultado el 06 de julio de 2023, disponible en: http://intranet_sii//especiales/plan_estrategico/plan_estrategico2023.pdf

Servicio de Impuestos Interno (2023), Plan de Gestión de Cumplimiento Tributario. Consultado el 07 de julio de 2023, disponible en: https://www.sii.cl/destacados/pgct2023.pdf

The human capital of tax administrations in the exponential era

Rodrigo Luis González Cao

SYNOPSIS

We are currently living in an era of exponential changes that transform society and people and affect the role of tax administrations. Given this volatility and uncertainty, it is necessary to understand how the management of people operate and the administration of human capital can be strategically organized to achieve an effective operational model that retains valuable human talent in the face of the expansion of functions that exceed the original legal mandate of the tax administrations.

KEYWORDS: Tax administration, Human capital, Human resources, Human talent, Strategic plan

CONTENT

Introduction
1. An era of exponential change
2. Organizing the function
3. Strategic planning
4. Decentralization of operational tasks
5. Organizational design
6. Management autonomy
7. Operating models
8. Organizing the work
9. Managing employment
10. Performance management
11. Managing development and training
12. Managing compensation
13. Managing commitment and values
14. People management in practice

Conclusions

References

AUTHOR

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INDEX

INTRODUCTION

Tax Administrations face exponential changes typical of the volatility of the current surveillance economy in the framework of the fourth industrial revolution. To face these challenges in this exponential era, it is necessary to strategically manage the most valuable asset that Tax Administrations have: their personnel. To analyze a possible path, an analysis of the following related processes is presented below:

- Strategic planning, operational decentralization and management of the operating model,
- Organisation of Work,
- Employment management,
- Performance Management,
- Development and training management,
- Compensation management and,
- Management of commitment, values and relationships.

In addition to aligning work planning with strategic planning, it is necessary to analyze which is the most appropriate operating model to organize people management and human capital administration.

On the other hand, given the importance of retaining scarce human talent in a labor market eager for trained people, a holistic management is proposed aimed at strengthening the search, selection and incorporation of suitable public servants, critically redesigning their professional trajectories, encouraging staff development and evaluating the impact that the inefficiency of poorly managed people management processes can have on compliance with institutional plans.

As we will explain later in more detail, the training and development of personnel, as well as knowledge management in tax administrations, are some of the axes on which all human capital management should revolve to be successful.

1. AN ERA OF EXPONENTIAL CHANGE

Zuboff in his book “The Age of Surveillance Capitalism. The struggle for a human future in the face of the new frontiers of power” (2019) presents us with an economy that imposes itself on the foundations of the knowledge society enunciated by Castells in his work “*The information age*” (1996).

This surveillance economy has found fertile ground in the current volatile context that BAUMAN identifies in his book “*Liquid Modernity*” (2000).

As a result of this expansion, the surveillance economy imposes the asymmetric rules of virtual platforms on all of society and all social and economic exchanges, exploiting the advantages of oligopolistic management of massive amounts of information (González Cao, La economía de vigilancia y las plataformas, 2021).

Oscar Oszlak in his recent work “*The State in the Exponential Era*” (2020) warns that in this disruptive environment large-scale changes arise that pose challenges to public administrations. These challenges go beyond the digitalization of processes and involve people management. Tax administrations, due to their inherent complexity, do not escape these challenges of managing the contribution of people to organizations in a strategic way to respond to volatile, uncertain, changing and ambiguous environments. Consequently, organizational transformation requires both data-driven innovation and the empowerment of human talent (González Cao, Transformación organizacional, 2022).

2. ORGANIZING THE FUNCTION

A strategic view recognizes that people's intellectual knowledge (intellectual capital) is enhanced by their social interactions (social capital) and, in turn, these synergistic peer-to-peer exchanges help generate organizational knowledge (organizational capital) in tax administrations. The synergy of this virtuous triangle will be called "*human capital*" (González Cao, Gestión estratégica, 2023). To manage human capital the people management function must be organized in a strategic way.

As we will present below, both people management and the administration of human capital are part of a macro support process that is present in a transversal way in all tax administrations, whether at the national, subnational or local level.

Given the complexity of this function, to advance in its analysis we will resort to an analytical framework (Longo, 2002), which is recovered both in the CIAT Human Resource Management Manual (CIAT, 2010) and in other regional studies on the subject (Echebarría, y otros, 2006). Taking these sources as a theoretical framework, we can state that human management processes make up an ecosystem that feeds on each other (González Cao, Gestión estratégica, 2023) and that, in a tax administration, comprises, at least, the following processes:

- Strategic planning, operational decentralization and management of the operating model,
- Organisation of Work,
- Employment management,
- Performance Management,
- Development and training management,
- Compensation management and,
- Management of commitment, values and relationships,
- Classic Personnel Management Operational Tasks

To follow a logical order, we will then present a brief synthesis of each of these processes, leaving for the end a grounding that tries to relate the entire theoretical approach to the reality of a specific national tax administration: the Federal Administration of Public Revenue (AFIP) of Argentina.

3. STRATEGIC PLANNING

To begin with, we must clarify that the strategic planning of people management cannot be separated from the other strategic planning efforts of the tax administration. The necessary alignment of these efforts requires that, in general, the senior director of the human resources area reports directly to the central superior authority of the tax administration. Direct reporting ensures strategic alignment and recognizes the importance of people's contribution to improving the performance of any tax administration.

In turn, in complex organizations with a large geographical extension, the strategic activities of people management and human capital administration are usually conducted at headquarters. This is the case in most tax administrations, mainly at the national level (González Cao, Organizar la función, 2023); (Morán & Díaz de Sarralde Miguez, 2021).

4. DECENTRALIZATION OF OPERATIONAL TASKS

To advance in the analysis we must differentiate strategic functions from operational functions. The latter are likely to be decentralized at the regional and local levels. However, as Idalberto CHIAVENATO explains in his work "Management of human talent" (2009), to successfully achieve the decentralization of certain tasks, it is a prerequisite to work on a clear definition of responsibilities and on the standardization of procedures and work guidelines, both to mitigate overlaps and to ensure the strategic exploitation of information on human capital at the central level (González Cao, Organizar la función, 2023).

5. ORGANIZATIONAL DESIGN

By virtue of the various factors outlined and the institutional governance options of each tax administration, the most appropriate position and size for the human capital management team should be defined. Finding internal consistency in the organizational designs that make up this macroprocess is an overly complex task that can be influenced by internal and external forces that influence the formulation of policies and the implementation of organizational transformations.

6. MANAGEMENT AUTONOMY

Human capital management autonomy is the degree of discretion that the tax administration has to decide on human resources matters, including the size of the staffing and its redeployment, the necessary skills requirements and how to cover them, the criteria for external recruitment and internal mobility, the promotion of existing personnel, territorial and area deployment of personnel, the remuneration policy and disengagement (withdrawal, dismissal). Most tax administrations have a significant level of independence in matters of human capital management, but the degrees of autonomy vary according to jurisdictions, the economic situation and the existence of government regulations or restrictions at a general level (Morán & Díaz de Sarralde Miguez, 2021).

7. OPERATIONAL MODELS

An operating model is the framework that helps organize the functions related to the macro process of people management and human capital administration. For this reason, the correct choice of the most appropriate operating model for each organization has an impact on institutional plans. And, in turn, when choosing the operating model, the organizational structure and governance options of the tax administration should be considered to ensure internal consistency in organizational designs and avoid overlaps and conflicts.

Another factor to consider is the decision as to which functions will be centralized and which other operational tasks will be decentralized at the regional and local levels.

The operational models of people management are diverse, but the most widespread is a tripod based on transversal services, specialized units and potential institutional partners.

Among the institutional partners (in addition to external strategic consultants), the other supporting macro-processes, mainly those of financial administration, technological management and material resources, should also be considered. This must be done as part of the institutional strategic alignment in order to have the necessary technologies and a sufficient budget.

In turn, in the most complex organizations, enhanced versions are also used that add units dedicated exclusively to the strategic look to the original tripod or others with a special focus on the development, training and retention of people (González Cao, Organizar la función, 2023).

The choice of the appropriate model must consider the size of the tax administration and its geographical extension, the organizational structure, its complexity and the degree of decentralization of certain functions, the openness in processes that integrate the macroprocess of people management and human capital administration, as well as the degree of autarchy and autonomy that the rules grant to the tax administration in this matter.

As Oscar Oszlak warns, the uncritical implementation of models transplanted from other experiences can generate the optical illusion of a successful organizational transformation. But it is not enough to cover the appearances by drafting manuals of procedures or cumbersome nomenclators of job classification to reduce the abyss between the ideal world of papers and the blunt reality that is verified when touring the organizations (Oszlak, El servicio civil en América Latina y el Caribe, 2001).

Likewise, cosmetic changes that modify the name of certain organizational units or increase bureaucracy by creating new structures are the easy shortcut that many adopt in order not to face the complexity of critically reforming the areas of people management in which more permutations of tasks and responsibilities can no longer be made (Oszlak, Quemar las naves, 1999).

The origin of the gap between grandiloquent statements and reality is multicausal but, without a doubt, cultural and political resistances play an important role in the superficiality of the implementation of reforms (González Cao, Transformación organizacional, 2022). Both technological transformations and cultural changes require leadership that sustains them in the long term (González Cao, Procesos críticos y buena gobernanza, 2022).

At this point, we must not lose sight of the fact that, although the people management system is a support service, it has a great influence on organizational transformation and, consequently, is also highly vulnerable to the inertia of bureaucratic cultures that are reactionary to changes. Such cultures resist because their source of power and influence is often threatened (Oszlak, El servicio civil en América Latina y el Caribe, 2001).

8. ORGANIZING THE WORK

In a context of exponential changes, the functions that tax administrations must address are expanded and these new responsibilities far exceed the original mission and legal mandate. For this reason, having the right people to respond with agility to such changing environments requires developing good hiring practices and designing a clear and transparent career path that feeds back into the rest of the people management ecosystem, mainly its training and development (González Cao, La organización del trabajo, 2023).

The first step is to design jobs and describe sufficiently exhaustive profiles so that each person understands the tasks they must perform.

Secondly, both the skills and the training that must be acquired to perform the position must be identified, recognizing a horizontal progressiveness of degrees of maturity of the task.

As a third instance, the complexity of the tasks that make up the same job function must be identified in order to recognize a vertical progressiveness of who performs each job and the levels of difficulty of the activity performed.

As a result, a career path should be expressed as a related series of jobs that are differentiated by their increasing levels of complexity within a given job function, both horizontally and vertically.

Given the contextual volatility, the organization of work requires a periodic review that updates both the progression and professional development required for each job position, especially in key critical areas.

To have the right people, both a job catalogue and a remuneration policy that attracts, motivates and retains staff must be implemented, especially scarce talents that are highly demanded by other organizations eager for them in an increasingly competitive labor market.

The professionalization of public employment, especially in tax administrations of greater complexity, requires organizing work as part of a comprehensive strategic alignment effort from which the processes of people management and human capital administration cannot be excluded.

9. MANAGING THE EMPLOYMENT

The employment management process includes the search, selection, outsourcing, incorporation, internal mobility and promotion of people. Strategic employment management is an approach that supports the long-term objectives of tax administration within an overall planning framework.

Strategic alignment of the employment management process should ensure emphasis on professionalization, bridging gaps in critical positions, attracting and retaining scarce skills, meeting potential future needs, and ensuring diversity and inclusion.

The search for the right people to fill a vacant position can be done internally or externally and must conform to principles such as suitability, fairness, probity, transparency, clear rules and accountability.

An effective employment management function adds value to the jobs to be filled and ensures that the tax administration has the talented, trained and committed people it needs. This includes investing in your training and compensation management to retain valuable talent. Consequently, while it is especially important to develop good hiring practices, the design of a transparent career path that is linked to an appropriate remuneration policy, performance appraisal and rewards management should not be neglected.

10. PERFORMANCE MANAGEMENT

When referring to human capital management, talking about strategic governance requires analyzing how an organization makes decisions related to people. People bring organizations to life. Therefore, the proper management of individual and collective performance will result in a substantial improvement in the achievement of institutional goals. Applying a strategic and people-centered approach is an invitation to institutional actors to strive to identify the most appropriate indicators to measure the contribution of people to the organization (Oszlak, Culturas orientadas a resultados, 2003).

Effective performance management adds value to performance appraisal by rewarding the talented, skilled, and committed people the organization needs. But it is also a challenge to identify problematic situations in work teams and propose improvement plans to overcome these difficulties. Staff training and development cannot be dissociated from performance management and consequently both are feedback processes. Therefore, if the organization strategically aligns both processes, human capital will be enhanced, influencing the improvement of institutional performance.

To achieve this synergy, access to knowledge, the development of personal skills and the enhancement of those skills that personnel need to perform better in their jobs must be ensured.

Adopting evaluation systems that superficially simulate measuring performance when in fact they are governed by personal influences, friendships, disagreements or even "*quotas*" for each rating tranche is, as Oscar Oszlak warns, insufficient to reduce the gap between good intentions and the effective realities of civil service systems in public organizations (Oszlak, El servicio civil en América Latina y el Caribe, 2001).

11. MANAGING THE DEVELOPMENT AND TRAINING

Training and development focus on ensuring that organizations have the people with the necessary knowledge, skills, and commitment. The training and development process goes beyond conducting series of technical courses that transmit knowledge about taxes.

The training and development function must help the organization achieve its strategic objectives through its people, encouraging and helping them to learn and grow both personally and professionally to successfully face the changing circumstances of a disruptive and volatile reality.

Learning needs analysis involves an assessment of the gap between the current skills and competencies of the existing workforce and the skills and competencies that are required to meet institutional needs, both present and in the near future. Consequently, in order for training efforts not to become obsolete, tax administrations must have a learning and development strategy that is regularly reviewed.

Successful apprenticeship programs require effective planning, preparation, and delivery, but also broad and generous feedback that does not ignore the views of the tax administration.

Knowledge management is the storage and sharing of 'know-how'. That is, the wisdom, understanding, and experience developed within an organization about its processes, procedures, and operations. In order to respond swiftly to an environment of exponential change, tax administrations must have both a knowledge management strategy and the appropriate technology to support the implementation of the strategy.

The strategic and people-centred approach encourages institutional actors to give greater importance to investments in training and staff development. But this investment is not only about setting up expensive hybrid classrooms equipped with the latest devices applied to teaching. Any investment must be made thinking about how to enhance human capital, based on the conviction that this directly affects the improvement of institutional performance. An effective human capital management function adds value to the strategic use of human resources, ensuring that the tax administration has the talented, trained and committed people it needs.

12. MANAGING THE COMPENSATION

The compensation management includes the administration of all the remuneration, rewards and bonuses that each member of the organization receives.

As Jorge Hintze points out in his work "*Wages as an X-ray of human resources policy*" (2001), compensation management and the administration of remuneration and rewards is the expression of how each organization implements its strategies to retain human talent in the face of other offers in the labor market. This retention is achieved by identifying and valuing those jobs and job profiles that are considered critical and scarce for the organization. But also working hard on training, staff development and remuneration policy, pay, bonuses and rewards. Hintze points out that rewards can have two different natures, calling them extrinsic or intrinsic. Compensations of an extrinsic nature are those that have a monetary value such as payments in cash or in kind and are generally the most widely used in all tax administrations.

On the other hand, rewards of an intrinsic nature are those things, often immaterial and intangible, that contribute to staff motivation and reinforce their commitment to the organization. Consequently, as Gabriel Wegman highlights in his recent work "*Motivation as a critical factor of public employment*" (2021), tax administrations must manage compensation and remuneration in a new way to be successful in retaining human talent in the face of a labor market eager for critical profiles that are scarce.

In this sense, following Hintze's classification, the compensation policy must overcome the traditional relationship between salary scale and job classification, to also consider other additional factors such as the complexity of the tasks that each person performs, the qualification requirements for the position they perform and the evaluation of performance, both personal and collective.

But in addition, as Hintze points out when describing rewards of an intrinsic nature, a holistic compensation management aimed at retaining scarce human talent must exceed the mere improvement of the pocket salary to also include other benefits, many of them intangible and immaterial, which fully express the integrality of the people management policy of each organization as well as the organizational climate lived in them, as WEGMAN concludes in the same line of thought.

13. MANAGING COMMITMENT AND VALUES

Finally, taking up some ideas outlined by Wegman in the book entitled "*Motivation as a critical factor of public employment*" (2021), we close the presentation of a virtuous ecosystem of people management and human capital administration with the processes related to the management of commitment, values and relationships between those who make up the tax administration. Staff engagement occurs when people are engaged in their work and aligned with achieving organizational goals and are therefore motivated to deliver high levels

of performance. Managing positive engagement requires implementing a virtuous ecosystem that includes among its elements:

- Clear purpose, goals and deliverables,
- Job challenges, variety of tasks and opportunities for growth,
- Feedback and spaces for improvement and adjustment and,
- Positive managerial leadership.

When we talk about purpose, we mean a clear understanding of the meaning and why of the work being done. As we previously pointed out in the book "Resources of social security and tax administration: their joint contribution to social cohesion" (González Cao, 2021), the meaning of our work begins by understanding the strategic role played by the tax administration in the collection of public revenues that allow financing government programs that ensure social cohesion. But, closer to the daily task, there must also be clear goals and deadlines for each project and activity that is faced.

We refer to labor challenges, the variety of tasks and development opportunities in the sense of offering staff challenging career paths that cover the breadth of work of the tax administration, recognizing the commitment and performance of those who do not stagnate and are trained to take on new challenges.

Feedback is the axis on which performance management works, both personal and collective. For feedback to be continuous and not limited to an annual interview with management, it is necessary to have both short-term goals and "deliverables", as well as direct and clear information on the effectiveness of personal performance and the work team.

As a result of such continuous evaluation dynamics, the necessary adjustment and improvement mechanisms must also be recreated. All this is not possible without the active participation of the personnel, both providing ideas to overcome unforeseen situations in a context of exponential changes and solutions to overcome the difficulties that arise when managing work teams. But it is also important to ensure as much participation as possible in 360-degree feedback mechanisms that enrich performance management.

In summary, it is important to promote both the implementation of flexible working methodologies and the simplification of procedures as well as opportunities for personal development and performance and reward management systems.

Finally, the virtuous ecosystem of commitment and values management requires positive management leadership that acts as oiling the operation of all the aforementioned parts. Positive leadership should be from both senior authorities and line managers. Leadership begins with the clear transmission of the organizational vision and institutional goals, taking advantage of all available communication channels, which must be fluid and transparent. Also, because of their immediate proximity, line managers play a key leadership role in people's engagement.

14. PEOPLE MANAGEMENT IN PRACTICE

Next, we will try to correlate the concepts previously developed with a real case, the management of people and human capital in the Federal Administration of Public Revenue (AFIP) of Argentina based on the public data available on its website and those from the ISORA survey (Morán & Díaz De Sarralde Miguez, 2021).

The "*tax administration*", also called "*tax agency*", is the body with the character of "*tax authority*", whose purpose is to conduct a strategic activity of the State consisting of the determination, settlement and collection of taxes, contributions to social security and their accessories for the financing of public expenditure. In some countries it also assumes control of foreign trade and the perception of customs revenue. Said "*tax authority*" is the representative of the public power that is empowered to collect taxes, control obliged and taxpaying subjects, impose sanctions provided for by the punitive and tax procedure regimes, and interpret provisions of the law, among others.

In the Argentine Republic, the state body with the status of "*fiscal authority*" at the national level is the Federal Public Revenue Administration (AFIP).

To understand the particular nature of the AFIP, it is necessary to previously explain that the National Public Administration in the Argentine Republic is organized through organizations that operate within the national budget and that we can identify as centralized, deconcentrated and decentralized.

However, there are also other entities that complete the organization chart of the National Public Sector, but which, due to their legal status, operate outside the budget of the National Administration. These other entities that comprise the so-called "*Extrabudgetary Administration*" are governed by specific regulations that Congress dictates by means of a special law.

According to subsection c) of article 8 of Law No. 24156 on Financial Administration, this subsector is made up of certain bodies excluded from the national budget and includes any "*non-business*" state organization, with financial autarchy, legal personality and its own assets, where the national State has majority control of the assets or the formation of decisions. Consequently, the final approval of its budgets is conducted separately from the approval of the annual draft law on the budget of resources and expenses of the National Administration, being regulated by Title II of Chapter III of Law No. 24156 "*Of the budgetary regime of Public Companies, Trust Funds and Public Entities not included in National Administration*".

The *Institutional Classifier of the Budgetary Classifications Manual for the National Public Sector* lists the agencies that make up this extra-budgetary subsector (Oficina Nacional de Presupuesto, Subsecretaría de Presupuesto, 2016). Among the "*Public Entities of extrabudgetary administration*" we find the Federal Administration of Public Revenues (AFIP). This is because, in November 2001, by Decree No. 1399/2001, the financial autarchy of the AFIP was established.

This financial autarchy, which adds to the administrative autarchy that the national tax administration already possessed since its creation in 1997, means that AFIP defines its budgetary policies and the administration of its own resources and establishes its own regime for the management of people and human capital.

Likewise, although AFIP is an autonomous entity that operates with a relative degree of autonomy, the Ministry of Economy exercises control of legality and superintendence over its management, including annual budgetary administration and strategic plans. Consequently, as far as the analysis of the topic covered in this article is concerned, the workforce planning may occasionally find conditioning in such control mechanisms.

The AFIP was born in the period that Oscar Oszlak calls the state reform "*inward*" and that, promoted by the World Bank since 1997, promotes the strengthening of institutional and management capacities through organizational restructuring, the professionalization of the public service, the de-bureaucratization of rules or procedures and the introduction of new management technologies (Oszlak, Quemar las naves, 1999).

With regard to the function of people and human capital management, this paradigm is characterized by certain initiatives to professionalize the administrative career and training, incorporation of technology, responsibility for results, contracts for objectives, definition of standards and performance incentives (Oszlak, Burocracia estatal: política y políticas públicas, 2006).

As a result of this stage, various entities that fulfilled tax collection functions are merged and the concept of "*integrating*" tax administrations of the collection efforts of the different public revenues is generalized, implementing the "*single agency*" tax, customs and Social Security Resources model.

The main function of the AFIP is the execution of the tax, customs and Social Security Resources policy of the Nation. The AFIP is in charge of a person who is designated as a holder by Decree of the National Executive Power with the title of Federal Administrator of Public Revenue.

The AFIP is made up of three business units: the Directorate General for Taxation (DGI), the Directorate General for Customs (DGA) and the Directorate General for Social Security Resources (DG SESO), each headed by a Director General. In turn, the Federal Administrator is assisted by a set of Deputy Directors General who lead the main organisational macro-processes.

As AFIP manages its own employment regimes, it does not adopt the National Public Employment System (SINEP) that governs the central Public Administration under the Public Employment Framework Law No. 25164. Accordingly, at the AFIP we find two different Collective Labor Agreements (CCT) that regulate the performance of its personnel:

- Decree No. 15/1991 for tax personnel and Social Security resources represented by the trade union entity called AEFIP (Association of Tax and Public Revenue Employees).
- Decree No. 56/1992 for customs personnel represented by the Single Union of Customs Personnel of the Argentine Republic (SUPARA).

One aspect that must be considered is the stability of public employment, a guarantee incorporated in the 1957 constitutional reform in article 14 bis of the National Constitution. Appropriately, in the 1990s, the conventional framework was reformed by means of both decrees of the Ministry of Labor previously referred to, for not reaching an agreement between the union representation and the employer. This reform included the possibility of dismissal without cause. This clause was disputed and, after several years, was removed due to the unconstitutionality dictated in various rulings of the Supreme Court of Justice such as "*Madorrán, Marta against the National Customs Administration*" of 2007.

In the current context of disruptive technological changes, one aspect to consider enhancing the implementation of a strategic view of people management is the coexistence of various systems that provide information on the management of human capital, many of them based on "*legacy*" technologies that do not take full advantage of the integral exploitation of data.

Regarding the organization of work, the job classification system is continuously reviewed by a specialized area, however, the generality with which some positions were originally described and the speed with which new tasks are assumed that exceed the original legal mandate of the tax administration means that the assignment of a profile to a new job position, when faced with the creation of new structures or the assumption of unforeseen responsibilities, often must be done "*ad hoc*" or by forcing the choice of "the closest thing" within the available catalog.

Regarding the reception and welcome of new additions, or a history of training and educational activities in order to certify the level required for the exercise of operational functions, as is the case of the customs service (for example: guard, verifier guard, scanner operator, meter, canine guide, verification assistant or verifier). However, this aspect is not defined with equal precision for other business areas.

The performance management processes have been implemented through performance evaluations that also have some impact on remuneration. On the other hand, with regard to the management of compensation, there are components related to the seniority in employment, the degree in the ranking, the professional title and the performance of executive functions of management ("*personnel in charge*").

Notwithstanding this, in terms of intrinsic and extrinsic recognitions, there is still a potential to reward the horizontal career, the skills demonstrated in daily performance, the complexity of the tasks performed and the knowledge of the function. As far as the use of non-monetary recognition mechanisms is concerned, their application is not widespread and depends on discontinuous impulses of each driving style.

Plans for staff reaching retirement age and the transfer of knowledge and human capital to the rest of the workforce is another issue with potential do work on.

Regarding the management of human and social relations, the surveys of work climate have not had a periodic continuity and the intervals between them are variable. And, regarding internal communications, different channels of contact with the staff have been explored.

On the other hand, regarding the size of the staffing, we will use the data published by ISORA (Morán & Díaz De Sarralde Miguez, 2021) and compare them with different variables. For comparative purposes, we will use data from Argentina, the average of Latin America and the Caribbean (LAC) and that of the various members of the Inter-American Center of Tax Administrations (CIAT).
To begin, we will analyze the relationship with the total population and with the economically active population. On the one hand, for the heterogeneous set of countries that make up CIAT, an average of 6,260 inhabitants are obtained for each worker employed in the Tax Administration (TA), which is far higher than the average of Latin America and the Caribbean, which is 3706, and also than Argentina's own numbers, which turn out to be 2,920 (46% of the average CIAT value).

In turn, when considering the proportion of the active population for each worker in the Tax Administrations, we find a global average of 2690 inhabitants for CIAT members, a decreasing average for Latin America and the Caribbean of 1802 and a lower value of 1350 for Argentina (50% of the CIAT average value).

Likewise, with regard to the size of the staffing, we can also use the comparison with the universe of active taxpayers in the main taxes applied:

- Individual Income Taxpayers (PIT),
- Corporate taxpayers (CIT) and,
- Value Added Tax (VAT) taxpayers.

First, from the comparison of the size of the personnel employed based on the number of taxpayers of the Personal Income Tax (Personal Income Tax - PIT) emerges a global average of 829 contributors for CIAT members, a decreasing average for Latin America and the Caribbean of 498 and a lower value of just 69 for Argentina (8% of the CIAT average value).

For its part, the comparison of the size of the personnel employed based on the number of taxpayers of the Income Tax for Legal Entities (Corporate Income Tax - CIT) shows a global average of 81 contributors for CIAT members, a close average for Latin America and the Caribbean of 72 and a lower value of just 24 for Argentina (29% of the CIAT average value).

Finally, with respect to the Value Added Tax (Value Added Tax - VAT), the averages for CIAT countries are 139, for Latin America and the Caribbean 118 and for Argentina only 70 (50% of the average CIAT value).

As Diaz de Sarralde opportunely pointed out in the previous edition of said Panorama published in 2019, this great heterogeneity is multi-causal and can recognize, among many other factors, demographic circumstances, greater informality, weakness of direct taxes and importance of payments from large taxpayers in relation to the total collection (Morán & Díaz de Sarralde Miguez, 2021).

In turn, we can consider the distribution of personnel with respect to the main macro-processes that make up a tax administration (GONZÁLEZ CAO, Gestión estratégica, 2023). We will begin by analyzing the distribution of personnel employed in the three main macro-processes that ISORA points out:

- Verification: Audit, investigation and control (AIC)
- Registration, Attendance and Payments (RAP)
- Debt management and regularization (MRD in Spanish)

From ISORA's information, it (Morán & Díaz De Sarralde Miguez, 2021) emerges that the audit staffing in Argentina (26.6%) is similar to the averages of CIAT members (27.2%) and the regional set of Latin America and the Caribbean (25.8%).

On the other hand, the relative importance of the debt management and regularization (MRD) function in Argentina (23%), which doubles the CIAT (10.7%) and regional (11.3%) averages, is close to that found in certain Tax Administrations such as Spain (20.3%) and Canada (26%).

On the other hand, we are interested in highlighting the lower value of personnel assigned to the headquarters in the case of Argentina (17%) compared to CIAT averages (29.5%) and the region (28.8%). This can be explained by the degree of operational decentralization in the Regional Directorates and the corresponding local Agencies, Districts and Recipients that the AFIP has established to address the vast geographical extension of a country of continental dimensions, the fourth country in the Americas and the eighth in extension worldwide.

Table 1

Composition of the employed personnel (ETC) by age range

CIAT member countries. Year 2019.

Place of jurisdiction	Under 25	Between 25 and 34	Between 35 and 44	Between 45 and 54	Between 55 and 64	Older than 64
Argentina	2.2	11.4	22.3	34.5	27.0	2.8
ALC	4.2	26.5	32.6	22.0	13.1	1.6
CIAT members	2.7	22.6	28.1	24.8	19.5	2.2

Source: Own elaboration, based on information from ISORA (Morán & Díaz de Sarralde Miguez, 2021)

As we see in Table No. 1, the staffing of the Argentine Tax Administration is older than in the other groups described, with 64.3% of its members concentrated in the strata over 45 years of age.

Table 2

Composition of the employed personnel (ETC) by age range

CIAT member countries. Year 2019.

Place of jurisdiction	Less than 5	5 - 9 years	Between 10 and 19 years old	More than 19 +
Argentina	14.5	4.1	30.8	50.6
ALC	30.8	17.4	28.0	23.8
CIAT members	28.7	15.4	25.4	30.6

Source: Own elaboration, based on information from ISORA (Morán & Díaz de Sarralde Miguez, 2021)

Accordingly, in Table No. 2 we can analyze the seniority of the personnel of the Tax Administration. From their reading it emerges that the values of Argentina for those people who have been working in the organization for more than 19 years (50.6%) more than double the average values of Latin America and the Caribbean

(23.8%) and also exceed the weighted values of the CIAT member countries (30.6%). This value is a reference regarding the accumulated experience of those who work in the tax administration and is related to the average age.

Table 3

Indicators of the dynamics of the personnel employed (ETC)

CIAT member countries. Year 2019.

Place of jurisdiction	Annual balance	Income rate	Exit rate
Argentina	1123	8.1	2.9
ALC	-1883	7.1	6.3
CIAT members	-1332	8.3	7.2

Source: Own elaboration, based on information from ISORA (Morán & Díaz de Sarralde Miguez, 2021).

In Table No. 3 we present the recent staff dynamics, concluding that the annual balance for fiscal year 2019 was positive for Argentina (1123), not so for Latin America and the Caribbean (-1883) nor for the CIAT member countries (-1332). This data shows a tendency to strengthen the staffing in Argentina, while net staff reductions are observed in the other groupings outlined in the table. This trend, if maintained, can ensure a replenishment of staff reaching retirement age and will influence future measurements of seniority and possibly age of staff.

Another value that emerges from Table No. 3 are the rates of entry or recruitment of workers as well as those of exit or dismissal, considering the hiring/dismissal in tax year 2019 with respect to the average staffing during the same period. This average is calculated by dividing by two the total endowment sum at the beginning and end of the year analysed.

When comparing the values, we can see that the average staff entry rate for CIAT members (8.3%) is similar to that of Argentina (8.1%), although somewhat higher than that corresponding to the grouping of Latin American and Caribbean countries (7.1%). However, the same does not happen with the rate of discharge or departure of personnel, where the average of CIAT countries is higher (7.2%) than the value of Latin America and the Caribbean (6.3%) and more than double that of Argentina (2.9%).

To close this analysis, it is important to bear in mind that one cannot venture hasty conclusions regarding these indicators without first considering in detail the potential factors that affect them. These factors are multicausal and may be related to the evolutionary stages that each tax administration goes through, its own macroeconomic context and other particular characteristics of each jurisdiction (Morán & Díaz De Sarralde Miguez, 2021).

CONCLUSION

We have presented the state of the art of human capital management in the exponential era. In all tax administrations, the macro-process of people management and human capital administration includes how people are recruited, trained and accompanied in their development.

Beyond the fact that the tax administration operates at the national, subnational (provincial or state) or local (municipal or communal) level, for many years the administration of personnel was limited to the performance of classic operational activities, sporadically showing some reactive behavior that responded to spasmodic impulses of certain higher authorities, an impulse that languished when these people ceased their functions.

Inertial and reactive management did not question which profiles are required to meet the future needs of the organization or improve the link with the citizenry, affecting such narrow-mindedness in the organizational results.

Adopting a strategic and people-centered approach rebukes institutional actors regarding investments in training and staff development and reinforces the conviction that enhancing human capital directly affects the improvement of institutional performance.

Although there are several operational models of people management, this article presents a tripod based on transversal services, specialized units and potential institutional partners. This tripod, in the most complex organizations, can be reinforced with a strategic planning unit and another that emphasizes the training and development of personnel, both with the intention of reinforcing the retention of scarce human talent, especially in the main key critical areas of tax administration.

Achieving internal consistency in organizational designs is a complex task, which cannot be dissociated from institutional governance options and which, moreover, is not free from influences and resistance, both internal and external.

The personnel cannot be strategically managed if such efforts are not aligned with the long-term objectives of the tax administration within an overall planning framework that considers both resources and the changing work environment, people development, and how all these factors are integrated into institutional strategies and organizational transformation efforts.

In this article we propose to add value to the strategic use of human resources with a view to ensuring that the tax administration has talented and committed people who are trained to perform adequately in a context of exponential changes.

To plan the workforce, the current staffing must be analyzed, determining the needs for reinforcements, identifying the gap between reality and the immediate future. In turn, actions must be implemented to ensure that the tax administration can fulfill both its mission and objectives and the strategic plans and new functions assigned to it by the government in these volatile contexts of exponential changes that require rapid reflexes that ensure social cohesion.

In addition, it is important to develop good recruitment practices, define a clear and transparent career path and an appropriate remuneration policy. In an increasingly competitive labour market where the required talents are scarce, remuneration and reward arrangements within a tax administration must be managed intelligently to attract, motivate and retain certain profiles, especially those corresponding to key critical areas. While tax administrations should generally adhere to the civil service staffing standards of each jurisdiction and those governing remuneration in the public sector, it is important to have some managerial autonomy to reward outstanding performance. Related to this, another key aspect is to implement an effective performance management system, both individual and collective, aimed at improving staff engagement.

I hope that this analysis will stimulate the future discussion of government authorities and specialists on a topic of great relevance for the management of tax administrations.

REFERENCES

CIAT (2010). Manual CIAT para la gestión de los Recursos Humanos en las Administraciones Tributarias. Panamá, República de Panamá: Centro Interamericano de Administraciones Tributarias, CIAT.

Echebarría, K., Longo, F., Iacoviello, M., Zuvanic, L., Rodríguez Gusta, A. L., Iturburu, M., & De la Cruz Orozco, I. (2006). Informe sobre la situación del servicio civil en América Latina. (K. Echebarría, Ed.) Washington, Distrito de Columbia, Estados Unidos: Banco Interamericano de Desarrollo, BID.

González Cao, R. L. (2021). La economía de vigilancia y las plataformas. Su evolución y la mitigación de sus externalidades negativas a través de la regulación y la fiscalidad. Buenos Aires, Argentina: Centro de Estudios en Administración Tributaria, CEAT. Recuperado de: https://www.economicas.uba.ar/wp-content/uploads/2021/03/economia-de-vigilancia-y-plataformas.pdf

González Cao, R. L. (2022). Los procesos críticos y la buena gobernanza. Juntos, pero no revueltos. (CEAT, Ed.) Buenos Aires, Argentina: Centro de Estudios en Administración Tributaria, CEAT. Recuperado de: https://www.economicas.uba.ar/wp-content/uploads/2022/10/procesos-criticos.pdf

González Cao, R. L. (2022). Transformación organizacional: gestión del talento humano e innovación basada en datos. (U. d. Facultad de Ciencias Económicas, Ed.) Buenos Aires, Argentina: Centro de Estudios en Administración Tributaria, CEAT. Recuperado de: https://www.economicas.uba.ar/wp-content/uploads/2022/08/gestion-talento-e-innovacion-basada-en-datos.pdf

González Cao, R. L. (2023). Gestión estratégica de personas y del capital humano en las Administraciones Tributarias. (U. d. Facultad de Ciencias Económicas, Ed.) Buenos Aires, Argentina: Centro de Estudios en Administración Tributaria, CEAT. Recuperado de: https://www.economicas.uba.ar/wp-content/uploads/2023/04/gestion-estrategica-de-personas-y-capital-humano.pdf

González Cao, R. L. (2023). La organización del trabajo en una administración tributaria. Buenos Aires: Centro de Estudios en Administración Tributaria, Facultad de Ciencias Económicas, Universidad de Buenos Aires. Recuperado de: https://www.economicas.uba.ar/wp-content/uploads/2023/06/La-organizacion-del-trabajo-en-una-AATT.pdf

González Cao, R. L. (2023). Organizar la función de gestión de personas y capital humano en las Administraciones Tributarias. Buenos Aires: Centro de Estudios en Administración Tributaria, Facultad de Ciencias Económicas, Universidad de Buenos Aires. Recuperado de: https://www.economicas.uba.ar/wp-content/uploads/2023/05/Organizar-la-funcion-de-gestion-de-personas-y-capital-humano-en-una-AATT.pdf

Longo, F. (2002). Marco analítico para el diagnóstico institucional de sistemas de servicio civil. (I. d. ESADE, Ed.) Barcelona, España: Banco Interamericano de Desarrollo, BID.

Morán, D., & Díaz de Sarralde Miguez, S. (2021). Panorama de las Administraciones Tributarias en los países del CIAT. Ingresos, recursos, funcionamiento y estado de la transformación digital en la antesala previa a la pandemia de COVID-19. Resultados de la Encuesta ISORA 2020 (Datos 2018-2019). Ciudad de Panamá, República de Panamá: Centro Interamericano de Administraciones Tributarias - CIAT.

Oszlak, O. (1999). Quemar las naves (o cómo lograr reformas estatales irreversibles). Aportes para el Estado y la Administración Gubernamental, 6 (14), 1-28.

Oszlak, O. (2001). El servicio civil en América Latina y el Caribe: situación actual y retos futuros. Buenos Aires, Argentina: Centro Latinoamericano de Administración para el Desarrollo, CLAD.

Oszlak, O. (2003). Culturas orientadas a resultados: la creación de eslabonamientos claros entre el desempeño individual y el éxito organizacional. (O. Oszlak, Trad.) Buenos Aires, Argentina: Tecnología para la Organización Pública, TOP.

Oszlak, O. (2006). Burocracia estatal: política y políticas públicas. Post Data, Revista de reflexión y análisis político, XI.

Anti-BEPS tax reforms and the WTO: Addressing global tax challenges

Antonio Lopo Martinez

SYNOPSIS

This comprehensive study examines tax reforms implemented by states to protect their tax base while considering potential conflicts with World Trade Organization (WTO) rules. The article highlights the significance of cross-border transactions on contemporary tax revenues and focuses on anti-BEPS (Base Erosion and Profit Shifting) reforms as well as anti-tax avoidance strategies. It emphasizes the need to strike a balance between anti-BEPS reforms and WTO regulations, recognizing the importance of international collaboration and multilateral approaches to address global tax challenges. The study also analyzes the implications of these reforms within a volatile global environment characterized by emerging fiscal complexities.

KEYWORDS: Tax reforms, Tax base erosion, World Trade Organization, International taxation, International cooperation

CONTENT

Introduction
1. Anti-BEPS reforms
2. Anti-tax avoidance measures and the WTO

Conclusions
References

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INTRODUCTION

The contemporary challenges in taxation and trade are notable due to growing calls for tax reform. These demands stem from both domestic and international entities. International organizations are tirelessly working to improve dispute resolution mechanisms, while governments and global institutions are proposing substantial changes to tax systems both at home and abroad.

Leading the global effort to create new tax norms for the digital age is the Organization for Economic Cooperation and Development (OECD). Their project, known as the BEPS 2.0 Action Plan, aims to redefine international tax rules. The goal is to ensure digital companies pay taxes where they generate value and maintain a substantial digital presence, thereby contributing to the efficient administration of tax regimes.

In addition to addressing digital taxation, global initiatives to establish tax policies promoting environmental protection and promoting healthy practices are gaining traction. Governments worldwide are working to make businesses more environmentally responsible and incentivize sustainable practices through tax incentives, green taxes, and other policies. This approach can be seen as a form of regulatory taxation, where taxes are used to regulate behavior and encourage adherence to specific policies.

In terms of broader tax reforms, lowering tax rates and broadening the tax base are often considered effective measures to enhance the efficiency and equity of the tax system. Furthermore, many countries are transitioning from a structure based on direct taxes to a preference for indirect taxes due to their ability to generate revenue more efficiently and equitably. Additionally, governments increasingly seek regional tax integration systems, such as the European Union and Mercosur, to promote cooperation and facilitate trade[1].

However, a primary challenge is that in recent years, many multinational companies have structured and conducted business in ways that challenge the fundamentals of international income taxation. For example, more sophisticated cases result in so-called double non-taxation, where no jurisdiction has the right to tax income. Instead, these companies mitigate their tax burden through specific corporate structures, transfer pricing, and hybrid financial instruments. While these strategies may not violate the letter of the law, they often contradict moral principles, undermining wealth distribution and justice.

To address these challenges, governments aim to create anti-avoidance measures to curb international tax planning. However, such actions may conflict with general principles and domestic and international legal rules. Furthermore, such legislation may clash with WTO agreements, leading states, inadvertently or intentionally, to promote protectionist practices in conflict with the rules of international trade law.

This study explores the possible tax reforms implemented by states to safeguard their tax base and analyzes how they may conflict with the rules established by the World Trade Organization (WTO). This topic is highly relevant and current, as cross-border transactions with tax implications increasingly play a significant role in the tax revenues of modern states.

1 In this millennium, several trends in tax systems have been identified, among which are: 1) a focus on reducing tax rates and broadening the tax base, 2) a shift from a structure based on direct taxation to a preference for indirect taxation, 3) the introduction of an environmental taxation system favorable to sustainable development, and 4) the pursuit of a regional tax integration system. Cf. (Bao, 2001, 2002).

First, we will address anti-BEPS (Base Erosion and Profit Shifting) reforms, which aim to prevent tax base erosion and profit shifting between countries. Next, we will examine several anti-avoidance strategies designed to combat tax avoidance and identify possible conflicts with WTO rules. Finally, we will conclude with the impact of these tax reforms and their implications for states and the WTO itself (Martinez, 2022).

1. ANTI-BEPS REFORMS

In recent years, numerous multinational companies have structured and conducted business in ways that challenge the fundamentals of international income taxation. In its most sophisticated form, this type of international tax planning results in no jurisdiction being able to claim income taxation, a situation called double non-taxation[2].

Multinational corporations can effectively mitigate their tax burden by arranging specific corporate structures through transfer pricing and hybrid financial instruments. Although the strategies adopted may not violate the letter of any tax law, they often confront moral aspects, damaging wealth distribution and undermining the values of justice (Hilling & Ostas, 2017, p. 40–46).

In light of these challenges to prevent abusive international tax planning, governments develop anti-avoidance tax measures aimed at preventing such conduct; however, these may call into question general principles and legal norms, both nationally and internationally. Moreover, since the application of such legislation is inherently uncertain, mainly when a general rule of equity is applied in an international context, the effectiveness of such measures can be questioned. An additional challenge is that such legislation may also conflict with WTO agreements. In other words, in implementing such measures, states may inadvertently or even intentionally promote protectionist practices that disagree with the rules of international trade law.

The OECD has developed the BEPS plan with fifteen action items, many of which contain minimum standards geared towards unilateral or bilateral implementation at the national level. Other items include changes to OECD models and guidelines, as well as commitments to greater dialogue and agreements on tax cooperation. The OECD has organized its minimum standards into four main categories: i) Country-by-Country (CbC) reporting, ii) tax treaty abuse, iii) harmful tax practices, and iv) cross-border tax dispute resolution. The standards are set out as prescriptive rules accompanied by various best practice recommendations.

In the European Union (EU) context, the Anti-Tax-Avoidance Directive (ATAD) establishes five anti-tax abuse rules: (i) limitation of interest deductibility to discourage artificial debt arrangements designed to minimize taxes; (ii) exit taxation to prevent companies from avoiding taxation by reallocating assets; (iii) a general anti-abuse rule (GAAR) to combat aggressive tax planning when other rules do not apply; (iv) controlled foreign corporation (CFC) rules to discourage the transfer of profits to countries with low or no taxation; and (v) a framework to combat hybrid arrangements.

Although ATAD incorporates many of the BEPS measures into a European tax harmonization process, it does so unilaterally and with provisions that go beyond the BEPS package. This can create problems of discriminatory impositions before the WTO agreements. In addition,

2 Cf. (Dillon, 2017, p. 1–2) ‘Tax avoidance’ strategies involve legally minimizing tax obligations by strategically distributing corporate profits to jurisdictions with lower or even no taxes. This allocation contrasts with an alternative scenario, in which stricter regulations might necessitate these profits to be assigned to high-tax jurisdictions.

with the adoption of ATAD by the EU, the possibility of new "regional" versions of BEPS is growing, adding more complexity to the international tax landscape (Carbajo Vasco, 2017, p. 23).

The primary objective of reforming the international tax system is to redistribute taxing rights among jurisdictions globally while combating tax avoidance and harmful tax competition. However, the close relationship between international trade law obligations and the international tax system requires careful consideration by advocates of such tax reforms. Multinational corporations' erosion of the international tax base largely stems from increased global trade, the integration of developing countries, and the reduction of tariff barriers. These factors have allowed trade between related parties (two subsidiaries of the same corporate group) to expand to about 40 to 60 percent of international trade. It is in these transactions that multinationals transfer profits between countries.

One proposal to address this problem is the "Global anti-base erosion proposal" (GloBE)[3], which emerged from an OECD Public Consultation addressing the "Tax Challenges Arising from the Digitisation of the Economy". The proposal encourages the development of a coordinated set of rules to address profit shifting within corporate groups to low or no-tax jurisdictions. In summary, GloBE aims to ensure that a minimum tax is paid where value is generated, and economic activity takes place. Additionally, it seeks to address remaining BEPS issues by preventing harmful tax competition, primarily by reducing pressures to grant unjustified tax incentives with no positive economic impact and by complementing existing measures to combat tax avoidance and aggressive tax planning[4].

The first objective in reshaping the international tax system is addressed by three innovative proposals, known as Pillar I: (i) the "user contribution" approach, which seeks to align taxation with the existence and activity of "users" of digital services in a jurisdiction; (ii) the "intangible marketing" approach, which allocates (residual) profits to jurisdictions where the taxpayer (foreign company) has created a digital or non-digital intangible asset related to its customer base; (iii) the "significant economic presence" approach, which proposes changes in the paradigms of defining permanent establishment and possibly allocating profits to market countries based on a specific formula. The latter approach was advocated by the G-24 group, composed of emerging and developing economies.

The second objective is addressed by the proposal for a "minimum tax regime" (known as Pillar II), which allows both residence and source countries to levy compensatory taxes if the tax burden on corporate profits in the countries with the highest taxing rights does not reach an effective tax rate above a certain minimum threshold (Schön, 2019, p. 1003–1004).

It is crucial to emphasize that, despite the justifiable urgency, the reformulation of the international tax system cannot be promoted without considering its profound intersection with the WTO agreements. It has been observed that discussions have been conducted

3 Cf. (Englisch & Becker, 2019). The proposal, known as GloBE, draws inspiration from the GILTI and BEAT systems enacted during the US tax reform of 2017. It advocates for the implementation of income inclusion rules, bearing resemblance to comprehensive CFC regimes, and places restrictions on tax deductibility and the application of withholding taxes for expenses and payments made overseas.

4 GloBE's aim is to explore an approach that allows jurisdictions the freedom to shape their own tax systems, including the decision on whether to have a corporate income tax and where to set their tax rates. However, it also considers the rights of other jurisdictions to implement GloBE rules when income is taxed at an effective rate below the minimum. Cf. (Nogueira, 2020, p. 1).

without due consideration of how unilateral measures announced by states can create a mechanism that, under the pretext of preserving the tax base, also ends up arbitrarily and unjustifiably discriminating against international products and services.

2. ANTI-TAX AVOIDANCE MEASURES AND THE WTO

This section will discuss some of the anti-base erosion tax measures being promoted and to what extent they may conflict with WTO agreements.

2.1 Transfer pricing rules

In the quest to reform transfer pricing rules, potential adjustments in calculation criteria and attempts to impose a heavier tax burden on multinational companies may result in double taxation. Such a situation could be perceived as discrimination against international producers. Suppose authorities in one country make transfer pricing adjustments to increase taxable profits in that country. In that case, double taxation becomes a risk unless corresponding adjustments are made in the other country involved. However, the authorities in that other country will likely have no incentive to make such adjustments. Although tax treaties typically contain a reciprocal obligation to make so-called "correlative adjustments," it is unlikely that a joint bilateral arrangement will be established during the redistribution of taxing rights, where there will be winners and losers (Easson, 2004, p. 43).

There is broad agreement that discrimination against foreign goods by considering them as expenses (business expenses, advertising costs, extraordinary expenses) violates the principle of equal treatment of nationals. Tax cases have shown that a generous transfer pricing practice can subsidize exports. In this regard, the Agreement on Subsidies and Countervailing Measures (ASCM) explicitly supports the principle of "full competition" in item 59, second sentence. On the other hand, a state may discriminate against imports if the importer's income is calculated based on low transfer prices. Subsidies and discrimination appear again as antagonisms. The consequence of such transfer pricing discrimination is shifting the tax base from the exporting to the importing country.

A substantive question for low-income countries is whether a minimum tax rate approach can be used, publicly setting minimum profit margins for defined sets of transactions, ignoring transfer pricing and arm's length. Taxpayers would not need to produce a transfer pricing study or seek comparable market transactions; they would need to show a profit margin for qualifying transactions to fall within the safe harbor level. However, such measures, by disregarding arm's length pricing, may be at odds with WTO agreements (International Monetary Fund, Legal Dep, 2019, p. 24–25).

2.2 Controlled Foreign Corporation (CFC)

Multinational corporations often operate in several countries and are subject to multiple tax jurisdictions. To prevent these companies from minimizing their tax liability by taking advantage of tax differences between countries, anti-tax avoidance rules, known as Controlled Foreign Corporation (CFC) rules, have been implemented. These rules target domestic companies that establish subsidiaries in low-tax jurisdictions to avoid taxes. CFC rules require that the taxable profits of a CFC are taxed in the state of the parent company.

However, there is a possibility that these rules are applied in a discriminatory manner concerning certain conditions, which can result in an indirectly unfavorable tax position for the foreign company compared to a domestic company.

CFC rules are measures designed to counter base erosion and the diversion of income by resident taxpayers to companies controlled by them that typically reside in countries with low or no taxation. BEPS Action Plan 3 (Tax Base Erosion and Profit Shifting) recommends that CFC rules only operate concerning CFCs subject to effective tax rates significantly lower than those imposed by the home state. Thus, from the host state's perspective, there is a real possibility that subsidiaries controlled by non-residents will be affected by the CFC rules of the states where the shareholders are residents (Chen, 2017, p. 30).

Under these rules, some countries may be treated less favorably from a tax perspective, and based on the Most Favored Nation (MFN) clause, those who feel aggrieved could claim no less favorable treatment. It is worth noting that the OECD recommends defensive measures to combat harmful tax practices, including the adoption of CFC rules, which could potentially conflict with the principle of non-discrimination, especially with the MFN clause.

CFC rules are intended to combat tax avoidance, not to prevent double taxation. Therefore, it seems difficult to interpret them as a double tax treaty (DTC), i.e., one that ensures that the tax is levied only in the foreign jurisdiction. Moreover, in trade in services, it seems unlikely that the exception in Article XIV(e) of the General Agreement on Trade in Services (GATS) would apply, which would not support the maintenance of such discriminatory treatment. Thus, WTO Members with a significant number of CFCs could, in theory, argue that they are being treated less favorably compared to other States that are excluded from the list of more stringently treated countries.

It is crucial to clarify that CFC legislations do not impose restrictions on the importation of capital by the state since they cover the domestic shareholder of the foreign company exclusively. The WTO agreements do not directly prohibit tax discrimination against domestic investors in cross-border investment activities. Similarly, the freedom of the foreign corporation to finance its activities is not protected by a trading system.

A violation of the WTO agreement obligations only occurs if a tax measure puts a foreign supplier of goods or services at a competitive disadvantage, constituting an import barrier, or if the tax measure creates a subsidy. However, there may be an indirect disadvantage to the foreign corporation, as the taxation of shareholders in the importing state may be considered an import barrier.

In addition, country-specific CFC rules could conceivably violate the most favored nation clause, as mentioned earlier. An example would be differential treatment for companies with domestic capital in countries considered tax havens. CFC standards could represent de facto discrimination against subsidiary companies controlled by resident shareholders.

These rules may also, in theory, be challenged at the WTO by the host state if there is prima facie evidence of discriminatory treatment. This scenario highlights the complexity of CFC legislation and the need for a careful balance between protecting the tax interests of states and ensuring a fair and competitive business environment for foreign companies.

2.3 Thin capitalization rules

High corporate tax countries encourage multinational companies to finance investments with debt because interest payments are tax-deductible, which is not usually the case with equity financing. Consequently, an economic incentive arises for multinational companies to finance internally between entities in lower-tax countries and those in higher-tax countries.

Action 4 of the OECD BEPS aims to prevent tax base erosion caused by the use of interest expenses, particularly employing related parties and third-party debt to obtain excessive interest tax deductions. However, it is not only exorbitant or arm's length interest deductions that are under scrutiny; preferential tax regimes (tax havens) are also a key area of concern, as they cause harmful tax competition.

Often, the "race to the bottom" manifests as across-the-board reductions in corporate tax rates on certain types of income, such as income from financial activities or the supply of intangible goods. To combat the erosion of their tax bases, countries have begun to introduce limitations on interest deductions, especially when the income is subject to zero or low taxation. This is particularly the case when the beneficial owners reside in a country that offers a favorable tax regime, are subject to a low statutory tax rate, or receive a significant tax exemption or reduction[5].

Thin capitalization rules limit the deductibility of interest paid on loans made by a foreign-related person in the case of capitalization of the resident company. Such specific laws may prohibit tax deductions for interest payments unless the recipient pays a specific minimum tax on the interest payments received. Moreover, in some cases, thin capitalization rules are drafted in such a way that they imply the use of the "arm's length" principle to define the amount of debt that a third-party lender would be willing to lend. In this case, thin capitalization rules face the same shortcomings as general transfer pricing rules, highlighting the complexity of the international tax landscape and the need to find balanced solutions to deal with these challenges (Dubut, 2015, p. 143).

From the perspective of the Most Favored Nation (MFN) and National Treatment (NT) clauses in the context of GATT and GATS, specific interest limitation rules may raise concerns. Moreover, these concerns may intensify if a WTO member decides not only to combat tax base erosion and profit-shifting opportunities between groups or related parties but also to address the problem of harmful tax competition more broadly. One example would be to deny all interest deductions related to tax havens or low-tax jurisdictions (Dziurdź, 2019, p. 186–187).

When a country with a high statutory tax rate denies interest deductions paid to residents of countries with a low statutory tax rate, these interest payments are treated more unfavorably than interest payments received by residents of other countries with sufficiently high statutory tax rates. Moreover, these payments are treated worse than most domestic interest payments. Thus, the question arises whether the first country's non-deductibility rule is consistent with the MFN and NT provisions in GATT and GATS.

5 For in-depth discussion of techniques used to reduce the tax base, as well as regulations being instituted to curb such practices, see: (Pinetz & Schaffer, 2017).

By potentially denying the ability to apply complete interest relief to foreign-based companies, this could be seen, in theory, as a competitive disadvantage for these companies in transactions with a country that institutes thin capitalization rules. This could consequently create obstacles to cross-border business transactions, with important implications for international trade and cooperation between countries.

2.4 General Anti-Abuse Provision: GAAR

Tax anti-abuse rules have become a key element in the post-BEPS tax landscape. Falling revenues, high levels of public debt, and growing public interest in issues related to tax base erosion have pushed governments to adopt or strengthen General Anti-Abuse Provisions (GAARs). Furthermore, the EU and the OECD have proposed several measures to enable tax authorities to combat aggressive tax planning (Lang et al., 2016).

General Anti-Abuse Provisions (GAAR) authorize tax administrations to deny certain tax benefits when a transaction lacks economic substance and occurs exclusively for tax reasons. These provisions are present in the tax systems of most developed countries, allowing tax authorities to combat situations where only the letter, and not the spirit, of the law is respected. These measures are necessary to cover situations that do not fall within the scope of the rules mentioned above. Some tax systems rely solely on anti-abuse provisions, with no specific CFC or thin capitalization rules. In addition to introducing a GAAR, the tax system can be supplemented by a growing number of Specific Anti-Abuse Rules (SAARs) (Courinha, 2016, p. 527).

Although the discussion of GAAR is more abstract than the limitations imposed by CFC and thin capitalization rules, the same conclusions may apply. If the interpretation and application of these rules result in frequent discrimination of cross-border transactions, there may be a violation of the WTO principle of non-discrimination. Thus, it is crucial to ensure that such measures are applied in a fair and balanced manner to respect the principles established by international agreements and promote cooperation between countries.

2.5 Tax-based defensive measures

Possible defensive measures can impact the supply of goods or services, depending on how the countries involved apply their sanctions. There are three types of punitive sanctions or defensive measures that can be challenged by the WTO Dispute Settlement Body (DSB):

i) tax or administrative measure applied to all or some transactions involving the sale of a good or service of a WTO member;

ii) a tax or administrative measure that penalizes the income of companies, domestic or foreign, for trade in goods and services with a WTO member;

iii) a measure aimed at putting pressure on non-cooperative tax havens but with no direct impact on trade distortion (Hofbauer, 2004, p. 402).

Denial of deductions or exemptions, collection of withholding taxes, or taxation of certain income may also be imposed concerning the supply of goods and services. Except for the last-mentioned sanction, the

proposed defensive measures will likely violate MFN clauses under the GATT and GATS. A tax or administrative effort that penalizes the income of a taxpayer who trades goods and services across borders may be considered discriminatory. However, it should be noted that exceptions or justifications may cover defensive measures that violate the MFN principle.

In addition, OECD members have developed several recommendations involving tax havens, including proposals for countermeasures to combat harmful tax competition. While OECD initiatives appear to be more focused on information exchange at present, locations classified as tax havens should be alert to the imposition (direct or indirect) of countermeasures by other countries seeking to improve their tax competitiveness outside the context of more formal action by the OECD. Such countermeasures may result in allegations that an OECD member (or non-member country) is acting inconsistently with its WTO obligations, such as its financial services obligations under the GATS. If a member decides to impose countermeasures, it should always verify compliance with its obligations under the WTO agreements. Countries affected by such measures will undoubtedly examine carefully and be prepared to assert their rights in the WTO if circumstances so require (Orava, 2002, p. 197).

For example, on December 5, 2017, the Council of the European Union established an agreement proposing a list of defensive measures of a fiscal nature. These measures could be implemented by EU member states against non-cooperative jurisdictions while respecting the competence of each state. The proposed defensive measures include:

i) non-deductibility of costs;

ii) international tax transparency rules;

iii) measures relating to withholding taxes;

iv) limitation of the participation exemption regime - PEX (exemption for income derived from dividends and capital gains);

v) transition clause - switch over (replacement of the exemption method by the imputation method to avoid international double taxation on income from dividends and capital gains);

vi) reversal of the burden of proof;

vii) specific documentation requirements;

viii) mandatory disclosure by tax intermediaries of taxes related to international agreements (González, 2018, p. 953).

Notably, the WTO Dispute Settlement Body has already recognized that when states allow price manipulation between related parties (i.e., the use of non-market transfer pricing), this may violate the Customs Valuation Agreement (CVA) or constitute a prohibited export subsidy (ASCM).

Indeed, without analyzing concrete cases and considering only the abstract level, it is difficult to determine whether the defensive measures proposed by the OECD, applied collectively or individually by OECD Members, will violate their WTO obligations and result in the nullification and impairment of the rights of affected WTO Members. However, we can predict that withholding taxes on transactions with tax havens are probably the measures most likely to be seen as violations of GATT or GATS obligations (Brosens & Bossuyt, 2020, p. 313). As for sector-specific measures that restrict total tax take, they are the most credible and common form of defensive action and may also constitute violations of GATS obligations. The legality of specific defensive measures will depend on the particular sector and the commitments in the services sector made by WTO Members.

CONCLUSION

The objective of anti-BEPS tax reforms is to safeguard the tax bases of states and counteract revenue erosion resulting from tax evasion and avoidance. However, it's vital that these reforms are in compliance with the World Trade Organization (WTO) agreements, particularly those aimed at countering discrimination against imported goods and services. The WTO's mission is to liberalize international trade and eradicate discriminatory practices, thereby ensuring a fair and balanced business environment for all members. Therefore, it is imperative to strike a balance between the implementation of anti-BEPS tax reforms and the adherence to WTO rules, thus maintaining the integrity of states' tax bases while upholding the principles of international trade.

Remarkably, the fight against base erosion and tax evasion has become a political priority for numerous states. However, unilateral measures are insufficient solutions to confront these global challenges. Tackling these issues mandates international cooperation and consensus-building. A multilateral approach is the only effective strategy to navigate the complexities of globalization in modern states' tax management. The adoption of unilateral solutions and piecemeal proposals without dialogue with key stakeholders could potentially lead to greater costs and uncertainties. In the context of the World Trade Organization (WTO), it could result in litigation and potential trade retaliation.

Regrettably, the post-BEPS environment, compounded with the fiscal challenges brought about by the COVID-19 pandemic, already indicates signs of escalating global tax chaos. Countries across the globe are unilaterally changing their tax regimes, progressively disregarding established international trade and tax rules. In this context, tax policymakers must understand the interaction between tax law and other fields of international law, such as trade law and WTO agreements. Encouragingly, by correctly comprehending WTO rules, tax policymakers can adjust their strategies without infringing upon international trade law commitments. WTO-related issues need not, and should not, be insurmountable barriers in the pursuit of sensible tax reforms, which must be upheld.

The principal challenge here is to attain a global agreement predicated on reasonableness and good faith in international relations, bearing in mind that sincerity is often misconstrued where hypocrisy dominates. A critical question remains: how can states reconcile anti-BEPS tax policies and WTO rules in a globally unstable scenario with increasing fiscal difficulties?

Consequently, tax administrations must take an active role in fostering international cooperation, promoting dialogue with stakeholders, and comprehending the interactions between their local tax laws and international trade laws. The successful implementation of anti-BEPS tax reforms and adherence to WTO rules necessitate a balanced, global approach that takes into account the complexities of modern states' tax management.

REFERENCES

Bao, L. (2001). Several Issues at the Forefront of the Current Tax Theory Debate. Asia-Pacific Tax Bulletin.

Bao, L. (2002). Researching the Tax Burden with a View to Further Tax Reform. Asia-Pacific Tax Bulletin.

Brosens, L., & Bossuyt, J. (2020). Legitimacy in International Tax Law-Making: Can the OECD Remain the Guardian of Open Tax Norms? World Tax Journal, 12(2).

Carbajo Vasco, D. (2017). El futuro de BEPS: ¿aplicación uniforme, fragmentación o BEPS II? Crónica tributaria, 162, 7–24.

Chen, V. T. (2017). Trump's Corporate Income Tax Rate Reduction: A CFC Trap for Foreign-Controlled US Subsidiaries. Bulletin for International Taxation, 6a.

Courinha, G. L. (2016). Chapter 25: Portugal. Em M. Lang, A. Rust, J. Schuch, C. Staringer, J. Owens, & P. Pistone (Orgs.), GAARs: A key element of tax systems in the post-BEPS world. IBFD.

Dillon, S. (2017). Tax Avoidance, Revenue Starvation and the Age of the Multinational Corporation. International Lawyer, 50(2), 275-. LegalTrac.

Dubut, T. (2015). Designing Anti-Base: Erosion Rules for Developing Countries: Challenges and Solutions. Em G. M. M. Michielse & V. Thuronyi (Orgs.), Tax design issues worldwide (p. 141–155). Kluwer Law International.

Dziurdź, K. (2019). Non-discrimination in tax treaty law and world trade law: The impact of formal, substantive and subjective approaches. Kluwer Law International B. V.

Easson, A. J. (2004). Tax incentives for foreign direct investment. Kluwer Law International.

Englisch, J., & Becker, J. (2019). International Effective Minimum Taxation – The GLOBE Proposal. World Tax Journal, 11(4).

González, D. (2018). Fraude y paraísos fiscales. Em E. Giménez-Reyna & S. Ruiz Gallud (Orgs.), El fraude fiscal en España (p. 941–990). Thomson Reuters Aranzadi.

Hilling, A., & Ostas, D. T. (2017). Corporate taxation and social responsibility (Edition 1:1). Wolters Kluwer.

Hofbauer, I. (2004). To What Extent Does the OECD Harmful Tax Competition Project Violate the Most-Favoured-Nation Obligations under WTO Law? European Taxation.

Lang, M., Rust, A., Schuch, J., Staringer, C., Owens, J., & Pistone, P. (Orgs.). (2016). GAARs: A key element of tax systems in the post-BEPS world. IBFD.

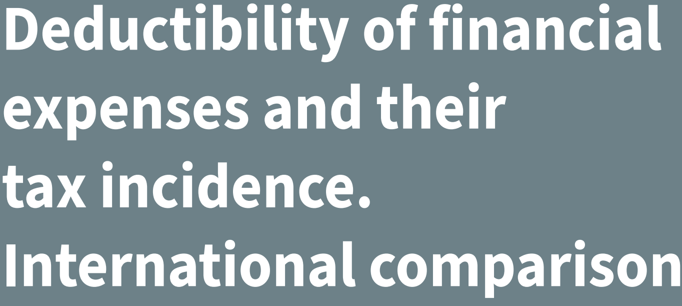
Martinez, A. L. (2022). Tributação na OMC. Acordos, Jurisprudência e Reformas (1o ed). Revista dos Tribunais.

Nogueira, J. F. P. (2020). GloBE and EU Law: Assessing the Compatibility of the OECD's Pillar II Initiative on a Minimum Effective Tax Rate with EU Law and Implementing It within the Internal Market. World Tax Journal, 12(3).

Orava, S. (2002). Potencial WTO Claims in Response to Countermeasures under the OECD's Recommendations Applicate to Aleeged Tax Havens. Em R. Biswas & Commonwealth Secretariat (Orgs.), International tax competition: Globalisation and fiscal sovereignty. Commonwealth Secretariat.

Pinetz, E., & Schaffer, E. (Orgs.). (2017). Limiting base erosion. Linde.

Schön, W. (2019). One Answer to Why and How to Tax the Digitalized Economy. Intertax, 47(12), 1003–1022.



Deductibility of financial expenses and their tax incidence. International comparison

Marlon Manya Orellana

SYNOPSIS

This article addresses the problem of thin capitalization as a tax avoidance practice, caused by intragroup transactions between related companies that allocate higher levels of third-party debt in high tax countries, use intragroup loans to generate interest deductions in excess of the actual interest expense of third parties in the group, and third party or intragroup financing to finance the generation of tax-exempt income.

For this purpose, considering the guidelines established in Action 4 of the BEPS Plan (Base Erosion and Profit Shifting), an international comparative analysis is made related to thin capitalization rules where the rules established in the limitation of the deductibility of financial expenses are identified. One of these rules corresponds to a fixed ratio of earnings before interest, taxes, depreciation and amortization (EBITDA), whose application will be demonstrated through the cases presented.

KEYWORDS: Undercapitalization, BEPS, Interest expense, EBITDA

CONTENT

Introduction
1. Theoretical framework
2. International comparison
3. Experiences in Latin American and Caribbean countries
4. Experiences in other countries
5. Methodology
6. Results

Conclusion
References

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INTRODUCTION

Within the income tax framework, a company's financial expenses associated with its operations represent deductible expenses for tax purposes, since they serve to obtain, maintain and improve taxable income subject to income tax, which is why there are incentives for companies to finance their operations through debt rather than equity, particularly if the corporate income tax rate is high.

This is why intra-group operations between companies (parent company, affiliates, subsidiaries) require the greatest attention from the control agencies because they can minimize the tax effects by placing higher levels of third-party debt in high tax countries, and/or using intra-group loans to generate interest deductions in excess of the actual interest expense of third parties in the group, and/or using third party or intra-group financing to finance the generation of tax-exempt income.

This was expressed by Graham (1996) who provided evidence highlighting that companies subject to high tax rates issue more debt than their counterparts with low tax rates, concluding that the leverage is sensitive to a country's tax rate. In turn, Huizinga et al. (2008) demonstrated the sensitivity of the capital structure of multinational companies to tax rates in different jurisdictions, concluding that a company's leverage depends on tax rates, reflecting the presence of international debt transfer.

In that context, Action 4 of the BEPS Plan (Base Erosion and Profit Shifting) focuses on the use of third party, linked and intra-group debt to achieve excessive interest deductions and/or to finance the production of exempt property or deferred income. A best practice approach to address these issues should be applied to all forms of interest and interest equivalent payments, to ensure that groups in an equivalent position are treated consistently and to reduce the risk of a group avoiding a rule by structuring its borrowings in a different legal form.

Base erosion and profit shifting can arise from arrangements using third party debt, where one company or country has an excessive proportion of the group's total net third party interest expense, and also arise from own debt where a group uses intra-group interest expense to shift taxable income from high tax to low tax countries. Likewise, within a country, base erosion and profit shifting may arise as a result of interest payments to a third party under a structured contract, or where interest is paid to a group entity in the same country that makes a corresponding payment to a foreign lender.

In order to counteract this situation, various countries have incorporated in their tax legislation limitations on the deductibility of interest as deductible expenses, through the imposition of thin capitalization rules. In this regard, Buettner et al. (2012) analyze the effectiveness of limitations on the tax deductibility of interest expenses in the capital structure of foreign subsidiaries located in OECD countries between 1996 and 2004, showing that thin capitalization rules reduce the incentive to use domestic borrowing, but result in higher external debt.

Similarly, Buslei and Simmler (2012) express that many countries have introduced or tightened thin capitalization rules to broaden the tax base, the main objective of these rules being to prevent companies from shifting profits abroad

1. THEORETICAL FRAMEWORK

Weichenrieder et al. (2008) show that by providing intra-group loans to their foreign subsidiaries, multinational companies can reduce their tax liability abroad. In the study developed on corporate policy in Germany they found that the tightening of thin capitalization rules had some limiting effect on leverage. Foreign affiliates reacted by reducing intra-group lending and increasing equity capital, without significant evidence of reduced real investment.

Egger et al. (2010) using data from 32,067 European firms compared domestic and foreign-owned plants with respect to their debt-to-assets ratio and analyzed to what extent the difference is systematically affected by corporate taxes. They conclude that foreign-owned firms on average have a significantly higher debt ratio than their domestically owned counterparts in the host country. Moreover, this gap in the debt ratio increases with the statutory corporate tax rate in the host country.

Fuest et al. (2011) show empirical evidence suggesting that the effect of the host country corporate tax rate on the debt ratio of multinational affiliates in developing economies is positive and larger than the same effect for affiliates in developed economies.

Ruf and Schindler (2012) present the general design of thin capitalization rules in Germany and summarize the economic effects of such rules identified in theoretical models. They conclude that the arm's length principle is administratively too costly and impractical, while controlled foreign firm rules could be another avenue to limit domestic debt switching.

Haufler and Runkel (2012) emphasize that thin capitalization rules have become an important element in the corporate tax systems of developed countries. They present a model in which domestic and multinational companies choose tax-efficient financial structures and countries compete for multinational companies through statutory tax rates and thin capitalization rules that limit the tax deductibility of domestic debt flows.

These authors find that in an equilibrium of symmetric tax competition, each country chooses inefficiently low tax rates and inefficiently lax thin capitalization rules. They conclude that a coordinated tightening of these rules benefits both countries, although it intensifies competition through tax rates.

Taylor and Richardson (2013) examine the determinants of undercapitalized structures of Australian listed firms. Based on a sample collected from 203 listed firms over the period 2006-2009, the results indicate that firms' thinly undercapitalized position is significantly and positively associated with multinationalism, the use of tax havens, withholding tax, and tax uncertainty. Multinationality and the use of tax havens are, in particular, strongly associated with low undercapitalization.

Schindler et al. (2013) argue that multinational firms can exploit the debt tax advantage more aggressively than domestic firms. In addition to using the standard debt tax shield, multinationals can shift debt from subsidiaries in low-tax countries to subsidiaries in high-tax countries.

Blouin et al. (2014) examine the impact of thin capitalization rules limiting the tax deductibility of interest on the capital structure of foreign subsidiaries of U.S. multinationals. The sample taken was in 54 countries for the period 1982-2004 and using confidential data on the internal leverage of these subsidiaries.

Thus, they conclude that restrictions on the ratio of an affiliate's total debt to assets reduce this ratio by an average of 1.9%, while restrictions on the ratio of an affiliate's indebtedness to the parent company to its equity reduce this ratio by 5.7%. Additionally, restrictions on parent company indebtedness reduce an affiliate's total debt-to-assets ratio by 3.5%, demonstrating that regulations that focus on internal debt have an indirect effect on the overall indebtedness of subsidiaries.

2. INTERNATIONAL COMPARISON

The following is an analysis of the basic features of the financial expense limitation rules in force in different countries in Latin America and the Caribbean, and in other countries, based on the information provided in the database of the Inter-American Center of Tax Administrations CIAT (2021), the Organization for Economic Cooperation and Development OECD (2021), and the IBFD Tax Research Platform.

Another source of information corresponds to the study prepared by Fernández González (2016) regarding the comparative legislation among the countries that adopted the BEPS Inclusive Framework and its relevant conclusions.

Along these lines, it is noted in Corporate Tax Statistics OECD (2021), that information on the presence and design of interest limitation rules is available for 134 Inclusive Framework jurisdictions, of which 67 had interest limitation rules in place in 2019, including interest to EBITDA ratio, debt/equity ratio, minimum thresholds, as general and specific thin capitalization rules, respectively.

Also, all EU member countries apply an interest cap that restricts a taxpayer's deductible borrowing costs to between 10% and 30% of the taxpayer's earnings before interest, taxes, depreciation and amortization (EBITDA). Other countries have also taken measures to limit interest deductibility or are in the process of aligning their national legislation with the recommendations of Action 4 of the BEPS Plan.

3. EXPERIENCES IN LATIN AMERICAN AND CARIBBEAN COUNTRIES

ARGENTINA

In Argentina, the measure on the imitation of the deduction of interest and financial charges originated in loans contracted with related parties is in line with the recommendations of Action 4 of the BEPS Plan.

Law No. 20,628 (2019) in its article 85 indicates the limitation of the deduction of interest on debt of a financial nature. The measure referring to the application of a group ratio or fixed ratio that are part of multinational groups indicates that the deduction may not exceed the annual amount of US$ 1 million or the equivalent to 30% of the net profit for the year resulting before deducting interest on debts of a financial nature and the expected amortizations, whichever is greater.

The measure that deals with the broad definition of interest or financial yields including payments that are economically equivalent to interest and other expenses incurred with the creditor, related to obtaining financing, states that the term interest includes not only the interest of debts of a financial nature, but also the exchange differences or updates that they originate. There are no limitations on the deductibility of interest for the banking and insurance sectors.

COLOMBIA

The Colombian thin capitalization rule applies to debts that generate interest that are contracted, directly or indirectly, in favor of national or foreign related parties. For purposes of calculating the limitation of the interest deduction, the Colombian rule does not consider the EBITDA (only the ratio 1/2 of the taxpayer's net worth). The entity acting as creditor of the credit must certify to the debtor that the credit or credits do not correspond to indebtedness operations with related entities through a guarantee, back-to-back, or any other operation in which substantially such related parties function as creditors.

In accordance with Article 118-1 of the Colombian Tax Statute, an undercapitalization rule is provided, which establishes a ratio that may not exceed the result of multiplying by 2 the net worth of the taxpayer determined as of December 31 of the immediately preceding taxable year. Therefore, the proportion of the expense that exceeds the mentioned limit will not be deductible.

In the case of financing transactions, the regulations ensure that in transactions with related parties, elements such as payment, term, risk rating, guarantee, debtor's solvency and interest rate comply with the comparability criterion.

The measure with respect to the specific rules for the banking and insurance sectors, shows that the local regulations indicate an express treatment for financial instruments (variable income securities, fixed income securities, financial derivative instruments, other instruments) stipulated in Article 33 of the Tax Statute. On the other hand, the thin capitalization regulation excludes from this limitation the entities that are supervised by the Financial Superintendence and those that perform factoring activities.

ECUADOR

In Ecuador, according to the Internal Tax Regime Law, article 10, paragraph 2, highlights the control of thin capitalization in companies, which began in 2008 limiting the deduction of interest in a debt/equity ratio of 3, applicable to external loans granted by related parties. As of 2020, and given the guidelines of the BEPS Plan, the measure was changed and a fixed ratio of 20% of the profit before labor participation, plus interest, depreciation and amortization (EBITDA) of the resident taxpayer is applied.

For tax purposes, financial income is equivalent to interest, and includes income from credits of any nature such as income from bonds and debentures, income from deposit and fixed income investment transactions, including capital gains arising from discounts or premiums on these types of transactions. It also includes any cost or expense that is economically equivalent to interest in connection with obtaining financing from third parties, such as yields generated on convertible bonds or zero-coupon bonds, among others.

The measure regarding the specific rules for the banking and insurance sectors shows that the previous rule, i.e., a limit based on a debt/equity ratio of 3, was maintained.

PARAGUAY

In Paraguay, rules are provided for the deductibility of interest on loans, royalties and technical assistance, when they are performed by a) the partner or shareholder of the company; b) the parent company or other branches or agencies abroad; c) related companies, as indicated in Law No. 6380 (2019) in Article 15 numeral 23.

The condition stipulates that interest expenses on loans, royalties and technical assistance must not exceed the market price or accrue interest at rates that do not exceed the average passive rates of the banking and financial market applicable to operations of similar characteristics, according to the publication of the average rates issued by the Central Bank of Paraguay; the amount of the corresponding taxes has been paid and such expenses do not exceed 30% of the net income for the year, before the deduction of such expenses is computed.

PERU

In Peru, starting January 2021, the interest deduction will be limited to 30% of the EBITDA of the previous year (net income after offsetting losses plus net interest, depreciation and amortization). Interest in excess of the limit may be deducted in the following 4 years.

This limitation is not applicable, among others, to companies of the financial and insurance system, companies with revenues less than or equal to 2,500 UIT Tax Unit (approximately US$310 thousand), Public-Private Partnerships, indebtedness from the issuance of debt securities that meet certain conditions, as indicated in Executive Decree 1424.

As a transitory measure, it has been established that during 2019 and 2020 the deduction of interest on financing transactions between related and independent parties will be subject to a limit of 3 times the net assets of the previous year (thin capitalization rule). Note that, until 2018 such limitation only applied to financing transactions between related parties.

COSTA RICA

In Costa Rica, Law No. 9635 in its Title II, article 2, numeral 10, establishes the limitation of 30% for the first two years starting from the second year of the law's enforcement, and will be adjusted downward each year by two percentage points until reaching 20% of the profit before taxes, interest, amortization and depreciation. The only exceptions are for transactions with financial entities, public infrastructure projects or supervised financial entities.

Financial expenses paid to local and foreign regulated entities are not considered within the financial expense limitation. This last point is not in line with the recommendations of Action 4 of the BEPS Plan.

MEXICO

In Mexico, as of January 1, 2020, Article 28 of the Income Tax Law included a rule adjusted to the recommendations of Action 4, limiting the deduction of net interest for the year that exceeds 30% of EBITDA. The rule incorporated into Mexican law excludes members of the financial system from applying the limitation on the deduction of interest.

CHILE

In Chile, the debt/equity ratio of 3 is maintained, applicable to debt with related parties. To date, Chile has not adopted the recommendations of Action 4 of the BEPS Plan, nor is it in the process of doing so.

It should be noted that a thin capitalization rule of this type was implemented in 2014. Except for some adjustments proposed in a tax modernization bill, no other immediate changes are under consideration.

A study was also conducted on the implementation of Action 4, which concluded that the ratio of net financial expenses to EBITDA is highly volatile. It was also possible to appreciate that the medium-sized taxpayer's segment has a higher ratio of net financial expenses to EBITDA than the large taxpayer's segment, which reflects the regressivity of the standard.

BRAZIL

Brazil is currently in the process of adopting the recommendations of Action 4 of the BEPS Plan. The limit of deductibility of interest when it is paid to the related company abroad, calculated on the basis of EBITDA, is proposed within its regulations.

HONDURAS

In Honduras, to date, the recommendations of Action 4 of the BEPS Plan are in the process of being adopted, and there is a bill that contemplates the limitation of interest deductions.

Deductions of interest and other financial payments are being audited without there currently being a reform in the legislation or a tool focused on limiting the progress in the application of this risk. There are no plans to consider the fixed ratio rule, only the group rule.

It is important to note that countries such as Bolivia, Cuba, Dominican Republic, El Salvador, Guatemala, Haiti, Jamaica, Nicaragua, Panama, Trinidad and Tobago, Uruguay and Venezuela have not adopted the recommendations of Action 4 of the BEPS Plan, nor are they in the process of doing so.

4. EXPERIENCES IN OTHER COUNTRIES

GERMANY

In Germany, the type of interest limitation rule as of 2019 is Earnings stripping. The accounting measure adopted is interest on EBITDA. The fixed ratio applied is 30% over EBITDA, and its limit is on the net interest expense, applicable to debt with third parties and related parties. There is a threshold of 3 million euros or when the net amount paid to any shareholder of more than 25% does not exceed 10% of the total.

SPAIN

In Spain, Law 27 (2014) in its article 16 regulates the limitation of financial expenses. The type of interest limitation rule as of 2019 is Earnings stripping. The accounting measure adopted is interest over EBITDA. The fixed ratio applied is 30% over EBITDA, and its limit is on the net interest expense, applicable to debt with third parties and related parties.

It applies to all entities with an exit rule allowing deductibility of 1 million euros. The group ratio is not included, only the fixed ratio is considered. However, the group ratio is optional. Also, certain exceptions are not included in the application of the ratio rule, in particular in relation to long term loans.

PORTUGAL

In Portugal, Article 67 of the Corporate Income Tax Code states that the type of interest limitation rule as of 2019 is Earnings stripping. The accounting measure adopted is interest on EBITDA. The fixed ratio applied is 30% over EBITDA, and its limit is on the net interest expense, applicable to debt with third parties and related parties. There is a threshold of 1 million euros.

BELGIUM

In Belgium, the type of interest limitation rule as of 2019 is Earnings stripping. The accounting measure adopted is interest on EBITDA. The fixed ratio applied is 30% of EBITDA, and its limit is on the net interest expense, applicable to debt with third parties and related parties.

Excess financing costs are deductible up to the greater of (i) the €3 million threshold or (ii) 30% of the taxpayer's taxable EBITDA. The threshold amount must be considered on a consolidated basis.

This implies: The EBITDA of the taxpayer must be increased or decreased by the amounts paid/received by the taxpayer to/from a Belgian company or Belgian permanent establishment which are part of the group and are not excluded from this rule. The threshold of EUR 3 million will be shared proportionally among the members of the group.

There are also two different debt/equity ratios depending on the type of loan. For loans granted by the directors and shareholders of non-resident companies to a resident company, a debt/equity ratio of 1 is set.

CZECH REPUBLIC

In the Czech Republic, the type of interest limitation rule as of 2019 is Earnings stripping. The accounting measure adopted is interest on EBITDA. The fixed ratio applied is 30% over EBITDA, and its limit is on net interest expense, applicable to debt with third parties and related parties.

Likewise, there are two different debt/equity ratios depending on the type of loan. For loans granted by a bank or insurance company, a debt/equity ratio of 6 is established. As a general ratio, a debt/equity ratio of 4 is established.

DENMARK

In Denmark, the type of interest limitation rule as of 2019 is Earnings stripping. The accounting measure adopted is interest on EBITDA. The fixed ratio applied is 30% over EBITDA, and its limit is on net interest expense, applicable to debt with third parties and related parties. There is a threshold of 1 million euros.

There are also two different ratios, the first one based on the tax value of assets, which also affects net financial expenses exceeding DKK 21.3 million (approximately EUR 2.5 million), and if the debt exceeds the threshold of DKK 10 million (approximately EUR 1.3 million) and the debt/equity ratio of 4.

ESTONIA

In Estonia, the type of interest limitation rule as of 2019 is Earnings stripping. The accounting measure adopted is interest on EBITDA. The fixed ratio applied is 30% on EBITDA, and its limit is on net interest expense, applicable to debt with third parties and related parties. There is a threshold of 3 million euros.

FINLANDIA

In Finland, the type of interest limitation rule as of 2019 is Earnings stripping. The accounting measure adopted is interest on EBITDA. The fixed ratio applied is 25% over EBITDA, and its limit is on net interest expense, applicable to debt with third parties and related parties.

There is a threshold of 500 thousand euros. Despite the established rules, the deductible amount of interest expense net of external net interest is EUR 3 million.

FRANCE

In France, the type of interest limitation rule as of 2019 is Earnings stripping. The accounting measure adopted is interest on EBITDA. The fixed ratio applied is 30% of EBITDA, and its limit is on the net interest expense, applicable to debt with related parties.

There is a threshold of 3 million euros considered as a general limit. In this scenario, only up to 75% of all net financial expenses will be deductible.

The deductibility of interest paid to shareholders and related parties also applies if the debt/equity ratio is 1.5. If the amount of interest paid to related parties exceeds the amount of interest received from related companies, i.e. ratio interest paid to related companies / interest received from related companies of 1.

There is a threshold of EUR 1 million or 10% of EBITDA (whichever is higher). It is considered a safe harbor (no interest limitation applies) if the debt/equity ratio of the group to which it belongs is higher than its own ratio.

NETHERLANDS

In the Netherlands, the type of interest limitation rule as of 2019 is Earnings stripping. The accounting measure adopted is interest on EBITDA. The fixed ratio applied is 30% over EBITDA, and its limit is on the net interest expense, applicable to debt with third parties and related parties. There is a threshold of 1 million euros.

GREECE

In Greece, the type of interest limitation rule as of 2019 is Earnings stripping. The accounting measure adopted is interest on EBITDA. The fixed ratio applied is 30% over EBITDA, and its limit is on the net interest expense, applicable to debt with third parties and related parties. There is a threshold of 3 million euros.

HUNGARY

In Hungary, the type of interest limitation rule as of 2019 is Earnings stripping. The accounting measure adopted is interest on EBITDA. The fixed ratio applied is 30% over EBITDA, and its limit is on the net interest expense, applicable to debt with related parties.

ITALY

In Italy, the type of interest limitation rule as of 2019 is Earnings stripping. The accounting measure adopted is interest on EBITDA. The fixed ratio applied is 30% over EBITDA, and its limit is on the net interest expense, applicable to debt with related parties.

LITHUANIA

In Lithuania, the type of interest limitation rule as of 2019 is Earnings stripping. The accounting measure adopted is interest on EBITDA. The fixed ratio applied is 30% over EBITDA, and its limit is on net interest expense, applicable to debt with related parties.

There is a threshold of 3 million euros, and also a debt/equity ratio of 4 applicable to debt with related parties.

LUXEMBOURG

In Luxembourg, the type of interest limitation rule as of 2019 is Earnings stripping. The accounting measure adopted is interest on EBITDA. The fixed ratio applied is 30% over EBITDA, and its limit is on the net interest expense, applicable to debt with third parties and related parties. There is a threshold of 3 million euros.

NORWAY

In Norway, the type of interest limitation rule as of 2019 is Earnings stripping. The accounting measure adopted is interest on EBITDA. The fixed ratio applied is 25% over EBITDA, and its limit is on net interest expense, applicable to debt with third parties and related parties.

There is a threshold of NOK 25 million (approximately EUR 2.5 million) on a consolidated basis for all Norwegian entities.

POLAND

In Poland, the type of interest limitation rule as of 2019 is Earnings stripping. The accounting measure adopted is interest on EBITDA. The fixed ratio applied is 30% over EBITDA, and its limit is on net interest expense, applicable to debt with third parties and related parties. There is a threshold of 3 million Polish zloty (approximately 630 thousand euros).

SLOVAC REPUBLIC

In Slovak Republic, the type of interest limitation rule as of 2019 is Earnings stripping. The accounting measure adopted is interest on EBITDA.

The fixed ratio applied is 25% of EBITDA, and its limit is on gross interest expense, applicable to debt with related parties.

SLOVENIA

In Slovenia, the type of limitation rule is the debt/equity ratio as of 2019, with a ratio of 4. Its limit is on gross interest expense, applicable to debt with related parties.

SWEDEN

In Sweden, the type of interest limitation rule as of 2019 is Earnings stripping. The accounting measure adopted is interest on EBITDA. The fixed ratio applied is 30% over EBITDA, and its limit is on net interest expense, applicable to debt with third parties and related parties.

There is a threshold of SEK 5 million (approximately 480 thousand euros).

SWITZERLAND

In Switzerland, the type of interest limitation rule is the debt/equity ratio as of 2019. The rule provides acceptable levels of debt financing per asset category based on fair market values.

Its limit is on gross interest expense, applicable to debt with related parties.

ICELAND

In Iceland, the type of interest limitation rule as of 2019 is Earnings stripping. The accounting measure adopted is interest on EBITDA. The fixed ratio applied is 30% over EBITDA, and its limit is on net interest expense.

There is a threshold of 100 million Icelandic krona (approximately 700 thousand euros).

TURKEY

In Turkey, the type of interest limitation rule is the debt/equity ratio as of 2019, with the ratio being 3. The limit is on net interest expense, applicable to related party debt.

UNITED KINGDOM

In the United Kingdom, the type of interest limitation rule as of 2019 is Earnings stripping. The accounting measure adopted is interest over EBITDA. The fixed ratio applied is 30% of EBITDA, and its limit is on the net interest expense, applicable to debt with third parties and related parties.

There is a threshold of £2 million (approximately €2.3 million).

BULGARIA

In Bulgaria, the type of interest limitation rule as of 2019 is Earnings stripping. The accounting measure adopted is interest on EBITDA. The fixed ratio applied is 30% over EBITDA, and its limit is on the net interest expense, applicable to debt with related parties.

CROATIA

In Croatia, the type of interest limitation rule is the debt/equity ratio as of 2019, being the ratio of 4, applicable to related parties.

ROMANIA

In Romania, the type of interest limitation rule as of 2019 is Earnings stripping. The accounting measure adopted is interest on EBITDA. The fixed ratio applied is 10% over EBITDA, and its limit is on the net interest expense, applicable to debt with third parties and related parties.

There is a threshold the equivalent in Romanian leu of the amount of 1 million euros or 30% of the base calculation, where the base is (income - expenses + excess borrowing costs + tax depreciation amounts).

MALTA

In Malta, the type of interest limitation rule as of 2019 is Earnings stripping. The accounting measure adopted is the excess of borrowing costs to tax-adjusted EBITDA.

The fixed ratio applied is 30% of EBITDA. The limit applies to excessive borrowing costs (net interest expense).

The threshold has been chosen to be implemented in sub-paragraph 4(a) of Article 4 of EU Council Directive 2016/1164. This provides a EUR 3 million threshold together with an anti-fragmentation rule.

RUSSIA

In Russia, the type of interest limitation rule is the debt/equity ratio as of 2019, being the ratio of 3, applicable to related parties.

UNITED STATES

In the United States, the type of rule is based on the interest limitation. The accounting measure adopted is interest over EBITDA. The fixed ratio applied is 30% of EBITDA, and its limit is on gross interest expense, applicable to debt with third parties and related parties. There is a threshold of US$25 million.

CANADA

In Canada, the type of interest limitation rule is the debt/equity ratio as of 2019, being the ratio of 5, applicable to related parties.

JAPAN

In Japan, the type of interest limitation rule as of 2019 is Earnings stripping. The accounting measure adopted is interest over EBITDA. The fixed ratio applied is 50% over EBITDA, and its limit is on net interest expense, applicable to debt with related parties.

There is a threshold where the net interest expense in a fiscal year is 20 million yen or less (approximately 151 thousand euros). Also, there is a debt/equity ratio of 3 applicable on gross interest.

SOUTH KOREA

In South Korea, the type of interest limitation rule as of 2019 is Earnings stripping. The accounting measure adopted is interest over EBITDA. The fixed ratio applied is 30% over EBITDA, and its limit is on net interest expense, applicable to debt with related parties.

There is a threshold where the net interest expense in a fiscal year is 20 million yen or less (approximately 151 thousand euros). Also, there is a debt/equity ratio of 2 applicable on net interest.

CHINA

In China, the type of interest limitation rule is the debt/equity ratio as of 2019, being the ratio of 2, applicable to related parties.

INDIA

In India, the type of interest limitation rule as of 2019 is Earnings stripping. The accounting measure adopted is interest over EBITDA. The fixed ratio applied is 30% over EBITDA, and its limit is on gross interest expense, applicable to debt with related parties. There is a threshold of 10 million rupees (approximately 120 thousand euros).

On the other hand, it should be mentioned that countries such as Austria, Ireland, Cyprus, Latvia, Albania, Andorra, Bosnia, Macedonia, San Marino, Serbia, Ukraine and Monaco have not adopted the recommendations of Action 4 of the BEPS Plan, nor are they in the process of doing so.

5. METHODOLOGY

The methodology maintains a qualitative and quantitative approach through case study analysis. Accordingly, based on the tax regulations applicable in a jurisdiction that is within the Inclusive Framework of the BEPS Plan, the following procedure is considered:

1. The total value of interest paid or accrued by any taxpayer that is not a financial institution or insurance company, in transactions with related parties, will be subject to a deductibility limit.

2. The deductibility limit is 20% of the earnings before labor participation, plus interest, depreciation and amortization (EBITDA) of the resident taxpayer.

3. Group ratio does not apply.

4. The minimum net interest value (MIN) will be calculated as the result of subtracting, from the total interest paid or accrued in the fiscal year, the total financial yields or interest recorded as taxable income of the taxpayer.

5. The net interest in related party transactions (RPT) will be defined as the total interest paid or accrued by the taxpayer in related party transactions; however, this value (RPT) will not be less than the minimum value (MIN) calculated above.

6. When the limit calculated on EBITDA is less than or equal to zero (operating loss), the taxpayer may not deduct for income tax purposes the total value of interest paid or accrued by the taxpayer on related party transactions.

7. When the limit calculated on EBITDA is greater than zero (operating income), and the net interest in related party transactions (RPT) does not exceed such limit, the taxpayer may deduct for income tax purposes the total value of interest paid or accrued by the taxpayer in related party transactions.

8. When the limit calculated on EBITDA is greater than zero (operating income), and the net interest in related party transactions (RPT) exceeds such limit by an amount greater than the total value of interest paid or accrued by the taxpayer in related party transactions, the total of the latter item will not be deductible.

9. When the limit calculated on EBITDA is greater than zero (operating revenue), and the net interest in related party transactions (RPT) exceeds such limit by an amount less than the total value of interest paid or accrued by the taxpayer in related party transactions, only the respective excess will not be deductible.

10. Once the aforementioned points have been reviewed, the companies to be evaluated must be selected, whose common aspects are the loans they have with local and/or foreign related parties.

11. Subsequently, using the respective corporate income tax returns for the last tax year, the following variables are identified: Profit before labor participation, net interest, depreciation, amortization, EBITDA.

12. Next, the respective calculations of the minimum value of the net interest (MNI) and the net interest in related party transactions (RPT) are made. After this, the deductible and non-deductible financial expenditure is determined according to the regulations applied.

6. RESULTS

The results in limiting financial expenditures in each of the cases presented are shown below:

Table 1
Deductibility of financial expenses

INTEREST DEDUCTION	CASE 1	CASE 2	CASE 3	CASE 4
Income (Loss) before Employee Profit Sharing	100.000	25.000	2.500	- 32.000
(+) Interest accrued or paid	25.000	50.000	5.000	30.000
(+) Depreciation and/or amortization	800	10.000	3.000	800
Adjusted earnings (EBITDA)	125.800	85.000	10.200	- 1.200
LIMIT (20% EBITDA)	**25.160**	**17.000**	**2.100**	
Interest accrued or paid	25.000	50.000	5.000	30.000
(-) Accruable interest (taxable income)	10.000	100	10.000	5.000
Minimum value of net interest (MIN)	**15.000**	**49.900**	**- 5.000**	**25.000**
Net interest in related operations (RPT)	**15.000**	**49.900**		**25.000**
Deductible financial expense	25.000	17.000		
Non-deductible financial expense		**33.000**	**5.000**	**30.000**

Source: Own elaboration.

CASE 1

- The operating profit (EBITDA) corresponds to the profit before labor participation plus interest accrued or paid and plus depreciation and/or amortization amounting to $ 125,800.
- The calculated limit is 20% of EBITDA, i.e., $ 25,160.
- Interest accrued or paid amounts to Ps. 25,000.
- The accrued interest corresponding to the financial yields collected is $ 10,000.
- The minimum net interest value (MIN), which is the difference between the interest earned or paid and the interest collected, is $15,000.
- Net interest on related party transactions (RPT) is $ 15,000, which is less than the interest accrued or paid.
- Consequently, all financial expenses are deductible to the amount of $25,000.

CASE 2

- Operating income (EBITDA) corresponds to income before employee profit sharing plus accrued or paid interest plus depreciation and/or amortization of $85,000.
- The calculated limit is 20% of EBITDA, i.e., $17,000.
- Interest accrued or paid amounts to $ 50,000.
- The accrued interest corresponding to the financial yields collected is $ 100.
- The minimum net interest value (MIN), which is the difference between the interest earned or paid and the interest collected, is $49,900.
- Net interest on related party transactions (RPT) is $49,900, which is greater than the interest earned or paid.
- Consequently, the deductible financial expense is $17,000, and the non-deductible financial expense is $33,000.

CASE 3

- Operating income (EBITDA) corresponds to income before employee profit sharing plus interest accrued or paid and plus depreciation and/or amortization, amounting to Ps. 10,500.
- The calculated limit is 20% of EBITDA, i.e., $ 2,100.
- Interest accrued or paid amounts to $5,000.
- The accrued interest corresponding to the financial yields collected is $ 10,000.
- The minimum net interest value (MIN) which is the difference between the interest earned or paid and the interest collected is $ - 5,000.
- There is no net interest in related party transactions (RPT) because the minimum net interest value (MIN) shows a negative result.
- Consequently, all financial expense is non-deductible to the amount of $5,000.

CASE 4

- There is an operating loss (EBITDA) corresponding to income before employee profit sharing plus accrued or paid interest plus depreciation and/or amortization of $ - 1,200.
- There is no calculated limit of 20% of EBITDA, due to the operating loss.
- Interest accrued or paid amounts to $30,000.
- The accrued interest corresponding to the financial yields collected is $ 5,000.
- The minimum net interest value (MIN), which is the difference between the interest earned or paid and the interest collected, is $25,000.
- Net interest on related party transactions (RPT) is $25,000, which is less than the interest accrued or paid.
- Consequently, the entire financial expense is non-deductible to the amount of $30,000.

CONCLUSION

The thin capitalization as a tax avoidance practice consists of the financing between companies of the same group that are located in different jurisdictions, in order to disguise a financing with own resources by external resources, the objective being to minimize the profit obtained from the company located in the country where it is taxed more.

The OECD (2017) in its report on tax base erosion and profit shifting, discusses good practices in tax control, and recommends a fixed ratio rule that limits a company's net deductions for interest and economically equivalent interest payments to a percentage of its earnings before interest, taxes, depreciation and amortization (EBITDA).

At a minimum this should apply to multinational groups specifically in intra-group operations (parent company, subsidiaries, affiliates). To ensure that countries apply a fixed ratio that is low enough to address BEPS, while recognizing that not all countries are in the same position, the recommended approach includes a ratio between 10% and 30%.

To date, out of a total of 134 Latin American countries, members of the OECD and Inclusive Framework, 67 countries have interest limitation rules in force, including interest to EBITDA ratio, debt/equity ratio, minimum thresholds, as well as general and specific thin capitalization rules, respectively.

These rules impact companies with a high level of interest expense and a high net interest/EBITDA ratio, ensuring that net interest deductions are linked to the taxable income generated by their economic activities. An important feature of the fixed ratio rule is that it only limits a company's net interest deductions. The rule does not restrict the ability of multinational groups to obtain debt with unrelated third parties, and then finance the generation of exempt income in one of their related companies.

REFERENCES

Blouin, J., Huizinga, H., Laeven, L. and Nicodème, G. (2013). Thin capitalization rules and multinational firm capital structure, No. 1323, Working Papers, Oxford University Centre for Business Taxation. https://EconPapers.repec.org/RePEc:btx:wpaper:1323

Buettner, T., Overesch, M., Schreiber, U.y Wamser, G. (2012). The impact of thin-capitalization rules on the capital structure of multinational firms, Journal of Public Economics, 96, issue 11, p. 930-938. https://EconPapers.repec.org/RePEc:eee:pubeco:v:96:y:2012:i:11:p:930-938

Buslei, H. y Simmler, M. (2012). The impact of introducing an interest barrier: Evidence from the German corporation tax reform 2008, DIW Discussion Papers, No. 1215, Deutsches Institut für Wirtschaftsforschung (DIW), Berlin. http://hdl.handle.net/10419/61391

CIAT (2021). Base de Datos BEPS actualizada entre los meses de enero a mayo de 2021. Acción No. 04 Limitar la erosión de la base imponible por vía de deducciones en el interés y otros pagos financieros. https://www.ciat.org/base-de-datos-monitoreo-beps/

Egger, P., Eggert, W., Keuschnigg, C. y Winner, H. (2010). Corporate taxation, debt financing and foreign-plant ownership, European Economic Review, 54, issue 1, p. 96-107. https://EconPapers.repec.org/RePEc:eee:eecrev:v:54:y:2010:i:1:p:96-107

Fernández González, M. (2016). La deducción de los gastos financieros en el Impuesto sobre Sociedades: un análisis de la normativa anti-elusión española. Tesis Doctoral. Universidad de Cantabria. Departamento de Economía. https://repositorio.unican.es/xmlui/bitstream/handle/10902/8438/Tesis%20MFGT.pdf?sequence

Fuest, C., Hebous, S. y Riedel, N. (2011). International debt shifting and multinational firms in developing economies, Economics Letters, 113, issue 2, p. 135-138. https://EconPapers.repec.org/RePEc:eee:ecolet:v:113:y:2011:i:2:p:135-138

Graham, John R., (1996). Debt and the marginal tax rate, Journal of Financial Economics, 41, issue 1, p. 41-73. https://EconPapers.repec.org/RePEc:eee:jfinec:v:41:y:1996:i:1:p:41-73

Haufler, A. y Runkel, M. (2012). Firms' financial choices and thin capitalization rules under corporate tax competition, European Economic Review, 56, issue 6, p. 1087-1103. https://EconPapers.repec.org/RePEc:eee:eecrev:v:56:y:2012:i:6:p:1087-1103

Huizinga, H., Laeven, L. y Nicodème, G. (2008). Capital structure and international debt shifting, Journal of Financial Economics, 88, issue 1, p. 80-118. https://EconPapers.repec.org/RePEc:eee:jfinec:v:88:y:2008:i:1:p:80-118

OCDE (2017), Limiting Base Erosion Involving Interest Deductions and Other Financial Payments, Action 4 - 2016 Update: Inclusive Framework on BEPS, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264268333-en

OCDE (2021), Action 4 Limitation on Interest Deductions. https://www.oecd.org/tax/beps/beps-actions/action4/

Ruf, M. y Schindler, D. (2015). Debt Shifting and Thin-Capitalization Rules – German Experience and Alternative Approaches, Nordic Tax Journal, 2015, issue 1, p. 17-33. https://EconPapers.repec.org/RePEc:vrs:notajo:v:2015:y:2015:i:1:p:17-33:n:2

Schindler, D., Møen, J., Schjelderup, G. y Tropina, J. (2013). International Debt Shifting: Do Multinationals Shift Internal or External Debt? VfS Annual Conference 2013 (Duesseldorf): Competition Policy and Regulation in a Global Economic Order, Verein für Socialpolitik / German Economic Associatio. https://EconPapers.repec.org/RePEc:zbw:vfsc13:79749

Taylor, G. y Richardson, G. (2013). The determinants of thinly capitalized tax avoidance structures: Evidence from Australian firms, Journal of International Accounting, Auditing and Taxation, 22, issue 1, p. 12-25. https://EconPapers.repec.org/RePEc:eee:jiaata:v:22:y:2013:i:1:p:12-25

Weichenrieder, A. J., Windischbauer, H. and Weichenrieder, A. (2008). Thin-Capitalization Rules and Company Responses Experience from German Legislation, No. 2456, CESifo Working Paper Series, CESifo. https://EconPapers.repec.org/RePEc:ces:ceswps:_2456

Factors affecting the voluntary use of electronic tax documentation in Chile. Case: Electronic sales and services ticket

Mauricio Andrés Marín Escobar

SYNOPSIS

The mandatory use of electronic tax documents has been a pillar in the modernization of the Internal Revenue Service. The last document that was added to this regime corresponds to the sales and services ticket (called boleta in Spanish), which since March 2021 has been mandatory for all companies.

However, this document was optional for almost two decades, being used voluntarily by hundreds of companies. The present research sought to establish which determinants affect the probability of voluntary adoption of this document, in such a way as to provide a reference for future public policies in the field.

KEYWORDS: Sales and services ticket, Electronic receipt, Electronic tax documents, Electronic invoicing

CONTENT

Introduction
1. Purpose of the research
2. Main assumptions
3. Experience in the use of electronic tax documents
4. Methodology and development

Conclusion
References
Annexes

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INTRODUCTION

At the beginning of 2020, Law 21,210 was enacted, which, among other matters, established the mandatory issuance of the electronic sales and services ticket in electronic format starting in 2021, in addition to other documents that present such a requirement, such as invoices, credit and debit notes, which has had positive results in the collection of value added tax.

However, the intention to force the electronic issuance of this document was announced almost a year and a half earlier, when in August 2018 the bill entered Congress through a presidential message. At that time, about 15,000 taxpayers used the electronic ticket voluntarily, representing about 4% of the total number of companies that should adopt this form of issuance.

During the 16 months it took for the project to be processed, the number of companies that joined the electronic issuance of the ticket increased, reaching a little more than 150,000 by the end of 2020. However, it was not until the obligation became really effective that the great majority of taxpayers began to use the electronic invoice, amounting to more than 500,000 companies that currently use the document through the different systems available.

Why do some companies optionally issue their tax documents electronically, while others only do so when it is mandatory? Moreover, considering the multiple benefits that, in theory, the operation of electronic form has, such as the reduction of costs in terms of paper use and storage of documents, as well as the saving of time by avoiding attending in person before the SII to authorize their tickets, and the facilitation of internal management of companies, since they can access reports of their sales, inventory control, among others.

This question is the driving force of the present work, which will try to identify how likely it is that a taxpayer migrates from the paper world to the electronic one. In other words, we will seek to know what are the factors that determine that a taxpayer voluntarily chooses to fulfill their obligations to issue tax documents electronically, unlike those who will do so only if they are compelled.

To do this, information that characterizes electronic ticket issuers in various variables will be used, along with their registration date, to establish whether they were influenced by the announcement of the obligation or began to use the document completely voluntarily.

To answer this question, a “probit” model will be used, which will allow us to calculate the probability of transitioning from a paper sales and services ballot issuance model to an electronic one, considering the milestones mentioned in the previous paragraph. In this way we will obtain a valuable input that will help us establish some bases to understand the behavior of taxpayers in the face of the modernization of the State and the digitalization of procedures in our country. In addition, the quality of Chile as a benchmark in the field of electronic tax documents at the international level should be considered, so this analysis can be especially useful for future related public policies, both in Chile and for other countries.

1. PURPOSE OF THE RESEARCH

Chile, and in particular the Internal Revenue Service (SII), have been examples at the international level in the field of digitalization of procedures (Inter-American Development Bank, 2021). As an example, electronic invoicing has been mandatory for years, allowing the Chilean state to access information on all transactions made between companies. The present work seeks to provide a frame of reference for future public policies for both Chile and abroad, on the adoption of technological systems by citizens and companies. To do this, the case of the mandatory electronic sales and services ticket, which began in 2021 for all taxpayers, will be analyzed, identifying those who present the greatest difficulty for its adoption, in such a way as to have more information to develop strategies and facilitate the fulfillment of new obligations.

Through this analysis, we will seek to answer the following question: What factors influence the voluntary issuance of electronic tax documents by taxpayers, and what is the impact on their behavior? For this, as mentioned above, the case of the electronic sales and services ticket will be analyzed.

2. MAIN ASSUMPTIONS

When talking about electronic or digital systems, various barriers that users must face appear on the horizon, preventing or hindering the adoption of new technologies. These difficulties are especially relevant in situations such as the use of tax documentation, since the non-compliance with what is indicated by the legislator causes breaches that can bring serious consequences for the taxpayer.

Therefore, we should not make the mistake of minimizing or ignoring the existence of these difficulties, but on the contrary, we should pay special attention to them, in order to facilitate the adoption of these tools, and in the particular case we are analyzing, to facilitate the tax compliance of individuals and companies.

Considering the experience accumulated since the creation of the electronic tax document issuance system in 2003, the main factors that are noticed when joining the voluntary issuance of this type of documentation are the following:

- Users with poor or irregular internet access

It also includes those who are located in geographical areas far from urban poles tend to a lesser use of technological tools. It should be noted that this situation is considered by the legislator, allowing the issuance of tax documents on paper to those taxpayers who have their domicile in places without access to data connectivity or electric power.

- Younger users or digital natives

They have a greater predisposition to the use of technological systems, compared to older people.

- Income level

Migrating to technological systems brings with it new costs, both in the acquisition of infrastructure (computers, mobile devices), and services (data plans).

- Company size

In the sense of presenting a greater challenge in their administration and internal control, the large companies will have a greater incentive to use electronic systems than micro or small companies that only have one branch office.

- Monitoring

The use of electronic systems brings with it a feeling of greater control by the tax authority towards taxpayers, so companies that present questionable tax behavior or that incur in constant breaches of their obligations tend to present a lower intention of using technological tools.

3. EXPERIENCE IN THE USE OF ELECTRONIC TAX DOCUMENTS

Knowing the scope and results of the implementation of tax documentation in electronic format is of vital importance to understand the context in which this public policy is developed, and also to understand the relevance of this analysis.

First of all, we will analyze our country, taking into consideration that in Chile different documents are used for transactions with business customers (B2B) and final consumers (B2C), using in the first case the electronic invoice and in the second case the electronic sales and services final ticket. (or final consumer invoice) Although this situation is repeated in different countries, the electronic invoice is a much more consolidated document in comparison with the ticket, where its mandatory use in electronic format is much less developed. For this reason, the information on the electronic sales and services ticket is somewhat scarcer, unlike the electronic invoice, for which there are various studies that show the positive effects in terms of collection and in decreasing VAT evasion with the use of this document, both in Chile and abroad. Considering that, the experiences in the field of electronic invoicing are analyzed, and its eventual similarity with the sales and services ticket, to analyze the advantages that exist in the use of tax documentation in electronic format for various countries

3.1 Results in Chile

Since 2014, there has been a consistent decrease in the evasion of value added tax (Internal Revenue Service, 2018), at which time the obligation to issue electronic invoices in our country began, from 23.2% in 2014 to an expected 21.3% in 2018. The above was reaffirmed by the Minister of Finance of the time, Felipe Larraín, who reported that VAT evasion fell for the first time from the 20% limit, thanks to the implementation of electronic invoicing (Gallardo, p. 2018).

Considering the good experience in this matter, the Law Modernizing the Tax Legislation (Act No. 21,210, 2020) was enacted. This law, among other things, stipulates that all sales and service receipts issued on paper must be replaced by an electronic one, which is expected to raise an additional US $1,181 million for the tax authorities in the next three years after its implementation (Leiva. M, 2018), despite the initial questions raised by several experts, who expected an overestimation of the collection capacity of this measure (Céspedes et al., 2018)

This year, the institution reported that in January 2021 it recorded an increase in VAT collection of 17% (Servicio de Impuestos Internos, 2021), in the first month of the beginning of the obligation to issue tax receipts in electronic format, which allows to continue fighting tax evasion, which is estimated at around 20% for this tax.

3.2 Results abroad

The evidence in Latin America regarding the use of electronic invoicing is also overwhelming (Inter-American Development Bank, 2018). The document details the main advantages of the implementation of electronic invoicing, which are summarized as: tax control, economic dynamics, accounting advantages for taxpayers and information security, where except for the first point, the rest of the advantages directly benefit taxpayers, a key element for its implementation.

In addition, that document reflects that both Argentina, Ecuador and Mexico showed increases in VAT collection after the implementation of the electronic invoice, despite the fact that the tax rate did not change, although it should be considered that given the extension of the evaluated period, there may be other factors that explain the variation. In addition, some studies in Ecuador and Argentina reaffirm this. In the first case, the VAT increased by 24% in taxpayers who used electronic invoicing, compared to those who did not (Inter-American Development Bank, 2018). For its part, in the trans-Andean country, there is statistically significant evidence that there is an improvement in the levels of taxed sales and VAT debits once companies start issuing electronic invoices (Inter-American Development Bank, 2018). Although in the case of Uruguay the first mentioned study did not show increases in collection, another document shows that the Electronic Tax Documentation (EFT) regime had a positive effect of 3.7% on the amount of payments in that country (Inter-American Development Bank, 2018).

The positive effects of issuing invoices in electronic format have been studied not only in Latin America. The study conducted in South Korea mentions that 69.4% of the 334 respondents agreed or strongly agreed that e-invoicing has contributed to curb the evasion of value added tax (Chul Lee H. 2016). In addition, other benefits are reported, such as greater efficiency in operations and management that tax authorities can perform.

3.3 Experience with the electronic ticket

As mentioned above, the evidence on the mandatory use of the electronic sales and services ticket, and its benefits for tax coffers and the market, is rather less generous. However, if the challenges involved in its implementation have been analyzed, establishing that, although the gaps in compliance due to VAT evasion are an important catalyst for the digitalization of tax documents, showing good results in electronic invoicing in countries such as Brazil, Mexico and Colombia, although there is an important difference between the virtual world and the real world, as the author names them (Koch, B. 2017).

Another relevant aspect are the expectations of growth in their use, especially boosted by the covid-19 Pandemic, which has brought an important boost both in the digitization of procedures and in the way in which consumers have changed their shopping habits, opting increasingly for electronic commerce, there are great expectations of development for both B2B and B2C transactions, in which the use of electronic sales and services tickets is framed, where the initiatives of various countries in this matter are mentioned (Koch, B. 2021). To highlight our country, which is listed as a leader in the region and will also be used as an example by Israel for the implementation of its electronic invoice registration.

4. METHODOLOGY AND DEVELOPMENT

For the present work, the Internal Revenue Service has the authorization to use the information from taxpayers issuing electronic sales and services tickets, which is cross-sectional as of August 2021, accounting for a total of 466,616 companies. This information consists of various of their characteristics; however, it is not possible to identify them, thus safeguarding the integrity of their personal information.

Taking into account the availability of data and the question we are seeking to answer, we determined that the most appropriate model to use is a “probit” model, which allows us to calculate the probability that a taxpayer transitions from a model of issuing paper sales and service receipts to an electronic one, considering the descriptive variables available, where the dependent variable would be the enrollment or not in electronic tickets for an evaluated given period of time.

4.1 Time periods to be analyzed

The analysis was conducted for two different periods of time, in order to identify changes in the behavior patterns of taxpayers in the face of different incentives:

- Before the announcement of the obligation to issue the tickets exclusively in electronic format. In this case, companies registered with a date equal to or earlier than August 2018 are considered.

- Once the obligation to issue the tickets exclusively in electronic format is implemented In this case, companies registered after February 2021 are considered.

In this way, the evolution of the aforementioned variables in these periods will be compared, in such a way as to identify patterns that allow understanding the impact of each of them on the probability that a taxpayer chooses to issue their tax documents in electronic format, along with determining whether there are modifications in the behavior of taxpayers in both scenarios posed.

4.2 Description of the variables

The analysis unit will consist of each taxpayer, for which a database was built that considers the following descriptive and outcome variables.

- Size of the taxpayer

Variable that can obtain the values 1, 2, 3 or 4, corresponding to Micro-enterprise, Small Enterprise, Medium Enterprise and Large Enterprise, respectively. It should be mentioned that this classification is the one used by the Internal Revenue Service (Law N° 20.416, 2010), allowing to consider the effect of the income of companies on the probability of registration in electronic ticket, along with the difficulty in its administration.

- Rural areas

Variable that corresponds to the percentage of rural population residing in a given commune. The value 0 corresponds to a commune with 100% of its urban population, being used as an approximation to the eventual difficulties of data connectivity, understanding that, at a higher level of rurality, it is likely that there is a lower availability of internet service. In addition, it also presents the restriction that, for taxpayers located in the same commune, they will have the same value, regardless of their particular conditions.

- Number of branches

Variable that consists of the number of branches that the taxpayer has reported to the Internal Revenue Service. This variable, like the size, gives us information about the size of the taxpayer and the possible administration problems that are solved through the use of technological tools.

- Number of authorized paper tickets

Variable that shows the number of sales and service tickets on paper that were authorized by the SII to taxpayers, providing valuable information about the volume of their operation.

- Tax age

Variable that considers the years from the beginning of the taxpayer's activities to the obtaining of the data used (August 2021). This variable will allow us to get closer to the "younger" users of the sales and services electronic ticket system.

- Number of non-compliances in VAT

Variable that provides us with insights into their tax behavior. All taxpayers issuing sales and service tickets must file their Monthly Tax Return on a monthly basis through Form 29 (F29). Each time a company does not make this declaration, an automatic mark is generated in the Internal Revenue Service systems, so the more of these breaches, the worse tax behavior is assumed.

- Number of breaches of domicile accreditation

Variable that provides us with insights into their tax behavior. Every time a taxpayer modifies his address, or adds a new branch, he must prove this address to the tax authority, presenting documentation that supports this information (lease contract, current domain certificate, or another). Each time a company does not make this declaration, an automatic mark is generated in the Internal Revenue Service systems, so the more of these breaches, the worse tax behavior is assumed.

- Global risk

Variable that can obtain the notes 1, 2, 3 and 4, referring to a Low, Key, Medium and High-risk level, respectively. The Internal Revenue Service defines global risk as "*an indicator of historical behavior that groups taxpayers into four categories according to the probability of failing to comply with tax obligations and the consequences that these failures could have on collection, processes or the image of the Service*" (Internal Revenue Service, 2021).

- VAT impact

Variable that indicates whether a taxpayer has activities that affect the value added tax, or only has activities that do not affect or exempt from said tax, which will allow us to identify if the taxpayer's economic activities are related to the probability of using electronic documents.

- Registration as an electronic ticket issuer

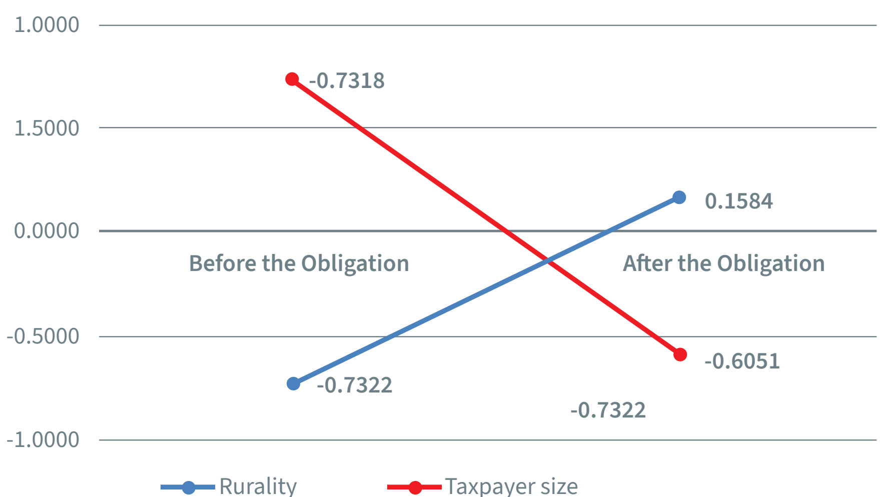
Variable (Enrolled or Not Enrolled) that will be used as a dependent variable being evaluated at different periods in time. This variable will allow us to calculate the influence of the other variables on the probability of electronic ticket registration by taxpayers.

4.3 Main findings

The most relevant findings occur with the variables "Rural areas" and "Taxpayer Size", since they show a sudden change in behavior between the two time periods analyzed. While prior to the start of the obligation a taxpayer located in a rural area has a considerably lower tendency to use electronic tax documents voluntarily, a larger company has an opposite behavior, that is, it has a higher probability of using the electronic ticket system.

Both assertions are consistent with the hypotheses raised at the beginning of this work, however, once the obligation is already operational the influence of these variables takes an unexpected turn in the first instance. Now, taxpayers in more rural areas would tend to be more receptive when it comes to registering as electronic ticket issuers, while larger companies show the opposite behavior.

Graph 1
Rurality and taxpayer size variables



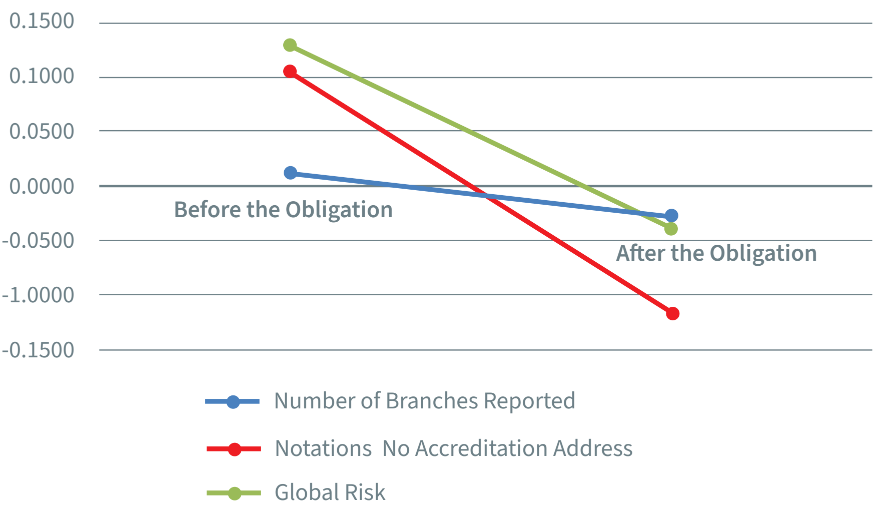
Source: Own elaboration, based on SII information.

In the case of the variable “Rurality,” their behavior seems to indicate that they are taxpayers who generally have a good tax behavior, complying with the obligations established by the authority. However, as long as these procedures are not mandatory, they would prefer to maintain their processes and procedures without major modifications, leaving little room for innovations. The latter can be explained by the technological gap that may exist in these geographical areas, where beyond internet connectivity, value-added services or the development of new business management tools seem to take a back seat. Another plausible explanation lies in a greater tendency to comply with their obligations, either due to fear of the tax authority or due to the reduced availability of resources for the payment of possible fines or penalties.

On the other hand, when talking about the largest companies, they had a great incentive to operate with electronic tickets voluntarily, which consists of the benefits that this modality presents for the management and administration of the business, so it is not surprising that they presented a positive effect prior to the obligation. However, if as of March 2021 there were still medium-sized or large companies that continued to operate with analog systems for sales and service tickets issuance, it is most likely because they did not want to migrate to an electronic issuance model. There are various reasons for the above, which range from conservative organizational cultures to companies that reject technological systems to avoid handing over information to the tax authority, thus avoiding eventual inspections or even sanctions, as well as a greater economic capacity to face such consequences.

Graph 2

Other variables that change their effect



Source: Own elaboration, based on SII information.

Continuing along this line of tax behavior, we see how other variables that modify their effect between the two stages, and whose objective is to capture the effect of tax behavior, behave in the same way. These are “Entries Without Proof of Address” and “Risk”, which present a behavior consistent with the Size variable, which seems to partially endorse the hypothesis about taxpayers who present a possible bad tax behavior, when we talk about medium or large, which could explain the lower probability of registration in electronic ticket when they are already obliged.

It should be mentioned that in the previous graph it can be seen that the variable “Number of Branches” behaves in a similar way to the other variables described, which also allows us to draw some conclusions about the taxpayers who have a larger size or size in their operation, and about how the obligation to issue sales and services tickets in electronic format affects them negatively in their probability of registration as electronic ticket issuers.

Finally, other variables were not incorporated into the previous graphs such as ”Tax Age“, ”Number of Stamped Tickets“, ”VAT Affect“ and ”F29 Non-Filing Entries”, because, regardless of the period of time analyzed, they always positively influence the registration in sales and services electronic ticket, not seeing their behavior modified as in the cases analyzed above.

CONCLUSION

The present work was born with the intention of providing information on the behavior of taxpayers when issuing their tax documentation electronically, specifically in documents sent to the final consumer (B2C), that is, sales and service tickets, and in this way, serve as a reference for future public policies in the matter, delivering elements to determine which type of users will present greater difficulties or greater resistance to change, in order to better focus efforts on the implementation of the projects. This could even be extrapolated to the digitalization of procedures at a general level, a matter that has taken on special relevance in recent times given the covid-19 pandemic.

By establishing that there are factors that allow determining in advance that a group of taxpayers will have greater difficulties issuing their documents electronically, and what is the incidence of these determinants on the behavior of taxpayers, recommendations can be made to carry out different strategies that facilitate the adoption of new technologies by users, according to the segment to which they belong.

By analyzing the results of the model using, both for before and after the start of the obligation to issue electronic sales and services tickets in electronic format, the existence of certain behavioral patterns has been corroborated, as well as the existence of certain variables that will help us understand, and even predict which group of taxpayers will voluntarily enter the electronic world of issuance, or on the contrary, they will only do it when this is inevitable (and even then they will show some reluctance).

In particular, a striking behavior is observed for the largest companies, either by their sales level or by the size of their operation, who go from having a very high probability of using electronic documentation before the obligation becomes a reality, to presenting a lower tendency in its use in the following scenario, which should be a warning signal for the tax authority, who should pay special attention to this group of taxpayers. On the other hand, the myth is broken with rural taxpayers, who, faced with the inevitability of electronic issuance, have a greater tendency to comply with this obligation, despite its limitations.

At the same time, the analysis conducted allows to identify some variables different from the aforementioned ones that do have an impact on the way in which taxpayers face the obligations in terms of digitization of procedures imposed by the authority, such as the global risk calculated by the Internal Revenue Service and the non-compliance in terms of domicile accreditation by taxpayers, both variables associated with the tax behavior that is jealously monitored by said institution.

On the other hand, some that might initially seem attractive are discarded, such as the number of paper-stamped tickets, non-compliance with monthly tax returns through Form 29, and tax age. What relates to the declaration of the well-known F29 is particularly noteworthy, since it is a highly relevant variable for the Tax Service, but it has apparently no major influence on the adoption of electronic tax documentation by companies.

However, being a first approximation to this universe, the above conclusions should be taken with caution, which should be strengthened in the future by incorporating other variables that could not be added to the present study, such as, for example, the levels of internet connectivity (assimilated in Rurality), and the age of the owners or partners of the company (and not the tax age), among others. In addition, it would be highly recommended to evaluate the variables in different time periods, analyzing the behavior of companies in the face of different incentives, applying a political economy analysis of institutions. It would be very interesting to analyze how the probability of registration in the electronic ticket was modified since the announcement of its future mandatory nature, the creation of the Free Electronic Ticket Issuance System of the SII in August 2020, the subsequent delay of some months of the mandatory nature (Law N° 21.256, 2020), until effectively the obligation was a reality for all companies.

In spite of the limitations mentioned in the previous paragraph, the conclusions of this work give a warning signal and call for a rethinking of the logics, approaches and possible prejudices that are held when digitalizing certain procedures, and even more so when they are obliged to be conducted electronically. This is especially evident with rural taxpayers, who, despite having an obvious greater difficulty joining the electronic world voluntarily, present a better behavior when faced with the obligation.

The latter suggests that, with the appropriate support and advice, companies that may have a relevant digital divide in the first instance can migrate towards technological solutions without the need for a law that forces them to do so, which brings with it a series of benefits, both for the companies themselves and for the state. In addition to the economic and political costs of the processing of a draft law, especially expensive when the subject is of a tax nature, a better approach to the needs and behavior of taxpayers in the face of the challenges of digitalization can prevent institutions that conduct projects of this type from exerting unnecessary efforts in the identification of these taxpayers, and on the contrary, focus their resources on those who will tend to default on their future obligations, despite the appearance of a greater inclination to do so.

REFERENCES

Banco Interamericano de Desarrollo. (2018, enero). Análisis del impacto de la factura electrónica en Argentina.

Banco Interamericano de Desarrollo. (2018, enero). Factura electrónica y cumplimiento tributario: Evidencia a partir de un enfoque cuasi-experimental.

Banco Interamericano de Desarrollo. (2018, enero). Facturación Electrónica en Ecuador: Evaluación de impacto en el cumplimiento tributario.

Banco Interamericano de Desarrollo. (2018, marzo). Factura Electrónica en América Latina.

Banco Interamericano de Desarrollo. (2021, diciembre). Transformación digital en las administraciones de América Latina: Chile.

Céspedes, L., Cuevas, A., Ffrench-Davies, R., Larraín, G., Micco, A., Piedrabuena, B., Rodríguez, J., Rojas, R. y Ugarte, A. (2018). Análisis del Proyecto de Ley de "Modernización Tributaria". Informe Final. Centro Democracia y Comunidad.

Chul Lee, Hyung. (2016). Can Electronic Tax Invoicing Improve Tax Compliance? A Case Study of the Republic of Korea's Electronic Tax Invoicing for Value-Added Tax. World Bank Group.

Gallardo, P. (2018, junio). Evasión de IVA cae por primera vez del 20% por factura electrónica. Diario La Tercera. Disponible en: https://www.latercera.com/pulso/noticia/evasion-iva-cae-primera-vez-del-20-factura-electronica/206435/

Koch, B. (2017). E-Invoicing / E-Billing Significant Market Transition lies ahead. Billentis.

Koch, B. (2021). E-Invoicing / E-Billing International Market Overview & Forecast. Billentis.

Leiva, M. (2018, diciembre). Reforma Tributaria: SII defendió recaudación de boleta electrónica. Diario La Tercera. Disponible en: https://www.latercera.com/pulso/noticia/reforma-tributaria-sii-defendio-recaudacion-boleta-electronica/442878/

Legislation

Ley Nº 20.416 Fija Normas Especiales para las Empresas de Menor Tamaño", Diario Oficial de la República de Chile, Chile, miércoles 10 de febrero de 2010, pp. S/pág.

Ley Nº 21.210 Moderniza la Legislación Tributaria", Diario Oficial de la República de Chile, Chile, lunes 24 de febrero de 2020, pp. S/pág.

Ley Nº 21.256 Establece Medidas Tributarias que forman parte del Plan de Emergencia para la Reactivación Económica y del Empleo en un marco de Convergencia Fiscal de Mediano Plazo", Diario Oficial de la República de Chile, Chile, miércoles 02 de septiembre de 2020, pp. S/pág.

Servicio de Impuestos Internos (2018). Serie de Evasión en el IVA empalmada 2003 – 2018. Disponible en: https://www.sii.cl/sobre_el_sii/economico-tributario.html

TECHNICAL ANNEXES

1. Summary of the used variables

Table N° 1 summarizes the variables mentioned above, indicating their type, coding and source of extraction.

Table 1
Variables summary

Variable	Type	Codification	Source
Registration as electronic ticket issuer (Y)	Dependent	Dichotomous	SII
Size of the taxpayer	Independent	Discrete	SII
Rural areas	Independent	Continuous	INE
Number of branches	Independent	Discrete	SII
Number of authorized paper tickets	Independent	Continuous	SII
Tax age	Independent	Discrete	SII
Number of non-compliances in VAT	Independent	Discrete	SII
Number of breaches of domicile accreditation	Independent	Discrete	SII
Global risk	Independent	Discrete	SII
VAT impact	Independent	Dichotomous	SII

Source: Own elaboration.

2 Analysis of the model before obligation

Developing the probit model for the situation of taxpayers prior to the announcement of the mandatory issuance of electronic sales and services receipts, we obtain the following values for the coefficients that accompany each variable studied. It should be recalled that the model in this period of time aims to calculate the probability of using the electronic format of the sales and services receipt on a voluntary basis, according to the following expression:

$$\mathbf{Y} = -3{,}39 + 0{,}0092X_1 + 0{,}0003X_2 + 0{,}0061X_3 + 0{,}1007X_4 - 0{,}7322X_5 + 0{,}1267X_6 + 0{,}7318X_9$$

Table 2
Model results before the obligation

Variable	Coefficient	P Value	
Intercept	-3.3930	$< 2e^{-16}$	***
Number of branches informed (X_1)	0.0092	$6{,}46e^{-14}$	***
Number of stamped tickets (X_2)	*0.0003*	0,00349	**
Annotations for Non-Submission F29 (X_3)	0.0061	$< 2e^{-16}$	***
Annotations No Accreditation Address (X_4)	0.1007	$< 2e^{-16}$	***
Rurality level (X_5)	-0.7322	$< 2e^{-16}$	***
Global risk (X_6)	0.1267	$< 2e^{-16}$	***
Subject to VAT (X_7)	0.0079	0,69479	
Tax age (X_8)	0.0009	0,08274	
Taxpayer size (X_9)	0.7318	$< 2e^{-16}$	***

Source: Own elaboration.

It can be seen that some initial hypotheses are fulfilled, in the sense that taxpayers of a larger size or with higher sales have a greater probability of voluntarily registering as electronic issuers. This can be seen in the coefficients associated with the variables "Number of Branches" and "Taxpayer Size", which present a positive value, indicating that the higher the sales, the more likely the use of electronic documents.

On the contrary, the rurality variable presents the opposite behavior, since the higher the level of rural population of the commune to which the company belongs, the lower the probability that it will voluntarily join the issuance of electronic invoices. This is also consistent with what was stated at the hypothesis level, since the rurality variable helps us to approach the reality of taxpayers with difficulties in Internet connection, or who have a greater digital gap.

The rest of the variables seem to be positively correlated with the probability of voluntarily registering as an electronic tax return user, highlighting those related to the taxpayer's behavior, which in the first instance would go against the initial hypothesis that a company with bad tax behavior would tend to have a lower propensity to use documents in electronic format. On the other hand, the quality of being subject to or exempt from value added tax, as well as the tax age are not significant, since the hypothesis is not fulfilled by observing the "p-value" obtained for the estimator, so those variables do not influence the behavior of taxpayers at this stage.

3 Post-obligation model analysis

The dependent variable is now analyzed once the obligation to issue the document is in force, obtaining the following results:

$$\mathbf{Y} = 1{,}222 - 0{,}0285X_1 + 0{,}0002X_2 + 0{,}002X_3 - 0{,}1184X_4 + 0{,}1584X_5 - 0{,}0401X_6 + 0{,}1075X_7 + 0{,}004X_8 - 0{,}6051X_9$$

Table 3
Model result after the obligation

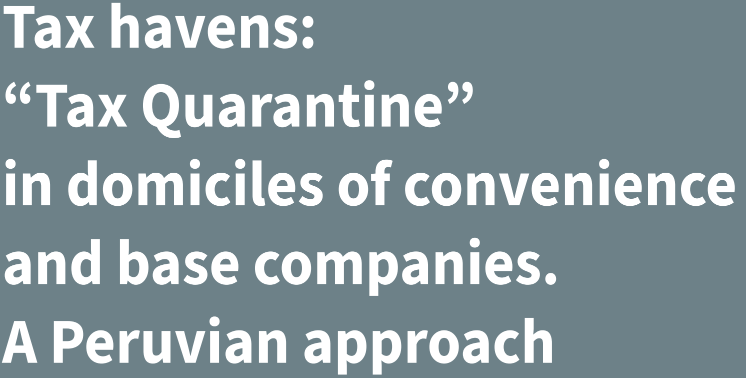
Variable	Coefficient	P Value	
Intercept	1.2220	$< 2e^{-16}$	***
Number of reported branches (X_1)	-0.0285	$< 2e^{-16}$	***
Number of stamped tickets (X_2)	*0.0002*	0,014	*
Annotations Non-Submission F29 (X_3)	0.0020	$< 2e^{-16}$	***
Annotations no accreditation of address (X_4)	-0.1184	$< 2e^{-16}$	***
Rurality level (X_5)	0.1584	$< 2e^{-16}$	***
Global Risk (X_6)	-0.0401	$< 2e^{-16}$	***
Subject to VAT (X_7)	0.1075	$< 2e^{-16}$	***
Tax age (X_8)	0.0040	$< 2e^{-16}$	***
Taxpayer size (X_9)	-0.6051	$< 2e^{-16}$	***

Source: Own elaboration.

Once the obligation has been implemented, the change in the effect of the variables on the probability of becoming an electronic ticket issuer can be seen. Rurality stands out, which now becomes a positive coefficient, indicating that the higher the proportion of rural population, the higher the probability of becoming an electronic issuer, which contradicts to a certain extent the ideas foreseen in the hypotheses of this paper.

On the other hand, at this stage, the negative tax behavior of taxpayers decreases their influence on the probability of becoming electronic issuers, and in the case of annotations for failure to prove domicile, there is even a negative effect. The same occurs with the Risk variable and others that help us determine the size of the taxpayer.

It is worth mentioning that the variables related to the taxable age of the taxpayer and whether the taxpayer is subject to or exempt from value added tax, in this case their influence is significant, compared to the period prior to the beginning of the obligation. Regarding the number of stamped paper tickets, they do not seem to show differences between the different time periods analyzed, all of them having a positive impact on the probability of registration.



Tax havens: "Tax Quarantine" in domiciles of convenience and base companies. A Peruvian approach

Sonia Jackeline Miranda Ávalos

SYNOPSIS

The purpose of this article is to show an anti-tax haven measure called tax quarantine and the structures of tax havens such as domiciles of convenience and base companies. To recognize the fiscal transparency approach to this type of countries that in their fiscal sovereignty decide to encourage the concealment of income and thus erode the tax bases of the income generating countries.

Our study is descriptive, qualitative through documentary sources with bibliographic review. As a result, we consider the application of the tax quarantine for two fiscal years following the departure of Peruvian nationals to countries considered non-cooperative or of low or no taxation as an alternative for the fight against tax evasion and avoidance.

KEYWORDS: Tax havens, Tax forty, Base companies, Convenience companies

CONTENT

Introduction

1. Theorical basis
2. Structure of tax havens
3. Tax planning strategies used by companies to reduce their tax burden from tax havens. tax burden from tax havens
4. Anti-tax haven measures

Conclusion

References

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INTRODUCTION

The non-cooperating countries or territories or low or no taxation denomination incorporated by OECD to the so-called tax havens or tax havens are a latent reality since the existence of isolated islands in ancient Greece until the XXI century, being the freedom of any State under its sovereignty power to choose the tax regime that best suits it; Under these premises, the other States cannot do anything against the freedom and fiscal sovereignty, except for agreements of mutual agreement, otherwise the countries incorporate in their legislation barriers to reduce the transfer of benefits to this type of countries, in addition to the famous black or gray lists published by the OECD or the European Union, in Peru we have a list of 44 countries considered non-cooperating countries or low or no taxation published via Supreme Decree No. 340- 2018-EF.

These tax havens are used as tax planning strategies that in our position are aggressive, depending on the specific case, used by the company to reduce its tax burden, through the application of structures motivated by asset protection, investment diversification and tax savings such as domiciles of convenience, base companies, special purpose vehicles and service companies. Our article will focus on the domiciles of convenience and base companies. Thus, in order to counteract these structures, anti-tax haven measures appear, among them the tax quarantine, a measure that is applied in the Spanish literature, provided for in article 8, paragraph 2 of the Personal Income Tax Law (Law 35/2006 of Personal Income Tax).

In the Peruvian approach we do not have this measure to counteract the transfer of profits to low or no taxation or non-cooperating countries, would it be advisable to apply it in Peru and in other countries? The development of this article aims to show and put in analysis to the reader a latent problem and reflection of the actions of our countries where we live is sufficient or how we should improve through the application of good practices in this case in particular the use of the "Tax Quarantine".

1. THEORETICAL BASIS

1.1 Tax havens or low or no taxation countries

1.1.1 Background

The concept of tax havens has been present in the history of humankind, Charles Adams, in his book "Tales of Tax Havens: Stooges, Bandits and Swindlers", points out that tax havens are nothing new. Some historians mention the existence of isolated islands that have been tax havens as far back as Ancient Greece, as noted by BBC Mundo.

The Romans had established most incredible tax haven in the ancient world, in the second century B.C. on the island of Delos in the Aegean Sea. Adams explains that tax havens played an especially important role in the growth and stability of the Roman Empire, so much so that the Roman government rewarded cities that were loyal to it by giving them the status of tax-free ports or Libertas. Freedom in the ancient world meant nothing more than freedom from taxes. Taxing, on the other hand, according to the historian Cicero, was more of a punishment for all those who rebelled against Rome. Many cities therefore enthusiastically supported the expansion of the Roman Empire in exchange for this status, i.e. that of tax-free ports, a policy that was particularly popular in the time of Emperor Julius Caesar.

The term tax haven began to be coined as early as the 1950s, although it is not clear why and how it was coined. However, the foundations of tax havens as we know them today, i.e. territories whose tax law allows zero or extremely low taxes in order to attract clients from abroad, emerged in the 19th century.

Professor Ronen Palan, in his book "History of Tax Havens", points out that the first examples of these territories were not independent nations, but the US

states of New Jersey and Delaware, according to the BBC Mundo portal [1].

In the late 19th century, they implemented the "easy incorporation" policy, which is used by all tax havens today.
This policy allows someone to "buy any ready-made company and start trading in less than 24 hours". In other words, the company is already structured and only the names of the owners have to be put in.

At the same time, these states created highly favorable conditions.

Professor Ronen Palan in his book "History of Tax Havens" recounts that New Jersey was extremely attractive to corporations because of its liberal "business incorporation" laws and low tax rates.

The model was so successful that it was subsequently brought to Europe in the early 20th century. Several Swiss cantons, particularly the impoverished canton of Zug, not far from Zurich, copied this practice. The Zurich-Zug-Liechtenstein triangle emerged as a true tax haven center in Europe in the 1920s.

Another key piece of the modern concept of tax havens was created by the British. It is the concept of the virtual residence of a company.

"We should give credit to the British courts for creating the virtual residency technique that allows companies to incorporate in the UK without paying tax, a development that some believe is the linchpin of the tax haven phenomenon." (BBC World, 2016).

So it is that today, tax havens make up an important part of the global economy. According to an article published by Bloomberg cited by BBC Mundo, one third of the world's 200 richest people, with an estimated wealth of US$2.9 trillion, control part of their personal fortune through a company located in these havens. And that is why they are also so controversial. These are also a key piece in the world's inequity, as they make it easier for the so-called 1% to evade their social responsibilities, while the middle class and the poorest have to comply with the payment of their taxes (BBC Mundo, 2016).

This Inequity that is in inverse relation with tax justice, by transferring their incomes to countries with low or no taxation, without considering the place of the source of such wealth.

This is a phenomenon that needs to be reduced, however, the political environment and the sovereignty of each country mean that we still have these tax phenomena, such is the case that Luxembourg and Ireland do not appear as tax havens by the European Union even though in practice they are, hence the importance of the subject to be investigated in this article.

1.1.2 Definition

There is no official or standardized definition that explains exactly what should be understood as a tax haven, within their denominations, they are also called offshore companies (Offshore) the term Offshore is more a colloquial term than a legal description and was used in navigation mainly in the United Kingdom.

According to the Dictionary of Administration and Finance (Rosenberg, 1989) it is defined as a country with very favorable tax laws for the establishment of the legal residence of individuals or legal entities that want to pay less taxes.

In turn, the Accounting, Administrative and Tax Dictionary of José Isauro (López, 2004) defines it as jurisdictions that within their tax administration do not contemplate norms that regulate the generation of an income tax or do so at minimal or symbolic rates, in relation to other Tax Administration systems.

1 https://www.bbc.com/mundo

The Dictionary for Jurists (Palomar, 2003) points out that a tax haven is a place where the absence or parity of taxes and financial controls applicable to resident foreigners constitutes an effective incentive to attract foreign companies and investors.

Thus, we can conclude, that tax havens are those countries that allow in some way either legally or not, to favor foreign investors or with their banks grant facilities to favor their local economies and thus attract more capital and investment to their country. (Davizon, 2014)

These are territories whose regulations, mainly fiscal and financial, are established in order to attract money from abroad that will not be destined to the productive activity of the receiving country. We speak then of tax havens only for foreigners, since for residents the regulations are usually much stricter. This is the reason we also speak of dual systems: a very flexible and lax system of play for foreigners coexists with a strongly regulated and supervised system for residents.

We should ask ourselves the question: Who uses tax havens and how do they use them?

The use of tax havens is primarily by three different types of actors: banks, transnational corporations and high net worth individuals, banks, transnational corporations and high net worth individuals. While all these actors take advantage of tax havens for their own benefit, their specific purposes and mechanisms differ from one another (Garzon, 2011).

Likewise, Chávez points out: A "Tax Haven" may be a country, a territory, a certain region or also an economic activity that is sought to be privileged over the rest, with the purpose of capturing strong investments, incorporating companies, hosting natural persons (individuals) with large capitals, etc. In other words, tax havens are those places that attract foreign investors because of the favorable tax treatment they receive. As can be seen, the term "tax haven" admits multiple possibilities, which is why it is advisable to use the term "low tax countries or zones".

In practice, governments use two main methods for the "identification, hunting and trapping" of tax havens, and capture" of tax havens. The first consists of preparing blacklists of tax havens. The other option is to draw up a list of defining characteristics of a tax haven. In this way, any country or territory that meets the "requirements" of the list will merit the distinction.

Since the first method seems to me to be ineffective due to its lack of dynamism, I will list the basic characteristics of tax havens.

a. Basic features of tax havens

• Existence of a dual system, in such a way that there is a different tax, exchange control, banking, etc. regime, depending on whether it applies to nationals of that haven or to holders of third States that are covered by it.

The confidentiality, secrecy and anonymity in which the ownership and movements of bank accounts, transactions of all kinds, the ownership of the shares of the companies domiciled therein, etc. are conducted, all of which are protected by banking, commercial, administrative and registry secrecy.

• Existence of a restrictive law that prevents the lifting of bank secrecy and the limits of information (scarce and with no tax significance) that can be obtained from public records, the tax administration itself rejects any type of mutual assistance and exchange of information with other tax administrations, whether or not they are covered by agreements to avoid international double taxation.

• These jurisdictions prevent the negotiation of any kind of agreement that includes a clause regulating the exchange of information, this being one of the indicators that reflects, vis-à-vis the international community, the will of these countries to configure themselves as a privileged tax zone.

Even if such a clause is available, in practice, these actions are limited or cancelled on the grounds that the performance of such actions involves the disclosure of a commercial or industrial secret, or for reasons of administrative practice that prevent its application, and finally they may choose to delay the deadlines for the delivery of the required documentation.

• There is an absence of any regulation limiting or controlling the movement of capital originating, or of capital that has its origin or destination in a tax haven. This absence of restrictive exchange control regulations allows the recycling of capital using the legal and tax structure offered by the tax haven as a support.

• For this scheme to work, the existence of a communications network, of all kinds, which favors the movement of goods and people, goods and services, as well as the existence of a legal, accounting and tax infrastructure that allows access to advisors, counselors and professionals specialized in taking advantage of the benefits offered by the tax haven.

• In some cases, there is even a tourist infrastructure and a favorable climate that allows attracting investors both economically and as a leisure option.

• Some developing or politically unstable countries offer legal and fiscal immutability clauses guaranteeing, in some cases, the maintenance of the current fiscal status until a certain date or, more reasonable, the automatic and instantaneous transfer, in cases of urgency of the head office or the amounts deposited there, to other countries that do not offer any doubt as to their reliability and international relevance. (Chavez, 2014).

In summary, tax havens have the following characteristics: Places of low or no direct taxation, confidentiality, attractive financial and commercial legislation and political and economic stability. (Picón, 2005).

Next, we will define tax haven from an OECD and Peru perspective.

b. Tax haven according to the OECD[2]

To identify tax havens, the Organization for Economic Cooperation and Development has defined criteria, among others:

That the tax jurisdiction has no or extremely low taxes. While it is true that no or extremely low taxation is a condition to be identified as a tax haven, where non-residents can escape their taxes in countries of residence and here it would fall under the classification of tax haven.

Regarding the lack of transparency and information to know more about the taxpayer, because of the existence of banking and tax secrecy, which does not allow to know the operations conducted within their country or jurisdiction.

Anonymity plays a fundamental role in relation to the fact that tax authorities cannot request information from banks and there is no financial exchange to cooperate, which allows tax fraud and harmful and unfair tax competition.

The impact of the international tax evasion budget means within the tax haven, a harmful competition, as giving response to different criteria, which are based on the opacity of income that has been evaded in a certain way, by multinational companies operating under that regime, in that sense the tax haven expresses a legal reality that has been occurring at international level legally and different from state avoidance (Davizon, 2014). We present here the list of tax havens according to OECD.

2 Organisation for Economic Cooperation and Development.

Table 1
List of tax havens according to OECD

Andorra	Grenada	Niue - Nueva Zelanda
Anguilla - Overseas Territory of the United Kingdom	Guernsey/Sark/Aldemey - Dependency of the British Crown	Panamá
Antigua y Barbuda	Isla of Man - Dependency of the British Crown	Samoa
Aruba - Kingdom of The Netherlands	Jersey - Dependency of the British Crown Liberia	The Republic of Seychelles
Commonwelath of the Bahamas	The Principality of Liechtenstein	St. Lucia
Bahrain	The Republic of Maldives	The Federation St. Christopher & Nevis
Barbados	The Republic of the Marshall Islands	St. Vincent and the Granadines
Belize	The Principality of Monaco	Tonga
British Virgin Islands - Overseas Territory of the United Kingdom	Monserrat Overseas Territory of the United Kingdom	Turks & Caicos - Overseas Territory of the United Kingdom
Cook Island - New Zealand País independiente en asociación libre con Nueva Zelanda	The Republic of Nauru	US Virgin Islands - External Territory of the United States
The Commonwealth of Dominica	Netherlands Antilles -Kingdom of the Netherlands: Holanda, Antillas Holandesas y Aruba son tres países del Reino de Holanda	The Republic of Vanuatu
Gibraltar - Overseas Territory of the United Kingdom		

Source: Picón (2005).

In addition, it is important to note that on February 27, 2020, the European Union will update its blacklist, i.e. the list of countries with low or no taxation, which are composed of:

Table 2
List of tax havens according to Peru

Samoa American	Samoa	Trinidad and Tobago
Cayman Islands	Panama	United States Virgin Islands
Fiji	Palau	Vanuatu
Guam	Oman	Seychelles

Source: Council of the European Union https://www.consilium.europa.eu/es/policies/eu-list-of-non-cooperative-jurisdictions/

c. *Tax Haven under Peruvian Law*

We can distinguish it under two options:

Option 1.
List of 44 countries, which will be detailed in the following lines.

Option 2.
Definition; For a jurisdiction to be considered an LBNI[3] two characteristics must be present;

• Effective IR rate[4] (companies 29.5%) <= 60% of Peruvian IR (14% or less).

• It presents one of the following characteristics;

a) That they are unwilling to provide information on the beneficiaries with no or low taxation.

b) That the country or territory has a particular tax regime for non-residents that provides tax benefits or advantages that explicitly or implicitly exclude residents.

c) That the parties benefiting from low, or zero taxation are prevented, explicitly or implicitly, from operating in the domestic market of such country or territory.

d) That the country or territory advertises itself, or is perceived to advertise itself, as a country or territory to be used by non-residents to escape taxation in their country of residence. (Picón, 2005).

We note that through Supreme Decree No. 340-2018-EF published on December 30, 2018, Annex No. 1, the list of countries with low or no taxation was updated as follows:

Table 3
List of tax havens according to Peru

1. Anguila	12. Granada	23. Mancomunidad de Dominica	34. República de Liberia
2. Antigua y Barbuda	13. Guam	24. Mancomunidad de las Bahamas	35. República de Maldivas
3. Aruba	14. Guemsey	25. Niue	36. República de Nauru
4. Bahía de Jersey	15. Isla de Man	26. Principado de Andorra	37. República de Panamá
5. Barbados	16. Islas Caimán	27. Principado de Liechtenstein	38. República de Seychelles
6. Belice	17. Islas Cook	28. Principado de Mónaco	39. República de Trinidad y Tobago
7. Bermudas	18. Islas Monserrat	29. Región Administrativa Especial de Hong Kong	40. República de Vanuatu
8. Curazao	19. Islas Turcas y Caicos	30. Reino de Bahréin	41. Saint Maarten
9. Estado Independiente de Samoa	20. Islas Vírgenes Británicas	31. Reino de Tonga	42. San Vicente y las Granadinas
10. Federación de San Cristóbal y Nieves	21. Islas Vírgenes de Estados Unidos de América	32. República de Chipre	43. Sampa Americana
11. Gibraltar	22. Labuán	33. República de Islas Marshall	44. Santa Lucía

Source: Salvatierra (2019).

3 Free, low or zero taxation.

4 Income tax.

Palau, Fifi, Oman are part of the black list (tax havens) of the European Union as of 02/18/2020, however, in Peruvian literature they are not considered tax havens.

It is curious to note that Luxembourg (Luxleaks case) and Ireland, countries of the European Union, are not considered tax havens by the European Union, nor by the OECD or Peru. Although there are investigations of the tax advantages granted to large transnational corporations in the world (see chart below), which motivates us to conduct a major investigation, which does not correspond to the analysis of this article.

Graph 1

European Commission investigations on tax benefits

DATE	COUNTRY	COMPANY	RETURNS (millons of euros)
October 2015	Luxemburgo	Fiat	**23,1**
October 2015	Holanda	Starbucks	**25,7**
January 2016	Belgium	35 multinacionales	**900,0**
August 2016	Ireland	Apple	**14.300,0**
October 2017	Luxembourg	Amazon	**282,7**
June 2018	Luxembourg	Engie	**120,0**
September 2018	Luxembourg	McDonald's	-

Source: El País https://elpais.com/internacional/2019/01/23/actualidad/1548263635_497369.html

1.1.3 Why tax havens have a negative connotation

The negative connotation of tax havens derives from the following aspects:

a) Through its use, it is possible for taxpayers with large businesses or wealth to escape their tax obligations. The above implies the reduction of current revenues used by the States to comply with their constitutional duties, such as the provision of public goods, etc.

b) The use of tax havens has an important effect on the competitiveness of transnational companies, which take advantage of the tax advantages obtained through their use to achieve economically more competitive products or services. This results in a distortion of competition in the domestic market, since the lower price is not achieved as a consequence of higher productivity, but as a result of tax evasion and avoidance.

c) They lead to strong and harmful "tax competition". In order to attract foreign investment, countries that are not considered tax havens (especially capital-importing countries such as Colombia) have to resort to tax rates that allow them to be competitive with them. This significantly reduces their access to resources that, in the absence of such "harmful competition", would be available to them.

Additionally, the negative connotation of tax havens derives from the fact that they are closely related to the concealment of the proceeds of illicit activities, known as "money laundering".

The basic problem is that tax havens can erode the tax bases of other countries, as far as they can be used, in the absence of exchange of information, to reduce or avoid the de facto tax burden in other States. Legitimate burden, which companies or individuals seeking to avoid it should be willing to reciprocate, to the extent that they have enjoyed the public and collective goods, as well as the other favorable conditions that a State with a high level of taxation usually offers. (Davizon, 2014).

In the following, we will detail the structures of tax havens in relation to domiciles of convenience and base companies.

2. STRUCTURE OF TAX HAVENS

Generally speaking, the use of tax haven structures can be accessed for three main reasons:

I. Patrimonial Protection
II. Tax Savings
III. Investment Diversification

Below, we will detail the structures of tax havens to obtain tax savings:

- Address of convenience
- Base Companies
- Holding companies
- Service providers companies (Picón, 2005)

For the development of our article, we will take two types of tax haven structures:

2.1 Domiciles of convenience or fiscal domicile

Individuals (for Peru) or legal entities with significant economic capacity establish their domicile in tax havens or in countries in which in some way a significant reduction of tax obligations is obtained, although they continue to maintain most of their personal ties and economic activities in the country of origin. This is why companies incorporated in these jurisdictions are called domicile or residence companies. Thus, the first use of tax havens that we identify corresponds to an "emigration", which in essence has a permanent character, meaning a flight of taxpayers and along with them a tax base that had a potential collection.

Reason for use

This emigration[5] in terms of tax domicile responds to the advantages offered by the legal definition of tax residence in the country of residence, opting for the total transfer of the residence abroad.

In this sense, total emigration can be considered as the total liquidation of all ties with the territory of a given tax jurisdiction, since one does not emigrate from one country to another if the latter does not offer a better environment or at least as good as the country one is leaving. However, it should be pointed out that the main reason, but not the only one, for the use of tax domiciles in tax havens is not to be taxed in a territory where taxation is high, thus changing the links with a territory that allows the greatest tax savings. Now, emigration to the offshore domicile can occur not only totally, but also under the modality of non-permanent transfer, for an extended period of time, of the tax residence while maintaining, as expected, significant links with the country of origin (Picon, 2016), graphed as follows:

5 Population movement that consists of leaving the place of residence to settle in another country or region, generally for economic or social reasons.

Graph 2
Address of convenience

Source: Picón (2016).

2.2 Base Companies

Another structure of tax havens, which allows the tax authorities of a high-tax country to keep assets or income safe from the tax authorities, is the use of base companies.

2.2.1 Definition of base companies

These companies are also called “shell companies”, they are companies established in tax havens or countries that offer certain tax advantages to avoid the income tax of the country where the recipient resides. The latter country recognizes the legal personality of the base company and allows the profit to escape, at least momentarily, from its fiscal sovereignty. It should be noted that the base companies seek to defer the payment of taxes due in the taxpayer’s state of residence. Therefore, the base company domiciled in a tax haven receives the income corresponding to the taxpayer, so that until it is distributed as dividends to the taxpayer no tax is accrued in the country of residence of the taxpayer. As the profit obtained by the base company must be taxed in the State of residence of the recipient when such profit is distributed, technically, through the base companies only the deferral of the payment of tax is obtained. However, this deferral becomes relevant when it takes place over a prolonged period of time, so that in practical terms it would be assimilated to a tax avoidance transaction. Apart from the tax aspects, the main function of a base company is to preserve the agility of financing international operations by avoiding the limitations and burdensome procedures imposed by the legislation of the country of residence (e.g. exchange control or authorization system).

2.2.2 Forms of utilization of base companies

In order to optimize this mechanism, various mechanisms are often used to avoid taxation of profits in the taxpayer’s original state of residence, for example, reinvesting profits in a country other than the investor’s country of residence, transforming the profit into a loan to the investor, into income from work or capital gains or, finally, some system for exempting dividends. A particularly widespread strategy consists in establishing a base company in a tax haven adapted to its purposes. From a tax point of view, the main function of a shell company is to receive income that would otherwise be received directly by the taxpayer and to bring this income under the taxation of the countries where the taxpayer resides. Initially, the income is protected from taxation in the taxpayer’s country of residence because the shell company is constituted as an entity with its own legal personality and recognized as such in the country of its tax domicile. By being transferred to the base company, the income escapes the worldwide taxation to which the taxpayer is normally subject in its country of residence. Although the income may normally be taxed in the form of withholding tax in the country of origin, if the latter applies a system of territorial taxation, this taxation, for a number of reasons, such as the application of a tax convention, may be zero or very favorable, so that significant tax savings may be obtained.

2.2.3 Advantages of using base companies

The fundamental tax advantage is that for a long time the income placed at the low taxation of the tax haven is not distributed, thus materializing the deferral of tax payment. From the taxpayer’s perspective, it is common to consider that it is only a tax deferral. However, the

tax authorities may consider that this advantage is not justified since the base company is used to divert income from the taxpayer's country of residence or to block abroad income that would have been received directly by the taxpayer. In addition, the taxpayer may prevent the shell company from redistributing the income, thus prolonging the tax deferral in the medium or long term.

Income transferred to a base company and over which the taxpayer has rights can escape taxation thanks to a protection mechanism that some call "second degree". This result is achieved by modifying the qualification of the income to benefit from exemptions provided for in tax treaties and by domestic provisions of the taxpayer's country of residence, or by using various techniques.

2.2.4 Second-degree dissimulation mechanisms

Among the second degree or secondary dissimulation mechanisms that allow avoiding taxation of income distributed by the base company to the beneficiary in the form of dividends. These could be:

- Reinvestments abroad of amounts of money that are in a tax haven in such a way that they do not pass through the country where the person concerned is resident.

- Use of these sums of money for shareholder loans.

- Dissolution of the company or transfer of the shareholding and realization of the taxable capital gain at a reduced tax rate or an exempt transaction.

- Distribution in the form of dividends benefiting from the regime of parent companies and subsidiaries.

Finally, we must mention that the income received by the base company may have its origin in the country where it is domiciled, in third countries, or in the country of residence of the shareholder-beneficiary. In the first two cases there will be, from the point of view of the country of residence of the shareholder-beneficiary, deferral of the personal income tax liability corresponding to foreign source income.

In the last case (income from the country of residence of the shareholder-beneficiary) there can be and normally will be tax avoidance of income[6] from a national source; in this case, in order to articulate the avoidance it will be necessary either to use a Double Taxation Agreement[7] (which provides for the exemption[8] of the income in question in the country of the source, for example,

6 The taxpayer's conduct aimed at creating legal transactions with the appearance of being legal, seeking to avoid the tax obligation with indirect violation of the law, avoiding its material field and incidence, that is, avoiding falling within the operations taxed by it (https://ius360.com/publico/tributario/impacto-del-decreto-legislativo-n-1422-en-la-clausula-anti-elusiva-general/).

7 The essence of the Double Taxation Conventions, as systems for the elimination of international double taxation, lies in the mutual transfer of tax sovereignty that the Contracting States enter into for this purpose. It is precisely in the stability and possibilities that this transaction opens up that one of the qualitative differences between unilateral and concerted measures for resolving this phenomenon lies. This is due to the fact that, although the latter operate on the same international consensus on the matter and on the same technical principles, the international pact allows both to modulate the distribution of taxing power among the States involved in the most appropriate way for each specific case, and to introduce technical solutions or mechanisms for resolving this problem that are more refined or finished and that can only be articulated through these systems of coordination of fiscal sovereignties. Thus, as regards the international distribution of the taxing power established by the Double Taxation Conventions, it should be noted that these, insofar as they pivot (move) on the principle of reciprocity and mutual cession, allow modulating the universally accepted principles of priority of taxation of the State of the source and residual right of the State of residence, so that this linear conception becomes more flexible according to different criteria and factors such as the greater or lesser economic connection with each State, the degree of development, needs or priority interests of these, establishing the parties involved. In: CALDERÓN CARRERO, José Manuel. "La Doble Imposición Internacional en los Convenios de Doble Imposición y en la Unión Europea". Editorial Aranzadi.1997. Pág. 58.

8 Privilege by which someone is free from a burden or obligation.

interest, capital gains, etc.), or to use some other form of tax exemption in the country of the source country.), or the use of some special feature or "loophole" of the non-resident legislation of the non-resident country of the country of residence (e.g., non-taxation of real estate held by non-resident companies, non-taxation of interest paid to non-residents, etc.).

In cases where there is only deferral of tax in the country of residence, this deferral may be transformed into avoidance if the income (dividends) is "recharacterized" at the time of redistribution in such a way as to avoid taxation in the country of residence (e.g., in the form of a loan to the shareholder-beneficiary), (Picon, 2016). The following chart outlines this type of tax haven structure.

Graph 3
Base companies

Source: Picón (2016).

It is important to point out that both domiciles for convenience and base companies are tax haven structures. However, it should be noted that they would fit under the concept of tax avoidance since they are behaviors of the taxpayer whose purpose is the creation of legal business with the appearance of being legal, seeking to avoid the tax obligation with indirect violation of the Law, avoiding its material field and incidence. Propitiating the opportunity to be incorporated this type of tax haven structures within the catalog of high tax risk schemes of SUNAT[9].

3. STRATEGIES FOR "FISCAL PLANNING"[10] USED BY COMPANIES TO REDUCE THEIR TAX BURDEN FROM OFFSHORE TAX HAVENS

The following are some of the "tax planning" strategies used by companies to avoid paying tax in their country of residence.

3.1 The "re-founding" of the company

This is one of the strategies most commonly used by U.S. companies. It consists of setting up a subsidiary[11] in a tax haven, inverting the ownership relationship between the parent company and its subsidiary, in such a way that the one that was initially the parent company becomes a subsidiary of the one incorporated in the tax haven. An example of this can be seen in the famous *Tyco International Ltd.* case referred to by Hernández Vigueras, in which this company moved to the Bermuda Islands (1997), thus avoiding payment to the U.S. Administration of taxes derived from its transnational operations.

9 The National Superintendence of Customs and Tax Administration.

10 Covering up tax avoidance.

11 [company] That is controlled by another company that owns the majority of its capital.

3.2 "Thin capitalization" or "undercapitalization"

It consists of the incorporation of companies in a country with ordinary taxation, with a minimum capital and less than what a company under similar conditions would need to start its activities.

Consequently, as it requires resources to develop its activity, it will have to borrow money from third parties, which in turn are subsidiaries or branches of the same corporate group located in tax havens. Under this figure, via interest, the undercapitalized company will transfer resources to such subsidiaries, branches, and thus achieve the following tax saving effects:

1) the subsidiary or branch will not be taxed on such interest because it is located in a tax haven,

2) the undercapitalized company will take the payment of such interest as a cause for deduction, thus reducing its taxable income.

3.3 The "parking of intellectual property"

This practice consists in the relocation of intellectual property in the head of entities incorporated in tax havens, in such a way that the income from licensing the use of trademarks or patents, etc., will no longer be in the head of the resident subject and, therefore, will no longer be part of its worldwide source income, but will be considered in the head of the entities in tax havens where they will not pay tax or will pay it nominally. (Schombergerl & López, 2007).

After conceptualizing, knowing the structures of tax havens and some tax avoidance schemes under the concept of tax planning, with respect to tax havens, we will now present the anti-tax haven measures where we will know the definition of tax quarantine indicated in the title of our article.

4. ANTI-TAX HAVEN MEASURES

Nowadays, the use of tax havens is not an important part of the tax planning of multinational groups, basically due to the anti-tax haven measures adopted by the countries themselves and, on the other hand, for reasons of image that make the presence of investments or activities delicate.

The following are the anti-tax havens measures:

- Fiscal Quarantine
- International Fiscal Transparency
- Undercapitalization
- Transfer Pricing
- No deduction for services (Picón, 2005)

Of which we will elaborate in the Fiscal Quarantine that corresponds to the analysis of our research.

The term fiscal quarantine is derived from the experience lived during the COVID pandemic, where we have learned to recognize the miracle of life much more and to promise ourselves that we will not be the same person, but much better.

Under this preamble, we will understand quarantine at the tax level. And for Peruvian readers, it would make us reflect on the application in the country, thus reducing the levels of tax evasion and avoidance in Peru.

4.1 Tax quarantine

This type of anti-paradise measure proposes the figure that the jurisdiction of the resident will not give immediate effects to the change of domicile when such change is made to a tax haven. This means that, if a taxpayer changes its tax domicile in order to achieve the lowest tax payment, to a jurisdiction considered a tax haven, this change will not take effect instantaneously, so it will continue to be taxed under the rules of the country of its previous domicile. Thus, we can observe that the domicile of convenience breaks or breaks the criterion of worldwide source income, and does not give immediate effects to the change, which is known as "Tax Quarantine".

It is also necessary to refer to the so-called tax quarantine, which means that persons of Spanish nationality who prove their new tax residence in a country or territory qualified by regulations as a tax haven will not lose their status as taxpayers for income tax on natural persons (personal individuals in Peruvian literature). This mandate will be applied in the tax period in which the change of residence takes place and will be extended for the following four tax periods.

This is a very practical and effective measure used by the States in order to avoid the change of tax domicile or "domicile of convenience".

It should be noted that Peruvian legislation has not established the rules that allow the use of tax quarantine.

It can be pointed out that this is a "preventive" rule, generating a special transitional taxation regime for those who change their tax residence to a privileged tax territory.

The law makes it difficult in itself to "relocate" to a tax haven: the Administration can require that the stay in said territory be accredited for more than 183 days in the calendar year, in order to stop the computation of the sporadic absences from Spain as effective time of residence in the Spanish territory.

But, once this test has been passed, the legislator punishes the "Spanish" individual who makes such displacement of fiscal location and has Spanish nationality, with the subjection to taxation by the Income Tax on individuals (subjecting to taxation, therefore, the totality of his income), under a regime of "quarantine", under a peculiar status of farewell to Spanish taxation, for five years (the tax period of departure and the following four tax periods).

Thus, in accordance with the provisions of Article 8, paragraph 2 of the Spanish Personal Income Tax Law (Personal Income Tax Law 35/2006), Spanish nationals who move their tax residence to a tax haven will be subject to personal income tax for five years:

> *"Art. 8. Taxpayers*
> *(…) 2. Individuals of Spanish nationality who prove their new tax residence in a country or territory considered as a tax haven will not lose their status as taxpayers for this tax. This rule will be applied in the tax period in which the change of residence takes place and during the following four tax periods".*

The rule described above has been the subject of much doctrinal criticism, highlighting the unjustified qualification as fraudulent conduct of certain behaviors that are really nothing more than mere "economies of choice"[12].

12 It occurs when the tax regulation allows different possibilities or options, and the taxpayer chooses the one that according to his particular situation is more beneficial (less tax burdensome). It must be distinguished from abuse in the application of the rule or fraud of law.

It should be noted that, if this mandate is imperative, only when the tax authority of the haven certifies such circumstance -the stay for more than six months in its territory- (or this proof is obtained by another means, especially if there is no "tax authority"), the alleged "delocalized" will lose the status of tax resident in Spain. It is notorious the ease with which the "tax" authorities of certain tax havens issue certificates of all kinds and nature (the access to the status of supposedly stable resident or with "certain presence" in their territory, and its consequent accreditation, will easily lack enormous obstacles), with which the task of the counter-proof by the Spanish Administration will end up in most cases being the end of the road. It should not be forgotten that if the final objective of the taxpayer is to flee from his "natural" taxation and to locate himself taxwise under a certain tax status, he may also find it in certain countries, foreign to the list of havens statutorily qualified by the Spanish Administration, or use a transit country of residence, in transit towards his definitive tax destination, in order to avoid, prima facie, the application of the described tax quarantine (which would also be achieved by renouncing the Spanish nationality, which is one of the presuppositions for its application. (Picon, 2016)

It is important to point out that Peruvian legislation has not contemplated this measure; however, it is a good Spanish practice that we can implement.

The following chart is presented for a better understanding.

Graph 4

Tax quarantine

Source: Picón (2016).

4.2 Recommendations to strengthen tax regulations in ordinary tax countries against the use of tax havens and preferential tax regimes

The OECD recommendations in this regard are as follows:

a) Inclusion of CFC legislation[13]. Under such regulations, the profits obtained by a company located in tax havens or subject to preferential tax regimes will be directly imputed to the taxable income of the shareholder or holder of quotas representing the capital of the CFC in its place of residence, even when such profits have not been distributed, thus avoiding the deferral in the payment of the tax. The document also recommends extending the aforementioned treatment to the "*fidecomiso extranjero*" (foreign trust).

13 Controlled Foreign Companies, ECND.

b) Adopt regulations to prevent the legislation on foreign controlled entities from not applying to foreign investment funds. As the common CFC legislation applied only to residents whose participation in the CFC was significant, residents no longer constituted these entities directly, but acquired shares of such international funds, with a low participation, to avoid the application of such legislation.

c) That the methods to avoid international double taxation are not applied when foreign source income is obtained through practices related or linked to tax havens.

d) Adopt rules that allow countries to have mechanisms that facilitate access to information on international transactions and operations abroad of resident taxpayers.

e) Follow the international transfer pricing principles adopted in the OECD guidelines.

f) Establish mechanisms that allow access to banking information for tax purposes. In this sense, all barriers that prevent access to such information must be removed, as well as effective collaboration with the Administration.

g) Undertake programs to intensify the exchange of relevant information for tax purposes, related to tax havens or preferential regimes. The idea is that information on tax havens obtained by a given country can be shared with other countries that may be interested in it. In this sense, it would be convenient to sign treaties or agreements between countries on the exchange of information related to these matters.

h) That conventions and treaties adopt measures to restrict the benefits derived therefrom, with the purpose of preventing subjects located in tax havens or with preferential tax regimes from using them. For example, with provisions tending to determine the residence of a subsidiary based on the residence of its shareholders or the holders of the capital of such subsidiary.

i) Include in tax treaties a list of entities or types of income to which the benefits set forth therein shall not apply.

j) That countries denounce treaties entered into with tax havens and avoid their conclusion in the future.

k) That countries develop coordinated activities aimed at controlling income from practices considered harmful tax competition (tax havens and preferential regimes). It is suggested to conduct joint audits, joint training programs, simultaneous examination of information, etc.

l) Take the necessary measures to enforce the tax claims and demands of other States. The OECD[14] concluded that the use of tax havens for tax purposes increases when support scenarios are not sought to enforce the claims of other countries. This arises from concerns about extraterritorial enforcement of tax claims.

m) Issue a list of jurisdictions that constitute tax havens (*blacklists*).

n) That countries with particular political, economic or other links to tax havens ensure that such links will not contribute to or promote harmful tax competition.

o) Promote principles and practices on good tax administration (Schombergerl & López, 2007).

14 Organisation for Economic Cooperation and Development.

CONCLUSION

Tax havens have their origin in ancient Greece and in Rome since the second century B.C., playing an important role in the growth of the Roman Empire where cities that were faithful were rewarded by giving them the status of tax-free ports and the tribute was considered a punishment for all those who rebelled against Rome. The original vision of this type of countries has not lost its essence in the XXI century, we understand that the taxing power of every State implies the creation, repeal and modification of taxes, reason why tax havens today called non-cooperating countries or low or no taxation still exist and will continue to exist, therefore it is a challenge that each State can ensure tax collection and thus the fulfillment of the purposes of a fairer society with redistribution of public revenues that involves the development of a nation in all its aspects.

Tax haven structures are used for three main reasons, for asset protection, for investment diversification and for tax savings in this last variant we have the application of domiciles for convenience that corresponds to an “emigration”, which in essence has a permanent character, meaning a flight of taxpayers and along with them a tax base that holds a potential collection. And the application of the base companies or also called shell companies offering certain tax advantages to avoid the income tax of the country in which the recipient resides. This is where the anti-tax haven measures appear, one of them being the tax quarantine.

The “tax quarantine” which applies to the year of loss of Spanish residence and the following four tax periods as long as a tax residence is obtained in a tax haven, i.e. the Spanish citizen will be taxed on his worldwide income for the following four years despite having left the Spanish territory. However, it only applies to people who are **Spanish nationality**, here the IRPF law is apart from the criterion of residence by permanence and / or economic or family interests and applies the criterion of nationality. In other words, if a Peruvian citizen who was a tax resident in Spain for a couple of years and then leaves the country to a tax haven, Article 8 of the Personal Income Tax Law does not apply, since the tax quarantine applies only to Spanish nationals.

We find this anti-tax haven measure very interesting, and we take it as a good practice that would be applicable in any country, at least in Peru, with certain nuances such as, for example, the tax quarantine for two fiscal years following the departure of Peruvian nationals to countries considered non-cooperative or low or no taxation as an alternative for the fight against tax evasion and avoidance.

REFERENCES

BBC Mundo. (9 de abril de 2016). BBC Mundo. Recuperado el 19 de Abril de 2020, de BBC Mundo: https://www.bbc.com/mundo/noticias/2016/04/160408_historia_paraisos_fiscales_offshore_finde

Chavez, J. (27 de Junio de 2014). Los paraisos fiscales y su impacto global en América Latina (México). San Nicolas de Hidalgo, México. Recuperado el 20 de abril de 2020

Davizon, G. (2014). Legalidad de los Paraísos Fiscales y la Elusion Fiscal en México. Revista de Estudios de Contaduría, Administración e Informática, 1(8), 86-101. Recuperado el 23 de abril de 2020

Garzon, A. (15 de octubre de 2011). Paraísos fiscales en la globalización financiera. Sevilla, Sevilla, España. Recuperado el 20 de abril de 2020

Picón, J. (22 de agosto de 2005). Paraísos Fiscales. Lima, Lima, Perú. Recuperado el 23 de abril de 2020, de https://www.ipdt.org/uploads/docs/Picon_22-08-05.pdf

Picon, J. (5 de febrero de 2016). Los Paraísos Fiscales como herramienta de Planificación Tributaria en el Perú. Sevilla, Sevilla, España. Recuperado el 23 de abril de 2020, de https://idus.us.es/bitstream/handle/11441/39141/tesis.pdf?sequence=1

Schombergerl, J., & López, J. (21 de mayo de 2007). La problemática actual de los paraísos FISCALES. 10. Bogota, Bogota, Colombia. Recuperado el 23 de abril de 2020

Vásquez, J. (16 de mayo de 2016). Los paraísos fiscales en españa y el mundo. Zaragoza, Aragón, España. Recuperado el 23 de abril de 2020

Tax reform in Paraguay: Evolution, reforms and challenges. Period 2018-2022

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SYNOPSIS

The tax reform implemented in Paraguay seeks to strengthen the state and improve the country's economic structure. Its objectives include increasing equity, justice, modernization and simplification of tax processes, as well as improving income distribution and promoting the formalization of economic sectors. Despite having been conducted in the midst of the COVID-19 pandemic, this reform is expected to have a positive impact on the internal revenue collection. The initial results show an increase in tax revenues, which strengthen the availability of resources for financing the General Budget of the Nation.

KEYWORDS: Tax reform, Tax structure, Tax policy

CONTENT

Introduction
1. Methodology
2. Tax reform. Conceptual aspects
3. Impact of the implementation of Law No.6380-19
4. Methodology for impact estimation
5. Results and analysis of the implementation of the Reform
Conclusion
References

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INTRODUCTION

When analyzing the composition or formal aspects of the tax structure of a country, a process of detailing the important points of the types of taxes, the scope, coverage and finally the tax pressure is initiated, this in order to see and compare at a regional level, regarding the tax burden that new investments or existing ones would bear.

In this context, an important aspect is to be able to develop mechanisms that help potential investors to observe the country as a strategic ally to make investments in fixed capital that help in a way to the development of the country and in turn provide the profitability expected by the investor.

In the case of Paraguay, it is often mentioned that the tax pressure is low and that new taxes should be increased and/or created so that the State can fulfill each of its obligations, without generating cost overruns for new investments or generating conditions to make them strategically attractive for foreign investments.

In the development of this premise, what is sought is to generate appropriate conditions to provide benefits to potential investors, without neglecting the collection needs to cover the General Budget of the Nation.

Considering the foregoing, a process can be initiated to help the interpretation of said reform, within a context of generating resources to support the nation's budget and provide conditions for the population and investors.

Considering the above, it can be mentioned that the low tax pressure that Paraguay presents, added to the difficulties that arise in obtaining resources that manage to generate conditions for financing the budget and the complexity that entails the risk of generating a lot of informality to the economy, an appropriate framework has been developed for the implementation of the reform within the country that aims to mitigate these adversities.

In order to be able to analyze the context of the tax reform together, we present the following structure of research, an analysis made within a broad context that facilitates the exposition of the main results linked to the implementation of the Reform in Paraguay.

For the impact analysis, a residual estimation methodology is used, in which the base collection is established and from it the components that make the tax collection grow are analyzed, thus generating a residue that does not explain the growth of the collection, that is, the collections grow with certain economic variables, and those that are not attributed to those variables, are considered as the impact of the implementation of the reform within the country.

In order to conduct the corresponding analysis, in the same chapter the assumptions and expectations generated by each type of tax are presented, that is, the characteristics of the previous regulations versus the current regulations are developed in order to determine what the real impact on the economy would be.

An important point to note is that during the beginning of the implementation of the tax reform, the COVID–19 pandemic began, so the reform was implemented in the middle of a pandemic.

Thus, many provisions were postponed for the implementation of the reform in full. On the other hand, the tax administration implemented measures to alleviate the situation of the pandemic, generating on the one hand a positive impact from the implementation of the reform but on the other hand a negative impact from the effects of the pandemic, both from the economic point of view and from the point of view of the management of the tax administration in terms of the implementation of administrative measures that can help the most vulnerable sectors of the economy, most affected by the pandemic

1. METHODOLOGY

The implementation of the Modernization and Simplification Law of the tax system in Paraguay generated benefits in the collection structure, increasing the participation of direct taxes and improving the levels of collection per tax, under this hypothesis we seek to analyze the main results found.

The design of the research was non-experimental, considering that during the research the data was analyzed without deliberately manipulating the variables, with this a phenomenon is observed in a natural state, the research had a mixed approach, considering the collection and analysis of quantitative and qualitative data, integrating and generating joint discussion.

As for the research modality, it was Documentary - Bibliographic, considering that different research related to the topic was reviewed, both regionally and internationally, based on qualitative and quantitative aspects.

The research had a mixed approach, considering the collection and analysis of quantitative and qualitative data, integrating and generating joint discussion, to make inferences from all the information collected, thus strengthening the analysis. Likewise, this research was of a cross-cutting nature, determining the impact generated by the implementation of the reform on various aspects of the tax system.

The research aimed at two approaches: i) Exploratory and ii) Descriptive, in that sense it can be noted that both approaches helped to better develop the prepositions that were analyzed within the context of the impact of the Reform.

2. TAX REFORM. CONCEPTUAL ASPECTS

2.1 Conceptual framework

It is important to highlight that the approach to a tax reform should be based on an economic policy that is pursued, this being aimed at economic growth, development or certain measures that help define the objectives set by the country.

2.2 Economic policy

In that sense, there are numerous definitions of economic policy in terms of praxis, in a certain sense it can be defined as "...*economic policy consists in the deliberate variation of a certain number of means to achieve certain objectives*" (Tinbergen, 1952). This author defines three categories of instruments: (i) **Quantitative policies**: considered as the modifications or variations that are applied to the existing instruments; (ii) **Qualitative policies**: considered as the introduction of changes at the structural level within the economy, without altering the essential elements and, (iii) **Fundamental reforms**: they are the fundamental changes of the economic system, in that sense the essence of the socio-economic organization of the country is modified.

2.3 Tax policy

It is an instrument used by all countries in tax matters, or tax policy with their respective instruments, taxes and expenditures. The tax policy is a branch of economic policy that uses, among other instruments, tax revenues that "include the different types of taxes that governments establish, aimed not only at collecting, but also at influencing the distribution of income and the allocation of resources" (Roura, 2010. Page 72).

It is also mentioned that taxation allows to capture resources so that the State and the Government can fulfill their purposes, and provide services to society, such as education, health, and security, among others.

Taxes are a mechanism to influence people's decisions and on the availability of the country's resources, in that sense taxes can be defined, however, by containing several elements there are several definitions such as the one that states that "...*is the only practical means of raising revenue to finance the public expenditure on goods and services that most people demand*" (Vito Tanzi & Howell Zee, 2001).

2.4 The main elements of a tax

The main elements of taxes that are part of the entire tax structure of a country are (Botello, 2020): (i) **Subject**: an individual or a legal entity established within the framework of current regulations that conduct some activity or taxable event that generates an obligation to the state; (ii) **Object**: event that generating the tax or tax obligation, in other words, it can be considered as a taxable event, this established in the current legal regulations; (iii) **Source**: it relates to the amount or assets of an individual or legal entity from which the monetary amounts necessary for the payment of tax can be obtained; (iv) **Base**: represents the amount or definition by the current legal regulations to establish on which the amount of the contribution or tax payable by the subject (taxpayer) is determined, whether an individual or a legal entity (taxable amount); (v) **Rate**: percentage that is established in the legal regulations and that is applied to the basis defined as a criterion for determining the payment; and (vi) **Payment**: it is the amount paid by the subject (individual or legal entity), depending on the determination of the tax in favor of the treasury, which is determined by the taxable base and the rate established in the regulations.

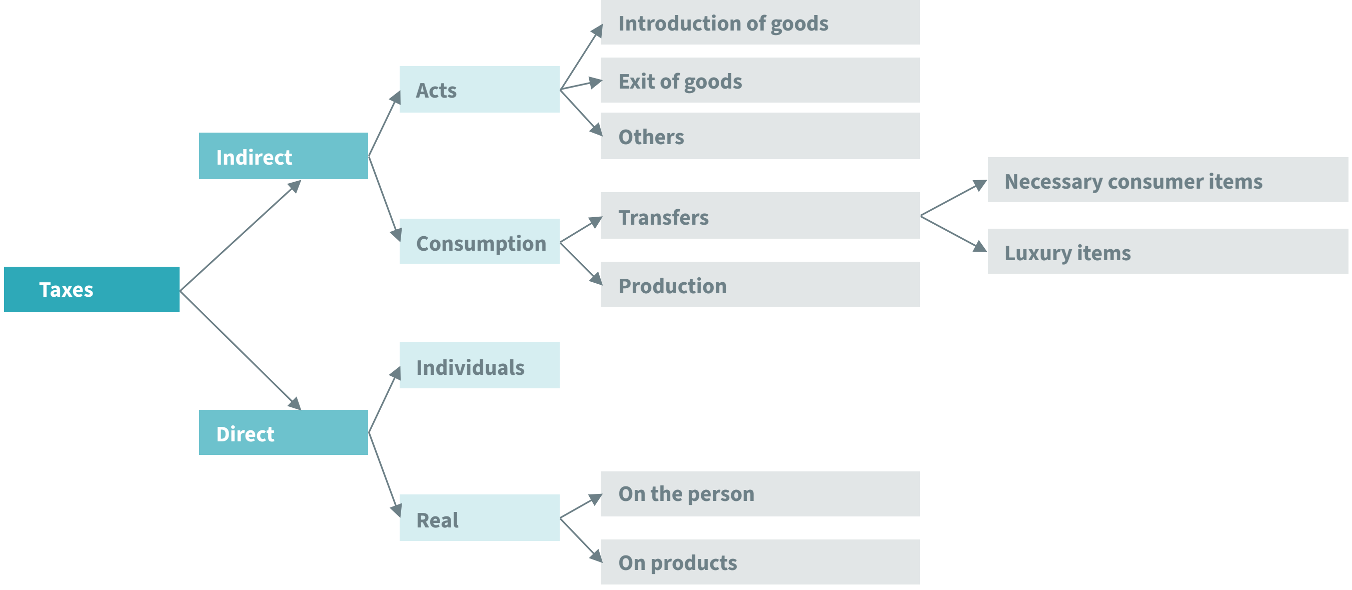
2.5 Classification of taxes

We can talk about a classification regarding payment, in that sense, they can be progressive or regressive; (i) **progressive**: when they tax "proportionately more to the one who earns more or proportionately less to the one who earns less" (Moreno, 2015, p. 38); (ii) **regressive**: when taxpayers who have more resources or have more, pay proportionally less, in this case, it has a negative effect on the income distribution, generating conditions to increase inequality.

From another point of view, taxes can be direct or indirect. The direct ones are taxes where the one who actually pays it (the taxpayer "in fact") and who is charged (the "legal" taxpayer") are the same person (Moreno, 2015): This is why assets, income are taxed and tend to be progressive.

On the other hand, if who is charged and who actually pays it are different taxpayers, you are facing an indirect tax, within these categories are consumption taxes such as value added tax (VAT) because "*the taxpayer who has the legal responsibility to collect the tax can shift the burden*" to the price of the products that the consumer actually pays (Moreno, 2015, p. 20); therefore, it can be understood as a regressive tax, since it tends to place a greater burden on those who receive lower incomes.

Figure 1
Classification of taxes



Source: Elements of Mexican public finance. (Flowers, 1972)

2.6 Tax reform in general

The process of a reform is initiated considering the need to strengthen the tax system understanding that a "reform is defined as a change to achieve something better. A reform corresponds to an improvement produced by altering or correcting errors or defects and bringing them to a better condition" (Yañez, 2012, p. 216).

A tax reform introduces changes within the structure of the tax system of a country, which seeks to improve its structure, fulfilling certain desirable principles and objectives. Within the tax system is the set or range of taxes applied, which includes the elements of its administration, collection, control and validation processes.

In this context, within the tax system is the set or range of taxes applied to the company, which includes the elements of its administration, collection, control and validation processes.

The collection refers to: how, when and where taxes are declared and paid; forms, terms and conditions of payment; forms, documentation and information systems used to file and endorse tax returns; who collects taxes directly from taxpayers and how, when and how much is paid for the provision of the tax revenue collection service; the total or partial integration of some taxes; mechanisms for advance collection of certain taxes or provisional payments; tax payment deferral systems; depreciation, monetary correction and presumptive declarations mechanisms; etc. The control deals with the rules, methods and procedures applied by the authority to ensure that taxpayers bear the tax burden they really have to face; the sanctions and penalties to be imposed on taxpayers who evade part or all of the assigned tax liability; mechanisms for resolving conflicts between the tax authority and taxpayers; etc. (Yanez, 2012, p.216).

The tax reform aims to generate conditions that modify the taxation system in a profound way, under certain new criteria introduced, expanding the quality of taxpayers, generating new taxes or looking for mechanisms that facilitate the State collection system, without neglecting the social aspects of the implementation of taxes.

The implementation of a tax reform seeks to improve the conditions of taxpayers, in order to achieve greater fairness and simplification in the processes, as well as achieve efficiency in the State collection system.

2.7 The tax reform in Paraguay

The Paraguayan economy has remained stable with satisfactory growth, but not enough to take on the structural challenges, especially in terms of human capital formation and infrastructure.

In this context, it is important to note that the country's economy has gone through complex situations that led to sustained growth in recent years, however, in 2019 there was a climate crisis that negatively impacted agricultural production, and in 2020 the COVID-19 pandemic appeared that also brought adverse effects to economic dynamics.

In 2017 and 2018, the Paraguayan economy showed positive growth, while in 2019 the crisis in the agricultural sector caused the economy to fall by around -0.4%.

Already in 2020, with the appearance of the COVID-2019 pandemic, the economy felt a wear and tear in terms of economic growth since it had a negative growth of -0.8%. This global, regional and national reality forced the Government to adopt measures to mitigate the adverse effects of the pandemic on economic activity, generating incentives to mobilize the activity of the primary and secondary sectors, to counteract the decline in the service sector.

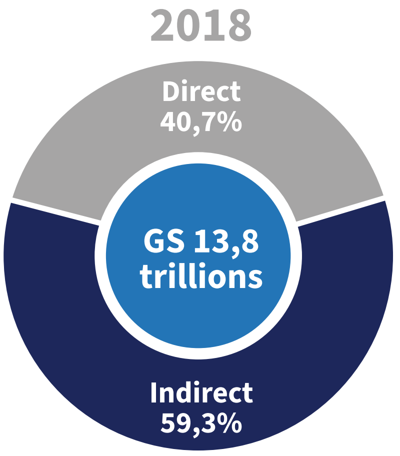
Among the changes in the regulations for 2019, the enactment and implementation of Law No. 6380 on modernization and simplification of the national tax system is mentioned, coinciding with the appearance of the pandemic.

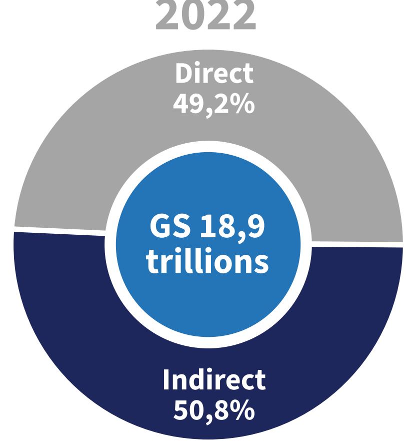
On the other hand, the contribution to economic growth by the different sectors of the economy can be analyzed, this is important to evaluate, considering what the structure of the economy would be before the application of the tax reform, and after the application of this. This analysis, it can be inferred, should be conducted from a considerable period of time, so as to clearly observe the effects on the economic structure of the country, from the entry into force of Law No. 6380, without forgetting the pandemic context.

2.8 Tax structure in Paraguay

In recent years, the country's tax revenues have evolved in line with the growth of the economy and with improvements in collection efficiency, this is how at the end of Fiscal Year 2021 the general government's collection levels ended up around 10.7% of GDP.
In addition, it can be seen that direct tax revenues increased in terms of their share of GDP, while indirect tax revenues fell as a percentage of GDP.

Figure 2
Comparison of tax structure of Paraguay 2022-2018
(% of GDP)





Source: Own elaboration with data from the Ministry of Finance.

By 2019, an economic slowdown was expected and consequently a slowdown in tax revenues, which implied a reduction in fiscal space, which reinforced the need to implement the reform and establish changes that affect the tax structure of Paraguay.

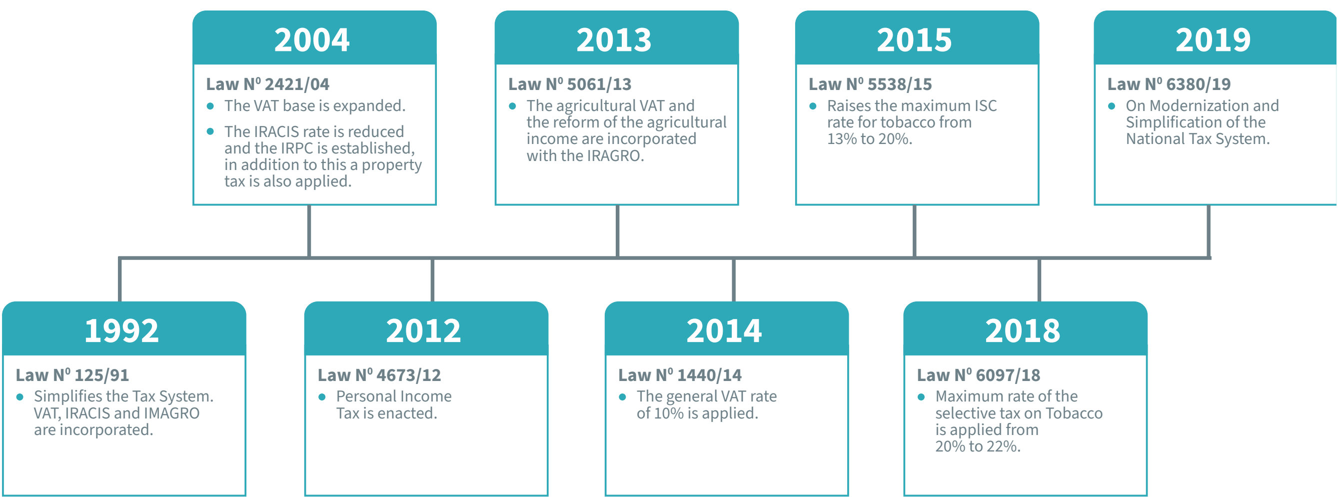
Among the most relevant aspects to mention is that most of the tax revenues come from indirect taxes such as the value added tax or VAT, which represents a large part of Paraguay's tax collections, followed by taxes applied to income (business and personal).

The tax structure of Paraguay showed a slight increase in tax pressure in recent years; however, it is still not such as to be close to the average of the region.

2.9 The Paraguayan tax legal framework

In 1991, some legal changes were incorporated into the Paraguayan tax system, these aimed at a greater organization and functioning of the tax system, reducing the large number of types of taxes remaining in 8 types of taxes. With this comes the Law N° 125/91.

Figure 3
Evolution of the Paraguayan tax system



Source: Own elaboration with data from the Ministry of Finance.

The following is a brief chronology of the salient facts on taxation in Paraguay:

- **1992:** Law N° 125/91
- **2004:** Law N° 24421/04, in which the VAT base is expanded, the IRACIS rate is reduced and the IRPC is established, in addition to this a property tax is also applied.
- **2012:** Law N° 4673, in which the personal income tax (IRP) comes into force, establishes the regulations related to the administrative provisions that regulate the IRP filing process, later in the
- **2013:** Law N° 5061, the agricultural VAT and the reform of the agricultural income are incorporated with the IRAGRO.
- **2015:** Law N° 5538, raises the maximum ISC rate for tobacco from 13% to 20%.
- **2018:** Law N° 6097, the maximum VAT rate for tobacco is raised from 20 to 22%.
- **2019:** Law N° 6380, on tax modernization and simplification.

2.10 Main aspects of the reform

The purpose of the implementation of the tax reform is to achieve equity and justice, the simplification of processes and the modernization of the national tax system.

As a rule of greater relevance in the structure of the national tax system, Law 125/91 stands out, which would have already undergone modifications over the years, but it was necessary to continue with the process of reforms that help the national tax system achieve better collection conditions. Thus, in the message of the same law it was quoted "*...the tax proposal seeks to raise revenue with an emphasis on equity and therefore on direct taxes. Consequently, it is proposed to deepen tax justice, but improving the competitiveness of the formalized market and supporting micro and small businesses and strengthening middle-income families*".

The same rules were maintained for different economic sectors, in order to maintain fairness and tax justice, in addition, it was proposed to tax the dividends paid by companies to shareholders, separately at a single rate and without deductions.

Among the important points of the aforementioned Law to be mentioned are:

- The same amount of taxes in relation to the previous law.
- Income Taxes: Corporate Income Tax (CIT), Dividend and Profit Tax (IDU), Personal Income Tax (PIT) and Non-Resident Income Tax (INR).
- Consumption Taxes: the Value Added Tax (VAT) and the Selective Consumption Tax (SCT) are maintained, increasing the maximum rates of the latter tax.
- As for the IRE of the General Regime, in case of presenting losses, they can be extended up to a period of 5 years.

3. IMPACT OF THE IMPLEMENTATION OF LAW N° 6380/19

The reform proposed with the implementation of the Law pursues two objectives, to modernize the tax system, and to introduce measures for its simplification. In addition, it also seeks to improve fiscal performance on issues of equity, competitiveness, formalization and support for middle-income families, and support for health objectives.

4. METHODOLOGY FOR IMPACT ESTIMATION

A methodological option is proposed that is based on an arithmetic estimation of the effects of each variable in an ex post forecast, that is, for each fiscal year the impact of the modifications of the regulations with respect to the main indicators of each tax is analyzed and with that the approximate estimates of what the impact of the implementation of the reform would be are obtained.

This methodological option rests on the assumption that the collection can be explained by other independent and measurable aggregate variables. In this option the approach is simplified considering the consecutive and proportional effect of 3 basic variables: (i) the growth of the economy; (ii) legal changes attributable to other reforms or changes; and (iii) the variation in the level of evasion.

The method is residual in the sense that all the difference in collection not attributable to the above factors is considered to have been caused by the reform. Thus, it constitutes an important tool when it comes to determining the additional resources that are generated by the implementation of the reform.

The first step is to determine a base year and from it determine the normalized net base collection. In this case, considering that the effects of the reform begin to take place from the year 2020, the natural base year to apply the method is the year 2019.

In the same sense, if what is desired is to measure the collection effect of the reform in the year t+1, then the normalized base collection for that year should be estimated, that is, to define the base collection of t-1.

For a greater appreciation it is necessary that the determination is made considering the following arithmetic rule:

+/-	Economic growth between (t) and Base Year
=	Base Revenue Adjusted for Economic Growth
+/-	Legal changes (other than reform) between (t) and Base Year (t-1)
=	Base Collection Normalized and Adjusted for Economic Growth
+/-	Effect Less Evasion between (t) and Base Year (t-1)
=	Normalized Base Collection, Adjusted for Economic Growth and for Compliance (t)

The effect of the reform is estimated as the difference between the effective collection and the base collection normalized and adjusted for economic growth and compliance.

It is important to note that, for this reason, this method does not require the need to perform the econometric estimation of a model, the details of which are shown below:

$$Ef_t = Re_t - \{ Rb^{Normalized\ Adjusted} \} \quad (1)$$

Where

Ef = Effect of the Reform on (t)

Re_t = Effective Collection in (t)

$Rb^{Normalized\ Adjusted}$ Normalized Base Collection

On the other hand, it can be expressed in terms of Gross Domestic Product, in order to quantify the magnitude of the impact of the implementation of the reform within the tax system and the economy.

$$IRPIB_t = \frac{Ef_t}{PIB_t} \quad (2)$$

$$IRIT_t = \frac{Ef_t}{IT_t} \quad (3)$$

Where

$IRPIB_t$ = Impact of the Reform in relation to Gross Domestic Product.

$IRIT_t$ = Impact of the Reform in relation to tax revenues.

The main relative advantage of this methodology is that it is much simpler to estimate the residue than with an econometric estimation, since, with an econometric estimation, other parameters that require to determine a higher degree of analysis must be considered, and on the other hand, a much broader series is needed than that required to measure by means of the arithmetic equation.

5. RESULTS AND ANALYSIS OF THE IMPLEMENTATION OF THE REFORM

The impact measurement was conducted under the previously described methodology, for the years 2020 to 2022. The calculations were made based on the 2019 base year collection.

Under the data of adjustments and considering that in 2020 there was a contraction of the economy by approximately 0.8%; for 2021 a growth of 4.1% and for 2022 again a slow growth of the economy, the normalized collection was estimated, on the other hand, the regulatory modifications by type of tax and their impact on the estimation of the normalized collection were analyzed.

With these data, a comparison was estimated between the Collection received at the end of the period (t), which for the first year would correspond to the Fiscal Year (FY) 2020, and the normalized collection considering the indicated adjustments, both on the side of economic growth and for the regulatory modifications implemented with the reform.

In this context, it can be pointed out that, considering the modifications within the tax regulations, the largest impact was presented in the FY 2020 within the Dividends and Profits Tax, while in the Fiscal Year 2021, the largest impact could be visualized in the Corporate Income Tax and by 2022 the impact is already normalized and is observed in the two taxes mentioned above.

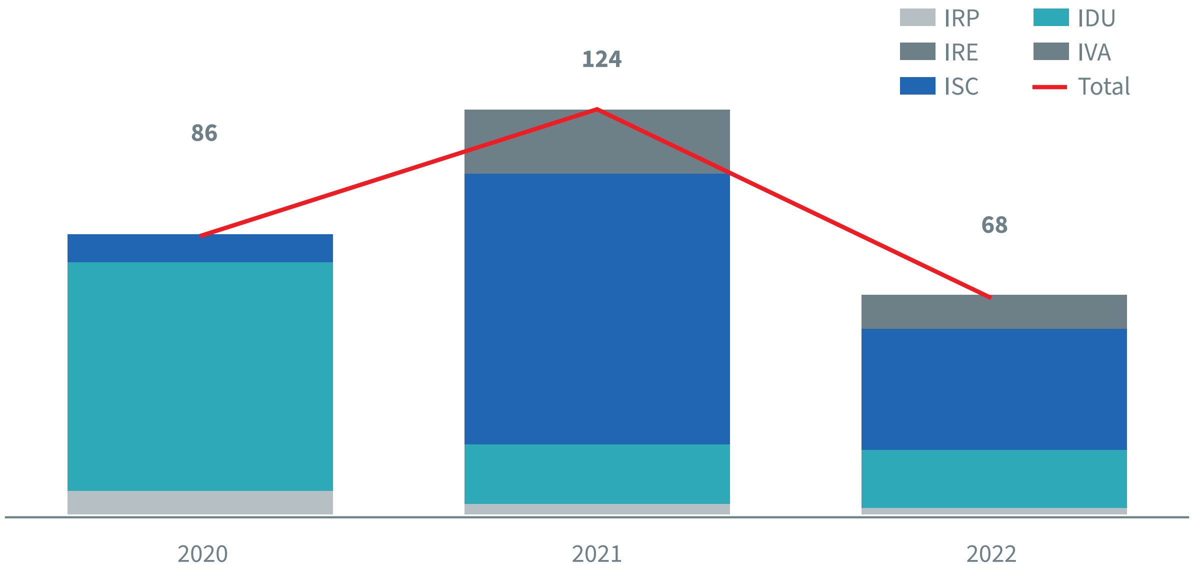
Within the Fiscal Year 2020, the impact on total revenues, product of the reform under the indicated methodology was USD 86 million. Meanwhile, for the Fiscal Year 2021, the impact of the implementation of the reform was USD 124.2 million, and for 2022 the Impact was USD 68 million, this can be considered an optimal result considering the context of the COVID–19 Pandemic, which was presented in the analysis period.

The impact or the incidence that was observed is explained from the regulations that were implemented by the reform, in that context, they are estimated by type of tax, this in order to be able to analyze the contribution of each tax in the total incidence.

Figure 4

Incidence or impact of the implementation of the reform

(In millions USD)



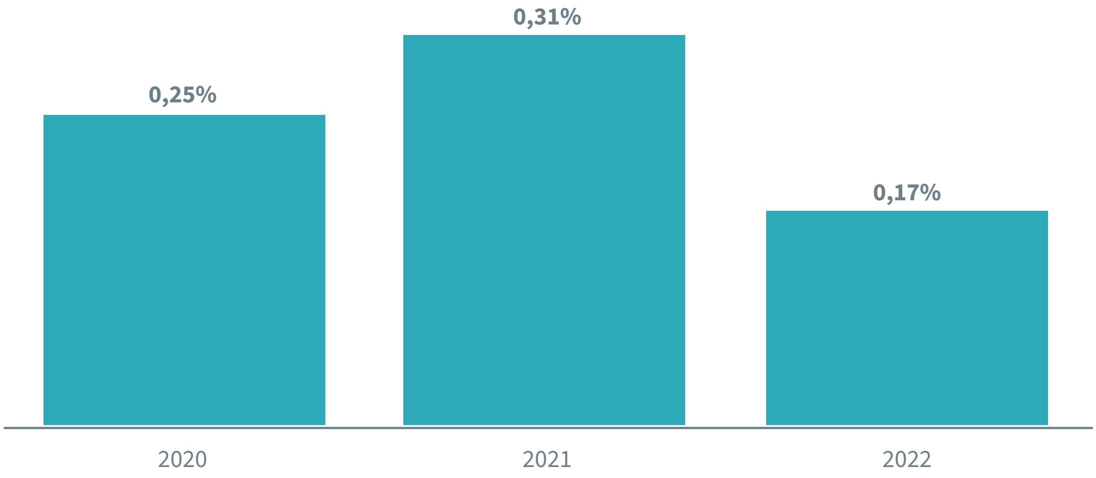
Source: Own elaboration with data from the Ministry of Finance (SET).

In the previous graph, it can be observed that for the year 2020 the largest participation was in the Dividends and Profits Tax, while, for 2021, a greater impact was generated in terms of the incidence on collections, but a greater contribution is observed in the CIT, and for 2022 a mixture between the three main taxes is observed.

For the period of analysis, the Paraguayan economy presented certain particular characteristics, as a result of the COVID-19 pandemic that generated a deterioration in certain sectors of the economy, however, the reform together with certain complementary measures applied managed to alleviate this negative shock.

As for the incidence in relation to tax revenues, we can mention that the implementation of the reform helped in terms of greater order, and in the collection of resources in relation to internal taxes, with which it was possible to finance the General Budget of the Nation for the indicated period.

Figure 5
Incidence or impact of the reform implementation
(In millions USD)



Source: Own elaboration with data from the Ministry of Finance (SET).

The incidence as a percentage of GDP reached 0.25% in Fiscal Year 2020, in 2021 it reached a percentage of 0.32% and by 2022 it was 0.17%, this shows the relevance of the additional collections resulting from the implementation of the reform within the tax system.

As for the incidence in relation to tax revenues, it can be noted that it represented 2.6% in 2020, in 2021 it was 3.2% and in 2022 it was 2.1%. This incidence shows that the additional revenue presented by the implementation of the reform helps to attract greater resources to finance the commitments assumed.

It can also be mentioned that the additional revenue generated from the implementation of the reform helped to improve the collection of resources by the State, and at the same time generate conditions to increase the tax burden and have tax resources for the budget of the various ministries of the Executive Branch.

CONCLUSION

It can be noted that, the implementation of the reform presented a positive impact on collections, both at the level of structure and increase in the availability of additional resources.

The incidence in monetary terms was USD 86 million in 2020, which represents 0.25% of GDP and 2.6% of tax revenues for that period. On the other hand, for the year 2021 the incidence was USD 124.2 million, which represents 0.32% of GDP and 3.2% of tax revenues for that year. And finally, by 2022, the incidence was USD 68 million, which represents 0.17% of GDP and 2.1% of tax revenues.

As can be seen if we consider the hypothesis stated, “the implementation of the Law for the modernization and simplification of the tax system in Paraguay generated benefits in the collection structure, increasing the share of direct taxes and improving the levels of collection per tax”, it can be concluded that the hypothesis cannot be effectively rejected, since despite the adversities of the COVID-19 pandemic, the implementation of the Reform had a positive impact.

In conclusion, the tax reform implemented in the Paraguayan tax system was helpful in terms of collection and mitigation of the negative impacts of the pandemic, but at the same time, it helped to improve the structure or composition of taxes within the national tax system.

REFERENCES

Arellano, J. & Corbo, V. (eds.) (2013). Tributación para el desarrollo. Estudios para la reforma del sistema chileno. CEP - CIEPLAN.

Banco Interamericano de Desarrollo (2018). “Paraguay: Rutas para el Desarrollo”. Departamento de Países del Cono Sur. VI. Serie.

Banco Interamericano de Desarrollo (2018). “El futuro del trabajo en América Latina y el Caribe”. Educación y Salud: ¿los sectores del futuro?”. Washington DC.

Barra, P. (2020). “Informe de Asistencia Técnica - Metodologías de estimación para la recaudación tributaria adicional para el fondo FOICAH”. Fondo Monetario Internacional y Ministerio de Hacienda.

Barreix, A. & Roca, J. (2007). Reforzando un pilar fiscal: el impuesto a la renta dual a la uruguaya. Revista de la Cepal, 92, pp. 123-142.

Cicowiez, M. & Lofgren, H. (2017). “A GEM for Streamlined Dynamic CGE Analysis: Structure, Interface, Data, and Macro Application”. World Bank Policy Research Working Paper 8272.

Corbacho, A., Fretes Cibils, V., & Lora, E. (eds.) (2013). Recaudar no basta: los impuestos como instrumento de desarrollo. Banco Interamericano de Desarrollo.

Giménez, L., Lugo, M., Martínez, S., Colmán, H., Galeano, J. y Farfán, G. (2017). “Paraguay: Análisis del sistema fiscal y su impacto en la pobreza y la equidad”. CEQ Working Paper N° 74. Ministerio de Hacienda, CEQ Institute y Banco Mundial.

Lustig, N., editor. (2018). “Commitment to Equity Handbook. Estimating the Impact of Fiscal Policy on Inequality and Poverty”. Brookings Institution Press and CEQ Institute, Tulane University.

Mirrlees, J., Adam, S., Besley, T., Blundell, R., Bond, S., Chote, R., Gammie, M., Johnson, P., Myles, G. & Poterba, J. (eds.) (2011) Tax by Design. The Mirrlees Review. Institute for Fiscal Studies. Oxford University Press.

Tanzi, V. & Zee, H. (2001). La política tributaria en los países en desarrollo. Fondo Monetario Internacional.

Legislation

Ley N° 6.380/2019 “De Modernización y Simplificación del Sistema Tributario Nacional”.

Decreto N° 2.787/2019 «Por el cual se establece la vigencia de las disposiciones contenidas en la Ley N° 6.380/2019 “De Modernización y Simplificación del Sistema Tributario Nacional”.

Decreto N° 3.107/2019 «Por el cual se reglamenta el Impuesto al Valor Agregado (IVA) establecido en la Ley N° 6.380/2019 “De Modernización y Simplificación del Sistema Tributario Nacional”.

Decreto N° 3.109/2019 «Por el cual se reglamenta el Impuesto Selectivo al Consumo (ISC) establecido en la Ley N° 6.380/2019 “De Modernización y Simplificación del Sistema Tributario Nacional”.

Decreto N° 3.110/2019 «Por el cual se reglamenta el Impuesto a los Dividendos y a las Utilidades (IDU) establecido en la Ley N° 6.380/2019 “De Modernización y Simplificación del Sistema Tributario Nacional”.

Decreto N° 3.181/2019 «Por el cual se reglamenta el Impuesto a la Renta de No Residentes (INR) establecido en la Ley N° 6.380/2019 “De Modernización y Simplificación del Sistema Tributario Nacional”.

Decreto N° 3.182/2019 «Por el cual se reglamenta el Impuesto a la Renta Empresarial (IRE) establecido en la Ley N° 6.380/2019 “De Modernización y Simplificación del Sistema Tributario Nacional”.

Decreto N° 3.184/2019 «Por el cual se reglamenta el Impuesto a la Renta Personal (IRP) establecido en la Ley N° 6.380/2019 “De Modernización y Simplificación del Sistema Tributario Nacional”.

Subjects without operational capability (SSCO) the effective procedure to combat fictitious operations. New legislation applicable in Peru

Alan Augusto Peñaranda Iglesias

SYNOPSIS

There is a worrying trend regarding invoices associated with fictitious, fraudulent, simulated or false operations, which are significantly undermining tax revenues. The increasing fraudulent use of credits, costs and expenses based on such false or unreal transactions is having a negative impact on tax bases and seriously undermining the revenues necessary for the proper functioning of the State.

This document examines the progress made in different countries in relation to the normative implemented to address this type of fraud, as well as a detailed explanation of the recent regulation enacted in Peru, on the attribution of subjects without operational capacity (In Spanish: SSCO, Sujetos sin capacidad operativa), procedures and consequences that are measures aimed at significantly reducing this type of evasion.

KEYWORDS: Invoicing, Non-real transactions, Simulated transactions, Apocryphal transactions

CONTENT

Introduction

1. International experience
2. Progress in Peru
3. New regulation to combat non-real operations
4. Procedure for attributing the condition of subject without operational capacity
5. Effects of the publication of the publication of the SSCO status attribution
6. Effects related to the payment vouchers or complementary documents issued up to the date of publication by SUNAT
7. Effects on the companies or persons related to the subjects that have been attributed the SSCO status

Conclusion

References

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INTRODUCTION

Invoices for fictitious transactions, also known as invoices for simulated transactions or apocryphal invoices, are documents issued to simulate commercial transactions that have not actually taken place. These invoices are often used for illicit purposes, such as tax evasion, money laundering or taking undue advantage of tax benefits such as supporting undue refunds. These invoices can be generated by companies or individuals with the purpose of reducing the tax burden by unduly increasing the tax credit or inflating deductible expenses or obtaining undue tax benefits such as refunds to exporters, tax reimbursement, among others. Generally, these fictitious or apocryphal invoices usually have all the legal formalities such as banking, execution of contracts and even being issued through electronic means with the requirements established by the National Superintendence of Customs and Tax Administration (SUNAT) and are issued by individuals or companies that do not have the suitability, sufficiency, reasonableness and proportionality of the economic, financial, material and human resources to conduct the operations that are reflected in the payment voucher.

The issuance and use of apocryphal invoices constitute a crime in most of the countries where this type of act is practiced, since it undermines the integrity of the tax system and harms tax collection, breaking with these practices the foundations and principles that every tax system has, such as neutrality, proportionality and equality, since all taxpayers are obliged to support public expenditures according to their economic capacity.

As has already been widely described in different documents on VAT (Rodriguez Dueña[1]), it is known that it is a non-cumulative multiphase indirect tax. It has been structured based on the value-added technique, with the subtraction method on a financial basis, under the system of tax against tax, by virtue of which it only taxes the value added generated in the different stages of a good or service reaching the final consumer who is the one who finally bears the tax burden of the tax. This is why this tax is neutral since the taxpayer determines its tax liability by deducting the corresponding tax credit from the tax debit. According to Luque Bustamante[2], it is only through the tax credit that the tax can fully achieve its technical objectives of neutrality and collection, since thanks to it, prices are not artificially increased and the Treasury obtains the tax in the right measure by receiving an amount equivalent to that which would have resulted from applying the tax rate to the sales value established for the final consumer, who, in this way, is finally the person economically affected by the tax.

With respect to income tax in Peru, article 20[3] Article 37 of the Income Tax Law establishes that the gross income is constituted by the total income obtained in the taxable year, and when such income comes from the sale of goods, the gross income will be given by the difference between the total net income from such operations and the computable cost of the goods sold, supported mainly by the payment vouchers. On the other hand, article 37[4] of this Law, provides that, in order to establish the third category net income, the expenses necessary to produce it or maintain its source, as well as those related to the generation of capital gains, shall be deducted from the gross income. Such expenses must be supported by payment vouchers that comply with the minimum requirements and characteristics established by the payment vouchers regulation. Thus, the more costs and

1 Rodriguez Dueñas, César; la imposición al consumo en el Perú; análisis y perspectiva. Ponencia presentada en el primer congreso institucional del IFA-Perú, noviembre 1999.

2 Luque Bustamante, Javier; el impuesto General a las Ventas. Tratamiento del Crédito Fiscal. VII Jornadas nacionales de Derecho Tributario. Pag. 175. www.ipdt.org

3 Ley del impuesto a la renta. Capítulo V. De la Renta Bruta. https://www.sunat.gob.pe/legislacion/renta/ley/capv.pdf

4 Ley del impuesto a la renta. Capítulo VI. De la Renta Neta. https://www.sunat.gob.pe/legislacion/renta/ley/capvi.pdf

expenses taxpayers deduct, the lower the income tax calculation base will be, making the income tax burden less burdensome. Without prejudice to the effects of making non-existent operations is the presumption for the payment of presumptive interest in accordance with the provisions of paragraph g) of article 24-A[5] of the income tax law.

From the above, it is important to guarantee the integrity in the processes of determination of the tax debt by the taxpayer insofar as the deductions allowed by law are those that correspond and to neutralize the possibility of subjecting those who, with non-real, fictitious and/or apocryphal operations, try to undermine the taxes due to the State. SUNAT usually carries out auditing actions to detect this type of fraudulent practices, using different techniques such as inspections, crosschecks of information, tax audits and sometimes collaboration with other governmental entities such as the Public Prosecutor's Office, financial intelligence unit, among others, is requested.

Peruvian Tax Court Resolution (RTF) No. 00986-2-2009[6] dated February 4, 2009 has established that in order to have the right to use the tax credit or to deduct the cost or expense, it is not enough to prove that there are payment vouchers that support the transactions carried out and comply with the substantive and formal requirements provided by law, nor to prove their accounting record, but it is necessary to prove that such vouchers correspond to real or existing transactions, that is to say, that they were actually carried out.

SUNAT has been making very frequent findings and repairs to taxpayers who have been carrying out this type of fraud, through the current regulated auditing procedures, under the limits of determination of operation by operation, fighting the actions of informality and evasion that have caused the undue deduction of costs or expenses based on non-existent operations whose reality could not be demonstrated by the taxpayers, since it was found that the tax credit was overestimated, use of cloned invoices, detection of "ghost" companies that issue invoices to transfer credit, cost or expense to the purchaser where the latter can use them to deduct the tax payable or even to request VAT refunds. Some of the modalities found are the following:

- Non-existence of reliable documentation evidencing the acquisition.
- Interposed persons representing the created companies.
- Front companies had been constituted to unduly transfer tax credits.
- Failure to support the acquisition in the volumes and characteristics of the goods.
- Failure to explain the procedure followed for the execution of a service.
- Failure to explain how prices are set.
- Failure to explain where the service was rendered or who supervises the service.
- Financial inability to purchase goods.
- The supplier performs only subsistence activities.
- The supplier does not have accounts in the financial system or, if they do, they do not register movements or operations in the financial system.
- The supplier does not have its own or rented premises, nor does it outsource its production.
- The supplier does not have personnel directly or indirectly capable of carrying out the activity.
- The supplier does not have fixed assets or the ones it had were insufficient.
- The supplier did not comply with its tax obligations.

5 Ley del impuesto a la renta. Capítulo V. De la Renta Bruta. https://www.sunat.gob.pe/legislacion/renta/ley/capv.pdf

6 http://www.mef.gob.pe/contenidos/tribu_fisc/Tribunal_Fiscal/PDFS/2009/2/2009_2_00986.pdf Página 10

It is important to highlight that invoice supported by non-existent, non-real or simulated operations are detrimental to the State and society as a whole and also to honest taxpayers who comply with all their tax obligations and who compete in a fair and just manner, banishing any practice related to tax fraud.

The problem of invoices for non-real operations or invoices for false operations or simulated operations crosses borders and is of great concern to the tax administrations that have-to-have control resources, which are already limited, to control that the credits, costs and expenses are real given the existing vulnerability; the virtue is that the tax administration with the massification of electronic invoices has the information before the taxpayer declares and pays the tax. The process of tax compliance that materializes with the registration of the taxpayer in records such as the RUC, the issuance of vouchers and the accounting record thereof, the declaration and payment is designed for effective compliance by the taxpayer and control by the administration, but in practice it is liable to be violated through the use of illegal practices that, acting on debits, credits and balances, manages to evade the payment of the tax and request in many cases tax refunds without being entitled to them.

When reviewing social networks, one can find an infinity of advertisements promoting the sale of invoices in full view of the tax authorities. These advertisements are aimed at reducing the General Sales Tax (GST) or income tax to be paid in the taxpayers' returns, and the worrying thing is that even these invoices can be issued electronically, which despite all the control elements underlying the same, has not diminished this illegal practice that undermines the revenue necessary for the proper functioning of the State.

In order to counteract these evasive practices, SUNAT has been strengthening its control actions over time to combat the issuance and use of invoices for non-real operations as detailed in the attached press releases. Furthermore, it has informed the representatives of the Peruvian business associations about the existing problem and has communicated the improvement of risk profiling strategies and the publication of a regulation that will severely impact and control this evasive practice.

PROHIBIDA SU REPRODUCCIÓN Y/O DIFUSIÓN

Sunat: facturas falsas o clonadas involucran a más de mil contribuyentes

La Superintendencia Nacional de Aduanas y de Administración Tributaria (Sunat) fortaleció las acciones de fiscalización contra las operaciones no reales, que involucran el uso de facturas falsas o clonadas para obtener crédito fiscal y reducir el pago de impuestos.

Este hecho genera evasión y competencia desleal con los negocios formales, según la Sunat.

Durante el 2018 y el primer semestre del año, la entidad desarrolló 4,829 procesos de fiscalización del Impuesto General a las Ventas (IGV), de los cuales, en 2,241 (46%) se detectó al menos una operación no real.

DEUDA DE 219 MILLONES DE SOLES

En esos casos, la Administración Tributaria determinó una deuda de 219 millones de soles, no solo desde el lado del IGV sino también por su efecto en el Impuesto a la Renta.

Para desarrollar las operaciones no reales, en algunos casos, se crean empresas de fachada con la finalidad de emitir facturas falsas o clonadas y "sustentar" servicios o compras simuladas o inexistentes.

Estas acciones, que constituyen un delito tributario, no solo implican a pequeñas y medianas empresas, sino también a algunas grandes empresas, incluso, en operaciones a nivel internacional.

Producto de las acciones de fiscalización, la Sunat remitió al Ministerio Público 115 informes de indicios de delito tributario que involucran a 1115 personas, naturales o jurídicas, que pueden recibir penas privativas de la libertad de entre 8 y 12 años, al culminar los procesos judiciales.

Por sector económico, de los 4,300 millones de soles en incumplimiento del IGV por operaciones no reales, se determinó que 1,700 millones corresponden al sector Servicios, seguido del Comercio, Manufactura y Construcción.

Estos cuatro sectores representan el 90% de los RUC y el 88% del monto de estas operaciones vinculadas a facturas falsas o clonadas.

COORDINACIÓN CON GREMIOS

Para fortalecer las acciones contra esta práctica, la Sunat realizó tres reuniones de trabajo con gremios empresariales, durante las cuales se expusieron las acciones desarrolladas para enfrentar esta problemática y se recibieron aportes y propuestas para su posterior implementación.

Los gremios que participaron fueron Confiep, SNMPE, CCL, ADEX, Comex, SNI, Capeco y SNP, cuyos representantes expresaron su disposición a colaborar con la Administración Tributaria para reducir el incumplimiento generado por las operaciones no reales, que afecta la recaudación y también generan competencia desleal.

En estas reuniones, la Sunat adelantó que actualizará los perfiles de riesgo con profesionales con experiencia empresarial, estableciendo sistemas de alertas preventivas y difundiendo las consecuencias del uso de esta modalidad de evasión.

Asimismo, establecerá la necesidad de efectuar cambios normativos que permitan posibilitar la fiscalización más efectiva de la evasión del IGV bajo la indicada modalidad.

Source: Andina, September 09, 2019: False or cloned invoices involve more than a thousand of taxpayers.
https://andina.pe/agencia/noticia-sunat-facturas-falsas-o-clonadas-involucran-a-mas-mil-contribuyentes-766061.aspx

ADMINISTRACIÓN TRIBUTARIA

PROHIBIDA SU REPRODUCCIÓN Y/O DIFUSIÓN

Afianzan fiscalización contra facturas falsas

Remiten a la fiscalía informes que involucran a más de mil contribuyentes.

Acciones. Sunat espera reducir evasión del IGV en las denominadas operaciones no reales.

Para contrarrestar la evasión y competencia desleal con los negocios formales, la Sunat fortaleció las acciones de fiscalización contra las operaciones no reales, que involucran el uso de facturas falsas o clonadas para obtener crédito fiscal y reducir el pago de impuestos.

Así, durante el 2018 y el primer semestre de este año, la entidad desarrolló 4,829 procesos de fiscalización del impuesto general a las ventas (IGV), de los cuales, en 2,241 (46%) se detectó al menos una operación no real.

En esos casos, el ente fiscal determinó una deuda de 219 millones de soles, no solo desde el lado del IGV sino también por su efecto en el impuesto a la renta.

Así, para desarrollar las operaciones no reales, en algunos casos, se crean empresas de fachada a fin de emitir facturas falsas o clonadas y "sustentar" servicios o compras simuladas o inexistentes. Estas acciones, que constituyen un delito tributario, no solo implican a pequeñas y medianas empresas, sino también a algunas grandes empresas, incluso, en operaciones a escala internacional, dijo la Sunat.

Agregó que como resultado de estas acciones de fiscalización, se remitió al Ministerio Público 115 informes de indicios de delito tributario que involucran a 1,115 personas, naturales o jurídicas, que pueden recibir penas privativas de la libertad de entre 8 y 12 años, al culminar los procesos judiciales.

Por sector económico, de los 4,300 millones de soles en incumplimiento del IGV por operaciones no reales, se determinó que 1,700 millones corresponden al sector Servicios, seguido del Comercio, Manufactura y Construcción. Estos cuatro sectores representan el 90% de los RUC y el 88% del monto de estas operaciones vinculadas a facturas falsas o clonadas.

Para fortalecer las acciones contra esta mala práctica, la Sunat además sostuvo diversos encuentros con representantes de gremios empresariales a fin de exponer estas acciones. Entre otros, participaron miembros de la Confiep, SNMPE, CCL, Adex, Comex, SNI, Capeco y SNP, cuyos representantes expresaron su disposición a colaborar con la administración tributaria para reducir el incumplimiento generado por las operaciones no reales, que afecta la recaudación y también genera competencia desleal.

Alertas preventivas

La administración tributaria, asimismo, adelantó que actualizará los perfiles de riesgo con profesionales con experiencia empresarial, estableciendo sistemas de alertas preventivas y difundiendo las consecuencias del uso de esta modalidad de evasión, así como la necesidad de efectuar cambios normativos que permitan posibilitar la fiscalización más efectiva de la evasión del IGV bajo la indicada modalidad.

Esta entidad además facilitó a los contribuyentes en envío de escritos sobre sus procesos de cobranza por internet, sin la necesidad de acudir personalmente a un centro de servicios.

Source: Newspaper El Peruano, September 10, 2019: strengthening the control of counterfeit invoices.
https://elperuano.pe/noticia/83247-afianzan-fiscalizacion-contra-facturas-falsas

1. INTERNATIONAL EXPERIENCE

Through the implementation of risk management strategies and the exhaustive analysis of data from electronic invoices, supported by information technology and other information analysis processes, numerous cases susceptible to involve fictitious transactions have been identified. However, the detection and verification of this type of fraud involves lengthy and safeguarding procedures, where the burden of proof falls on the tax administration. The latter must prove, through a thorough audit and data matching process, that the transaction in question is not real, but simulated. In other words, the tax administration has to allocate considerable resources to carry out operational visits to taxpayers, cross-checking information with both suppliers and the many customers who have used the invoices in question and, ultimately, not knowing the tax effects generated by these fictitious transactions. This situation represents a considerable challenge for the work of the tax administration.

Some countries have introduced regulations to ensure that the processes of detecting invoices for non-real transactions allow closing fraud loopholes effectively; in this regard many tax administrations have taken multiple actions to control false invoices, here is an explanation of the advances in legislation in Latin American countries that have been implemented.

1.1 Argentina

AFIP by means of General Resolution 3832[7] creates the base of unreliable taxpayers that according to its article 3 identifies the taxpayers with respect to which inconsistencies have been found or detected in relation to the operating, economic and/or financial capacity, which differs from the magnitude, quality or conditions shown in their affidavits, the supporting vouchers issued, or that do not reflect the operation they intend to document, or the absence of these and publish who they are and as a consequence of this they have some limitations. These suppliers that are included in the public databases suffer from a kind of discredit that this fact causes them and could deprive them of the pretension of exercising economic activities, since it is always difficult that any company would want to contract with who is in such database; also, the authorization of invoices is limited because they are in the base of unreliable taxpayers and even withholding of 100% of the VAT.

The qualification of unreliable subject in social security matters has even been extended to include those subjects with respect to which inconsistencies have been found or detected in relation to the generation of fictitious payrolls of workers, quality or conditions externalized by the Social Security affidavits, the supporting documentation of such labour relations or that do not reflect the reality of the links with the dependents they are trying to document, or the absence of such dependents.

The effects found in Article 6 include, among others, the temporary suspension of the authorization to issue invoices and/or vouchers, the suspension to request a non-withholding certificate, temporary disqualification for operations in the special customs registry systems, suspension of services with fiscal code.

1.2 Mexico

Another important regulatory advance is that implemented by Mexico's SAT with the application of Article 69-B[8] of the Mexican Tax Administration (SAT). The Federal Tax Code has characterized two types of subjects linked to non-real operations: companies that

7 http://servicios.infoleg.gob.ar/infolegInternet/anexos/255000-259999/259125/texact.htm

8 Código Fiscal de la Federación. https://www.diputados.gob.mx/LeyesBiblio/pdf/CFF.pdf

issue invoices for simulated operations (EFOS) and companies that deduct simulated operations (EDOS).

Article 69-B of the tax code states that when the tax authority detects that a taxpayer has been issuing vouchers without having the assets, personnel, infrastructure or material capacity, directly or indirectly, to provide the services or produce, market or deliver the goods covered by such vouchers, or that such taxpayers are not located, it will be presumed that the transactions covered by such vouchers are non-existent. The rule adds that in this case, the taxpayers that are in such situation will be notified through their tax mailbox, the SAT's web page, as well as through publication in the Official Gazette of the Federation, so that such taxpayers may state before the tax authority what they deem appropriate and provide the documentation and information they consider pertinent to disprove the facts that led the authority to notify them.

The effects of the publication of this list will be to consider, with general effects, that the transactions contained in the tax receipts issued by the taxpayer in question do not produce and did not produce any tax effect.

The regulation establishes a procedure for the taxpayer to demonstrate the existence of the operations, to present the supporting documentation, within the deadlines established for the taxpayer and the administration, with the consequent final publication of the taxpayers who finally confirm the issuance of tax receipts without having the assets or the means to carry out operations that cover such receipts, presuming the non-existence of the operations covered.

Likewise, there is a tax disregard procedure for those who have given any tax effect to the tax receipts issued by any taxpayer included in the EFOS list, having a term of thirty days following the date of such publication to prove before the SAT that they effectively acquired the goods or received the services covered by such tax receipts, or they will proceed within the same term to correct their tax situation, through the corresponding complementary tax returns.

Since false invoicing has become an endemic evil, this harmful and unfair practice must be severely combated and for this purpose tax administrations need specific and solid regulations to facilitate detection, neutralize the issuer and punish those who make a tax use of these fictitious invoices to reduce their tax obligations.

1.3 Ecuador

Another country that has regulated the treatment of non-real operations is Ecuador, which in Article 24 of the Regulations for the application of the Internal Tax Regime Law published in the Supplement to Official Gazette No. 209, "Regulations for the application of the Internal Tax Regime Law"[9], which defines **non-existent companies** as those for which it is not possible to verify the actual execution of a productive and commercial process. In the case of companies, and without prejudice to the foregoing, non-existent companies are those whose incorporation cannot be verified, either through public or private documents, as the case may be. On the other hand, Article 25 of the same regulatory body incorporates in the legislation the concept or definition of ghost or alleged companies, those that have been constituted by means of a fictitious declaration of will or with deliberate concealment of the truth, who based on the simulated agreement, pretend the existence of a company, enterprise or economic activity, to justify alleged transactions, hide benefits, modify income, costs and expenses or evade obligations.

Likewise, Article 25.1 will consider as non-existent transactions when the Internal Revenue Service (SRI in Spanish) detects that a taxpayer has been issuing sales receipts without having transferred the goods or rendered the service, without having the assets,

9 Reglamento para la aplicación ley del Régimen Tributario Interno, LRTI. Publicado en Suplemento del Registro Oficial 209 del 06 de junio del 2010, con última modificación a través del tercer suplemento del registro oficial 186 del 10 de noviembre del 2022.

personnel, infrastructure or material capacity, directly or indirectly, to render the services or produce, commercialize or deliver the goods covered by such receipts, or that such taxpayers are not located, presuming the non-existence of the transactions supported by such receipts.

The procedure states that the SRI will classify as non-existent companies, ghost companies or taxpayers with non-existent transactions and notifies taxpayers that incur in the conditions indicated in the preceding paragraphs by means of an official letter, in order to present, within a period of thirty working days, the documentation with which they intend to disprove such circumstances.

The taxpayers that do not refute the SRI's considerations will be notified, in the forms established in the Tax Code, with the administrative resolution that considers them as non-existent companies, phantoms or taxpayers with non-existent transactions, as applicable. The SRI publishes on its official website a list of taxpayers considered as non-existent or ghost companies or taxpayers with non-existent transactions, and may also publish a list of their clients, so that those who believe they have been harmed by such taxpayers may initiate actions to correct their tax situation, by filing the corresponding substitute returns or information annexes.

Once the resolution notified to the taxpayer has become final, the SRI suspends ex officio the Single Taxpayers Registry and the validity of the authorization(s) used for sales receipts, withholding and complementary documents.

Finally, Article 26 establishes that the taxable base will not be reduced for operations carried out with companies classified as non-existent, phantom or alleged, as well as with companies or individuals for non-existent transactions, and that it will not be possible to request a refund or use as a tax credit the taxes generated in operations carried out with companies classified as non-existent, phantom or alleged, as well as with companies or individuals for non-existent transactions.

The realization of simulated acts will be sanctioned in accordance with the corresponding regulations. The provisions of this article exclude those cases in which the taxpayer demonstrates the material sequentially of the expense and its economic essence.

1.4 Colombia

Through Articles 495 and 671 of the National Tax Statute, as amended by Article 294 of Law 1819[10]. Since 2016, this country has regulated the fictitious supplier, defining it as a person or entity that invoices simulated or non-existent sales or provision of services.

For this purpose, purchases or expenses made to those whom the DIAN has declared as a fictitious supplier or insolvent supplier will not be deductible in the income tax, nor will they give right to deductible taxes in the sales tax, which materializes from the date of publication in a newspaper of major circulation.

A supplier is fictitious when it invoices simulated, or non-existent sales or services. This qualification will be lifted after five (5) years of having been made.

10 Article 294 of Law 1819 amending Article 671 of the Tax Statute.
https://www.leyex.info/leyes/Ley1819de2016.htm https://grupoegs.leyex.info/documents/leyes/Decreto624de1989.htm

On the other hand, they consider a supplier as insolvent when the DIAN has not been able to collect the tax debts, because they transferred their assets to third parties, in order to avoid the collection of the Administration. The Administration shall lift the insolvency classification when the person or entity pays or agrees to pay the amounts owed. These purchases or expenses shall cease to be deductible from the date of publication of the corresponding declaration in a newspaper of wide national circulation.

2. PROGRESS IN PERU

In Peru, Article 44 of the GST and ISC Law[11] mainly provides a legal framework that gives tools to SUNAT to control invoices issued for non-real operations, the rule states that the payment voucher issued that does not correspond to a real operation will oblige the payment of the tax consigned in these, by the person responsible for its issuance. The person who receives the payment voucher will not be entitled to the tax credit or to any other right or benefit derived from the General Sales Tax originated by the acquisition of goods, rendering or use of services or construction contracts. For these purposes, the following situations are considered as non-real transactions:

a) **Absolut simulation:** that in which, although a payment voucher is issued, the taxable transaction shown on it is non-existent or simulated, allowing to determine that the transfer of goods, rendering or use of services or construction contract never took place.

b) **Relative simulation**: that in which the issuer appearing on the payment voucher or debit note has not actually conducted the transaction, having used its name and documents to simulate the transaction. In this case, if the acquirer cancels the transaction through the means of payment, he maintains the right to the tax credit.

Additionally, the rule states that the non-real operation may not be credited by means of 1. The existence of goods or services that have not been transferred or rendered by the issuer of the document; or, 2. The withholding made, or perception supported, as the case may be.

In multiple resolutions resolved by the tax court on the objections challenged by taxpayers whose tax credit, cost or expense was not recognized by SUNAT because it was supported by some invoices for non-real transactions, the taxpayers under audit raised their defence arguing that they were bona fide purchasers. SUNAT, through an exhaustive analysis of the transactions and a comprehensive evaluation of the evidence and the situation of the supplier and the taxpayer, using criteria based on the norm, on the accounting expertise, on the knowledge of the economic activity of its auditors, etc., inferred that the arguments were inconsistent, that the supplier did not have the operational capacity to have carried out the operation, and therefore finally rejected the transaction.

In this regard, by means of RTF N° 1759-5-2003[12] the Tax Court established the criterion that a transaction is not real or non-existent when it presents some of the following situations:

a) One of the parties (seller and buyer) does not exist or did not participate in the transaction.

b) Both parties did not participate in the transaction.

c) The subject matter of the sale is non-existent or different.

d) The combination of such situations, from which it is concluded that a transaction is not real if it is

11 https://www.sunat.gob.pe/legislacion/igv/ley/capitulx.pdf

12 http://www.mef.gob.pe/contenidos/tribu_fisc/Tribunal_Fiscal/PDFS/2003/5/2003_5_01759.pdf

established that any of the parties (seller or buyer) or the object of the transaction does not exist or is different from that which appears on the repaired payment voucher.

Also in the same ruling, it has been stated that in order to prove that there was no real operation to support the tax credit, it was necessary to investigate all the circumstances of the case, using for such purpose the relevant and substitute evidentiary means, provided that they are allowed by the tax system and are assessed jointly and with reasoned appreciation.

It is important to note that the tax court has established that if an objection arises from the fact that a taxpayer has not accredited the reality of the operations, the burden of proof corresponds to the taxpayer and not to the Administration, taking into consideration that the action of the administration is not based solely on observations or defects detected in the suppliers, but basically on the fact that the taxpayer, to whom the burden of proof corresponds, has not accredited the reality of the operations. However, auditing each taxpayer who acquires invoices for non-real, simulated or false operations entails long and costly procedures that needed to be improved in order to make this type of process more efficient and have a multiplying impact.

Notwithstanding the foregoing, these measures have proven to be insufficient and ineffective to thwart this type of evasion. It was necessary to improve the legal framework to combat this type of tax fraud so that those who have been detected do not continue issuing payment vouchers for transactions that they are not able to carry out, to discourage schemes in which the alleged sellers and buyers collude to reduce the amount of taxes to be paid and to eliminate invoices for non-real, false or simulated transactions from the market.

3. NEW RULE TO COMBAT NON-REAL OPERATIONS

In 2021, with Law No. 31380, the Congress of the Republic delegated to the Executive branch the power to regulate the procedure for **attributing the condition of subject without operational capacity (SSCO)** in order to establish effects with respect to the payment vouchers and complementary documents to these, of the payment of the General Sales Tax (GST), of the tax credit or other rights or benefits derived from the GST, of the deduction as an expense or cost, and to request the free disposal of the amounts deposited in the accounts of the system for the payment of tax obligations (Detractions - SPOT).

The purpose of the proposal was to address tax evasion, quickly improving the collection of GST and Income Tax through the identification of those subjects who are in such situation in an expeditious manner, to prevent and neutralize them from continuing with the practice of granting payment vouchers that allow the exercise of the tax credit and/or the deduction of the cost or expense for a certain period of time.

By means of Legislative Decree No. 1532[13], the Ministry of Economy and Finance (MEF) complied with the delegation and approved the rule that regulates the procedure for attributing SSCO status, the mechanism for publicizing the status, the procedure for resolving any challenges that this may generate and the challenges for debt determined by virtue of having been assigned SSCO status, guaranteeing the rights of taxpayers.

By enacting Legislative Decree No. 1532, the MEF has sought to achieve the following objectives:

- Tackle tax evasion and improve the collection of GST and IR.

13 https://busquedas.elperuano.pe/normaslegales/se-regula-el-procedimiento-de-atribucion-de-la-condicion-de-decreto-legislativo-no-1532-2049959-2/

- Reduce the risk of non-real operations and dissuade evasion behaviour.
- Establish an efficient control model within a guaranteeing legal framework.
- Contribute to the reduction of unfair competition.

This provision, which came into force in January 2023, becomes a powerful tool to control non-real operations.

4. PROCEDURE FOR ATTRIBUTING THE STATUS OF SUBJECT WITHOUT OPERATIONAL CAPACITY - SSCO

4.1 Conditions for determining the SSCO

Article 3 of Legislative Decree No. 1532 states that the SSCO is the one that, although it appears as issuer of payment vouchers or complementary documents, does not have the economic, financial, material, human and/ or other resources, or these are not suitable, to conduct the operations for which such documents are issued.

The procedure for attributing the status of subject without operational capacity specified in article 4° of the regulation states that SUNAT may initiate the procedure for attributing the status of SSCO when through a field verification and its sources of information -including that from private or public entities or that coming from crosschecks of information- it detects that a certain subject is included in the following situations:

a) It does not have the infrastructure or goods, or these or that are not suitable, to carry out the transactions for which the payment vouchers or complementary documents are issued;

b) It does not have assets, or these are not suitable, to conduct the transactions for which the payment vouchers or complementary documents are issued;

c) It does not have personnel (direct and indirect), or such personnel is not suitable to conduct the transactions for which the payment vouchers or complementary documents are issued, and/or

d) Any other objective situation that evidences that the subject does not have the economic, financial, material, human and/or other resources, or that these are not suitable, to conduct the transactions for which the payment vouchers or complementary documents are issued.

In the field verification that SUNAT will have to complete, the situations or assumptions indicated above will be verified through actions carried out by its personnel that can be of immediate execution such as the inspection of the premises occupied, under any title, by the subject, taking statements from the subject or its representatives who are present in the intervention, taking statements from its workers, taking inventory and carrying out any other action required to verify if said subject has incurred in one or more of the situations referred to in paragraph 4.1 of article 4 of the Decree.

A record must be made of the facts that are verified in the action(s) conducted during the field verification in the document called “minutes”, which must be signed by the subject to whom the field verification is carried out or his representative. This document does not lose its character as a public document nor is its content invalidated, even if it presents observations, additions, clarifications or inscriptions of any kind or when the subject or his representative declares his refusal and/or omits to sign the record or refuses to receive it.

Some examples of findings that lead SUNAT to determine a qualifying condition to start and confirm that the subject is without operational capacity:

- Not having the equipment that by the very nature of the activity was necessary.
- Not having the necessary office material to conduct the activity.
- Not having its own or rented vehicles to carry out the distribution tasks that support the documentation of the activity.
- Not having available personnel directly or indirectly, the latter through outsourcing companies.
- Absence of commercial infrastructure.
- No knowledge and preparation on the economic activity conducted.

The aforementioned article of the legislative decree explains that SUNAT, in order to evaluate the suitability of the situations indicated above, must take into account the **sufficiency, reasonableness and proportionality** of the economic, financial, material, human and/or other resources used by the subject to carry out the operations for which it issues the payment vouchers, based on the nature of the operations, the level of sales of the subject whose operating capacity is questioned, the economic sector to which it belongs, among others.

This evaluation is very important since SUNAT will have to take into account aspects that could configure the lack of operating capacity and collect a set of evidences that must be evaluated based on the evidence obtained and that cause conviction that a subject corresponds to the attribution of subject without operating capacity, given that the taxpayer can use additional elements to demonstrate that it has the suitable resources for the production of goods or the rendering of services.

An example of how we determine that the operation is not real consigned in the payment vouchers of a taxpayer dedicated to the construction sector is to request:

- Place where the economic activities are conducted, tax domicile and annexed establishments, installed capacity.
- Equipment, materials, infrastructure that demonstrates the activity conducted.
- List of the construction sites where the construction materials and services purchased were shipped.
- Attach the waybills showing the details of the materials sold.
- Proof of the entry and exit of construction materials acquired for sale to the clients, attaching the Kardex or stock and supplies control that proves their entry and exit.
- Attach the bills of lading showing the details of the materials purchased and sold, as well as the receipts for the transportation service, as well as their payment and collection.
- Indicate in writing how and who coordinated the quantity of materials required by customers.
- Attach documentation supporting the income of the invoices observed, such as copies of checks, bank statements, proof of deposit in checking or savings accounts, and that the cash and bank books are exhibited.
- Interview with the workers who have participated in the activities of the questioned invoices.
- List of clients and suppliers with their contact telephone numbers, as well as the e-mails where communications with suppliers or clients are verified.
- Advertising made through social networks, website, media advertisements, among others.

- Utility expenses related to the business, electricity, water, telephone, internet.

The following is an analysis of the aspects that must be considered when evaluating the suitability of the operations conducted by the taxpayer in which its performance as a supplier of goods or services is questioned.

- ***Sufficiency***

This refers to the availability of monetary funds, capital and sources of financing such as investments, loans, banking operations and financial management in general that evidences and proves that the economic activities for which the tax administration is questioning have been conducted, as well as the availability and adequacy of the necessary physical resources, such as equipment, facilities, infrastructure and supplies, and additionally the availability of competent personnel, in sufficient quality and quantity to perform the tasks and functions required to conduct the activities in question.

- ***Reasonableness***

This refers to the evaluation and verification of the processes, decisions and actions related to the possibility that the activity and therefore the economic transactions have been carried out and have been demonstrated with logical, sensible and adequate criteria according to the reality of the market and the sector where the taxpayer is developing the activity. Reasonableness seeks to guarantee that the economic activity has been carried out in accordance with the minimum practices found in the market or with the support that the taxpayer can provide. Whether the taxpayer is aware of the legal provisions and specific requirements that apply to the relevant industry or sector, knows the regulatory framework; has considered relevant factors such as the market, prices, competition, advertising and associated risks; performs a financial evaluation, cash flow, results for the month, cost and expense management, pursuit of business profitability, etc. It is also important to know if the company has implemented processes and controls, if clear responsibilities have been assigned and if follow-up and control mechanisms have been established; and additionally if factors such as training, assignment of tasks, motivation and professional development have been taken into account or if the services have been outsourced to a company specialized in the opportunity, form and conditions for the sale of goods or provision of services performed by the inspected taxpayer.

- ***Proportionality***

This seeks a balance or correspondence between the means used and the ends sought, it is considered that an allocation of resources, for example for the production of a good or service, is proportional when an optimum balance is achieved between the costs and benefits obtained, it implies demonstrating that the resources used, the costs incurred and the efforts dedicated to the economic activity are proportional to the benefits and results expected from the economic activity carried out by the taxpayer.

Proportionality involves assessing whether the economic, financial, material and human resources of the company are adequate in relation to the objectives of the economic activity it performs, whether the costs incurred, such as operating expenses, salaries and production costs, are proportional to the economic benefits generated and finally determining whether the size and scope of the activity are proportional to the capacity of the company being verified.

4.2 Operational procedure for the determination of the SSCO

Once the conditions indicated above have been verified, SUNAT proceeds to jointly notify the letter where it presents the tax agent and communicates the start of the procedure and the requirement communicating the situations detected in the field verification, as well as in what has been verified through its sources of information, so that the subject, within thirty (30) working days, presents the means of proof that disprove each of the situations communicated in said requirement.

SUNAT, within thirty (30) business days from the business day following the expiration of the term to submit the evidence, evaluates such evidence and, if applicable, may conduct a new field verification and/or its sources of information. After the evaluation of the evidentiary means, as well as the results of the field verification and its sources of information, SUNAT, under its responsibility, notifies the result of the requirement within the 30 working days indicated above in which it determines:

a) Each of the situations detected that led to the initiation of the proceeding have been disproved, culminating in the notification of the proceeding, or

b) Each of the situations detected that originated the initiation of the procedure have not been disproved, issuing and notifying within said term the resolution to grant the SSCO status.

Once the resolution of the attribution of the SSCO status has been notified, it will become final when:

- In the period of 10 business days for the filing of the appeal or appeal to challenge the resolution expires without the subject having filed such appeal;

- Having challenged the resolution, the taxpayer files the withdrawal in accordance with the provisions of article 130 of the Tax Code and it has been accepted, or;

- The taxpayer has been notified of a resolution that puts an end to the administrative process.

It is important to point out that Article 5 of the Legislative Decree establishes the following deadlines, among others:

- Five (5) business days for the correction of the admissibility requirements of the claim and appeal.

- Thirty (30) business days to resolve the claim and appeal, under liability.

- Ten (10) business days for the performance of the evidentiary means in the claim and appeal, provided that these had been offered within the term of thirty (30) business days of SUNAT's communication on the situations detected in the field verification, as well as its sources of information and had not been able to be acted for causes not attributable to the subject.

- Ten (10) business days for SUNAT to submit the appeal file to the Tax Court.

Both SUNAT and the Tax Court are competent to resolve the claims or appeals that attribute to the subject the condition of SSCO, so their treatment is governed by the contentious procedure of the Tax Code but with tighter deadlines because of the behaviour that must be neutralized quickly due to the actions of this type of subjects that are instruments for the reduction of the substantial tax obligations of the GST and income tax.

This regulation with its procedure turns out to be a guarantor given that the effects for the subject qualified as SSCO are only produced after it is included in the publication made by SUNAT, which is made only when the resolution that attributes the condition of SSCO is final, that is, even when the resolution issued by the Tax Court has exhausted the administrative process, Unlike what happens in Mexico, where the publication of the list of taxpayers classified as non-existent or ghost companies is made before the resolution attributing such condition becomes final, that is, before the taxpayer files any legal defence mechanism against such resolution, and the effects of this attribution begin with the aforementioned publication.

4.3 Publication of the SSCOs

After the resolution attributing the SSCO status is final, SUNAT publishes on its website and in the Official Gazette El Peruano, on the last calendar day of the month, the list of subjects without operating capacity. The referred publication must contain at least the following SSCO's data:

- RUC number

- Surnames and names
- Name or company name of the subject
- Tax domicile
- Surnames and names and identification of its legal representatives.
- Number of the SSCO attribution resolution
- Date of issuance of the resolution
- Date on which the resolution became final
- Date of publication on the website

The publication is maintained on the SUNAT website for a period of four (4) years counted from the day calendar following publication.

5. EFFECTS OF THE PUBLICATION OF THE PUBLICATION OF THE ATTRIBUTION OF THE SSCO CONDITION

The normative provides tax effects that neutralize the subject that has the attribution of SSCO status starting from the calendar day following the publication and ending 4 years later, not being able to issue payment vouchers that allow exercising the right to the tax credit or any other right or benefit derived from the GST and/or supporting the cost or expense for income tax purposes. The specific effects are as follows:

I. The cancellation of the series of physical payment vouchers and physical complementary documents. Given the massification of electronic payment vouchers, there is still a small universe of taxpayers to be incorporated to the electronic issuance system. If the taxpayer with SSCO status is in this universe, it will not be able to issue more physical payment vouchers unless it is located in an area of low or no connectivity, in which case the cancellation of payment vouchers will not include physical sales slips, since it will not be able to issue electronic vouchers.

II. The SSCO may only issue sales slips and related debit and credit notes until the expiration of the 4-year term. Said bills and notes must be issued electronically. This prevents the issuance of invoices that generate tax benefits to third parties such as the use of tax credit, cost or expense for income tax or tax refund. Likewise, in view of the taxpayer's negative background, it is considered convenient to incorporate him to one of the systems for the electronic issuance of payment vouchers so that he can only issue sales slips addressed to final consumers.

III. The operations carried out with the SSCO do not allow exercising the right to tax credit or any other right or benefit derived from the GST and / or support cost or expense for CIT purposes.

IV. No voucher issued by the subject can generate any tax benefit to its purchaser[14].

V. Others that are established according to law.

Another direct consequence of the SSCO is the payment of the GST recorded in the payment vouchers or debit notes, where it appears as issuer, as long as vouchers have been issued up to the day of publication, given that although this SSCO was constituted with the sole purpose of transferring tax benefits that ended up eroding or suppressing the true tax burden of the GST, it is not possible to assume the payment of the tax that was recorded in the payment vouchers or in the debit notes, where it appears as issuer, as long as vouchers have been issued up to the day of publication, This becomes a dissuasive measure in the future due to

14 Under Peruvian law, the subjects of the RUS (single taxpayer) only issue sales slips, however, these may be deductible as expenses or costs supported by these documents that do not grant such right, up to the limit of 6% (six percent) of the amounts credited through Payment Vouchers that grant the right to deduct expenses or costs and that are recorded in the Purchase Register. Said limit may not exceed, in the taxable year, 200 (two hundred) Tax Units. Likewise, the sales slips issued by the subjects that have been attributed the condition of SSCO may not be used for the deduction of the 3 Tax Units for the determination of the net income from work by individuals.

the enormous tax burden that would have to be borne by any subject that constitutes front companies, with SUNAT being authorized to demand the collection of the corresponding taxes.

6. EFFECTS RELATED TO THE PAYMENT VOUCHERS OR COMPLEMENTARY DOCUMENTS ISSUED UP TO THE DAY OF THE PUBLICATION MADE BY SUNAT

With the issuance of the resolution of attribution of the SSCO status, after it becomes final, the consequence is the loss of credibility in the realization of the operations that the subject indicated to have conducted, due to the confirmation by SUNAT that this subject did not have the operational capacity to carry out the economic activity that it supposedly performed and for which it issued payment vouchers.

Therefore, all taxpayers who have carried out commercial transactions with the SSCO up to the date of publication by SUNAT on its website and in the official gazette, may request the review of the payment vouchers issued by the SSCO to the tax authority, given that if the taxpayer does not request the review within 30 business days following the publication of the SSCO on SUNAT's web page, the payment vouchers issued by the SSCO will not allow the taxpayer to exercise the right to the tax credit or any other right or benefit derived from the GST or to support the cost or expense for income tax purposes.

Taxpayers who request the review of the payment vouchers received by the SSCO will be subject to a partial audit procedure to verify whether or not the payment vouchers correspond to real operations, after which the corresponding determination resolution must be issued, if SUNAT determines that the transactions are not real, it will disregard said payment vouchers and will urge the taxpayer to present its rectifications and payment of the unpaid taxes or issue the corresponding determination resolutions in order to materialize the omission and proceed to the collection of the tax debt, including the corresponding fines.

Likewise, the regulation states that the aforementioned disregard does not apply to those payment vouchers or complementary documents used to support the right to the tax credit or any other right or benefit derived from the GST and/or the cost or expense for CIT purposes in tax periods that are being subject to a definitive or partial non-electronic audit procedure for any of the aforementioned taxes, as long as it is in process prior to the date on which the resolution of attribution becomes final, whether the respective audit procedure was initiated before or after the notification of the letter and the requirement. The determination of the entitlement to the tax credit or any other right or benefit derived from the GST and/or the cost or expense for CIT purposes of the payment vouchers or complementary documents is made in the respective audit procedure in which they are examined.

7. EFFECTS TO COMPANIES OR PERSONS RELATED TO THE SUBJECTS THAT HAVE BEEN ATTRIBUTED THE SSCO STATUS

The regulation has provided an innovation with respect to extending the effects of the SSCO status to the persons or companies related to the one designated as SSCO, since it has been observed that it is recurrent the practice of persons that constitute front companies to constitute successive legal entities (EIRL or Companies) or to enter into business collaboration contracts to continue with the illegal practice of issuing invoices for non real operations, Therefore, the regulation establishes that all the companies linked to the SSCOs whose registration in the TIN is made as from the calendar day following the publication of the SSCO condition must also be published in the SUNAT web page and in the official gazette, for the purpose of establishing who are the taxpayers linked to the SSCO to be published and that they will have the same restrictions and limitations as the SSCOs. For this purpose, the companies to be created must be in the following situations or conditions:

a) The EIRL whose owner is a SSCO.

b) EIRLs whose owner is the same as that of the EIRL without operational capacity.

c) Companies incorporated by one or more SSCOs, in which, individually or jointly, they directly or indirectly own more than twenty percent (20%) of the capital of such companies.

d) Business collaboration contracts in which one or more of the contracting parties are SSCOs, provided that these, individually or jointly, have a participation of more than twenty percent (20%) in the results of said contracts.

e) Partnerships or business collaboration contracts in which their partner(s), shareholder(s), shareholder(s), or contracting parties who, individually or jointly, directly or indirectly own more than twenty percent (20%) of the capital of such partnerships or have a participation of more than twenty percent (20%) in the results of such contracts, and at the same time are or have been partner(s), shareholder(s), shareholder(s), or contracting parties, individually or jointly, of a company or of a business collaboration contract without operational capacity in at least such percentages.

It is noted that the indirect position mentioned above occurs when such possession is held through a third party. For this purpose, the following is considered as indirect possession:

a) In the case of an individual:
To that held by the individual through the person(s) related to it, as well as the possession, direct or indirect, that corresponds to the legal person(s), with respect to which said person and/or the person(s) related to it has (have) participation in its (their) capital.

b) In the case of a legal entity:
To that held by the legal person through another legal person(s) over which the former has participation in its capital, as well as the indirect ownership that the latter has, in turn, through another legal person(s).

For the relationship, the individual is also taken into account with their related relatives with degrees of consanguinity and affinity.

As a result of the publication of the related companies, the possibility for the SSCO designated subjects to constitute new companies directly or through their related companies is neutralized and they can continue issuing payment vouchers for non-real operations, so that immediately after the publication the following effects are produced:

I. Deregistration of the series of physical payment vouchers and physical complementary documents of EIRLs, business collaboration contracts and companies included in the publication.

II. The EIRLs, partnerships and business collaboration contracts included therein may only issue sales slips and debit and credit notes related to them. Said bills and notes must be issued in electronic form.

III. The restriction is maintained until the expiration of the term applicable to the SSCO that originated the EIRL, partnership or business collaboration contract to be in some situations of linkage.

IV. Such companies may request their exclusion and the lifting of the restriction through a challenge procedure.

Finally, this procedure is in force as from January 1, 2023 and its application reaches the payment vouchers issued as from the day after the publication of Legislative Decree 1532 that supports the rule, that is, as from March 18, 2022 onwards.

CONCLUSION

- Fake invoices or non-real transactions undermine state revenues by reducing the tax base and evading tax payments. This directly affects the state's ability to fund public services, infrastructure, education, health and other important programs. By combating these practices, state revenues are protected and the government's ability to fulfil its responsibilities to society is strengthened.
- The fight against non-real, simulated and non-existent operations is aimed at the relevant constitutional legal right: "the fight against tax evasion" since this evasive practice harms the States and society as a whole, generating unfair competition in those honest taxpayers who do declare and pay their taxes correctly and fairly.
- The use of false invoices or fictitious operations allows taxpayers to evade taxes unfairly. This creates inequality in the tax system, as some taxpayers evade their responsibility while others comply with their tax obligations. Combating these practices ensures equal treatment for all taxpayers and promotes tax fairness.
- The control and inspection actions conducted directly by the tax administrations are important through an efficient risk management, however, the detection and dismantling of this type of fraud modalities are costly in resources and time, so it is necessary to have more efficient regulatory measures.
- The Peruvian regulation recently approved through Legislative Decree No. 1535, which attributes the condition of subject without operating capacity, is an innovation in control because it neutralizes front companies so that it, its partners and related companies that are created later cannot grant credits, costs or expenses and no tax deduction benefits.
- Likewise, companies will be much more careful and attentive before simulated invoices or invoices coming from non-existent operations enter their accounting, since it is the company itself that will request SUNAT's review of the operations conducted with the SSCO.
- This measure will make the tax administration more effective in the detection and neutralization of the persons that make up front companies, achieving tax effects and in a massive way in the taxpayers that deduct tax credit unduly, with the use of fewer resources.
- For the State, the regulation would allow mitigating the risks of loss of collection with respect to the two main taxes, the GST and the income tax.
- For taxpayers that act diligently in the selection and relationship with their suppliers, this regulation is neutral, their operations will not be affected by any questioning, since their suppliers can hardly be considered as SSCOs.
- The regulation obliges taxpayers to be more diligent and choose their suppliers properly, improve the relationship protocols with their suppliers in order to ensure that their supplier has the capacity to carry out transactions with them.
- It is expected that this regulation will not only help to reduce tax evasion and increase the collection of GST and IR but will also help to reduce the unfair competition that taxpayers face when acting in markets where there are bidders that use evasion practices to generate an illegitimate competitive advantage.
- As detailed in this article, Peru is not the only country in Latin America that has enacted regulations that discourage the use of apocryphal invoices for false, simulated or non-existent operations, In our opinion, the Peruvian regulation is relevant and innovative and is an excellent proposal for tax control, duly justified.

REFERENCES

Alva Matteucci, Mario. Aplicación Práctica del IGV e ISC. Instituto Pacífico. Agosto 2020.

Luque Bustamante, Javier. El impuesto general a las bentas. Tratamiento del Crédito Fiscal. VII Jornadas nacionales de Derecho Tributario. Pag. 175. www.ipdt.org

Rodríguez Dueñas, César. La imposición al consumo en el Perú; análisis y perspectiva. Ponencia presentada en el primer congreso institucional del IFA-Perú, noviembre 1999. Pp. 161-180

Legislation

"Código Fiscal de la Federación". Diario Oficial de la Federación, México, 31 de diciembre de 1981, lunes 31 de diciembre de 2012, Titulo Tercero, De las Facultades de las Autoridades Fiscales, Capitulo I. Artículo 69-B.

Decreto Legislativo 1532, Perú, 19 de marzo de 2022."Se regula el procedimiento de atribución de la condición de sujeto sin capacidad operativa", pp. 10-15/pág.

"Estatuto Tributario Nacional". Decreto 624 de 1989. Artículo 495 y 671, modificado por el artículo 294 de la Ley 1819 del año 2016. Colombia.

"Ley del impuesto a la renta". Perú. Capítulo V: De la Renta Bruta y Capítulo VI. De la Renta Neta."

"Ley de impuesto general a las ventas. Perú. Capítulo X https://www.sunat.gob.pe/legislacion/igv/ley/capitulx.pdf

"Procedimiento. "Sistema Registral". Estados Administrativos de la Clave Única de Identificación Tributaria (C.U.I.T.). Acceso a los servicios con Clave Fiscal. Resolución General N° 3.358. Su sustitución. Resolución General 3832, Buenos Aires, Argentina. 01 de marzo del 2016, Artículo 3° y Artículo 6°.

"Reglamento para la aplicación de la Ley de Régimen Tributario Interno". Publicado en el Suplemento del Registro Oficial No. 209, 06 de junio del 2010 y última modificación: tercer suplemento del registro oficial 186 del 10 de noviembre del 2022. Ecuador. Capítulo IV, Depuración de Ingresos. Artículos 24, 25, 25.1, 25.2. y 26 Artículos sustituido por artículo 2 y 3 del Decreto Ejecutivo No. 586, publicado en Registro Oficial Suplemento 186 de 10 de noviembre del 2022.

Electronic References

El Peruano. 10 de setiembre de 2019 https://elperuano.pe/noticia/83247-afianzan-fiscalizacion-contra-facturas-falsas

Andina. 09 de setiembre 2019 https://andina.pe/agencia/noticia-sunat-facturas-falsas-o-clonadas-involucran-a-mas-mil-contribuyentes-766061.aspx

Resolución del Tribunal Fiscal: N° 986-2-2009 http://www.mef.gob.pe/contenidos/tribu_fisc/Tribunal_Fiscal/PDFS/2009/2/2009_2_00986.pdf

Resolución del Tribunal Fiscal: N° 1759-5-2003 http://www.mef.gob.pe/contenidos/tribu_fisc/Tribunal_Fiscal/PDFS/2003/5/2003_5_01759.pdf

DeFi regulation proposal: Stimulating financial innovation with transparency and tax liability

Vinicius Rodrigues Reggio

SYNOPSIS

This article presents a proposal for regulating the Decentralized Finance (DeFi) sector, aiming to stimulate financial innovation through transparency and fiscal responsibility. The proposal addresses the implementation of automatic tax collectors and government oracles, emphasizing their importance in promoting compliance and improving efficiency in decentralized transactions. The proposed regulation seeks to create a safe and reliable environment for the sustainable development of the DeFi ecosystem, benefiting both participants and regulatory authorities.

KEYWORDS: Regulation, Decentralised finance, Tax collection, Cryptoassets, Smart contracts

CONTENT

Introduction
1. Market and regulation today
2. Requirements
3. Reasoned analysis of future consequences
Conclusion
References

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INTRODUCTION

The term DeFi (acronym for “*Decentralized Finance*”) is relatively recent and often unknown to people who are not associated with the crypto environment. This expression represents the financial systems built on distributed ledger technologies (DLTs) and that allow trades to be executed automatically and without human intervention, promoting a true financial disintermediation. To a large extent, they try to emulate the activities of traditional finance, but with the difference that they do not have controlling or centralized entities, as well as regulation.

In recent years, the Decentralized Finance ecosystem has emerged as a new frontier of financial innovation, offering unique opportunities for access to open, public, and intermediary-free financial services. With the rapid growth and successive adoption of DeFi protocols, there is a need for an appropriate regulatory approach that promotes the safety, trust and sustainability of this constantly evolving industry.

Decentralized finance presents various risks for countries, and the lack of regulation coupled with increasing adoption amplifies these threats. Some of the main ones concern its use for illicit activities such as money laundering, evasion of sanctions and terrorist financing. Another concern is the acceleration of the cryptoization of economies:

The growth of DeFi may also contribute to currency substitution, especially in countries prone to higher inflation, macroeconomic instability, weak central bank credibility and with an inefficient banking sector. Such a scenario may lead citizens of these countries to buy crypto-assets as a potentially more reliable store of value than their own national currency. This phenomenon has been dubbed “cryptoisation”, which DeFi could accelerate if used more widely. As is the case for more traditional forms of currency substitution, cryptoisation may complicate the management of domestic monetary policy and ultimately compromise monetary sovereignty. In such a scenario, widespread adoption of crypto-assets may erode the efficacy of measures that the central bank may undertake to support the banking system in a crisis, for example introducing capital and foreign exchange controls. (FSB, 2023, p.24)

When developing a DeFi regulation proposal, it is crucial to involve relevant stakeholders, including regulators, technology experts and market representatives. Ongoing collaboration and dialogue will help promote balanced regulation that takes into account technical complexities and compliance needs. Futhermore, an adaptable and flexible regulatory approach will allow DeFi to evolve and adapt to future technological changes and market requirements without compromising its security or stability.

DeFi regulation, when implemented in a careful and balanced manner, can provide a solid foundation for the sustainability and healthy growth of this innovative sector as well as for effective control by the responsible government authorities. By establishing clear rules, protecting investors and mitigating systemic risks, a trusted environment for innovation can be built, solidifying DeFi as an active force within the global financial system.

This article presents a regulatory proposal for the DeFi space, aiming to establish a balanced regulatory environment that fosters innovation and protects the interests of users and participants, recognizing the benefits and challenges associated with decentralized finance.

The proposal seeks to organize a theoretical model that ensures the security of funds, the transparency of protocols, the prevention/punishment of illegal activities

1 *Digital Ledger Technology*: technology that allows the recording of information in digital format in a distributed and decentralized way.

and tax compliance, focusing on key aspects such as licensing of protocol operators, consumer protection, risk management and compatibility with existing and, perhaps, future financial laws.

Additionally, the importance of collaboration among regulators, protocol developers, and participants in the DeFi ecosystem will be addressed, emphasizing the need for effective implementation and ongoing monitoring of the proposed guidelines.

1. MARKET AND REGULATION TODAY

The breadth of the DeFi sector, although still small in relation to the total capitalization of the crypto market, is going through a period of a significant growth[2]. What fosters this expressive increase both in the number of users and in the *Total Value Locked* (TVL)[3] basically boils down to a single point: high financial returns[4]. According to the Organization for Economic Cooperation and Development (OECD), the primary motivation behind the growth in the DeFi sector is the pursuit of profits, predominantly focused on speculation, investments, and arbitrage (OECD, 2022a). As the Bank of International Settlements argues, “at present, it is geared predominantly towards speculation, investing and arbitrage in crypto assets, rather than real-economy use cases” (BIS, 2021, p. 32).

Regulation of DeFi by countries is still limited, and its discussion is minimal as regulators remain primarily focused on formulating rules and guidelines for traditional cryptocurrencies. As a result, the vast majority of these legislations are entirely silent on matters related to decentralized finance. Furthermore, the sector is relatively new and under development, making it even more difficult for the countries involved to understand and reach a consensus, as they have to define their forms of action in terms of taxation and inspection. However, supranational bodies such as the Financial Action Task Force remain alert and monitor the situation of the DeFi market (FATF, 2022). Moreover, its revolutionary nature demands innovative and creative approaches since there are few points of entry for regulation. According to the Organisation for Economic Co-operation and Development:

When it comes to truly decentralised financial application (as opposed to currently observed DeFi protocols with centralised characteristics), there may be a need for policy makers to rethink some of the policy tools to allow for compatibility with truly decentralised structures. This mainly relates to the absence of single regulatory/supervisory access points in decentralised systems, and the possible resulting incompatibility that tools of the existing oversight architecture designed with financial intermediaries at its core (e.g. enforcement in the absence of identifiable accountable entity). There may be a need to ‘re¬¬centralise’ DeFi in order to get some comfort from a regulatory and supervisory standpoint, without necessarily completely undermining decentralisation, by identifying forms of centralisation that may exist in such networks (OECD, 2022b, p.50).

Other alternative approaches are currently based on the figure of the gatekeeper who would control the entry and exit of users or financial resources.

2 More information available in the European Commission’s article “*Decentralized Finance: information frictions and public policies*”, available at: https://finance.ec.europa.eu/system/files/2022-10/finance-events-221021-report_en.pdf

3 Total Value Locked is a measure that represents the sum total of the values of assets that are locked or “frozen” in DeFi protocols.

4 Further information available at: https://www.ecb.europa.eu/pub/financial-stability/macroprudential-bulletin/focus/2022/html/ecb.mpbu202207_focus1.en.html

Not only DeFi, but all decentralized entities pose a considerable regulatory challenge. The traditional scenario in which those involved are known does not fit the world of decentralization in which the agents are all unknown, opaque or even non-existent. Even the FATF has already stated that, in some cases, the owners of Governance Tokens[5] should be responsible for fulfilling obligations AML/CFT[6] (FATF, 2021). For the SEC[7], DeFi presents the lack of transparency as a structural obstacle (despite the transactions being public) and pseudonymity[8].

The public sectors of the entire globe must as soon as possible regulate decentralized projects, otherwise they will lose adequate time. Projects already completed and settled no longer offer the window of opportunity in which governments could act.

Considering a hypothetical project, the moment when this regulation should be put into practice is prior to the launch of this DeFi project. This is when the developers of the technological part will start their work, so that all the compulsory requirements of control, imposed by the regulation, must be fulfilled by their creators. And this conformity must be the sine qua non condition for their advancement[9].

It is important to point out that crypto assets activities have distinct audiences. In general, there are those with a more purist approach, who despise regulation and believe in anonymity and privacy as the essence of this market (whether by conviction or for other reasons, including irregular ones). On the other hand, there are people who see crypto assets only as a form of investment portfolio diversification seeking profitability or risk reduction against fiat currencies or fragile economies. For the latter group, the non-identification characteristic is only residual and not relevant in the investment decision making process. This can already be seen, for example, in the number of transactions carried out by centralised virtual asset service providers[10] which have KYC/AML[11] protocols, in relation to those carried out by peer-to-peer. Thus, these should be the audiences that the proposed regulation wants to reach.

5 Governance Tokens are tokens issued by decentralized protocols or platforms that allow holders to participate in platform decisions. These tokens give holders the right to vote, make decisions, and participate in other governance activities.

6 Anti Money Laudering is the set of practices and regulations that primarily financial institutions carry out, through operational procedures, in order to detect, prevent and combat money laundering. Counter-Terroism Financing has the same meaning but the goal to be fought is the financing of terrorist activities.

7 Securities and Exchange Commission of the U.S. government.

8 Available at: https://www.sec.gov/news/statement/crenshaw-defi-20211109

9 According to the initial and more centralized parts of the "Lifecycle of DeFI services" exposed in the article "Decentralized Finance (DeFi) Policy-Maker Toolkit" of the World Economic Forum.

10 Broad definition, provided by FATF, which encompasses various actors in the crypto sector, such as exchanges, custodians, among others.

11 *Know your customer* is a process, basically carried out by financial institutions, in order to collect information and verify the identity of their customers. The main objective is to prevent illegal activities.

With regard to KYC/AML, although the practice is necessary and beneficial to the sectors that employ it, it brings inherent problems that are difficult to solve. The biggest one is based on the fact that data analysis is carried out by private entities, which, in many reported cases, have no interest in complying with the legislation in a minimally adequate way. There are plenty of examples where KYC/AML systems have not achieved the expected results or have failed, not only in the cryptoactive sphere[12] [13], but also in the traditional financial landscape[14] [15] [16] [17].

The usefulness of KYC allows for atypical situations to be reported to government agencies, which could, in theory, carry out interventions using this information as a starting point. The reason why government agencies cannot intervene *ab anteriori* comes from the simple reason that they do not have access to the situations that occur in the consumer-business relationship and, based on this argument, communication is required. Thus, it is noted that the use of KYC/AML protocols is intrinsically linked to centralised entities, which imposes severe restrictions on their use in decentralised environments.

On the other hand, in a scenario where the data is public and auditable, if the information about each user's identity is available to government institutions, there would be no need for communication, since everything that is happening is already known to the government. Therefore, in these specific cases, KYC protocols are unnecessary and even counterproductive, as they generate rework.

In the situation of a DeFi project where publicity rules are complied with, making transactions auditable by government bodies and these having the ability to link each user of the blockchain/smart contract with their respective real owner, KYC mechanisms could be suppressed.

From this perspective, KYC performed by private entities (which are supposed to exist even in a DeFi project, as strange as that sounds) can and should be replaced by government versions like Know your Citizen or Know your Taxpayer. These are mirrored versions of private Know Your Customer, with the significant difference that the atypical situations will all be analysed from the perspective of governmental risk management, whether performed in the context of the resident or the taxpayer. The advantages are relevant, since government entities have more information than a private institution, as well as the legal power to act if necessary. Nor are they affected by suspicious business relationships, as in cases where companies do not wish to harm their customers. Thus, it is possible that this proposal will reduce the composition of opportunities for illegal activities at first, and combat them later.

12 Available at https://www.dfs.ny.gov/reports_and_publications/press_releases/pr202301041

13 Available at https://www.dfs.ny.gov/reports_and_publications/press_releases/pr202208021

14 Available at https://www.fca.org.uk/publications/multi-firm-reviews/financial-crime-controls-at-challenger-banks#lf-chapter-id-key-findings

15 Available at https://www.thomsonreuters.com/en-us/posts/investigation-fraud-and-risk/european-banks-aml-efforts/

16 Available at https://www.fca.org.uk/news/press-releases/fca-fines-santander-uk-repeated-anti-money-laundering-failures

17 Available at https://www.justice.gov/opa/pr/danske-bank-pleads-guilty-fraud-us-banks-multi-billion-dollar-scheme-access-us-financial

2. REQUIREMENTS

Initially the basic requirements that are necessary for the implementation of the proposals to be discussed should be individualised and clarified.

The first item is the cryptographic address. This address is a set of characters generated from a public key. It works like a bank account number for financial transactions, being possible to make it available so that other people can deposit values, besides being used to withdraw values. Since it is derived from a public key, which in turn is derived from a private key through a one-way mathematical function, there is no way to deduce the private key based on the address. Therefore, its disclosure is feasible and does not present any identification risk to its owner.

Another key element is the resident's/taxpayer's registration number, often known as the TIN (tax/taxpayer identification number), ITIN (Individual taxpayer identification number), NIT (Tax Identification Number), RUC/RUT (Single Taxpayer/Tax Registry), DNI (National identity document), CPF (Registration of natural person), among others. A comprehensive overview of the types of registries in various countries is provided by the OECD[18]. Its importance lies in the fact that it uniquely and unequivocally identifies each person.

The third necessary component is the so-called blockchain, which is nothing more than a record distributed in a structure of interconnected and sequential blocks. Its access can be public or private. In the case in question, two technological possibilities will be addressed private or permissioned blockchains, i.e., those in which there are restrictive measures on user access (whether centralised or decentralised) (NIST, 2018), or public blockchains without access restriction, but which contain a smart contract that controls user access to certain functions. In the first possibility, the blockchain protocol would have to provide access to external data to perform validations. In the other alternative, much more feasible and easier to implement, the authorization would take place at the smart contract level, which would characterize a permissioned smart contract.

The fourth item, as mentioned above, is the smart contract, which is characterised by being a contract written in a programming language and linked to a blockchain, in which rules are defined and actions are assigned which will be executed autonomously. Smart contracts are indispensable for the functioning of decentralised finance.

Finally, the so-called oracles are needed. According to Koshik Raj (2019), the oracle would be an intermediary, a trusted entity that provides reliable information to the blockchain from outside the blockchain. Bashir (2018) defines oracle as an interface that provides data from an external source to smart contracts.

A smart contract in a given blockchain may require external information in order to be executed. As an example, a guarantee contract must learn about the updated values of the received collateral, so that if its value decreases considerably, in order to avoid losses, this collateral can be executed. Therefore, the information about the updated value must be collected from a reliable source, but which is outside the *blockchain*.

2.1 Government oracles

Government oracles have not yet been proposed and this is a point that this article aims to clarify. These would be systems whereby the public sectors would make specific information available for smart contracts. In this way a government oracle would play a key role at the intersection between DeFi and the traditional world,

18 Available at: https://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/tax-identification-numbers/

providing reliable information and ensuring the accuracy to sustain the safe and efficient operation of the DeFi ecosystem.

The emergence of a governmental oracle would be not only possible but also desirable, since governments possess considerable amounts of reliable and validated information. Its creation must be foreseen initially in normative acts and clear legal structures that will specify the conditions and requirements necessary not only for its operation, but also in relation to the projects that may use it. At this point it would be advisable for the government bodies involved to provide regulatory sandboxes[19] so that projects can be tested and validated. It would also help for the government to have a systemic view of the initiatives and their use in an environment of experimentation.

There are several types of information, necessary for the execution of smart contracts, that can be made available by a government oracle. For example, the execution of a life insurance contract created on a smart contract would be fully possible if the information on the insured's death were directly obtained by the government's registry of persons. Plenty of other information could be made available such as economic data (interest rate, inflation, aggregate metrics), identification data (affiliation, age, address) and property data (vehicle and real estate registration, financing, liens, pledges).

Regarding the present proposal, the government oracle would provide a basic and crucial information: whether or not a user can participate in a blockchain or a smart contract (linked to a DeFi project). This information would represent a legitimate "access authorization" to the user.

The use of a government oracle would bring possibilities of interconnection between various DeFi projects, as well as between these and the traditional financial system.

2.2 Process of linking a cryptographic address with a citizen/taxpayer

The first step consists of a link between a citizen/taxpayer and a cryptographic address. In this connection between the citizen/taxpayer government registry and the address two separate actions must take place:

A) It is necessary to prove that the user of the address is the legitimate citizen/taxpayer of the government register and[20];

B) It is essential to prove that the citizen/taxpayer is the legitimate holder of the private key that controls the cryptographic address[21];

And a mandatory condition: the citizen/taxpayer can have several cryptographic addresses, but each cryptographic address can only belong to one citizen/taxpayer.

19 These are experimental environments, made available by regulatory authorities, so that companies can test and validate their innovations, facilitating development.

20 This type of "action" is already fully viable in several countries where citizens can enter secure areas of government sites using digital certificates or other restricted forms of access.

21 For this the owner of the cryptographic address would send an encrypted message signed by the private key to the government entity informing and consequently proving that this cryptographic address belongs to the particular taxpayer/citizen.

Steps A and B are mandatory, as otherwise two situations may occur:

1. Linking cryptographic addresses to a Citizen/Taxpayer who is not a true owner

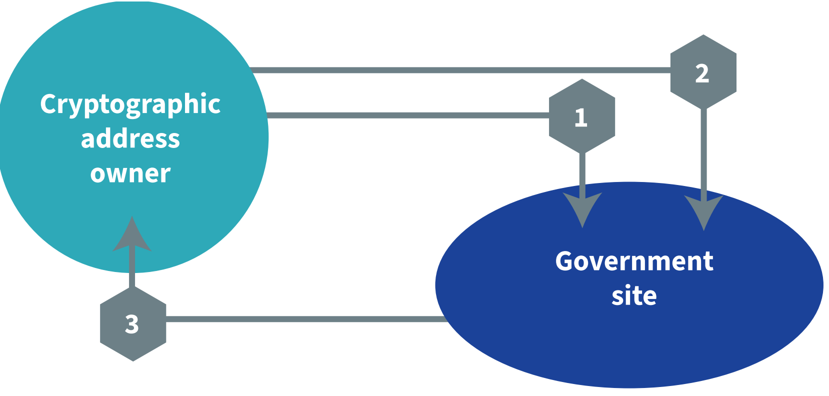
Without the proper restrictions discussed above, the linking of cryptographic addresses from non-owners could occur, allowing, for example, people to have addresses without even knowing they are theirs because a user has fraudulently linked them. It is possible that the real owner of any address informs that someone else is the owner; malicious users may use addresses in this way, linking them to users who are not even aware of the transactions, in order to benefit from the authorisation to access services when, for example, they have restrictions that prevent them from being authorised.

2. Linking citizens/taxpayers to addresses they do not have

In this case the person claims to be the owner of a cryptographic address without actually being the owner for various reasons, such as avoiding that a known address is later linked and its future use is "blocked", or in cases where an interposed person is used for criminal or tax purposes. The mandatory condition is for the purpose of avoiding more than one citizen/taxpayer being linked to a given address, which could lead to issues of shared responsibility. This condition is temporary and should be matured to multi-signature[22] protocol-based addresses.

Figure 1

Process of linking cryptographic address to the citizen/taxpayer



Source: Elaborated by the author, 2023.

22 Multisig addresses are those in which control is shared, and it is mandatory to use more than one private key for its use.

Table 1
Steps to link cryptographic address to citizen/taxpayer

Step	Process	Transmitted Information
1	User accesses the restricted area of the citizen/taxpayer in the government site and informs his cryptographic address.	Cryptographic address
2	User sends a message containing the citizen/taxpayer registration number, signed with the private key of the respective address to the government site/system	Message signed with the user's private key
3	Government site/system links information, performs validation by risk management and makes the result available to the user for his knowledge	Signed message, with government private key, containing the result "Authorised" or "Not authorised"

2.3 Query process for authorizing a cryptographic address

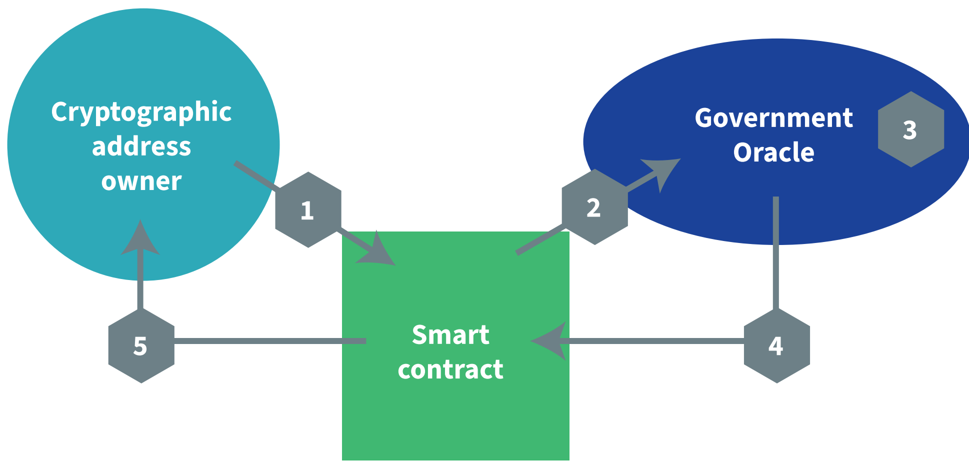
After the binding stage, the authorization for a cryptographic address to operate or not will be made available, upon consultation[23] to a Whitelist[24] belonging to the regulatory body (through a government oracle made available). If this address is validated by the previous process (see 2.2), authorization will be granted by the government agency and the smart contract will allow access to this user. But as long as the addresses have not been previously registered and validated, or in cases where the agency has assigned a non-conformity that prevents or restricts access to services, the smart contract will not find the authorization in the Whitelist and, consequently, will not allow access from this address to the services.

23 This query will be triggered by the smart contract, which must validate its own identity to be able to perform it. This way, only the smart contract will be able to perform the query, which is blocked to any other address. The purpose is to avoid queries by other contracts not previously authorised.

24 The Whitelist is necessary because it will unambiguously declare each authorised address. This form derives from the characteristics of the cryptographic addresses, as they may or may not have been created.

In this way the procedure boils down to:

Figure 2
Authorization process of a cryptographic address



Source: Elaborated by the author, 2023.

Table 2
Steps for authorising a cryptographic address

Step	Process	Transmitted Information
1	User informs cryptographic address to smart contract	Cryptographic Address
2	Smart Contract consults the Government Oracle	Message signed with private key of the smart contract (for oracle access validation purposes), Cryptographic address of the user
3	Government Oracle checks whether the cryptographic address is linked to a citizen/taxpayer and whether or not they have access restrictions	
4	Government Oracle informs Smart Contract whether or not to authorise access by the address consulted	Cryptographic address, message, signed with government private key, containing "authorised" or "unauthorized".
5	*Smart Contract accepts or rejects the address, according to the information passed on by the oracle*	Cryptographic Address, "authorized" or "unauthorized" message

2.4 Automated Tax Collector (ATC)

The Automated Tax Collector would be an automated way to collect taxes generated by users' transactions, working according to a set of pre-programmed rules and triggered by specific events (taxable events). It is suggested that it be made available through two distinct methods:

a) Cryptographic address belonging to the government in which the smart contract of the project would collect a pre-defined percentage as taxation of operations, written in the source code of the contract, in a previous way (during the creation of the project) or later (performed by the Governance token holders). By this method, the automatic withholding of values would occur.

b) Automatic transaction identification system and its respective tax assessment through the analysis of transactions in the blockchain and relationship with the taxpayers involved.

Both proposals have advantages and disadvantages. In the case where ATC is already provided for in the contract code (item a), its main advantage would be immediate taxation and tax collection. However, changes in tax rates would necessarily have to be voted on by Governance Token holders. Regarding the automatic systems (item b), due to its external operation to the blockchain, it would have as an advantage the greater facility to alter and as a disadvantage its higher cost of implementation and maintenance.

The process of operating an ATC would consist of:

1) **Event identification:** The smart contract would be designed to identify relevant events or taxable events that would trigger the collection of taxes. This may include specific transactions, such as asset transfers, profit realisation or any other event that is subject to taxation under applicable regulations.

2) **Tax calculation:** Based on the identified event, the smart contract would execute the programmed formulas and logics to calculate the amount of tax due. This could include the application of specific tax rates, allowable deductions or other tax parameters defined by the corresponding legislation.

3) **Automatic withholding:** Once the amount of tax due has been calculated, the smart contract could automatically withhold the appropriate portion of the assets involved in the transaction. These withheld assets could be transferred to a specific designated address or wallet for tax settlement purposes.

4) **Registration and reporting:** The *smart contract* could also be designed to keep a transparent record of taxable transactions and withholding tax amounts. This ensures transparency and accountability for all parties involved, including smart contract users and tax authorities.

5) **Payment of taxes:** Based on the records kept by the smart contract, the amounts withheld may be transferred periodically to the tax authorities or other appropriate intermediaries in accordance with the applicable tax regulations.

3. REASONED ANALYSIS OF FUTURE CONSEQUENCES

Based on the above, it is worth highlighting the potential and challenges that would arise from the implementation of the proposal.

1) The presence of a government entity guaranteeing the veracity of the platform users' information provides greater reliability to the market. This entity plays a key role in the supervision and

control ensuring the protection of personal data and the transparency of the information provided. With this additional security, users can feel more comfortable when using the platform, knowing that their information is being properly protected and verified. This trust strengthens the market as a whole, promoting active user participation and boosting the sector's growth. The existence of this government body creates a more credible environment and reduces the risk of fraud or abuse, generating benefits for both businesses and consumers.

2) The availability of information and control of access in the hands of the responsible entities play a crucial role in crime prevention and investigation. By having direct access to information, these organizations can act more efficiently and quickly to identify suspicious activities and collect evidence. This enables a more agile response to threats to public security and contributes to the reduction of impunity. In addition, direct access control helps to avoid possible manipulation or undue interference in the data, ensuring the integrity of the information and strengthening the system.

3) The maintenance of control of financial resources in the hands of users is guaranteed by the fact that private keys are not in the possession of government entities. Instead, only the information on who is responsible for each cryptographic address is shared with these entities. This preserves users' privacy and prevents potential abuses of power. Users have the unique power to access and manage their funds, thus maintaining autonomy over their financial transactions. This approach respects the principles of decentralisation and cryptographic security, providing trust and freedom to users of cryptocurrencies and other digital assets.

4) The absence of expenses with Know Your Customer (KYC) mechanisms represents lower costs for developers. By not having to implement and maintain these systems, projects can direct their resources to other areas in the creation of products and services. It allows them to focus on improvements, innovation and enhancing the user experience. This financial advantage benefits both developers and customers, contributing to a more efficient and attractive business environment.

5) The approach that avoids the direct application of KYC by Decentralized Finance managers comes closer to the status of decentralization, as well as automation offers greater autonomy to users, eliminating the dependence on third parties to verify their identity. In turn, full automation reduces the possibility of human error and favours the efficiency of transactions on the DeFi platform. By eliminating the need for human interventions, processes become faster and more scalable, allowing operations to occur continuously. This approach to decentralisation and full automation strengthens the core principles of decentralised finance, providing a more fluid experience for users.

6) The approach covers Governance Tokens, allowing the use of the information related to them for judicial and tax liability purposes. This means that the information recorded in governance tokens can be used as evidence in legal cases or for accountability purposes with tax authorities. Such transparency and traceability can contribute to legal compliance and the protection of investors' rights. By encompassing these tokens, the approach provides a more comprehensive regulatory framework that allows proper monitoring and enforcement, ensuring integrity and trust in financial transactions.

7) Under the new perspective, the approximation between the DeFi projects and the traditional financial organizations (TradFi) is promoted, enabling an interconnectivity of the activities. This means that DeFi solutions can integrate and interact with traditional financial systems, enabling collaboration and resource sharing. Such interconnectivity can result in mutual benefits, with traditional financial organisations benefiting from the efficiency and innovation brought by DeFi solutions, while DeFi platforms can gain greater access to liquidity and users from the TradFi world. This rapprochement between the two groups can drive the evolution and wider adoption of decentralised finance.

8) The regulation of this market promotes and enables the use of traditional forms of risk mitigation for users, such as the offer of guarantee funds to protect resources in case of losses. The treatment brings an additional layer of security and confidence to investors, providing a financial safety net. Through a validation “seal”, projects can be included in the risk mitigation mechanisms made available to ordinary investors, allowing them to access clear information about the reliability and protection measures offered by DeFi projects, facilitating informed decision-making and reducing exposure to unnecessary risks.

9) A peculiar aspect of the project is the geographical restriction of access, which can be seen as a security and regulatory compliance measure. Unless there are agreements for the exchange of information between countries, access to a given DeFi would only be available to local users or to those who are registered with the government entity. Although the geographic restriction may reduce the number of potential users, it can be seen as a form of user protection, avoiding potential risks and fraud associated with unauthorized access.

10) An important area of focus is constant vigilance against fraudulent practices, such as the use of interposed persons, figureheads, shell companies. By recognising and addressing these challenges, the project will be committed to maintaining the security and reliability of the process. The government’s implementation of robust risk management measures in identity control and ongoing monitoring can help mitigate the risk of these fraudulent practices and promote integrity in operations.

11) The public adoption of this specific project may be lower compared to the total DeFi market, as it targets a specific part of the total number of users of decentralised finance.

12) Asymmetries between traditional finance (TradFi) and decentralised finance (DeFi) may arise due to the lack of KYC requirement in DeFi projects, as opposed to what is required in traditional finance, resulting in cost and time inequality and conferring a clear competitive advantage for decentralised finance. The absence of KYC procedures allows users of DeFi platforms to access financial services in a more agile and cost-effective manner, while traditional financial institutions face more stringent requirements. This imbalance can shape market dynamics, encouraging the growing adoption of decentralised finance as a more affordable alternative for users.

13) The use of a government oracle can present the challenge of being susceptible to undue political influences, which may compromise the impartiality and veracity of the information provided. These influences may result in biased or unreliable data, affecting the integrity of the system. In this sense, the creation of an adequate legislative framework may be necessary to establish

conditions that ensure transparency, impartiality and accountability in the use of these government oracles. A clear set of guidelines and regulations can help prevent abuse.

14) The investment required for the availability of government oracles would include costs associated with infrastructure and skilled labour. These expenditures may cover the implementation of robust technology systems, the hiring of qualified professionals to manage and operate these Oracles, as well as the permanent outlay to provide ongoing support and proper maintenance of the systems.

15) The denial of access to a user can potentially result in legal claims. When a user is prevented from accessing a platform or service, they may seek legal action to challenge this decision. This may occur if the user alleges a violation of rights or unjustified discrimination. In such cases, the matter may be taken to court to have the legality of the denial of access assessed. It is important that government organisations are prepared to deal with potential legal disputes arising from the denial of access.

CONCLUSION

The introduction of a government oracle and an automatic tax collector via a smart contract are key measures in the proposal described. A government oracle would bring an element of regulatory oversight and control to the DeFi, enabling external data verification and validation, essential for many use cases in the financial sector. At the same time, the automated tax collector would bring a streamlined and transparent approach to tax compliance, ensuring conformity and sustainability of the DeFi ecosystem and guaranteeing resources to the Treasury.

According to the presented, the regulation would be conditioned by two mandatory requirements. There is a need for DeFi projects to have "permissioned" model blockchains or smart contracts, in addition to the KYC model for accessing them (including the case of Governance tokens) would be replaced by consultation with government Whitelist.

These mandatory conditions would delimit the target audience of the proposal, as well as linking developers to specific types of projects. In this way it is possible to provide an initial regulatory response that will inaugurate discussions on the subject.

The proposed regulation of DeFi should also consider international jurisdictions and perspectives. DeFi is a global phenomenon and crosses geographical boundaries. Therefore, harmonisation of regulations across different countries and coordination between regulators can promote a consistent and coherent approach to DeFi. This will reduce regulatory fragmentation, facilitate cross-border compliance and promote interoperability between protocols, allowing DeFi to reach its full potential as a genuinely global decentralised financial infrastructure.

However, it is recognised that the regulation of DeFi, with its many difficulties involved, is a complex challenge and often insurmountable with current technology and resources.

While regulation is often seen as a limiting factor for innovation, the proposed DeFi regulation with a government oracle and automatic tax collector seeks to balance the need for tax compliance with the promotion of financial innovation. By establishing clear guidelines and fair rules, regulation can foster a safer and more reliable environment for the development of DeFi solutions. This can encourage new entrants and investors, boosting creativity and diversity in the DeFi sector.

REFERENCES

Bashir, Imran. Mastering Blockchain. Distributed ledger technology, decentralization and Smart contracts explained. 2ª. Ed, 2018 Packt Publishing Ltd. P. 270

Bank for International Settlements. (2021d). DeFi risks and the decentralisation illusion. https://www.bis.org/publ/qtrpdf/r_qt2112b.pdf

Financial Action Task Force. (2021). Updated Guidance for a Risk-Based Approach. Virtual Assets And Virtual Asset Service Providers. https://www.fatf-gafi.org/media/fatf/documents/recommendations/Updated-Guidance-VA-VASP.pdf

Financial Action Task Force. (2022). Targeted Update On Implementation Of The Fatf Standards On Virtual Assets And Virtual Asset Service Providers. https://www.fatf-gafi.org/media/fatf/documents/recommendations/Targeted-Update-Implementation-FATF Standards-Virtual Assets-VASPs.pdf

Financial Stability Board. (2023). The Financial Stability Risks of Decentralised Finance. https://www.fsb.org/wp-content/uploads/P160223.pdf

National Institute os Standards and Technology. (2018). Blockchain Technology Overview – NISTIR 8202. https://nvlpubs.nist.gov/nistpubs/ir/2018/NIST.IR.8202.pdf

Organization for Economic Co-operation and Development. (2022a). Why Decentralised Finance (DeFi) Matters and the Policy Implications. https://www.oecd.org/daf/fin/financial-markets/Why-Decentralised-Finance-DeFi-Matters-and-the-Policy-Implications.pdf

Organization for Economic Co-operation and Development. (2022b). Institutionalisation Of Crypto-Assets And Defi–Tradfi Interconnectedness. https://www.oecd-ilibrary.org/docserver/5d9dddbe-enpdf?expires=1684894098&id=id&accname=guest&checksum=CD9D1625406ABF15AB0FD96C5E7D0557

Raj, Koshik. Foundations of Blockchain: The pathway to cryptocurrencies and decentralized blockchains application. 2019. Packt Publishing Ltd., p. 569

Tax and customs compliance risk management and institutional risk management: Concepts, similarities, differences and integration with strategy

André Luís Theresa

SYNOPSIS

This article seeks to demonstrate the importance of integrating institutional compliance risk management, institutional risk management and the strategy development process so that a Tax and Customs Administration can define, in a structured manner and based on objective criteria, its priorities at a given time. Based on research and the author's professional experience, concepts and similarities between these two risk categories were identified, proposing a Criterion for a clear distinction between them, as well as a 7-step approach for their integration with the strategy development process.

KEYWORDS: Tax and customs administration, Compliance risk management, Institutional risk management, Integration between risk management and strategy

CONTENT

Introduction

1. IRM and CRM: concepts, similarities and differences
2. Proposal of a criterion to clearly distinguish the two types of risk (compliance and institutional)
3. Integration between IRM, CRM and the tax and customs administration strategy
4. Seven steps approach to integrating Strategy, IRM and CRM

Conclusion

References

AUTHOR

Tax Auditor at the Receita Federal do Brasil (Brazilian Tax and Customs Administration), has led activities in areas such as Information Technology, Collection, Taxation, Monitoring of Large Taxpayers, Auditing, Internal Audit and Planning. Recently, he has participated in projects such as the "Implementation of Management Audit in the RFB", "Definition of Methodology for Tax and Customs Compliance Risk Management", and in the elaboration of the Institution's Strategic Planning. The lack of references on the integration between Institutional Risk Management, Compliance and Strategy motivated the author to deepen his research on the subject.

INTRODUCTION

Risk classification is a controversial issue, there is no consensus model that is exhaustive and applicable to all organizations (IBGC, 2007[1]). Within the scope of a Tax and Customs Administration (TCA), as pointed out by several national and international references, it is possible to identify two specific risk categories[2]:

1) Compliance risks: those related to non-compliance with tax and customs obligations by taxpayers and foreign trade actors (especially the obligations to register, provide timely and correct information, and pay taxes due), i.e., risks directly related to the business; and

2) Institutional (or operational, or corporate) risks: those that refer to the operation and performance of a TCA, i.e., its strategy, functionalities, resources and processes, i.e., the institutional, operational, organizational and corporate means that may affect the economy, efficiency, as well as the effectiveness and continuity of its operations.

Risk Management, in general, is a topic that has been discussed and studied for a long time. Tax and Customs Compliance Risk Management, as a specific application of Risk Management in general, is a more recent topic and has been the subject of publications by major organizations such as CIAT, OECD, European Community, WCO, World Bank, IMF, CARTAC and the TADAT Secretariat. These publications point out the importance of addressing tax and customs compliance risks for an effective administration of the tax and customs systems.

The distinction between institutional risks and compliance risks, and even the classification of a risk in one of these two categories, is sometimes not so clear and consensual. As a TCA's primary goal is to promote and ensure tax and customs compliance, and this is achieved primarily through work processes, projects, activities, systems, resources and people, any risk it faces, regardless of its classification (whether compliance or institutional), has the potential to cause harm to compliance.

For example, considering the two types of risk (compliance or institutional risks), how should the following be classified [3]:

a) a natural disaster that disrupts the operation of an TCA's computers and affects compliance by preventing the transmission of tax returns by taxpayers and/or the computation and payment of taxes due?

b) evasion of taxes due by concealing the taxable events, or manipulating the tax base, or applying a lower tax rate than the corresponding one?

c) the risk of improper recognition of a non-existent tax credit (an entitlement to restitution) due to poor analysis, lack of controls in the programs through which restitution claims are submitted, or fraudulent actions by the responsible agent?

The proposal of this article is therefore to conceptualize and present the similarities between the two categories of risks to which TCAs are exposed, to propose a Criterion that allows a clear distinction between them and to define a model of integration between the management of these risks and the TCA's strategy, organized in a 7-step flow.

1 Instituto Brasileiro de Governança Corporativa (IBGC). (2007). Guia de Orientação para Gerenciamento de Riscos Corporativos. São Paulo, SP.

2 Conceptualization proposed by the author based on the references mentioned.

3 Issues related to the classification of the events described in the sequence of the paragraph will be addressed in Chapter 3. Integración entre GRC, GRI and the strategy of the tax and customs administration.

The article is organized as follows:

- The first chapter discusses the concepts and similarities between Tax and Customs Compliance Risk Management (TCRM) and Institutional Risk Management (IRM) and demonstrates that, despite their distinct objectives, both share the same management process.

- In the second chapter, and here one of the main contributions of this article, a Criterion is proposed to clearly differentiate the two typologies of risks discussed here and, in this way, allow the classification of risk events as institutional risks or compliance risks, in order to enable a TCA to adequately manage the specific aspects of each of these risk categories.

- The third chapter discusses the need for integration between the management of the two risk categories, as well as with the TCA's strategy. To this end, the chapter aims to address the following issues:

a) If a TCA operates through its structure, processes, resources, systems and people, and if risks, regardless of their category, can impose compliance risks, by promoting a proper Institutional (or operational) Risk Management, wouldn't compliance risks also be identified and managed?

b) Wouldn't compliance risk management, then, be more of a focus of institutional risk management than a stand-alone process?

c) Would there therefore be a justification for the specific management of compliance risks and, if so, how would the management of these two risk categories be integrated?

- The fourth chapter proposes a risk management model integrated with the TCA's strategy, materialized in a flow composed of 7 steps.

The main innovations of this article, therefore, consist of:

- the definition of an objective criterion that clearly distinguishes the two types of risks (compliance risks and institutional risks); and

- the proposal of a 7-step sequence for the integration of compliance and institutional risk management within the Strategic Planning process of a TCA.

1. CRM AND IRM: CONCEPTS, SIMILARITIES AND DIFFERENCES

- IRM and CRM concepts

The risk is the effect of uncertainty on objectives (ABNT, 2009[4]), i.e., an uncertain event or condition that may impair (negative risk) or facilitate (positive risk) the achievement of an organization's objectives. Therefore, risk is derived from the objectives.

Tax and customs compliance risks, therefore, are the events or conditions that may positively or negatively affect the objectives of a TCA related to the promotion of compliance with tax and customs obligations by taxpayers and foreign trade actors.

4 Associação Brasileira de Normas Técnicas (ABNT). (2009). NBR ISO 31000: gestão de riscos: princípios e diretrizes. Rio de Janeiro: ABNT.

Tax and customs compliance refers to proper compliance by taxpayers and foreign trade actors with legal norms related to principal and accessory obligations, specifically in relation to registration in taxpayer and foreign trade actor identification registries and eligibility for specific regimes/programs; accounting and maintenance of complete and accurate information; timely submission of information to the tax and customs administration; and payment of tax and customs obligations owed. They are related to the informal economy, fraud (by taxpayers and foreign trade players), omission of information and declarations, abusive tax planning, etc. (CARTAC, 2008[5]).

The promotion of tax and customs compliance is carried out through a TCA's strategy, work processes, projects, systems/technology, resources and people. Thus, events that may affect these elements and/or the economy, efficiency, effectiveness and continuity of the TCA's operations are considered institutional (or operational, or corporate) risks.

Institutional risks are associated with the operation of the TCA and the possibility of losses (production, assets, customers, revenues) resulting from failures, deficiencies or inadequacies in internal processes, people, systems and strategy. The following questions can be asked to identify potential institutional risks:

- Is the available infrastructure satisfactory?
- Work processes are efficient, effective and complete?
- People in the organization are committed, motivated, act with honesty and are adequately trained in relation to the competencies required to achieve the institutional objectives?
- Are ITC systems adequate and reliable?
- Do the objectives, indicators and goals established really respond to the context in which the Tax and Customs Administration finds itself?

External events such as natural disasters, fraud, strikes and terrorist acts should also be considered institutional risks. These risks generally imply a reduction, degradation or total or partial interruption of activities, with a negative impact on the company's reputation in society, in addition to the potential generation of contractual, regulatory and environmental liabilities (IBGC, 2007[6]).

As can be seen, institutional risks can be classified into two subcategories: those of an internal nature and those external to the organization. The first is associated with deficiencies in internal controls, mainly derived from failures in people, technology and processes. The second is related to uncontrollable but manageable events, such as, for example, the risk of choosing a strategy that is not consistent with environmental factors (Trapp & Corrar, 2005[7]).

Since they deal with different types of objectives, a TCA must promote the Risk Management of both categories, which is materialized through the adoption of a set of

5 Caribbean Regional Technical Assistance Centre (CARTAC). (2008, Julio). Strengthening Risk Management and Audit Strategies to Improve Compliance. Thomson, R. Belize, Belize.

6 Instituto Brasileiro de Governança Corporativa (IBGC). (2007). Guia de Orientação para Gerenciamento de Riscos Corporativos. São Paulo, SP.

7 Trapp, A. C. G., & Corrar, l. J. (2005). Avaliação e gerenciamento do risco operacional no Brasil: análise de caso de uma instituição financeira de grande porte. Revista Contabilidade & Finanças, 16(37), 7-20.

actions aimed at the development, dissemination and implementation of methodologies for the management of both compliance risks and institutional risks.

Therefore, tax and customs risk management, whether institutional risk or compliance risk, is defined as a continuous and systematic process that involves the development of a set of actions aimed at identifying, analyzing, evaluating, prioritizing, treating, monitoring and communicating events capable of positively or negatively affecting organizational objectives at the strategic, tactical and operational levels. And this occurs as part of an architecture of its own: principles, structure and process.

In general terms, “Risk Governance” refers to the architecture (principles, structure and process) for managing risks effectively, while “Risk Management” refers to the application of that architecture to specific risks through its own process (ABNT, 2009). In other words, Risk Management represents a process that is part of Risk Governance.

- Similarities between IRM and CRM

The main commonality between institutional risk management and tax and customs compliance risk management lies in the fact that both must be conducted through a systematic, structured and integrated process: the Risk Management Process.

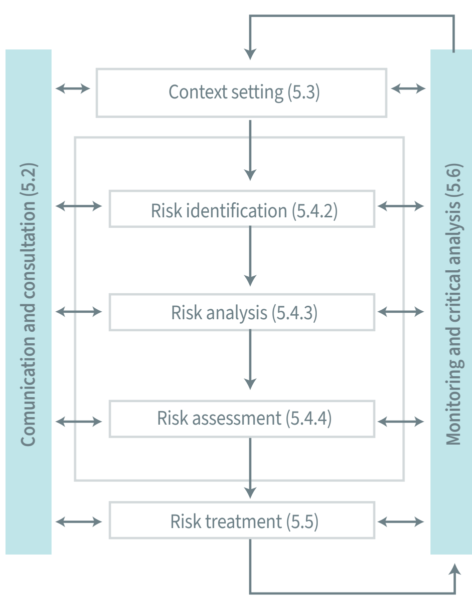
The Risk Management Process consists of a set of cyclical actions aimed at identifying, understanding, quantifying, prioritizing, treating, monitoring and communicating events capable of affecting, positively or negatively, the objectives related to compliance with tax and customs obligations by taxpayers and foreign trade stakeholders (tax and customs compliance risks), as well as those related to the performance and operation of a TCA, i.e. its strategy, functionalities and operations (institutional risks).

For example, the generic structure suggested by ABNT NBR ISO 31000:2009 (Figure 1, ‘a’) is applicable to both institutional risk administration and compliance risk management for tax and customs administrations. The WCO explicitly refers to this structure (Figure 1, ‘b’) in the document Customs Risk Administration Compendium (p. 13).

Although other representations of this risk management process can be found in the specialized literature (such as the models proposed by the OECD, Illustration 1, ‘c’, and by the European Commission, Illustration 1-’c’), it is true that in all of them the set of actions highlighted in the ABNT NBR ISO 31000:2009 standard (Illustration 1, ‘a’) is also present in some way.

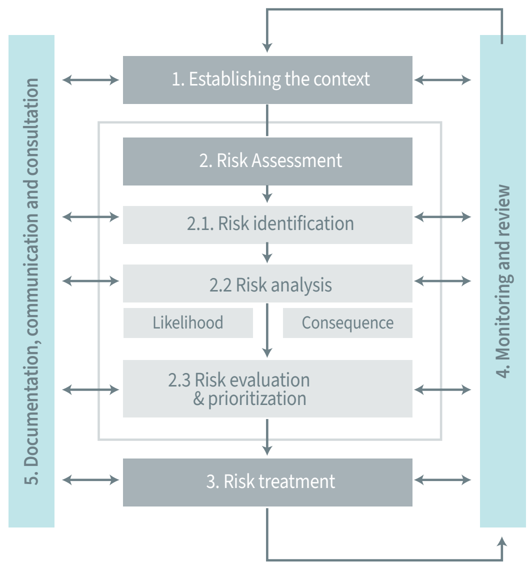
Illustration 1
Risk administration process

a) ABNT NBR ISO 31000:2009



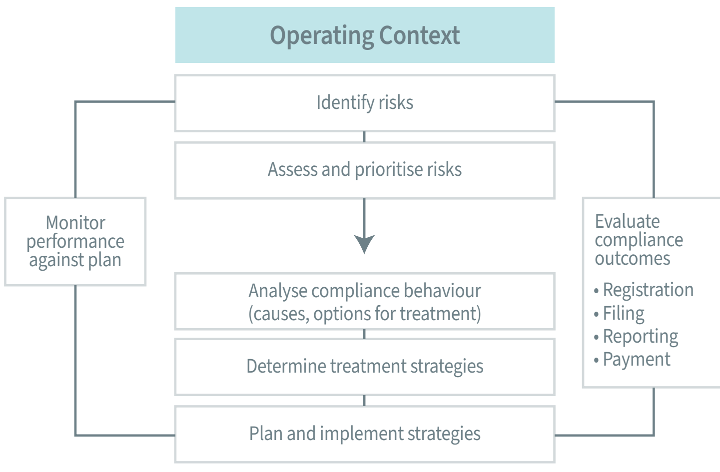
Risk management process (Section 5)

b) World customs organisation (WCO) Customs risk management compendium

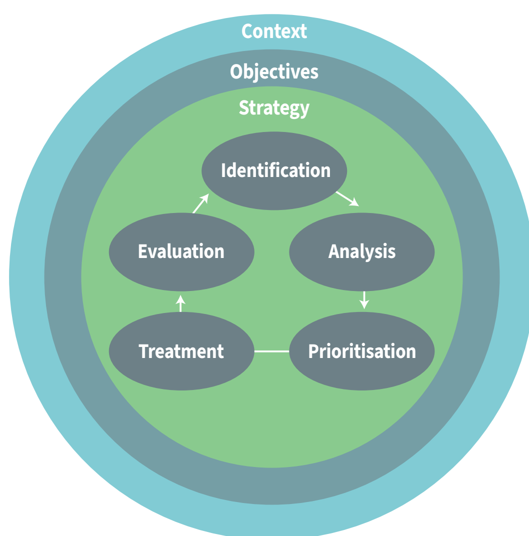


Source: Adapted from Revised Kyoto Convention General Annex Guideline 6 and ISO Standard 31000.2009 Risk management-Principles and guidelines

b) Organisation for Economic Co-operation and Development (OECD) - Compliance risk management: Managing and improving tax compliance



d) European commission - Compliance risk Management guide for tax administrations



Source: Composition elaborated by the author from illustrations taken from the following references:
- Associação Brasileira de Normas Técnicas (ABNT). Nbr ISO 31000: gestão de riscos: princípios e diretrizes. Río de Janeiro: ABNT, 2009.
- Organisation for Economic Co-operation and Development (OECD). Compliance risk management: managing and improving tax compliance. Paris: OECD, Centre for Tax Policy and Administration, 2004.
- World Customs Organization (WCO). Customs risk management compendium. Volume1. Brussels: WCO, [s. d.].
- European Commission. Compliance risk management guide for tax administrations. Brussels: EC, Fiscalis Risk Management Platform Group, 2010.

It is not the purpose of this paper to present the details of each of the stages that make up the risk administration process (for more detailed information on this process, it is suggested to consult the ABNT NBR ISO 31000:2009 standard). However, in summary, it is possible to establish that the initial result of the risk administration process for a TCA will be the identification of the risks that may affect the organizational objectives, their sources, causes, consequences and trends. From the establishment of the context (internal and external) of the specific TCA, it is possible to draw up a list of potential risks (usually recorded in a risk matrix). The risk levels (calculated from the probability and impact in relation to the objectives) must be determined, which will enable priorities to be established. Once the organization establishes the criteria, the risks to be prioritized are selected, leading to the development of action plans to implement the necessary measures to address those risks. Throughout this process, a permanent communication and consultation with stakeholders is conducted, and critical monitoring and analysis of the level of risk and the controls that modify them it is performed, in order to permanently evaluate the risk administration process and its results, and to generate institutional intelligence.

2. PROPOSAL OF A CRITERION TO CLEARLY DISTINGUISH THE TWO TYPES OF RISK (COMPLIANCE AND INSTITUTIONAL)

The importance of defining and categorizing risks as institutional or compliance risks, more than merely theoretical interests, lies in allowing the TCA to adequately manage the specific aspects of each one of them, guaranteeing the fulfillment of its mission. In the materials researched for the preparation of this article, however, no criterion was found that would allow this unequivocal classification, which motivated the author, based on previous studies and his professional experience in the evaluation of institutional and compliance risks, to propose the following conceptualization.

What differentiates the two risk categories is not simply the impact or consequence, as even institutional risks can affect compliance. **Categorizing a tax and customs risk as institutional or compliance risk involves analyzing its causes:**

- If the cause of a risk is related to the definition of the strategy, work processes, projects, systems/ technology, resources and people of an TCA, this will be an institutional risk, even though it may affect the taxpayer's compliance with tax and customs obligations. The identification of an institutional risk will determine the definition of treatment measures that lead to greater economy, efficiency, efficacy and operational effectiveness on the part of TCA.

- On the other hand, **if the risk is caused by the characteristics and attitudes of the taxpayers, which result in their behavior in complying with tax and customs obligations, this will be a compliance risk**, which will require the implementation of treatment measures aimed at changing that noncompliant behavior.

First of all, it should be noted that each taxpayer's tax and customs compliance behavior is directly influenced by individual factors, such as, for example, business factors related to economic activity, sociological, economic, psychological factors (OECD, 2004).
The experiment described in the following frame demonstrated this correlation between individual factors and taxpayer behavior towards tax obligations (especially tax payment), by investigating the feasibility of predicting the revenue collection of Brazilian municipalities solely based on publicly disclosed social, economic, demographic and geopolitical characteristics. Therefore, the intrinsic factors of each taxpayer must be investigated and known by the TCA to establish the most appropriate strategy and treatment measures in the face of the non-compliance to be avoided.

A taxpayer's decision to comply or not to comply with tax or customs laws and the obligations derived therefrom is the result of a risk-based decision-making process. In this case, the objective will be to obtain an economic benefit by paying the least possible amount of taxes and contributions due, or by engaging in foreign trade activities with products not legally authorized or in a manner not legally foreseen. The taxpayer bases his decision to comply or not on factors such as the amount of the potential benefit, the probability of being detected and the consequences he will face if discovered. Thus, individuals establish their own "reward x risk" equation, which is subject to their own socio-moral characteristics and helps them determine the attitudes and actions they will implement (Cartac, 2008)

Illustration 2 shows that:

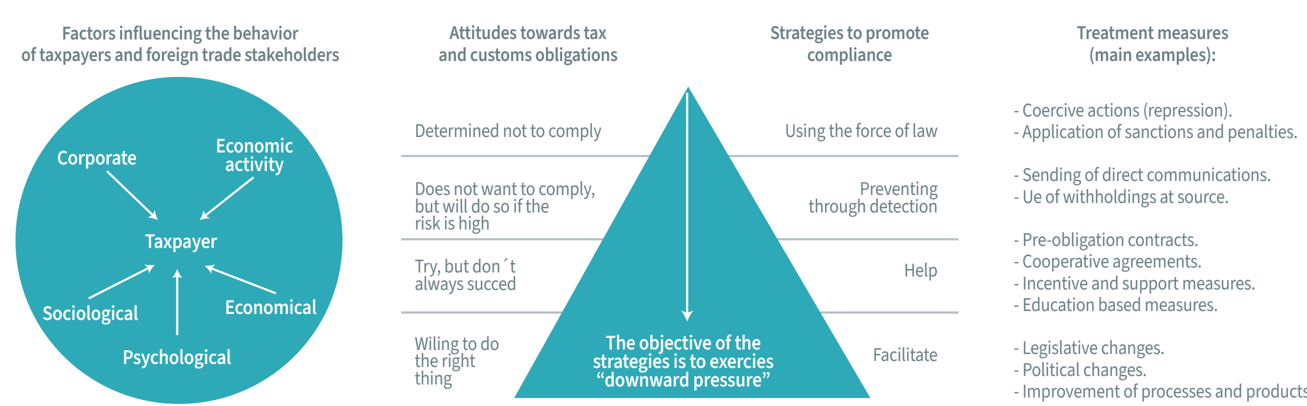
- The attitudes of taxpayers and foreign trade actors involved with tax and customs obligations are strongly determined by intrinsic factors related to each taxpayer;

- The TCA, upon recognizing a behavior (a challenge, given that it is complex to understand whether the taxpayer is determined not to comply, does not want to comply but will if the risk is high, tries but does not always succeed in complying, or is willing to do the right thing), must adopt specific strategies to encourage compliance (facilitate for those who are willing to do the right thing, assist those who try but do not always manage to comply, prevent by presence for those who do not want to comply but will do so if the risk of detection is high, and use the coercive remedies provided by law for those determined not to comply);

- Implement treatment measures that, defined on the basis of the identified behavior, are suitable to influence it in the direction of compliance.

Illustration 2

Relationship between Behavior x Attitudes x Strategies x Treatment measures [8]



Source: Illustration prepared by the author based on an adaptation of (OECD) "Compliance Risk Management: Managing and Improving Tax Compliance" (p. 41) e de (OECD) "Managing and Improving Compliance: Recent Developments in Compliance Risk Treatments" (p.19)

8 Audit – Estudo sobre a situação atual da RFB em relação à gestão de riscos de conformidade tributária e aduaneira (p. 34).

Therefore, the objective of compliance strategies should be to exert a 'downward pressure' on the pyramid in Illustration 2, inducing contributors whose behavior is at the top of the pyramid (taxpayer determined not to comply; unwilling to comply, but will do so if the risk is high; trying to comply, but not always succeeding) to move towards the bottom (taxpayer willing to do the right thing). To achieve this objective, it is essential to define strategies and implement a set of treatment options, both preventive and reactive, especially aimed at combating the causes of non-compliant behavior and focused on changing such non-compliant behavior.

Single box: Verification of the correlation between factors intrinsic to taxpayers (considered in aggregate in relation to the population of Brazilian municipalities) and their behavior in compliance with tax obligations (especially tax payment)*.

The experiment investigated and concluded that taxpayers' compliance behavior with respect to tax and customs compliance (in this case, with respect to the obligation to pay taxes) is directly influenced by individual factors.

The specific objective of the study was to investigate two issues from public information provided by the RFB (*Receita Federal do Brasil*) and the IBGE (Brazilian Institute of Geography and Statistics):

- Is there a correlation between social, economic, demographic and geopolitical factors and federal tax collection at the municipal level?

- Is it possible to predict the collection for each of the Brazilian municipalities only based on public data related to these individual factors of their residents and the business/industrial/public units established in them?

As a result of the experiment, **correlations have been evidenced between collection per municipality and the social, economic, demographic and geopolitical factors contained in the collected databases**. Therefore, the prediction of collection based on these individual factors was effective. **Although the scientific method used does not allow us to conclude a cause-and-effect relationship, it can be stated with confidence that the individual factors investigated for the set of residents and installed units are associated with municipal revenue**, so that when these individual factors are known (treated in aggregate), the municipality's revenue can be predicted.

The research process involved the collection and integration of seven main databases and one auxiliary database; the preparation, cleaning, transformation and enrichment of the data; the implementation of machine learning models (15 models were used, resulting from the combination of five algorithms and three study data frames) and, finally, the evaluation of the results:

- The quality of the machine learning model was measured using the Mean Absolute Error-MAE metric;

- The best machine learning model obtained an MAE of around R$ 41 million (achieved by applying the RandomForestRegressor algorithm on a dataframe whose independent variables had been converted to a natural logarithmic scale, as a strategy to reduce the large amplitude of the observed values).

- This value can be considered promising, given that it represents only approximately 16.44% of the average of the dependent variable, taking as a reference a baseline of R$ 504.6 million (calculated from the average of the dependent variable).

It is interesting to note that among the 20 variables (related to the factors studied) with the highest correlations in relation to the amount of collection per municipality (which was the dependent variable or label), there are examples of each of the factors of interest mentioned:

- Variables of a geopolitical nature (representing the state in which the municipality is located);

- Other variables of an economic nature (GDP value of the municipality; gross value added of services, agriculture and public administration; main economic activities);

- Other socioeconomic variables (average income and GDP per capita of the municipality's population);

- Others related to social factors (education levels); and

- Another related to demographic aspects (age range of residents).

This experiment, carried out by the same author of this article, gave rise to the Conclusion Work of the Lato Sensu Postgraduate Course in Data Science and Big Data, defended before the educational institution PUC-Minas, whose title is "Prediction of Federal Tax Collection, by Brazilian Municipality, based on Social, Economic, Demographic and Geopolitical information"[9].

- The text of the Course Conclusion Paper, the databases used in the project and the Jupyter notebooks created are available at: https://github.com/ALT-Andre/TCC-PUCMG;

- A video with an overview of the experiment is available at https://youtu.be/lvos6ISrnAM.

Having thus presented the concepts, similarities and criteria that differentiate the two risk typologies under discussion here, we can now return to the questions posed in the Introduction to categorize the risk events described therein as institutional risks or compliance risks:

a) The first risk event referred to a natural disaster that interrupted the operation of an TCA's computers, the consequence of which would be to prevent the transmission of returns by taxpayers and/or the calculation and payment of taxes due.

Although the consequences of this example directly affect compliance with two of the obligations related to tax and customs compliance (filing tax and customs returns on time and paying taxes and contributions on time), this risk is an institutional risk. This is because noncompliance with the obligation does not derive from the taxpayers' own characteristics and attitudes, but from problems in the IT systems and the lack or absence of a continuity plan or a contingency plan in case of disasters.

b) The second risk event was tax evasion by concealing taxable events, masking the tax base or applying a lower tax rate than the one due.

9 "Prediction of Federal Tax Collection by Brazilian Municipality from Social, Economic, Demographic and Geopolitical Information".

This is a typical example of tax and customs compliance risk, where the taxpayer (irrespective of any systems or process failures, for example) fails to comply with the obligation to provide complete and accurate information and uses irregular means to avoid paying the tax due.

Although treatment measures to prevent such events from occurring include reforming legislation, improving ITC systems or staff training, measures of an institutional nature, the causes of this risk are directly related to the taxpayer's attitude. Therefore, TCA's action should focus on taking appropriate measures to change that specific behavior.

c) In the last example, the risk event was the improper recognition, through poor analysis or fraud by the responsible official, of a non-existent credit based on incorrect information deliberately provided by the taxpayers in their returns.

In this example, it is true that there is noncompliance due to the submission of deliberately incomplete and inaccurate information that affects the payment of the tax due. However, the categorization here is no longer so easy. This event includes both risk categories.

As for deficiencies or fraud committed by the officer responsible for the analysis, this risk is an institutional risk, the causes of which may be lack of training, lack of internal guidance or even failure of internal processes and controls.

On the other hand, the taxpayer's action, his attitude towards the tax liability, is a determining element for the lack of compliance (thus characterizing the compliance risk), which requires the necessary and compatible action of the TCA.

And, saying once again, **the importance of this distinction and classification between institutional and compliance risks lies in allowing adequate management of the specific aspects of each of them**:

- regarding institutional risks, the assessments and actions of the TCA should be directed at institutional governance to ensure continuity of operation, institutional economy, efficiency, efficacy and effectiveness, acting on events that may result in losses due to failures, deficiencies or inadequacy of internal processes, people, systems and strategy;

- with regard to compliance risks, the focus of TCA should be on identifying the compliance behavior of taxpayers and foreign trade actors and, especially, on understanding the causes of this behavior, so that the treatment measures implemented are aimed at influencing the change of non-compliant behavior and incentivizing the maintenance of compliant behavior.

3. INTEGRATION BETWEEN CRM, IRM AND THE TAX AND CUSTOMS ADMINISTRATION STRATEGY

CRM and IRM focus on achieving organizational objectives; however, although they have different objects of attention, they compete for resources, both financial and human (since resources are limited, not all risks can be addressed at the same time). Therefore, CRM and IRM must be integrated in such a way that institutional priorities prevail over the priorities of each of these separate managements.

And the focal point for the integration of Enterprise Risk Management and Tax and Customs Compliance Risk Management should be the main objectives of the TCA, especially those included in its Strategic Planning.

As discussed, Tax and Customs Compliance Risk Management and Enterprise Risk Management have different focus approaches and specificities, so they could be treated and implemented autonomously, independently and in parallel. This position is reinforced by the fact that the international references investigated do not explicitly mention their integration.

Although incorrect, it is reasonable to think that integration between enterprise risk management and compliance risks could be achieved through the analysis of a TCA's work processes. This is because by ensuring economy, efficiency, efficacy and effectiveness of operations, the achievement of strategic objectives is enabled. And integration would occur because by managing risks from the analysis of a TCA's work processes, in addition to the business risks themselves, compliance risks would be incidentally identified and assessed, even though that was not their primary objective. This statement is not surprising, since the TCA's work processes, especially those related to the ultimate objective, should promote and ensure tax and customs compliance, and therefore include typical compliance activities and tools.

For example, if the TCA decides to train its staff and develop computer systems that expand information checks to detect potential fraud, in order to reduce undue refunds of overpayments made by taxpayers due to incorrect information deliberately provided on their returns, the possibility of authorizing a refund of an undue amount would be reduced. This strategy does not contemplate a change that considers the causes of the taxpayer's behavior but implements an improvement in the process related to the analysis of refund requests, even if this reduces non-compliance. In other words, from the main object of attention of institutional risk management (work processes), the identification of compliance risks (errors in the filing of returns that result in the improper refund of funds to the taxpayer) and the need for their consequent management would be derived.

However, this does not seem to be the best approach for the integrated management of tax and customs compliance and institutional risks.

When opting for risk management based on work processes, there is a tendency to implement actions in isolation, with little or no horizontal integration. In addition, processes that do not respond to the most critical risks may be maintained and the definition of new processes that address identified needs may not be evaluated. Therefore, risks should be considered broadly in the organization, prioritizing institutional objectives over the objectives of the parts (areas, work processes, regional and local units), given the importance of the whole, the sum of the risks and the interdependence of areas and processes (AUDIT - Study, 2016).

Thus, risk management in a TCA, rather than being based on the individualized analysis of work processes (which together make up the Value Chain), should have as its starting point the main objectives of the TCA, especially those defined as priorities in its Strategic Planning (demonstrated through the Strategic Map), this being, therefore, the main point of integration: the Organization's Strategy.

To this end, risk management (compliance and institutional) should be considered as an indivisible part of strategic planning and as a prominent part of "the way the organization does business" (OECD, 2004), i.e., it should be the focal point for organizational communication, governance and decision-making processes.

It should be noted that there is no incompatibility between Process Management, Institutional Risk Management and Compliance Risk Management. On the contrary, they are complementary. Institutional actions will continue to be executed through their work processes, while risk management will provide information for decision-making on what should be a priority for the institution as a whole and for its parts at any given time.

4. SEVEN STEPS APPROACH TO INTEGRATING STRATEGY, CRM AND IRM

As demonstrated above, the integration between the strategy development and monitoring process and the Compliance Risk Management and Institutional Risk Management processes is essential to ensure the achievement of the main objectives of the Tax and Customs Administration.

The following proposed flow contemplates 7 steps, through which we seek to provide a structure that allows integrating the identification, evaluation and proposal of action plans to mitigate the main risks with the definition, development and implementation of the objectives that make up the organizational strategy.

For this purpose, reference is made both to the risk management process (shown in Illustration 1 and briefly described in Chapter 2) and to Balanced Scorecard (BSC) concepts, adapted to a public institution.

The BSC is a strategic management method that helps to evaluate the progress of organizations towards their long-term objectives by translating the vision into strategic objectives, indicators, targets and projects. The BSC transforms the strategy into a Strategy Map, which is a cause-and-effect diagram. This map is composed of perspectives, which represent the different dimensions of analysis of the strategy, strategic objectives that translate the organization's challenges and cause and effect relationships that identify the impact of one objective on the others.

The strategic management model based on the BSC presupposes balanced objectives organized in perspectives that include Financial, Customer, Internal Processes, and Learning and Growth.

However, when applying the BSC in Public Sector organizations, the perspectives must be adapted to reflect the typical strategic focus of an organization that does not seek profit, but rather serves the demands of Society.

Thus, the following perspectives were adopted here::

- **Results Perspective:** includes the Financial and Customer perspectives of the classic model;

Financial perspective: In this perspective, strategic objectives should be aligned with the efficiency and effectiveness of tax collection, control of operating costs, optimization of the use of financial resources, among others. Financial indicators may include tax revenues, reduction of tax evasion and return on investment in compliance actions.

Customer perspective: In this perspective, objectives should be related to the satisfaction of taxpayers and foreign trade actors, improvement of voluntary compliance with tax obligations, establishment of partnerships with taxpayers and foreign trade actors, and reduction of response time to requests and inquiries. Indicators may include taxpayer satisfaction rate, claim processing time and the proportion of cases resolved favorably for taxpayers.

- **Internal Processes Perspective:** corresponds to the perspective of the same name in the classic model;

In this perspective, the objectives should focus on the key processes of the Tax and Customs Administration, such as control, collection, taxpayer service, risk management, customs control and compliance management. Indicators may include average process time, success rate in identifying irregularities, percentage of compliance achieved, average release time of imported goods, and process efficiency.

- People, Resources and Development Perspective: here, the Learning and Growth Perspective of the classical model are named differently:

In this perspective, the objectives should address the development of the competencies of the agents, the improvement of information systems, innovation and the capacity to adapt to changes in the regulatory environment. Indicators may include the percentage of trained officers, the level of updating of information systems, the rate of implementation of innovations and the response time to legislative changes.

The motivation for proposing this integration flow arises from the finding that the national and international references researched: either treat IRM or CRM separately; or when they mention both, they do not present an alternative for their integration; or when they propose that IRM and CRM should be an integral part of strategic and operational planning, they do not show how to implement it in practice.

This proposal is based on the author's research, accumulated experience in applying the risk management process to work processes, conducting performance audits (also known as operational audits), assessing compliance risks to support the selection of cases to be addressed through external inspections, and active participation in the last two RFB strategic planning processes.

It is understood that by adopting this integrated approach, the Tax and Customs Administration can strengthen its capacity to face challenges, make informed decisions and promote a solid risk management culture. It is expected that this integrated approach will contribute to the efficiency, transparency and reliability of the Tax and Customs Administration's activities, strengthening its reputation and relationship with taxpayers and society.

To illustrate the application of the flow composed of the 7 (seven) steps for the integration of Strategy, Compliance Risk Management (CRM) and Institutional Risk Management (IRM), a fictitious example has been developed and is available at https://github.com/ALT-Andre/7-PASSOS-PARA-INTEGRAR-ESTRATEGIA-GRC-GRI--EXEMPLO-DE-APLICACAO.

STEP 1.
Establishing the organization's strategic context

The first step to integrate Strategy, IRM (Institutional Risk Management) and CRM (Compliance Risk Management) is to establish the strategic context of the organization (first stage of the risk management process (Illustration 1, a), and a mandatory activity in any strategy development process). This involves understanding the environment (and its trends) in which the Tax and Customs Administration finds itself, considering external factors such as the cultural, political, legal, regulatory, technological, financial and other environments, and internal factors such as the organization's governance, organizational structure, policies and capabilities.

Especially in relation to the strategic context related to tax and customs compliance issues and taxpayer behavior with respect to principal and accessory obligations, it is essential to consider all available sources of information, such as tax and customs legislation, tax returns, third party data, macroeconomic indicators, tax gap studies, audit results (including random audits), studies assessing characteristics and changes in taxpayer compliance behavior, and public opinion surveys. In addition, it is important to assess relationships with external stakeholders and their perceptions and values.

STEP 2.
Identification, analysis and prioritization of major Strategic risks (institutional and compliance)

With the context established, it is necessary to identify, analyze and prioritize the major risks faced by the Tax and Customs Administration (stages that are part of the risk management process, Illustration 1, 'a'). Both major compliance risks and major institutional risks must be identified, analyzed and prioritized.

Using the concepts proposed by CARTAC[10]:

- Institutional risks are associated with the operation of the TCA (Tax and Customs Administration) and the possibility of suffering losses (of production, assets, customers, income) due to failures, deficiencies or inadequacy of internal processes, people, systems and strategy. These risks can be divided into two subcategories: those of an internal nature and those of an external nature to the organization. The first is associated with deficiencies in internal controls, mainly due to failures in people, technology and processes. The second is related to uncontrollable but manageable events, such as, for example, the risk of choosing a strategy that does not adjust to environmental factors;

- Regarding compliance risks, compliance levels should be investigated considering the four categories of obligations (registration in the registers, timely filing of returns, provision of correct information and payment of taxes due), the main taxes and taxpayer segments. The major compliance risks identified may be related to the complexity of the tax system or compliance with obligations, the informal economy, fraud (by taxpayers and intermediaries), omission of information and returns, abusive tax planning, etc.

It is essential that teams with specific expertise be formed for the identification and analysis of both institutional and compliance risks. However, the management of these individual teams should seek to ensure integration between the analyses.

Risks related to the strategy definition process itself (institutional risks) should also be assessed here, ensuring that the setting of the context has considered all relevant environmental constraints and stakeholder expectations, and that the model adopted can result in the declaration of adequate and sufficient Outcome Objectives to respond to the context.

Finally, it is important to mention that risk prioritization should not be reduced to a mathematical exercise. The initial ranking should be reviewed and confirmed through an analysis of other relevant aspects, especially contextual, so that it satisfies what is most important to the organization.

STEP 3.
Defining the Outcome Objectives

In accordance with the organization's mission, vision and values, and based on the major risks identified and the established context, Outcome Objectives must be defined. These objectives should respond to the challenges and opportunities identified and reflect the risks imposed by the operational and compliance context in which the Tax and Customs Administration finds itself.

By defining the outcome objectives to be achieved and the context (including the major risks) that determined them, it will be possible to establish in detail the fundamental references against which risk management will be carried out throughout the organization. Together, the outcome objectives and their context will reveal and assess the nature and complexity of the risks that TCA will need to manage and address through its internal work processes.

10 Caribbean Regional Technical Assistance Centre – CARTAC. Strengthening Risk Management and Audit Strategies to Improve Compliance. THOMSON, Ron. Belize, Belize. Julho de 2008.

STEP 4.
Breakdown into internal process objectives

The achievement of the established Outcome Objectives will necessarily be accomplished through the institution's internal processes, or when these are insufficient, through projects.

In Step 3 the Outcome Objectives have been established. The contexts identified in Step 1 and Step 2, as well as the strategic risks identified from the declared Outcome Objectives, are part of the operational context that can be complemented here to define the objectives of the Internal Processes. It is to highlight that the risks are derived from objectives, and it is also possible to derive new objectives, of a lower level, from risks. (AUDIT, 2016 - Methodological Guide).

Given this situation, once the Outcome Objectives have been defined, the context related to them should be detailed and new compliance and/or institutional risks (as the case may be) should be identified, analyzed and prioritized. In this new scenario, the Outcome Objectives must be broken down into Internal Process Objectives, which are the key activities that the Tax and Customs Administration must conduct to respond to the context and, above all, to the risks (compliance or institutional) identified in relation to the Outcome Objectives, thus ensuring their achievement.

These internal process objectives should be defined in a clear and measurable manner, with performance indicators established to monitor progress (a step common to both the risk management process - Illustration 1, 'a' - and the BSC model), ensuring that the organization focuses on mitigating strategic risks and improving the efficiency and effectiveness of its operations.

STEP 5.
Breakdown into people, resources and development objectives

Similar to what was done in the previous step, the Internal Process Objectives must now be disaggregated into People, Resources and Development Objectives. These represent the key competencies and resources that, when strengthened, will ensure the capabilities, means, knowledge and competitive advantages for the Tax and Customs Administration to achieve the Internal Process Objectives and, consequently, the Outcome Objectives, in a cause-and-effect relationship.

The People, Resources and Development Objectives should also be clearly defined and measurable, with performance indicators established to monitor progress.

In addition, each People, Resources and Development Objective should be aligned with the context and risks identified in relation to the Result Objectives and Internal Processes.

STEP 6.
Definition of performance indicators and instruments for monitoring and critical analysis on the development of the strategy

Monitoring and performance reporting play a key role in the integration between Strategy, IRM and CRM. This step involves activities related to the "Monitoring and Critical Analysis" stage of the risk management process (Illustration 1,'a').

Key performance indicators (KPIs) and corresponding targets should be established to measure progress against outcome objectives, internal processes and risks. KPIs should be monitored regularly, and performance evaluation reports should be generated to provide up-to-date information on the status of risks and the effectiveness of control measures implemented.

Performance reports should be clear, concise and provide an overview of performance against strategic objectives and risks. They should be shared with all relevant stakeholders, including senior management, risk management teams, regulators and interested external parties. These reports provide a basis for informed decision making and help ensure transparency and accountability for strategic performance and risks.

In addition, it is important that the strategy is regularly reviewed and updated to account for changes in the risk environment. Risks can evolve over time due to changes in laws and regulations, technological advances, changes in the economy, among other factors.

STEP 7.
Definition of strategic action plans

With the Internal Processes and People, Resources and Development objectives established, with the related risks known and with the performance indicators defined, it is necessary to establish the strategic action plans, which will include the necessary measures to achieve them (risk treatment stage of the risk management process 1'a'). The implementation of action plans to directly achieve the outcome objectives is not proposed here, as it is considered that this would be achieved through the achievement of internal process and people, resources and development objectives.

It should be noted that these strategic plans (preferably multi-year and with a vision of institutional integration) result from the application of a risk management process, such as the one established in the ABNT NBR ISO 31000:2009 standard (Illustration 1, 'a'), i.e., based on the established context and the risks identified, analyzed (especially through a detailed investigation of their causes) and prioritized, treatment measures should be defined and translated into an action plan.

Where possible, Action Plans should focus on addressing the causes of the risks observed. Therefore, when constructing an Action Plan in relation to institutional risks, the treatment measures defined should focus on the institutional, operational, organizational and corporate means that may affect the economy, efficiency, effectiveness and continuity of its operations. When an Action Plan is promoted due to a risk caused by the characteristics and attitudes of taxpayers, resulting in undesired behavior in relation to compliance with tax and customs obligations, such risk will be a compliance risk that requires the implementation of a set of treatment options, both preventive and reactive, directed towards the factors that determine the behavior, with the objective of its modification.

The plans should detail the context of the measure (which should be stated with a scope on the context and the risks, and their causes, that led to the definition of the corresponding objectives), the actions to be implemented, the deadlines, those responsible for their implementation, the results to be achieved and the indicators and/or other instruments that allow their monitoring and evaluation.

These Strategic Plans (preferably multi-year) should be subsequently broken down (after revision and detailing based on further analysis) into annual Operational Plans for each work process related to the actions required at the various relevant organizational levels (Central Units and Decentralized Units).

About communication and consultation

As can be seen in the previous steps and considering the stages of the risk management process (Illustration 1,'a'), only the "Communication and Consultation" stage was not explicitly mentioned.

This is not because it has been overlooked, on the contrary, because it is present in all 7 steps of the mentioned flow.

The communication and consultation stage, both in the risk management process and in the strategic planning process, is characterized by continuous, iterative and interactive activities conducted by an organization with the objective of providing, sharing or obtaining information and engaging in dialogues with stakeholders and other relevant actors.

Therefore, an example of this presence is the exchange of information between teams and contact with stakeholders to establish the context in Step 1. For Steps 2 to 7, it is necessary to maintain dialogues between the teams that conduct the strategy development process, the technical teams of various areas and the members of the different levels of the organization (strategic, tactical and operational). All this culminates in the proposal of objectives, indicators, goals and action plans that will be evaluated at each step by TCA's top management.

LIST OF SYMBOLS AND ABBREVIATIONS

ABNT. Brazilian Association of Technical Standards (Associação Brasileira de Normas Técnicas)

TCA. Tax and Customs Administration

Audit. General Coordination of Internal Auditing of Receita Federal do Brasil

CARTAC. Caribbean Regional Technical Assistance Center

CIAT. Inter-American Center of Tax Administrations

IMF. International Mo netary Fund (Fundo Monetario Internacional)

IRM. Tax & Customs (Compliance) Risk Management

CRM. Enterprise Risk Management

IBGC. Brazilian Institute of Corporate Governance (Instituto Brasileiro de Governança Cor-porativa)

IBGE. Brazilian Institute of Geography and Statistics

ISO. International Organization for Standardization (Organización Internacional de Normalización)

KPI. Key Performance Indicator (Indicadores clave de desempeño)

NBR. Brazilian Standard

OECD. Organization for Economic Co-operation and Development (Organización para la Cooperación y el Desarrollo Económicos)

WCO. World Customs Organisation (Organización Mundial de Aduanas)

GDP. Gross Domestic Product (Producto Interno Bruto)

PUC-Minas. Pontifical Catholic University of Minas Gerais (Pontificia Universidad Católica de Minas Gerais)

RFB. Receita Federal do Brasil (responsable por la Administración Tributaria y Aduanera en Brasil)

TADAT. Diagnostic and evaluation tool for the Tax Administration

CONCLUSION

In order to fulfill its main mission, a Tax and Customs Administration (TCA) mobilizes its structure, processes, resources, systems and personnel in the definition and implementation of strategies and actions that seek to influence compliance and address non-compliance by taxpayers and foreign trade actors, promoting compliance with tax and customs obligations.

To this end, it is essential to manage both the risks that may affect compliance with tax and customs obligations by taxpayers and foreign trade actors (compliance risks) and those that may affect TCA's functionalities and/or the economy, efficiency, efficacy and effectiveness of its operations.

However, since they compete for the same resources, both financial and human, and are ultimately oriented towards the achievement of organizational objectives, Tax and Customs Compliance Risk Management and Institutional (or Operational, or Corporate) Risk Management, although with different approaches, must be integrated. And the focal point of this integration should be focused on the main objectives of the institution, especially those included in the Strategic Planning.

Compliance Risk Management and Institutional Risk Management are therefore complementary and should form a prominent part of "the way the organization does business" (OECD, 2004), i.e., they should be central to organizational communication, governance and decision-making processes.

In this way, risk management (institutional and compliance) integrated into the strategy development process will provide the inputs for the decision on what is a priority for the institution as a whole and in parts. And these priorities, especially those aimed at driving compliance, should become actions of the TCA that will continue to be implemented through its work processes, whose economy, efficiency, effectiveness, efficiency, effectiveness and continuity should be ensured through effective institutional risk management.

Motivated by this, this article initially presented the concepts and similarities between IRM and CRM, demonstrating that, despite dealing with different objects, they are based on the same process.

In order to allow adequate management by the TCA of both compliance risks and institutional risks, and in view of the lack of references on this subject, one of the main contributions of this article was the proposal of a criterion that makes it possible to clearly distinguish the events of each of these risk typologies:

- What differentiates the two risk categories is not simply the impact or consequence, as even institutional risks can affect compliance. The categorization of a risk as institutional or compliance risk is based on the analysis of its causes.

- If the cause of a risk is related to the definition of a TCA's strategy, work processes, projects, systems/ technology, resources and personnel, it will be an institutional risk, even if it negatively affects the taxpayer's compliance with tax and customs obligations. The identification of an institutional risk will determine the definition of treatment measures that lead to greater economy, efficiency, efficacy and also operational effectiveness on the part of the TCA.

- On the other hand, if the risk is caused by the characteristics and attitudes of taxpayers, resulting in a behavior with respect to compliance with tax and customs obligations, this risk will be a compliance risk, which will require the implementation of treatment measures aimed at modifying this non-compliance behavior.

Based on this criterion, the questions posed in the Introduction could be taken up again to categorize the risk events described therein as institutional risks or compliance risks, which will allow an adequate and specific treatment by the TCA for each risk modality.

Considering that both IRM and CRM focus on the achievement of organizational objectives, they need to be integrated so that institutional priorities prevail over the priorities of each of these managements individually. Therefore, this article also contributes by showing that this integration must have the TCA's Strategy as its main focus and, above all, by organizing and describing the seven steps that guide this integration.

REFERENCES

Associação Brasileira de Normas Técnicas (ABNT). (2009). NBR ISO 31000: gestão de riscos: princípios e diretrizes. Rio de Janeiro: ABNT.

Brasil. Secretaria da Receita Federal do Brasil. Coordenação-Geral de Auditoria Interna e Gestão de Riscos (RFB/AUDIT). (Estudio). (2016). Estudo sobre a situação atual da RFB em relação à gestão de riscos de conformidade tributária e aduaneira. Brasília/DF. (Documento interno da RFB).

Brasil. Secretaria da Receita Federal do Brasil. Coordenação-Geral de Auditoria Interna e Gestão de Riscos (RFB/AUDIT). (Guia). (2016). Guia teórico-metodológico: gestão de riscos de conformidade tributária e aduaneira. Brasília/DF. (Documento interno da RFB)

Caribbean Regional Technical Assistance Centre (CARTAC). (2008, julho). Strengthening Risk Management and Audit Strategies to Improve Compliance. Thomson, R. Belize, Belize.

Centro Interamericano de Administrações Tributárias (CIAT), Serviço de Impostos Internos do Chile (SII), & Fundo Monetário Internacional (FMI). (2020). Manual sobre Gestión de Riesgos de Incumplimiento para Administraciones Tributarias.

European Commission. (2010). Compliance risk management guide for tax administrations. Brussels: EC, Fiscalis Risk Management Platform Group.

International Monetary Fund (IMF). (2010). Revenue administration: developing a taxpayer compliance program. Washington, DC: IMF, Fiscal Affairs Department.

Instituto Brasileiro de Governança Corporativa (IBGC). (2007). Guia de Orientação para Gerenciamento de Riscos Corporativos. São Paulo, SP.

Kaplan, R. S., & Norton, D. (1997). A Estratégia em Ação – Balanced Scorecard (6ª ed.). Rio de Janeiro: Campus.

Organización para la Cooperación y el Desarrollo Económicos (OCDE). (2004). Compliance risk management: managing and improving tax compliance. Paris: OCDE, Centre for Tax Policy and Administration.

Organización para la Cooperación y el Desarrollo Económicos (OCDE). (2009). Managing and improving compliance: recent developments in compliance risk treatments. Paris: OCDE, Forum on Tax Administration: Compliance Sub-group.

TADAT Secretariat. (2019). Tax Administration Diagnostic Assessment Tool: field guide. Washington, DC: Secretariado do TADAT.

Trapp, A. C. G., & Corrar, L. J. (2005). Avaliação e gerenciamento do risco operacional no Brasil: análise de caso de uma instituição financeira de grande porte. Revista Contabilidade & Finanças, 16(37), 7-20.

World Bank. (2011). Risk-based tax audits: approaches and country experiences. Washington, DC: The World Bank.

World Customs Organization (WCO). (s. d.). Customs risk management compendium. Volume 1. Brussels.

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