EDITORIAL

Quo Vadis International Tax Law?

Manuel Pires, Professor of Universidade Lusíada (Lisbon and Oporto), Portugal

International tax law – here used in the strict meaning of the term as tax law with an international source, the regulator of multi-locational tax relationships – has undergone notable evolution in recent decades. Even before this evolution, one of the habitual themes – the tax treatment of foreigners – had ceased to be a subject of concern to authors in the tax field. This is understandable, because, for some time now, generally speaking being foreign is not relevant to the assessment of taxation. Instead, emphasis is placed today on residence, although that concept adopts several forms (domicile, head office, effective management, etc.) and non-residence, in some cases, has come to be treated the same way.

However, the two classic problems remain: double taxation and tax evasion or avoidance, each subject to a different level of interest. Interest in tax evasion or avoidance has been increasing, often without regard to the consequences that the struggle against that phenomenon can have for double taxation. This game of cat and mouse has been enlivening the tax world, often with a very limited degree of subtlety – as with the use of foreign base companies, conduit companies, transfer pricing, thin capitalization, etc. on the one side – and general or special anti-abuse, or CFC legislation, etc. on the other.

But other phenomena are also increasing the problems of international tax law. Some time ago, tax harmonization, although dealt with in a different area of juridical knowledge – Community tax law – has become very important and this importance justifies its inclusion in international tax law, notwithstanding the autonomous treatment of that area of law. Although rejected at an early stage, the measures later to be taken by the developed countries to assist developing or less developed countries have been considered. Finally, it is important to add two other more recent phenomena: harmful tax competition and the tax problems of E-commerce.

We see, therefore, an enrichment of the problem of international tax law. In addressing those problems, what paths have been followed? In what directions do the corresponding solutions point? What solutions should have been or should be accepted, and how can a choice be made between alternative but conflicting solutions?

I have written elsewhere that it is not to possible to make a uniform construction of international tax law:

> 'As already said, the international law is not made to gloss over social realities. It does not merely contemplate them and allow States to act freely with the support of a façade of generalities and abstraction. Hence the rules underlying relations between States at different stages of development cannot be the same as those for relations between developed States.
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> This is therefore justification for an international tax law for development including the necessary tax rules for producing the required solidarity between developed and developing countries'[1]

The unquestionable engine of international tax solutions – The Committee of Fiscal Affairs of the OECD – has not paid full attention to that reality. It is important to clarify at once that the balance of the work of that Committee is very valuable considering either the published works or the works that, for one reason or another, have not been made available to the public. However, this does not mean that as much has been done as should have been. For example, studies have been planned but have failed to materialize, including the planned draft of a model convention for use between developed and developing countries. In 1965 it was written: 'Indeed one of the future projects of the Committee may be a report on a model convention with developing countries which will represent a consensus of OECD countries'[2]. It was also written:

> 'a convention between industrialized and developing countries may start with the provisions of the OECD draft convention, but in view of the different economic relations that prevail between them, modifications in that draft may be appropriate. The general principles for modification will have to be worked out in the course of bilateral negotiations between developing and capital exporting countries

Notes

1 Manuel Pires, *International Juridical Double Taxation of Income* (Kluwer), pp. 262 and 263.

2 See OECD, *Fiscal Incentives for Private Investment in Developing Countries* (1965), p. 59.

and will require further consideration by the Fiscal Committee'.[3]

Also the measures needed to facilitate the above-mentioned investment have not been further studied. The above report also states: 'The attached report prepared by the Fiscal Committee of the OECD should be regarded as an initial effort to study some of the important technical problems raised by fiscal incentives to promote private investment in developing countries'.

It is a pity that this study did not come to fruition as it would have been a notable contribution for the development of an international law environment more accommodated to the realities and not just reflecting incomplete vision.

On the other hand, it is important to remember a gap that reveals the non-adaptation of international tax law to a widespread problem: the growing protection of taxpayers' rights and guarantees. In effect, orientations and current rules are weighted in favour of assuring the receipts of the state – which is as it should be – but the rights and guarantees of those obliged to pay them should also be considered. It is enough to remember the mutual agreement procedure and the EU arbitration convention.

More concretely, what can we observe? There is a clear reinforcement of the state of residence as having taxing power in the elimination of double taxation. An example of this is the moving of the power to tax certain 'royalties' to the business profits Article, in which the existence of the permanent establishment is needed for taxation. The use of this concept to deal with new problems implies, in the case of E-commerce, a curious discriminatory treatment relative to traditional commerce, a solution that benefits the developed countries, increasing their tax hegemony.

On the other hand, it is the concept of 'harmful tax competition' which is fallen back upon. Even with establishment of criteria, this is something diffused, acknowledged to exist in some tax jurisdictions, and does not give enough emphasis to what happens in other more powerful countries. In this picture – as in others – the fiscal benefits are treated as 'tax aids', forgetting that these, used correctly, are acceptable or even necessary to the attainment of social and economic purposes, including development. In this picture the 'tax sparing credit' and even the exemption method are objects of exorcism, trying to show something that the contrary is evident and that is only explained (but not justified) for non-complete vision of the reality. Everything in life has inconveniences as well as advantages and that either of these two realities has advantages without the need for discussion is something that can be accepted only with a Herculean intellectual effort – effort that should be expended usefully in another direction – is questionable. Furthermore, in this domain of harmful competition individual rights are forgotten: the ends do not justify the means, even in the tax domain, and the need for independent authority to protect – to preserve – the rights cannot be removed for expediency's sake!

Tax harmonization has also been driven in a way that, if we did not know the antecedents in the picture of the rules of international taxation, would be surprising. How can it be justified that, in a time when so much is spoken and fought (and it shall be fought!) against tax evasion or avoidance, the power of taxation of the state of the source, the state in a better condition to apply an appropriate taxation, be removed? How can it be justified, on either scientific or pragmatic grounds, that the state of the source is placed as collector of information for the exclusive taxation benefit of the state of residence?

Thus we can see the imperfect path upon which the evolution of international tax law is treading, a path surprisingly accepted in the revision of the UN Model Convention for elimination of double taxation. This Model marks the desire to assist the special circumstances of the relationships between the developed and developing countries, but is essentially the OECD Model with some make-up applied; it appears as a clone, or an almost-clone, of that Model. What are the advantages of not facing the specialities of the relationships that seek to regulate?

To take advantage of the work of OECD in the domain of international tax is wise, but non-subordination to it when circumstances dictate is also an act of subordination. In what framework can independent international tax law work take place? In the OECD? In the UN? In a World Organization of Tax? The problem has to be solved. The task of the OECD is essential so that, even in the domain of taxation, the world can be a more just place.

Notes

[3] Ibid., p. 69.

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