MEASURES AGAINST TAX HAVENS IN SPAIN, ECUADOR AND THE UNITED STATES OF AMERICA

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SUMMARY:

The purpose of this paper is to analyze the characteristics of tax havens, their elements and their treatment in the legislations of Spain, Ecuador and the United States of America. Discriminatory measures against tax havens are a common practice in different jurisdictions around the world. This article will cover a historic account of tax havens and their effects on the world economy.

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CONTENT

The term "Tax Havens" for the Tax Administrations is as broad and vague a concept that it must be analyzed on the basis of two elements. The first is each country's economic system and the second, the tax system. These elements allow for effectively measuring the real impact of tax havens in the tax collection of other States.

The conditions whereby a jurisdiction may classify another jurisdiction as "tax haven" are in no way, unique, universal and standardized criteria. This is reflected in statistics compiled by some countries and international organizations. Thus, until 2002 the OECD[1] had a list of 7 jurisdictions identified as tax havens which had not implemented minimum standards on transparency and information[2] exchange. On the other hand Ecuador, perhaps because of its stricter system has enlisted 88 jurisdictions as tax havens, which number may be even greater by including other jurisdictions with a lower income tax rate than the one existing in Ecuador[3]. Spain, on the other hand, has less than half of the jurisdictions included in Ecuador; that is, 48 in 1991[4]. This is due to the fact that countries such as Andorra, Panama, Netherlands Antilles or Bahamas have recently signed information exchange agreements.

Given that international evidence shows that cases dealing with fraudulent bankruptcy and tax evasion are not few and insignificant, we will describe some emblematic cases.

In 1998, the Island of Nauru, which is barely 20km^{2}, received over 70 billion dollars in foreign Exchange from Russia, which year coincides with the downfall of the Ruble. Thus, the Central Bank of Russia lost practically all its reserves when the money was sent to this Island.

The cases of corruption in the recent dictatorships that have been overthrown in the world (Egypt and Lebanon), have resorted to Swiss bank secrecy to conceal corruption and embezzlement of the public treasuries. Switzerland disclosed that by 2011, the Libyan dictator, Muammar el Gaddafi, had investments which exceeded USD $365 million, as compared to the USD $415 million in investments of the overthrown President of Egypt, Hosni Mubarak.

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1. *Organization for Economic Cooperation and Development: www.oecd.org*
2. *Andorra, Liechtenstein, Liberia, Monaco, the Marshall, Nauru and Vanuatu Islands. http://www.oecd.org/document/57/0,3746,en_2649_33745_30578809_1_1_1_1,00.html*
3. *SRI Resolution 182*
   Publication: Official Registry Supplement 285
   Date: Feb. 29, 2008
   "Article. 3.- Regardless of the provisions of the foregoing article, tax havens, including, as appropriate, domains, jurisdictions, territories, associated States or preferential fiscal regimes are those where the rate of Income Tax or taxes of an identical or similar nature, is less than sixty per cent (60%) to the one corresponding in Ecuador to income of the same nature, in accordance with the Internal Tax System Act."
4. *Ministry of Economy and Finance*
   Rank: Royal Decree
   Published in: BOE number 167 of7/13/1991, pages 23371 through 23371 (1 page.)
   Reference: BOE-A-1991-18119

In most countries fiscal fraud is considered an offense. Nevertheless, in Switzerland, false declaration of taxes and concealment of revenues for not paying taxes are considered administrative infringements. In the same way, bank secrecy is fully protected, without there being administrative or judicial measures that may allow for raising it.

Ecuador has an Agreement for avoiding double taxation with Switzerland, which does not include an Information Exchange clause provided in the OECD's Model Convention. However, inexplicably it has been excluded from the list of tax havens. Thus, even though Ecuador cannot have access to information of account holders or users of this jurisdiction, it does not include it within the lists of tax havens.

In sum, the Tax Haven concept is a term with many meanings, for which reason our purpose is to give it the meaning that is closest to reality.

Definition

After analyzing the global elements of Tax Haven, their practical applications and some data, we will focus on the initially proposed topic. To this end, it is necessary to delimit the broad "Tax Haven" concept. Thus we will begin with some of its elements and a definition that may be in keeping with its practical use.

The term Tax Haven corresponds to an inappropriate translation of "tax heaven", which term originates from Anglo-Saxon law. It would be more appropriate to call these territories "tax shelters", since that is their true situation.[5]

It has been no easy task for state organizations to arrive at a definition that may cover all tax haven territories. However, they have determined several elements that are essential for determining whether a territory is one of privileged taxation or not. Professor[6] has established some elements, such as:

1. Lack of taxes on corporate benefit (income, earnings), on donations and inheritances: According to the Organization for Economic Cooperation and Development (OECD) this element exists when the presumptive Tax Haven does not apply any type of taxation because of commercial practices or because of the persons. Or instead, when these practices or persons are subject to taxation that is less than 60% of taxation applied by a State not considered a Tax Haven.

2. Bank secrecy, the existence of anonymous and numbered accounts and non-obligation of the banking entity to know the customer: This implies that many times laws with a constitutional rank are issued to protect the information of the account holders. This element is Bank and Corporate Secrecy. Nevertheless, it is ever more lacking in importance. Due to the September 11, 2001 attempt against the United States, the latter began a plan for collecting information, inasmuch as the accounts used to finance such attempt were in Switzerland, which at that time was considered a Tax Haven. Thus, Switzerland had no other alternative but to disclose such information so as not to be subjected to consequences and economic sanctions from the United States.

5. *Emilio Albi "Estrategias de Planificación Fiscal Internacional: Instrumentos Financieros". 1993 page 15. Diego Salto van der Laat. "Los Paraísos Fiscales como escenario de Elusión Fiscal Internacional y las Medidas Anti-Paraíso en la Legislación Española". 2000 páginas. 49-88*
6. *Los Paraísos Fiscales. Juan Hdez. Vigueras. Madrid, Editorial Akal, 2005*

3. Lack of Transparency: Involves the lack of information of juridical operations in said territories[7], as well as serious deficiencies or scarcity in banking supervision and control and on financial transactions, such as nonregistered bearer securities or non-obligation by the Banks to report doubtful transactions to the authorities.

4. Lack of Control: The simplicity for formalizing and registering companies and the lack of control on subsidiary companies of transnational business groups is a crucial element in tax havens.

5. Application Criteria: These criteria are Nationality and Territoriality. **The first**, provides for taxing individuals with nationality; that is, a point of connection that relates an individual to his (her) territory. The clearest example of this principle is found in Panama where individuals having Panama as source state and being Panamanian nationals, do not enjoy the low or null taxation privilege.

The second deals with territoriality; a point of connection that is related to the domicile. In this regard, it is irrelevant whether a person is a national of a country or not; what is important is that he (she) not be domiciled within said territory to enjoy the benefits that are typical of a Tax Haven.

Thus, by combining these five elements that are common to all tax havens, we may arrive at a more or less complete definition that may allow for fully understanding this concept. The definition is the following:

"Tax Havens are those state or substate jurisdictions without, or with very low taxation, wherein users enjoy total privacy with respect to their banking, corporate or professional information and where these jurisdictions have afforded legal and even constitutional rank to the provisions regarding the aforementioned secrecy."

Historical Framework

Tax Havens were conceived in the 1880s in the United States. At that time the States of New Jersey and Delaware envied New York and Massachusetts, which concentrated most of the social domiciles of businesses. Accordingly, they reported large tax collections. To compete with them, New Jersey provided for legislation which limited the corporate tax and in 1898, Delaware did the same.

In the twenties, in the United Kingdom, following some commercial disagreements, British judges considered that a British company established abroad and doing business outside the United Kingdom should not be subject to British taxes. That gave way to the creation of the fictitious residence principle due to fiscal reasons.

In 1934, in Switzerland, the finishing touch was put to the principles that are now considered common to tax havens, through the establishment of a law that penalized the violation of bank secrecy. That is, a legal basis was implemented to close the bank secrecy circuit.[8]

For these reasons, tax havens thrived in the mid-twentieth century, when the different post-war economies were at their peak and also as a result of the thriving European colonies following a process of decolonization, since they needed to attract capital for their development and they did so, by implementing juridical systems that were attractive to economic operators at the world level.

7. *Paraísos Fiscales: Satanización o Uso Prohibido. Jorge Ayala. Coffee Break, Opinión desde la Academia. Febrero de 2011*
8. *Estudio de los Paraísos Fiscales. Visión Fundamentada en la LIRPF y LIS 2008. Edición Hacienda Pública Española A.D.E. Carlos López López Pág. 5*

However, with the passage of time, many economic operators have taken unfair advantage of these jurisdictions and by misusing the right to bank secrecy have been the promoters of many anti-juridical acts. The most evident example is the financing of the greatest terrorist act against the United States; namely: the September 11, 2001 attack to the Twin Towers.

They have likewise been involved in such activities as moneylaundering and the concealment of properties, accounts and businesses of individuals that are being sought around the world for fraud against the treasury in their country of origin, residence or source of their revenues.

Lastly, another of the most common abusive uses is tax avoidance, to prevent being taxed in the person's jurisdiction. That is, in order to confuse the treasury where a specific person must pay his(her) taxes, they resort to the low taxation jurisdictions so as not to comply with that tax burden. Such abuse of the lower taxation jurisdictions became frequent starting in the 1990s.

Because of these abusive uses of lower taxation jurisdictions tax havens have been rendered vicious and have been compared and conceived as sources for bringing about acts that are contrary to the law. One example is moneylaundering, among others. Nevertheless, they had been originally conceived as a mechanism whereby the economic operators of various jurisdictions would become more efficient by not having to be subjected to excessively high taxation.

1. TAXES EVADED THROUGH TAX HAVENS

If we focus on the Latin American economies as beneficiaries of investment capitals, the so-called offshore[9] companies could generate drainage in tax collection:

1.1 Crafty reduction of the value of exports

Involves the fictitious and undervalued amount declared as exports to an offshore company which, in the resale will generate earnings in the offshore company, thereby slyly transferring the earnings to the company.

1.2 Crafty increase of import costs and expenditures

For businessmen carrying out commercial activities or rendering services locally that require the import of goods or inputs, the intermediation of an offshore company in such imports allows for artificially increasing the acquisition cost. In this way there is an artificial displacement of the earnings to the offshore company in the purchase and subsequent resale of the goods.

Most of the Ibero-American countries members of CIAT have a null or zero "withholding at the source" in payments for the imports of goods, due to the GATT (General Agreement on Tariffs and Trade) regulations.

1.3 Real estate taxes: Surplus value and transfer

Municipalities, city governments or local finance offices have been assigned competency over taxes on earnings as well as real estate transfer. In this case, offshore companies allow the possibility of making multiple real estate transfers through the sale of stock of the company

9. *Off-shore jurisdiction: Companies established abroad.*

appearing as owner of the property. Thus, it is unnecessary to formalize the change of owner at a Public Registry, thereby omitting the payment of the real estate transfer tax.

On the other hand, the earnings from this transaction results from the surplus value in the sale of stock; however, since this involves offshore companies, most probably the taxpayer will not pay taxes on such surplus value, given his perception that the Tax Administration has no way of knowing that he is a stockholder of said company or, even though being aware of it, will not know the real selling price of said stock.

1.4 Inheritance and donation taxes

The establishment of foundations or trusts allows for avoiding the tax on inheritance due to death, since the holder of the properties is not the actual or real owner of the properties but rather the legal or formal owner is the foundation or trust. Thus, estate may be transmitted between several generations without being at any time subject to the tax.

1.5 Individual Income Tax in the rendering of services

Individual taxpayers rendering services abroad could be using offshore companies where the taxpayer may be an employee and, therefore, income obtained from the rendering of such services appears as revenue of the offshore company and thus there is no obligation to pay taxes.

1.6 Income tax on capital gains

An offshore company could also be used for avoiding the payment of taxes on capital yields, by structuring the investment in the name of an offshore company with an account for depositing the benefits in a Tax Haven.

Such technique could be used for investments within the country as well as abroad, inasmuch as many legislations provide for exemptions conditioned to a specific term. The benefit in this case would be that such income would not be affected by an increase in net worth when the countries have another type of tax that is calculated on the capital or net worth of the companies or individuals.

1.7 Use of extraterritorial credit cards

The use of extraterritorial credit and debit cards, by professionals or individuals with significant amounts of economic resources is a way of concealing to the Tax Administration the benefits from revenues that barely leave some documentary evidence that may allow the Tax Administrations to detect such operations.

The Internal Revenue Service (IRS) of the United States has indicated that by 2002 some two million U.S. citizens would be using credit cards to evade taxes.

1.8 Delocalization of the tax domicile

A significant number of legislations of Ibero-American countries have combined the territorial taxation criteria for residents and nonresidents with that of world income as regards income obtained abroad by residents in the country which is added to the territorial income.

The tax domicile delocalization occurs when a taxpayer considered a tax resident of a specific country and under the world income taxation system, changes his residence to another territory that could well be Tax Haven.

Some well-known cases are those of Luciano Pavarotti who in 1999 established his residence in Monaco, that of the Spanish tennis player Arantza Sánchez, who moved to Andorra and the also Spanish citizen Fernando Alonso, whose domicile is in Switzerland.

This practice is followed by several elite sportsmen and renowned personalities.

Another modality are the rent-a-star companies whereby, from an offshore financial center an artist uses a company to manage his contracts, with representation before any fiscal jurisdiction and registering in the name of the company, instead of the person, revenues originating performances, tours and marketing.

The purpose of this research is to take advantage of the experience of Ecuador, Spain and the United States, convinced that a first step are the effort internally carried out by each State and which should subsequently be adopted by such regional forums as MERCOSUR, ALADI, CAN, CARICOM, CCALA, COMALEP.

2. ANTI-TAX HAVEN MEASURES IN SPAIN

To begin analyzing anti-haven measures, it is necessary to enunciate Spain's[10] 2012 policies regarding this issue. First of all, Anti-Haven measures will be promoted to strengthen the collection principle within the State. Thus, the policies are the following:

1. Information on business activities whereby it is possible to detect concealed revenues.
2. Information on professional activities that may disclose the existence of undeclared revenues from the activity or external signs of wealth held by said professionals.
3. Information on financial operations carried out within the national sphere as well as abroad to identify holders of financial assets.
4. Information on income or estates located in «tax havens».
5. Information on external signs of wealth to detect undeclared income and estates.
6. Information on foreign trade, in particular, regarding the countries of origin of imported goods, with respect to the very origin of the products with tax benefits, as well as the real values of the transaction.
7. Exchange of information with the Social Security General Treasury Office and the Labor Inspection and Social Security for the purpose of detecting undeclared economic activities.
8. Information on all public deeds formalized before a Notary's Office through direct access or telematic means to the Single Notarial Index.

Having stated Spain's 2012 public cooperation policies for accessing information, we will now refer to the specific measures.

2.1 Deduction of expenditures incurred

The first obvious rule regarding discriminatory measures against tax havens is the one preventing the deduction of expenses incurred in lower taxation jurisdictions (Article 42 of the Corporate Tax Act). That is, the Spanish legislation as well as most legislations expressly provide the expenses that are deductible from a commercial activity and those that are not.

Among deductible expenses, (article 11 of the Corporate Tax Act)[11] are those incurred in initiating a corporate economic activity, or likewise, the expenses incurred in maintaining it. On the other hand, there is the discriminatory measure that prevents a business company from deducting expenses that may have been paid directly or indirectly from a Tax Haven. The first thing that hits you in the eye is: What is a direct or indirect payment?

10. *BOLETÍN OFICIAL DEL ESTADO. Número. 52 de Jueves 1 de marzo de 2012. pág. 17599*
11. *Real Decreto Legislativo 4/2004 de 5 de marzo de 2004*

A direct payment is a disbursement made by a financial institution without intermediaries for fulfilling an obligation. On the other hand, an indirect payment is that may through third parties or “Related Companies” in jurisdictions other than the tax havens. Thus, these expenditures are not deductible either.

2.2 Discretional assessment of an economic transaction

Following our search and analysis of the Spanish Anti-Haven rules, we are faced with article 17.2 of the Corporate Tax Act, which provides as follows:

“The Tax Administration may attribute the normal market value to operations carried out with or by individuals or entities that are residents in tax havens.”

Thus, this article has several interesting aspects to be highlighted. First, the Spanish Tax Administration is granted a discretional power to determine the actual value of a transaction between persons wherein any of the two is domiciled in a Tax Haven. That is, The Spanish state may simply apply a certain taxable value to a transaction that had not been taxed in the Tax Haven, thereby safeguarding the legal right which is the “Preservation of Public Revenue.”

In the same regulation, one may observe the de facto presupposition which originates the juridical consequence. The first presupposition is that a transaction is carried out in a lower taxation jurisdiction; that is, that the tax burden is null or considerably lower than the one existing within the Spanish jurisdiction. The second de facto presupposition is that, in spite of having carried out a commercial transaction in a Tax Haven, there should be an unbalance between the tax burden borne by a person in one jurisdiction and the tax burden it would have had to bear if subjected to Spanish fiscal taxation.

These two de facto presuppositions activate the juridical consequence of the regulation; it being that the Tax Administration apply a value according to the market standards where the financial operation was carried out. Nevertheless, a warning is made in relation to a very ill-fated consequence for the taxpayer, given that the Administration, on determining the citizen’s relationship with the Tax Haven in a discretional manner, the latter cannot allege or submit evidence for the defense to rebut said relationship.

Therefore, an assessment should be made between the legal right protected by the Tax Administration and the legal right protected by the sanctioned citizen. The first ensures the safeguarding of the legal right which the “Preservation of Public Revenue”. On the other hand, the safeguarding of this legal right is contrary to the right of individuals to submit evidence for the defense when charged with a behavior sanctioned by the legal system. This right is better known as the “Right to Self-Defense”.

From what has been shown, it is worthwhile to ask the following question: Can the Tax Administration, on behalf of the “Preservation of Public Revenue” act against a citizen’s right to self-defense? At first sight it would seem not, since it would be incurring in an abuse of the State’s IUS PUNIENDI; nevertheless, it is a necessary measure for safeguarding the general good over the individual one.

2.3 Taxation of dividends originating in tax havens

This article deals with taxation of dividends originating from tax havens (Article 21 of the Corporate Tax Act). It provides as follows:

“Article 21. Exemption to avoid international economic double taxation of dividends and foreign source income originating from the transmission of representative values of the funds of entities that are not residents in the Spanish territory… In no case shall the provisions of this article be applied when the participating entity is a resident in a country or territory regulatorily classified as Tax Haven."

In this way, it allows that an expenditure that is subject to double income taxation, in two different jurisdictions be fully deductible in Spanish territory.

It is worthwhile to analyze the meaning of international double taxation. The doctrine has define international double taxation as:

"That situation whereby the same income or the same property is subject to taxation in two or more countries, for the totality or part of its amount during the same taxation period, if it is the case of periodic taxes and for the same reason"[12]

Likewise, there are international organizations in charge of regulating double taxation, among them, the Organization for Economic Cooperation and Development (OECD). This organization has developed a model agreement for avoiding double taxation of income and net worth. Since the article being analyzed only refers to income, this concept should be specific. To this end, the OECD has considered income tax as:

"Income taxes are those that encumber the totality of income or net worth or any part thereof, including profit taxes derived from the sale of personal property or real estate, taxes on the total amount of salaries or wages paid by the companies, as well as taxes on capital gains."[13]

Having defined the key concepts, it is now worthwhile to analyze the regulation. First of all, International Law has attempted to regulate double taxation issues; however, this regulation (Article 21 of the Corporate Tax Act) is contrary to said regulation. First of all, double taxation occurs when a citizen carries out an activity in a specific country where it will gain profits (Source State) and the latter must pay taxes where the citizen has his actual domicile (State of Residence).

However, if the citizen fulfills a specific tax obligation in the Source State, it is logical that he should not pay taxes on that same item in the State of Residence. This regulation unchains its juridical consequence when the Source State is a Tax Haven. Under this hypothesis, the citizen will have to pay taxes in the Source State as well as in the State of Residence for the same item (profits obtained in the Source State).

In this way, we may conclude that in the case of tax havens, the Tax Administration must, under any concept, impose a tax burden on the citizen so that they latter may pay tax on any economic yield acquired.

2.4 Presumption of spanish domicile of off-shore companies

In relation to this matter, article 8 of the Corporate Tax Act provides as follows:

"Article 8. Residence and tax domicile

1. The entities in which any of the following requisites is present will be considered residents in the Spanish territory:

    a. Those established according to the Spanish laws.
    b. Those with their social domicile in Spanish territory.
    c. Those that would have their actual headquarters in Spanish territory.

12. *"La doble imposición internacional: problemas jurídico-internacionales", A. Borrás Rodríguez, Madrid 1974, p. 30. LA DOBLE IMPOSICIÓN INTERNACIONAL . Nicolás Sánchez García. Pág 1*
13. *Artículo 2 del Modelo de Convenio Fiscal sobre la Renta y Sobre el Patrimonio. Organización para la Cooperación y el Desarrollo Económicos. Abril de 2000*

…The tax administration may presume that an entity established in some country or territory with null taxation, as provided in section 2 of the first additional provision of the Measures for the Prevention of Tax Fraud Act, or considered as tax haven, has its residence in Spanish territory, when its main assets, directly or indirectly, consist of properties located or rights fulfilled or exercised in Spanish territory …".

According to the provisions of the Spanish regulation, corporations located in tax havens are presumed to have residence in Spain. This is a way of "attracting residence" as well as of dissuading its residents from putting offshore corporations located in tax havens as fictitious owners of their properties in Spain.

To conclude, after having analyzed these provisions we may determine that the Anti-Haven measures find their legitimacy and ultimate goal of protecting the legal right of "Preserving Public Revenue".

Now, we will continue our analysis of the Anti-Haven regulations in Ecuadorian legislation.

3 ANTI-TAX HAVEN MEASURES IN ECUADOR

In Ecuador there is a diversity of laws that regulate the commercial transactions. Thus, we will make an analysis of the main Anti-Haven measures that govern the State's economic behavior.

3.1 Tax havens and public contracting

Articles 62, 63 and 64 of the Organic National Public Contracting System Act stipulate the causes that disqualify a citizen from entering into contract with the State. Among there are the President and Vice-President of the Republic, their brothers and sisters and close relatives, the Ministers and persons who have participated in the analysis of the bid. The article does not mention anything regarding the persons that are established or domiciled in tax havens. Nevertheless, the Executive Decree published in the Official Register No. 621-S of June 26, 2009, provides that:

"…the previous requisite for classifying and enabling a corporation as bidder will be the full identification of the individuals intervening as stockholders of the company; when other companies are stockholders, it is necessary to determine the individuals participating therein, in order to determine the disqualifications provided in articles 62, 63 and 64 of the Organic National Public Contracting System Act. With respect to the domicile of the corporations, it is provided that the companies established in "tax havens" determined by the SRI, will be disqualified."

With respect to this regulation issued through Executive Decree, two important observations may be made. The first is that the Executive Decree broadens the scope of application of the Organic National Public Contracting System Act. The articles referring to the disqualification for entering into contracts make no reference to corporations established in tax havens; nevertheless, said Decree expands the scope of application of this Law.

The second observation worth making following the simple reading of this regulation is that the Tax Administration acts by legitimizing itself in the IUS PUNIENDI. Thus, the State has a de facto presumption for disqualifying the companies that are or presumed to be established in tax havens. Therefore, a person established or domiciled in a Tax Haven cannot be awarded a State contract.

A clear example of the application of this article is the case of awarding of an important state contract to the company ECUACORRIENTE[14]. The shareholders of this company were established in a lower taxation jurisdiction (Cayman Islands). In a process of bidding and awarding of a contract with the State, ECUACORRIENTE participated and was awarded the bid. However, because the shareholders were domiciled in a lower taxation jurisdiction, they had to change domicile because otherwise the bid would have been cancelled.

3.2 Expenditure exemption

Another of the most evident Anti-Haven regulations is found in article 9 of the Internal Taxation System Act which provides:

"Art. 9 EXEMPTIONS.- For purposes of assessing and paying income tax, the following revenues are exclusively exempt:

1. The dividends and earnings calculated after the payment of income tax distributed by national or foreign corporations, not domiciled in tax havens or lower taxation jurisdictions or from individuals not residents in Ecuador."

This regulation establishes a very drastic Anti-Haven measure since it excludes tax havens, as well as lower taxation jurisdictions. We will explain the difference between tax havens and lower taxation jurisdictions from the standpoint of Ecuadorian legislation.

Tax Havens are jurisdictions that appear in a list issued by the Internal Revenue Service of Ecuador (SRI-Spanish acronym), and only the jurisdictions appearing in this list are considered as tax havens. On the other hand, lower taxation jurisdictions are those here the income tax burden is lower than 60% of income tax in Ecuador.

Having differentiated these two concepts we may evidence the scope of article 9 of the Internal Taxation System Act. Excluded from exemptions are the revenues obtained by persons domiciled or who are residents in tax havens as well as in lower taxation jurisdictions.

3.5 Interest deduction

With respect to the deduction of interest from credits originating from corporate or commercial activities, the Ecuadorian legislation (Art. 13 of the Internal Taxation System Act) allows its full deduction by way of Income Tax. However, due to the Anti-Haven measures, interest generated in these jurisdictions cannot be deducted from the income tax calculation.

Thus, the most important articles are within the internal legislation when it comes to collecting revenues by way of taxes. Likewise, the Tax Administration, basing its legitimate and ultimate right in the "Preservation of Public Revenues", issues laws that discourage the use of lower taxation jurisdiction or tax havens.

It is thus evident that Anti-Haven measures are acquiring ever greater importance within the internal legal system and since one of the main policies of tax havens is not to enter into any type of international cooperation or agreement for collaborating in tax collection, little by little the countries are issuing internal regulations for preventing the use of tax havens.

3.6 State intervention

The topic being analyzed is the presumption of nonexistence of legal business with properties of corporations in tax havens. Our analysis will be based on the case of Banco Filanbanco S.A vs. Agencia de Garantía de Depósitos.

14. *Diario EL COMERCIO. Editorial of March 27, 2012. Published in: http://www.elcomercio.com/negocios/Socios-Ecuacorriente-cambiaron-domicilio-contrato_0_670733127.html*

One of the most drastic actions against tax havens was the one adopted by Ecuador through Constituent Mandate No. 13[15]. In this Mandate, the Constituent Assembly decided to declare nonappealable the Resolution issued by Agencia de Garantía de Depósitos, the same one that allowed the confiscation of 195 businesses in Ecuador.[16] Ten years ago, the partners of these companies were the same partners of banking entities under investigation for fraudulent bankruptcy. However, ten years later, most of these businesses belonged to third parties, specifically of 15 holding companies located in Great Britain, Panama, Bermuda and Bahamas. In spite of this, the Ecuadorian government confiscated them.

The confiscation took place under de jure presumption. That is, a presumption against which no evidence is admissible. For which reason, the State's assertion that said corporations were merely instrumental for concealing the real identity of their holders and which were understood to be the same partners and directors of the banking entity under investigation which acted through their shadow corporations could not be contested neither through documentary or testimonial evidence.

Lastly, we will analyze the Anti-Haven measures in the United States of America.

4. ANTI-TAX HAVEN MEASURES IN UNITED STATES OF AMERICA

This country has had a significant influence in the regulation of the legal status of tax havens. In this way the Clinton Administration (1993-2001) promoted cooperation with several organizations for regulating tax havens. One of them was the Organization for Economic Cooperation and Development (OECD) and the Harmful Tax Competition Forum. They worked together to compile information about individuals that were holders of shares or accounts in tax havens. The Anti-Haven measures were greatly strengthened as of the year 2001.

In the Bush Administration (2001-2009), attention was given to improving surveillance of tax havens as regards cooperation in information exchange. Thus they supported the work of the OECD in relation to the initiative for implementing stricter rules for exchanging sensitive information between jurisdictions. The new policy of the United States of America dealt with not sanctioning lower taxation jurisdictions with Anti-Haven measures, if they collaborated by providing information on users of tax havens. Due to the increase in regulations for limiting the use of tax havens, the Congress of the United States of America issues the Stop Tax Haven Abuse Act.

The Obama Administration (2009-to the present), continues to complement the initiatives begun in the two previous administrations. Its main objective is to improve cooperation for exchanging information between jurisdictions. Therefore, in order to do so Congress issued a new law whose purpose is to improve the scope of the one issued in the Bush Administration. This law which contributes to transparency of information and the regulation of tax havens is known as the Incorporation Transparency and

15. *Decreto Legislativo 13. Publicación: Registro Oficial Register Suplemento 378. Fecha: July 10, 2008. (within the investigation for fraudulent bankruptcy of the former Banco Filanbanco)*
16. *http://www.isaiasfilanbancocase.com/index1_htm_files/RESOL%20AGD-UIO-GG-2008-12.pdf*

Law Enforcement Assistance Act. Thus, the U.S. policy has always been aimed at seeking cooperation from tax havens with respect to the transfer of information issue.

On the other hand, the Stop Tax Haven Abuse Act has provided for several Anti-Haven regulations some of which are:

4.1 The establishment of presumptions by the administration

Section 101 of the Stop Tax Haven Abuse Act provides that the Tax Administration may establish a presumption for taxing an individual, when the latter has benefits derived from the establishment, domicile, dividends, shares, interest or any other form of benefit in a Tax Haven. The law continues to provide that when said individual may have evidence of acquittal to avoid being taxed, it must be submitted at some administrative or civil procedure filed against him. However, the evidence of acquittal from non-U.S. citizens is not admitted.

Therefore, there are three aspects worth highlighting from this regulation. The first is that the Tax Administration has the same discretional power that we have seen in the previously compared legislations (Spain and Ecuador). Thus, the Administration may set a tax burden to a citizen who is presumed to be benefitting from the privileges provided by a Tax Haven. However, unlike the legislations analyzed, this is a de facto and not a de jure presumption. It is de facto, since it accepts proof to the contrary; that is, the citizen may be acquitted from taxation if the latter is exaggerated or is not in keeping with reality. On the other hand, the Administration has limited the manner and type of acquittal evidence that must be submitted. These limitations are: not being able to submit any evidence which may have originated outside the United States and likewise, a person who is not a U.S. citizen cannot submit acquittal evidence.

4.2 Obligation to submit information by users of tax havens

Section 202 of the Stop Tax Haven Abuse Act provides that programs should be implemented so that companies may issue a report on their activities and closely supervise the activities and abusive uses of tax havens. Therefore, if these companies do not provide these reports and all the required information they will be subject to a penalty.

The Tax Administration's power to request all documents containing sensitive information is provided in sections 306 and 307 of the Stop Tax Haven Abuse Act. It is stated therein that the Administration may request the information to economic operators and if they would refuse to provide it, a civil or administrative process would be established so that, with a judge's authorization the Tax Administration may obtain the information on its own account.

The ultimate purpose of this regulation is transparency of information and likewise, one of the main objectives of the United States is that there be no abusive use of tax havens or that fraud be incurred against the U.S. collection administration.

4.3 Sanctioning measures applicable to international jurisdictions for allowing fraud against the United States

Section 311 of the Patriot Act (31 U.S.C. 5318(a)) allows the U.S. administration to apply commercial and financial measures to jurisdictions allowing an action that may result in fraud to the United States. That is, if a Tax Haven allows that taxes are evaded or avoided due to the maintenance of accounts in their jurisdiction, then the U.S. Tax Administrations may implement such measures as the freezing of treasury funds or certain commercial embargoes.

In this way, the only purpose pursued by the Central Administration is the non-incurrence in any type of fraud, given that, if fraud to the treasury is allowed, many people would use this mechanism for not complying with their tax obligations, thereby generating an unbalance in a State's budget for financing all its projects.

To conclude, after examining the U.S. legislation, it may be observed that there are no regulations prohibiting the use of tax havens. In fact, they are many times promoted, since in this way an economic operator may become more efficient. Nevertheless, the different Administrations have actually regulated the issue of transparency and cooperation in information exchange.

The United States have strengthened the institutions in charge of ensuring the truthfulness of the official information provided by economic operators. In this way citizens benefit by making legal use of tax havens, while the Administration also benefits by keeping its citizens under surveillance.

5. CONCLUSIONS

1. Following this analysis, it is evident that there is no typical or accepted concept with respect to tax havens. However, international practice has accepted characteristic elements of tax havens. Therefore, a definition is not necessary for classifying a jurisdiction as a Haven, but rather, the analysis of the typical elements suffices to know whether or not we are faced with a Tax Haven.

2. Due to the linear policy of tax havens of not entering into any type of International Agreement to Avoid Double Taxation or for Cooperation in Information Exchange with jurisdictions that are not considered tax havens, these jurisdictions issue measures that render difficult the use of lower taxation jurisdictions, for which reason there are ever more discriminatory measures against tax havens.

3. In the Ecuadorian case, the use of tax havens is hindered by different regulations. One of them is the inability to enter into contracts with the State or nondeductibility of expenses. The result thereof is that income generated within the Ecuadorian State remains within the territory and is not transferred to a jurisdiction considered a Tax Haven, as was the case of Russia.

4. The "satanization" of tax havens has resulted from their abuse throughout history, since tax havens have been used by economic operators to evade the payment of taxes in their respective jurisdictions.

5. Finally, the measures adopted by Spain, Ecuador and the United States of America are a very important step which, towards the future should be reflected in the adoption of the same or similar measures by regional forums, of which the Latin American countries are a part

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