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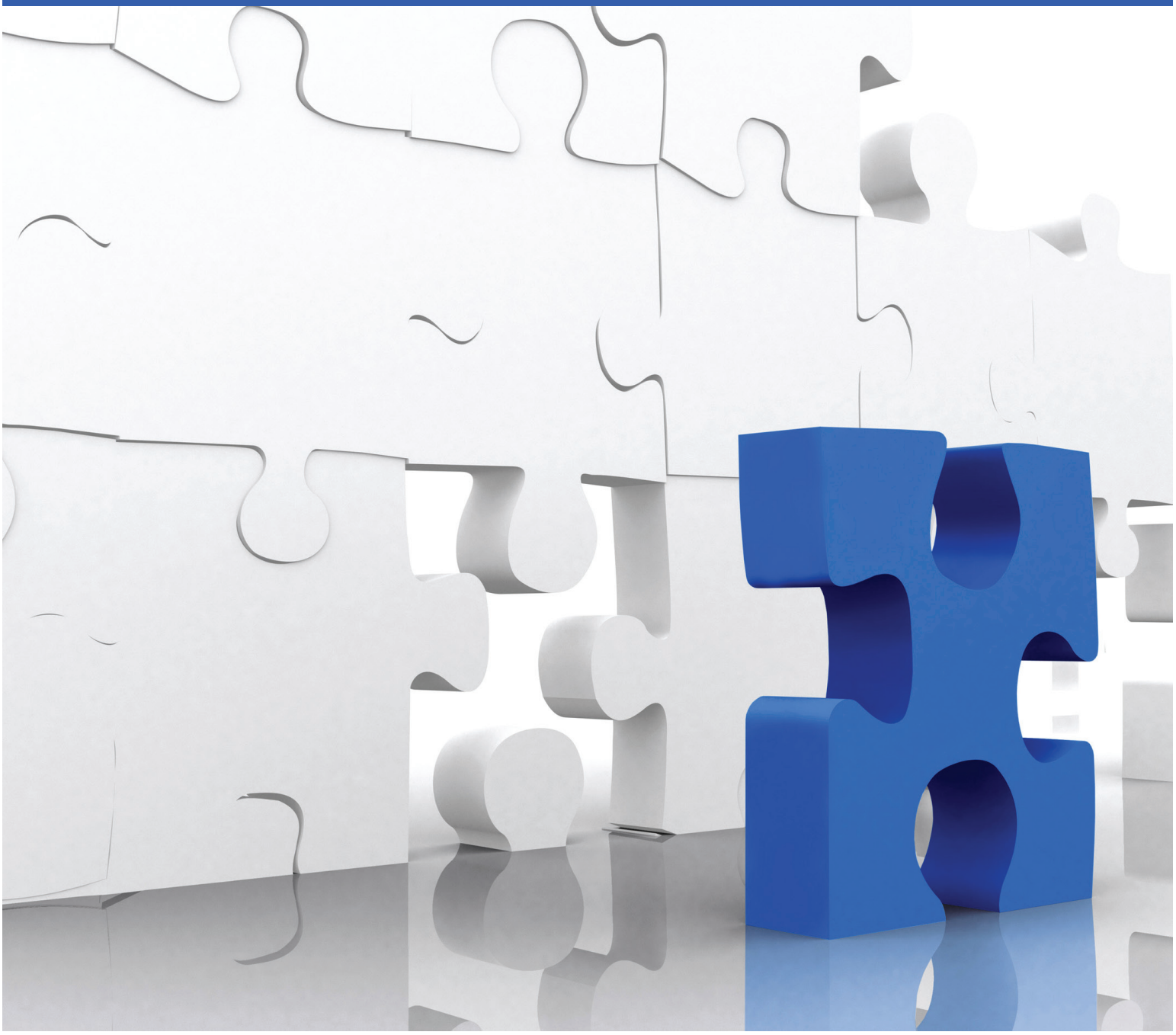

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Editorial Policy

The Technical Cooperation Agreement signed by CIAT and the State Secretariat of Finance and Budgets, 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 disseminate the different tax approaches in force in Latin America and Europe.

An Editorial Council formed by CIAT officials (the Executive Secretary, the Director of Tax Studies and Research, and the Director of Training and Development of Human Talent) and the Heads of the Spanish and French Missions, are responsible for determining the topics to be considered in each edition of the review.

The articles are selected by the Editorial Council, following 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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Tax Administration Review

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Editorial

Dear readers:

It is indeed a great pleasure to address you in this new edition, the fourth under the new format and express to the readers our heartfelt gratitude for the interest shown in the previous editions of this new stage. We also wish to thank all the authors; those who sent contributions and in particular, those whose works were finally chosen by the Editorial Council for publication.

Strategic issues for our Tax Administrations are the subject of this publication, such as: international taxation in Panama; information exchange in Argentina; the struggle against tax havens and communications in tax education actions in Brazil; the border analysis in examination and control processes in Peru; the refund of undue payments in Latin America; the experience with fiscal printers in the Dominican Republic, as well as the proposed use of a predictive model for determining the risk profile of taxpayers in Argentina.

As thus evidenced, these are all topics of significant interest for the permanent development and improvement of our Tax Administrations, whose aim is to continue being considered as organizations of excellence and reference within the public as well as private spheres.

Once again, we hope that this publication will be a useful instrument for enriching the International Community in Tax Administration issues.

Márcio Ferreira Verdi
Review Director

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

Javier Bustos A. and David Nájera O.

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.

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:

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.

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*

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.

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.

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:

a. Information on business activities whereby it is possible to detect concealed revenues.
b. Information on professional activities that may disclose the existence of undeclared revenues from the activity or external signs of wealth held by said professionals.
c. Information on financial operations carried out within the national sphere as well as abroad to identify holders of financial assets.
d. Information on income or estates located in «tax havens».
e. Information on external signs of wealth to detect undeclared income and estates.
f. 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.
g. 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.
h. 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

a. 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.

b. 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.

c. 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.

d. 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.

e. 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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FISCAL PRINTERS. DOMINICAN EXPERIENCE

Marvin Cardoza

SUMMARY

This study provides a description and analysis of the results of application of the fiscal printers in the Dominican Republic, as mechanism for controlling sales to end consumers in the retail commercial sector, restaurants and the like. During the study period, the increase reported by taxpayers with fiscal printers in internal VAT collection was greater than that of the group which did not have printers; it was even greater than the total internal increase of VAT. In addition, the increase in collection exceeded the cost of implementation of the project.

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CONTENT

The control of sales to end consumers is one of the most critical areas in tax compliance, with the omission of such sales being one of the most recurrent practices by taxpayers for avoiding the payment of taxes, especially when there is a normative scenario with little control and a low probability of being examined.

In order to face this problem some Tax Administrations (TA) are applying an innovative technological solution that has brought about excellent results. This measure is known as Fiscal Printers (FP) and its technology allows the TA to establish sales control points within the businesses that are similar to a fixed point examination[1].

Some successful experiences with the implementation of this system have been the cases of China, Italy, countries in Easter Europe, Chile (2003), Argentina (1998), Brazil, Venezuela (1994) and Dominican Republic (2008). In this latter country, fiscal printers arose as an initiative of the Anti-evasion Plan presented by the General Directorate of Internal taxes (DGII) in late 2004, intended to establish an effective tax compliance control mechanism to thus reduce evasion of the ITBIS which represented 41.7% of potential collection that same year.

Empirical evidence has proven that the success of this technological resource depends on, at least, the following requirements: the TA must have the legal power to oblige taxpayers to use this equipment; there should be no possibility of interfering with the equipment in order to offer guarantees to the taxpayers as well as the TA; there should be a technological infrastructure to withstand the quantity and quality of information; in addition to well trained and specialized human resources for making use of said information.

There was a gradual implementation process in the Dominican Republic. It was initially installed to a group of selected taxpayers wherein the DGII assumed the cost of the equipment and thereafter, in a following stage, coverage was expanded to the rest of the taxpayers, who assumed the initial investment costs, with the guarantee of being able to apply them as credits for Income Tax (ISR) or Assets Tax.

An aspect worth noting in the DGII Project was its interest in approaching and negotiating with the business associations, thereby achieving the support of their affiliates for adapting the sales systems so that they would be functional in the adoption of the fiscal printers.

By the end of 2010, a total of 1,447 fiscal printers had been installed in the points of sale of such commercial establishments as supermarkets, fast food, restaurants, stores and hardware stores. In the study period, the results show that benefits exceed the costs of implementation of the project; the increase in internal ITBIS collection reported by the taxpayer group with

1. *Fixed point is understood to be the in situ examination where the auditor registers the sales transactions of the day.*

fiscal printers exceeded that of the group that had no printers; additionally, there was a decrease in ITBIS tax noncompliance of 14.7 percentage points in 2008 with respect to 2004.

This document consists of seven sections, with this being the first one. Section two covers the background and challenges of the project; section three is devoted to legal considerations of the fiscal printers; section four describes the process of implementation of the fiscal printers; section five refers to the potential scope of coverage and progress of the project; section six considers the costs and benefits of the project, while finally section seven describes the main conclusions.

1. BACKGROUND

Fiscal printers arose in the DR as an initiative of the Anti-Evasion Plan submitted by the DGII in late 2004, whose purpose was to establish effective tax compliance control mechanisms and thus reduce ITBIS evasion, which represented 41.7% of potential collection that same year.

The plan covered, in general, two main control spheres:

1. Control of local sales intended for intermediate consumption: sales between companies or between taxpayers. To this end, the Fiscal Vouchers or Invoicing Control system was established in 2007.

2. Control of local sales intended for final consumption:

- Control of sales made through credit or debit card. This initiative gave way to Regulation 08-04, of October 2004, which provides for the obligation of card managing companies to withhold the ITBIS paid by the consumers.
- Control of cash sale transactions, mainly carried out by end consumers. The fiscal printers project thus responds to this scope.

In 2008, the DGII already had available mechanisms for controlling sales between companies and sales intended for final consumption, carried out with credit or debit cards. Thus, in late 2008, the DGII began implementing the fiscal printers in order to control mainly cash sales intended for final consumption. In this way, the sales transaction control process or cycle is closed, while at the same time effectively complementing the previous control mechanisms applied by the DGII.

According to the Central Bank figures, final consumption in Dominican households represented in 2008, 88% of GDP, which gives us an idea of the challenge that this constitutes for the TA as regards the requisites of technological infrastructure to withstand the quantity and quality of information and the well trained and specialized human resources required for analyzing the information.

Bearing this in mind, the Anti-Evasion Plan also anticipated the investment in technological infrastructure and human capital. In this regard, in 2008 the DGII inaugurated a Data Center which complies with the international standards[2], while at the same time it has been investing in Human Capital.

2. *The Data Center was designed by taking into consideration the international standard ANSI/TIA-942, regarding the i Data Centers Telecommunications structure*

2. LEGAL CONSIDERATIONS

Fiscal printers constitute equipment whose technology allows the TA to establish sales control points within the business. In this sense, it is essential to carefully review the scope of the TA's legal powers for establishing the obligation to use this equipment and additionally ensure that it be accepted and included as regular practice of the business.

In the case of the Dominican Republic, the legal provisions in force grant the TAs extensive powers for the permanent review of economic activities with the fundamental objective that all taxpayers comply with their tax obligations relative to the issuance of legal, documents, their registration, declaration and payment of the pertinent taxes. It is worth mentioning that such regulation does not in any way affect the right to free enterprise provided in the Constitution of the Republic.

In 2008, Presidential Decree No. 451-08 provided for the Regulations regarding the use of Fiscal Printers, with a view to clarifying and developing the general principles stated in the Tax Code and to render feasible the application of this technological resource. The following chart shows the legal framework of the DR on which the use of fiscal printers is based.

Chart No. 1

Legal Framework for the use of fiscal printers in the Dominican Republic

Legal Base	Description
Constitution of the Dominican Republic	Article 75, numeral 6), which provides that individuals have the duty of paying taxes according to the law and in proportion to their taxpaying capacity to finance public expenditures and investments. Article 243, regarding the principles of the tax system, which provides that "the tax system is based on the principles of legality, justice, equality and fairness in order that every citizen may comply with the maintenance of public burdens". Article 50, recognizes and guarantees freedom of enterprise, providing that "Every individual has the right to freely devote himself to the economic activity of his choice, without further limitations tan those provided in this Constitution and those provided by the laws." Article 128, numeral 2, paragraph b), grants the power to the President of the Republic to issue Decrees, Regulations and instructions whenever necessary.

Legal Base	Description
Tax Code	Confers to the Tax Administration the power to control taxpayers, through Article 50, paragraphs i), j) and k) quoted below:

Legal Base	Description
	i) Facilitate examining officials' inspections and verifications in any place, commercial or industrial establishments, offices, deposits, fiscal deposits, ports, airports, ships, aircrafts, vans or containers, vehicles and other means of transportation.
	j) Present or submit to the Tax Administration, the returns, reports, documents, forms, invoices, vouchers regarding the legitimate origin of goods, receipts, price lists, etc., in relation to events generating obligations, and in general, provide the clarifications that may be requested.
	k) All individuals or corporations carrying out transfer of goods or rendering free or encumbered services must issue fiscal vouchers for the transfers or operations carried out. Prior to their issuance they must be controlled by the Tax Administration according the regulations issued by the latter.
	Likewise, Article 355 of the Code provides for the obligation of taxpayers to issue the required documents to uphold their transfers, and taxed and exempt services
Law 227-06	Law 227-06, which grants legal personality and functional, budgetary, administrative, technical autonomy and net worth of its own to the General Directorate of Internal Taxes (DGII): Article 4, paragraphs c), d) and n), grant it other powers and functions such as: application of a management system to comply with the collection goals established by the Executive Body, as well as work for the continuous improvement of taxpayer assistance services, by designing administrative systems and procedures intended to strengthen compliance with tax obligations.
Decree 254-06	Rules for regulating the Printing, Issuance and delivery of fiscal vouchers.

Legal Base	Description
Decree 451-08	Regulations for the Use of Fiscal Printers. These regulations provide, among other obligations: · That all taxpayers, whether individuals or corporations, selling goods and services directly to end consumers (taxpayers of the retail sector), are obliged to use fiscal printers as of the date established and informed by the General Directorate of Internal Taxes as the effective date for having said fiscal printers installed. · Only those Fiscal Printers that are commercialized by suppliers that have certified them before the General Directorate of Internal Taxes, prior to beginning their commercialization, sale and installation shall be considered as such.

Legal Base	Description
	· Establish requisites that must be fulfilled by Fiscal Printers as such, as regards their physical configuration, fiscal control device, capacity for storage, among others. · Establish requisites that must be fulfilled by computer invoicing programs installed in businesses that must comply with these regulations. · Establish two modalities for incorporating Fiscal Printers with fiscal support. Initially, for a list of taxpayers that comprise the first group of interest that will use the Fiscal Printers. In this case, the DGII shall acquire and install the printers, at no cost to the taxpayer, the latter being responsible for the maintenance of the equipment and its replacement in the future. Secondly, taxpayers comprising the second group of interest for the DGII may opt for having the amount of investment and expenses in the installation of the Fiscal Printers be considered as Income Tax or Asset Tax credit.

3. PROCESS FOR IMPLEMENTING FISCAL PRINTERS

In general, the implementation process in the DR involved three phases:

- **Phase I (2008):** Examination of taxpayers selected for the installation of the Fiscal printers, in order to verify compliance with the tax obligations. Additionally, an inventory was undertaken of the software and printers used by the retail and fast food sectors for carrying out transactions and the invoicing process.
- **Phase II (2009):** The first Fiscal Printers are installed to a group of taxpayers selected according to their commercial activity, sales volume; which include hypermarkets, hardware stores, fast food store and large department stores. The DGII took on the cost of this first group.
- **Phase III (starting in 2010):** Coverage was expanded to the rest of potential taxpayers, who must take on the initial investment costs, with the guarantee of being able to apply them as Income Tax or Asset Tax credit in the fiscal period in which the investment was made.

For implementation in each phase, the following stages were completed:

- Certification and standardization of fiscal printers.
- Certification of applications (software) used by the commercial establishments for carrying out sales transactions and for the invoicing process.
- Installation of the Fiscal Printers in the taxpayers' establishments.

The FPs have been provided and installed by suppliers certified by the DGII[3]. To achieve certification, a series of tests were carried out to fully guarantee compliance with the Dominican Republic´s fiscal legislation.

The DGII determined a calendar of installations per taxpayer, which showed the dates on which the equipment would be installed and integrated to the operations in the commercial establishments and whose objective was not to affect taxpayer operations or affect them to the minimum extent possible.[4]

A noteworthy aspect in the DGII's project was the interest shown and its work in approaching and negotiating with the businessmen associations (ONEC, ADECOR, among others) [5], achieving the support of their affiliates for adapting the sales systems so that they would be functional in the adoption of the fiscal printers.

The fiscal printers certified to date are: IBM, EPSON, OKI, BMC and STAR. IBMs have been used in large supermarkets, EPSONs in fast food establishments and OKIs in hardware stores.[6]

4 FISCAL PRINTERS CONTROL COVERAGE

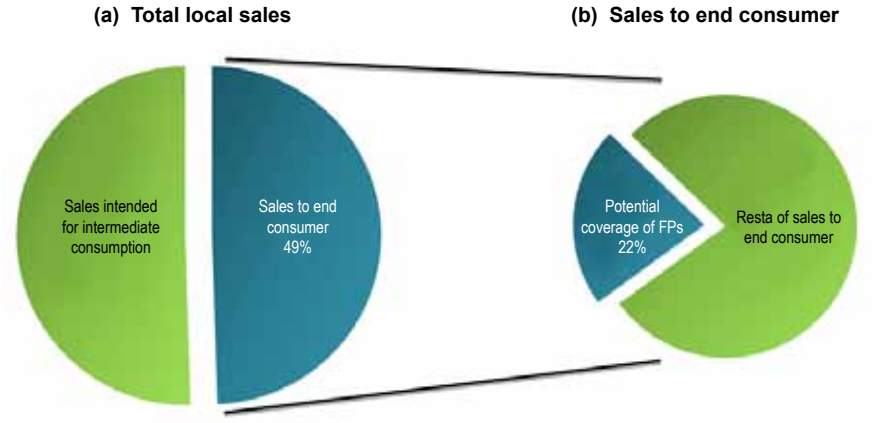
4.1 Potential coverage of FPs

Of total sales reported by taxpayers in 2008, excluding exports and government purchases, 51% was for intermediate use or sales between companies and the remaining 49% were sales intended for final consumption (See graph. 1a). That same year, the DGII had mechanisms for controlling intermediate consumption sales, as well as sales made with credit or debit cards. Nevertheless, it was necessary to follow up sales made to end consumers, most of which are made in cash.

In this sense, the FP project comes to fill this gap to provide coverage to at least 22% of total sales to end consumer. This percentage corresponds to retail sales sectors, such as bars, restaurants and the like.[7] (See graph. 1b).

Graph 1

Composition of local sales reported to the DGII and fiscal printer potential coverage
Year 2008; in percentages



Source: Economic and Tax Studies Department, DGII.

3. *See Annex No. 2: to see requisites that must be fulfilled by fiscal printer suppliers.*
4. *See Annex No. 1: regarding guide for the installation of fiscal printers in businesses.*
5. *ONEC: National Organization of Commercial Enterprises, ADECOR: Fast Food Companies Association.*
6. *See Annex No. 3: to see the fiscal printer models certified by the DGII.*
7. *Due to the particular characteristics of the rest of sectors with a high percentage of end consumer sales (financial intermediation, telecommunications, hotels, sale of vehicles, gas stations, house leasing, among others) other more effective tax control mechanisms are used.*

4.2 Coverage of project through December 31, 2010

At the end of 2010, there were 1,447 fiscal printers installed among taxpayers distributed in the Hypermarkets, Fast Food, Restaurants, Stores and Hardware Stores sectors. The main characteristics of these sectors are that they are retailers and their percentage of sales to end consumers represented 90.1% of their total sales reported in 2010. (See chart No. 2).

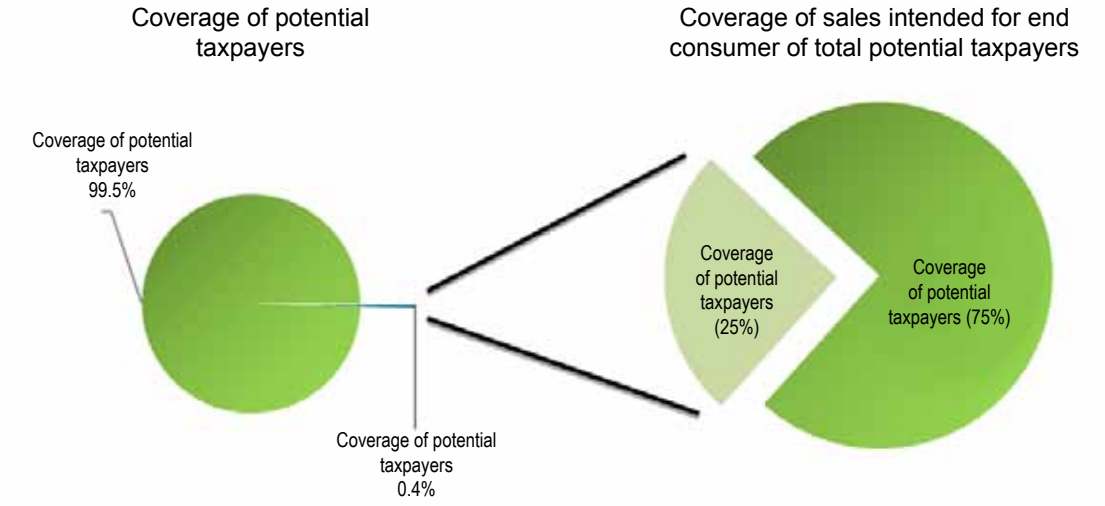
Chart 2
Establishments with fiscal printers and proportion of sales to end consumer
Through December 31, 2010

Sector	Number of Printers Installed	Proportion of Sales to End consumer *
Hypermarket	936	90.5
Fast Food	442	91.2
Restaurant	31	87.1
Clothing and Shoe Stores	35	98.2
Hardware Stores	3	59.4
Total	**1,447**	**90.1**

Source: Economic and Tax Studies Department, DGII.
*corresponds to 2010.

The foregoing represents a coverage of 0.4% of total potential taxpayers to whom fiscal printers will be installed. However, these represented 25% of total sales to end consumers from said group of taxpayers. (See graph 3).

Graph 2
Coverage of fiscal printers through December 31, 2011



Source: Economic and Tax Studies Department, DGII.

5. COSTS AND BENEFITS OF THE PROJECT

The reduction of tax noncompliance through the implementation of the FPs generates the following benefits:

- Increase in collection.
- Improves market operations, since it reduces unfair competition represented by evaders with respect to those that comply.
- Increases the horizontal equity of the system.
- Generates positive external results: greater transparency and internal control for the taxpayer; increase of productivity of the sector through the introduction of a more advanced technology; among others.

On the other hand, implementation involves the following costs:

- Increase in the Tax Administration's budget.
- Increase in the cost of compliance[8], for example, if taxpayers are required to provide large amounts of information.

5.1 Quantification of the costs of the project

The initial investment of the project was financed by the Inter-American Development Bank (IDB)[9] which mainly covered the acquisition of the fiscal printers.[10] Additionally, a new area was created in the Large Taxpayers Management Office for the purpose of carrying out office and field controls of taxpayers who use fiscal printers, in order to verify the correct operation and compliance with the formal and substantive obligations.[11]

The cost of the project which includes advertising costs, investment in the acquisition of equipment and the annual expenditures of the new created area created represented 0.20% of total ITBIS collected by the DGII in 2008. This amount has been decreasing to 0.14% in 2009 and 0.11% in 2010. (See Graph No. 3)

8. Cost of compliance is that incurred by taxpayers for fulfilling their tax obligations as regards the payment of taxes.

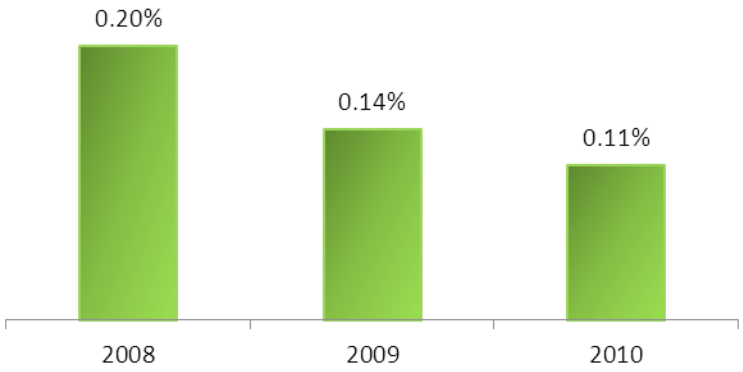
9. The main objective of the Project is to strengthen the Tax Administration through its organizational development and the increased use of information technologies in the examination processes, by promoting greater equity of the tax system to significantly reduce the costs of compliance for the taxpayer and the levels of evasion.

10. It is highlighted that the form of financing the acquisition of the FPs by the taxpayers has facilitated the introduction of the equipment, without it representing a cost for the taxpayer, inasmuch as the latter's investment is recognized as an Income Tax or Asset Tax credit.

11. See Annex No. 4 which shows the organization chart for this new area.

Graph 3

Costs of the Project as percentage of internal ITBIS collection



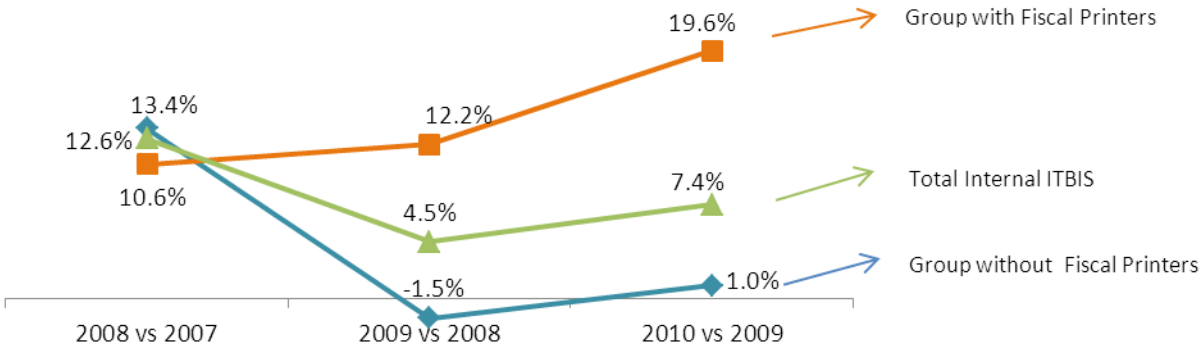
Note: Data calculated by the Studies Department with information from the DGII's Financial Management Office.

5.2 Quantification of the benefits of the project

In the period being analyzed, the results show that the increase in Internal ITBIS collection reported by taxpayers with FPs was greater than that of the group without printers, and it was even greater than the total increase of the Internal ITBIS. (See Graph 5). In addition, there was a 14.7 percentage point decrease in ITBIS noncompliance in 2008 with respect to 2004 (See Graph. 6).

Graph 4

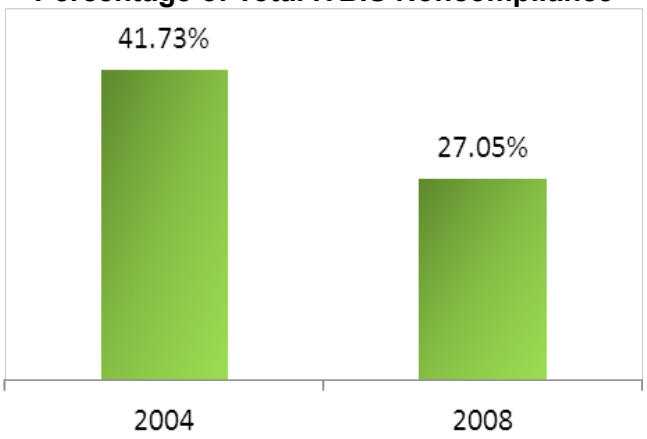
Comparison of ITBIS increase: taxpayers with and without fiscal printers; and total DGII ITBIS



Source: Economic and Tax Studies Department, DGII.

Graph 5

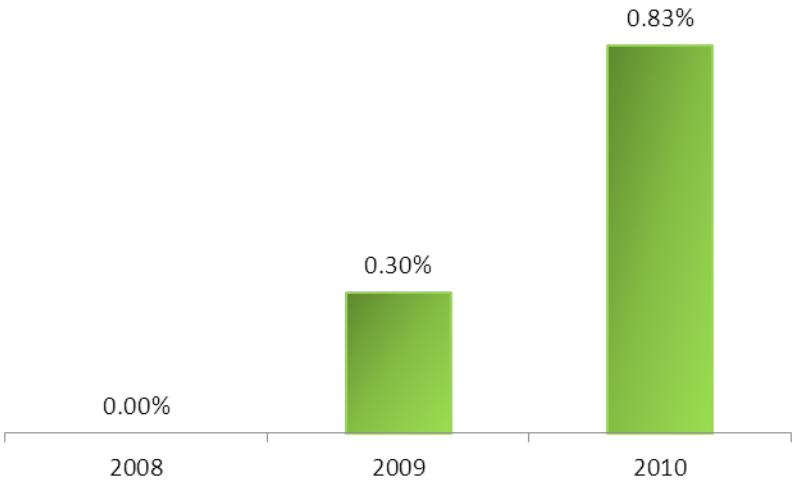
Percentage of Total ITBIS Noncompliance



Source: Economic and Tax Studies Department, DGII.

The direct benefit was the increase in collection which was estimated on the basis of the difference observed in the increase of ITBIS collection of taxpayers with printers, versus those without them. In this sense, there were no immediate benefits in the first year; however, in 2009 and 2010 the benefit was 0.30% and 0.83% of total Internal ITBIS, respectively. (See Graph 7)

Graph 6
Benefits of the Project as percentage of Internal ITBIS collection



Source: Economic and Tax Studies Department, DGII.

5.3 Comparison of benefits vs. project costs

The results show that the benefits (increased revenue) exceed the project costs which includes advertising costs, investment in the acquisition of equipment and the annual expenditures of the new created area. (See Chart No. 3)

Chart No. 3

Costs and Benefits of the Project as percentage of Internal ITBIS collection

Year	Costs	Benefits	Difference
2008	0.20%	0.00%	-0.20%
2009	0.14%	0.30%	0.17%
2010	0.11%	0.83%	0.72%
Total	0.45%	1.13%	0.69%

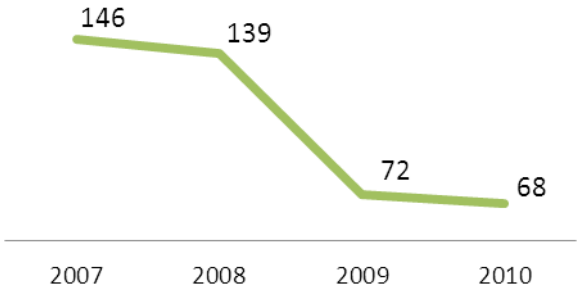
Note: Data calculated by the Studies Department with information from the DGIII's Financial Management Office.

These results evidence the successful application of the FPs by the DGII and the latter's effort for achieving full compliance of tax obligations by the taxpayers.

In general, the DGII's achievements in Information Technology (ICT) based projects have had a favorable impact in the way of doing business in the Dominican Republic and it was thus recognized by the World Bank in its 2009 study called Doing Business. The study states the following: "The Dominican Republic is the global and regional reform leader; it has speeded up formalities in several areas which may be carried out electronically. A system for filling out returns and paying taxes which began as a pilot project in 2006 is now fully operational. Businessmen may also complete formalities on-line, including the verification of the trade name …". In this way the country was moved from position 139 which it held in 2008 to 72 in 2009 with respect to the item on the payment of taxes. (See graph No. 8)

Graph 7

Payment of taxes indicator according to Doing Business



Source: Graph prepared by the author based on data from the Doing Business Report.

6. THE EXPERIENCE OF THE DGII AS REFERENCE IN LATIN AMERICA

The experience acquired by the DGII on developing within such a brief time frame the Fiscal Printers project is shared at international tax administration forums and is so positively valued that several countries have already requested the DGII's support for implementing their own projects.

Uruguay, Paraguay, Panama, Barbados, Nicaragua, Ecuador and others have been interested in learning more about the country's experience. Steps have been taken in accordance with the cooperation programs of the Inter-American Center of Tax Administrations (CIAT) in order that our technicians may offer the necessary support in the implementation of fiscal printers in these countries.

7. CONCLUSIONS

The fiscal printers system in the Dominican Republic is aimed at controlling retail sales by commercial establishments, in order to verify and ensure the correct issuance of documents by the taxpayer.

One of the basic aspects in developing the project was the coordinated work with businessmen associations (ONEC, ADECOR, among others), for the purpose of obtaining support in generating a business environment of sound competition and avoiding the unfair competition that could originate from tax evasion. In addition, the project's intention to adapt itself to the taxpayer needs and the characteristics of the commercial operations carried out in the country has ensured the implementation without affecting the normal taxpayer operations.

Another important aspect of the project is that it counts on an appropriate legal and normative framework which facilitated the introduction of the printers. In turn, there has been strong support from the political and government authorities to face resistance to greater of sales operations; along with the IDB's support in projects for strengthening the TA and the high level of credibility of the DGII before the Dominican society.

It has been highlighted that the form of financing the acquisition of the FPs by the taxpayers has facilitated the introduction of the equipment, without representing a cost for the taxpayer, inasmuch as the latter is allowed to deduct the investment as Income Tax or Asset Tax credit.

At the end of 2010, 25% of total local sales made to end consumers by potential taxpayers who were to install fiscal printers had been covered.

In the period under analysis the results showed that the increase in Internal ITBIS collection reported by the taxpayers with FPs exceeded that of the group which had no printers, and was even greater than the increase of total Internal ITBIS. There was also a decrease in ITBIS tax noncompliance of 14.7 percentage points in 2008 with respect to 2004.

On the other hand, the experience acquired by the DGII on successfully developing within such a brief time frame the Fiscal Printers project is shared at international tax administration forums and is so positively valued that several countries have already requested the DGII's support for implementing their own projects.

These results evidence the successful application of the FPs by the DGII and the latter's effort for achieving full compliance of tax obligations by the taxpayers.

In general, the DGII's achievements in Information Technology (ICT) based projects have had a favorable impact in the way of doing business in the Dominican Republic and it was thus recognized by the World Bank in its 2009 study called Doing Business. The study states the following: "The Dominican Republic is the global and regional reform leader; it has speeded up formalities in several areas which may be carried out electronically. A system for filling out returns and paying taxes which began as a pilot project in 2006 is now fully operational. Businessmen may also complete formalities on-line, including the verification of the trade name …" In this way the country was moved from position 139 which it held in 2008 to 72 in 2009 with respect to the item on the payment of taxes.

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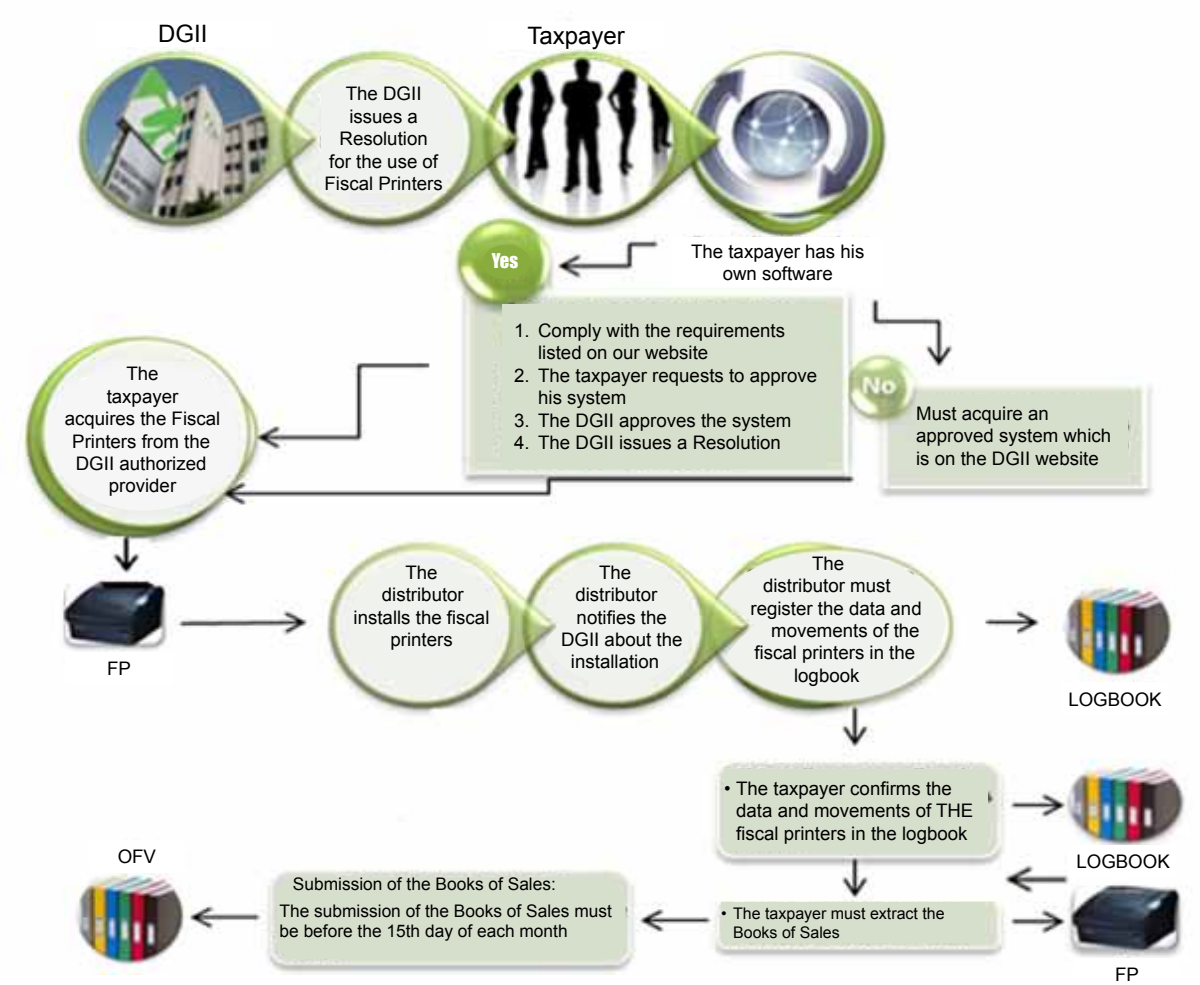
República Dominicana. Decreto 451-08 Reglamento para el Uso de las Impresoras Fiscales. Publicada en la Gaceta Oficial No. 10486, 2 de septiembre de 2008.

Annex 1

Guide for installing fiscal printers in businesses

The process begins with the issuance of resolutions by the DGII for the use of Fiscal Printers, after which an evaluation is made of the taxpayer's software. If the latter has software of its own, it must fulfill the requisites found in the DGII's Fiscal printer portal (www.dgii.gov.do). The taxpayer must then request the DGII to render his systems compatible and once the DGII completes such compatibility it issues the resolution authorizing the use of the system. If the taxpayer does not have his own system, it must acquire a compatible system, which is also available in the portal.

Thereafter, the distributor of Fiscal Printers installs them in the establishments and notifies the DGII. In turn, he must register the fiscal printer installation data in the system's register, which must store the information on each of the interventions made in the fiscal printers. On concluding the installations, the taxpayer must send the sales registry for each branch on a monthly basis.



Source: Technological Projects Management Office, DGII.

Annex 2

Requisites to be fulfilled by Fiscal Printers suppliers

1. They must be registered at the DGII and therefore, must have an assigned National Taxpayer Registry (RNC) number.
2. Prove his capacity of importer, manufacturer or representative of the Fiscal Printers submitted for their authorization by the General Directorate of Internal Taxes;
3. Have available the fiscal voucher numbers it must use, duly authorized by the DGII;
4. Maintain a record on initiation of activities of at least one year in the Dominican Republic.
5. Have been involved in the commercialization of printers or invoicing equipment for at least one year.
6. Request authorization in writing to the General Directorate of Internal Taxes, which should include a detailed explanation on compliance with each of the requisites provided in the Regulation for Fiscal Printers commercialized and comply with all documents required by the “Procedure for Requesting Authorization for Approval of Fiscal Printers”.
7. To be up to date in compliance with his tax obligations.
8. Fiscal Printers must comply with the technical specifications provided in the “Fiscal Printers Technical Specifications” Document.
9. Have service centers available for the support and maintenance of the fiscal printers.
10. Comply with the technical requirements of the DGII when granting the authorization.

Annex 3

Models of Fiscal Printers certified by the DGII

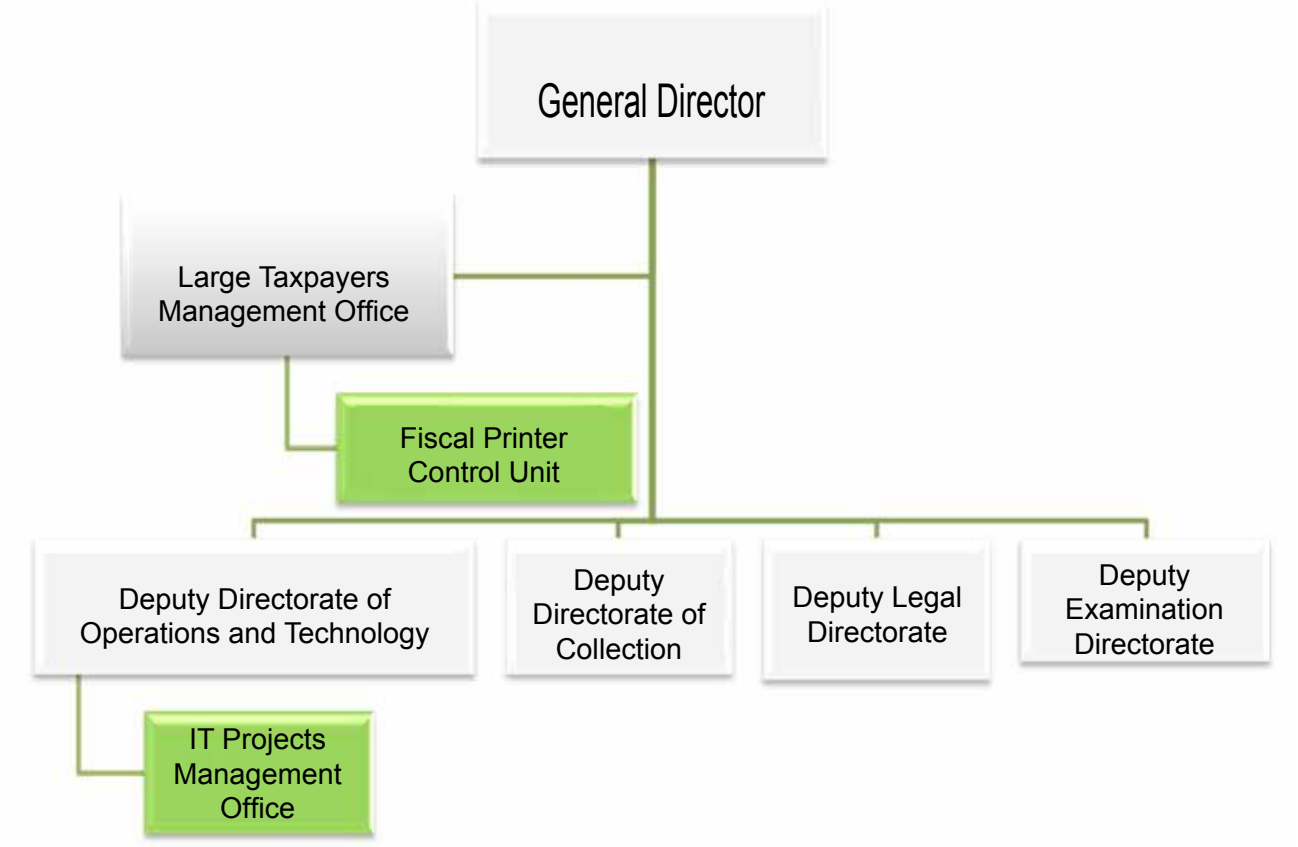
Picture	Description
	**IBM Model 4610-KS4** Includes the logic and fiscal memory, in addition to the physical security functions, it is fast, with high quality thermal printing of TPV for retailers with fiscal requirements. The fiscal models of the IBM SureMark printer have been designed to offer fast, silent and high quality thermal printing in the POS, in addition to entry of precise information which responds to regional fiscal requirements.
	**EPSON Model TM-H6000III** The EPSON TM-H6000III Fiscal is a hybrid printer of high performance, provides high speed in printing receipts, slips, two-colored graphs and advanced QuickPass processing, all in a compact, multifunctional printer. The TM-H6000III allows for implementing, a leading aggregate that allows for reading checks with an almost 99.9% accuracy, eliminating reading and substitution errors. It is a reliable model with an innovative time saving characteristic for sales as well as the banking sector. The EPSON fiscal printers, because of their constant research and innovation plus production in keeping with the modern standards create a synergy between the excellent quality of its hardware and the most reliable fiscal card developed in the Market.

Picture	Description
	**EPSON Model TM-T88IV** The EPSON TM-T88IV Fiscal Printer is ideal for Large Volume tasks. Thermal Printing Technology with a maximum speed of 200 mm/sec. It prints Vertical and Horizontal Bar Codes and optimizes the space in the Point of Sale (POS). The EPSON fiscal printers, because of their constant research and innovation plus production in keeping with the modern standards create a synergy between the excellent quality of its hardware and the most reliable fiscal card developed in the Market.
	**EPSON Model TM-U220B** The EPSON TM-U220B Fiscal Printer affords greater Printing Speed, easy loading of Paper and Bichromatic Printing in Black and Red to highlight Special Offers and print more impacting Logos. It also includes a function for adjusting the width of the Paper and for greater Flexibility and Savings. It comes with an Automatic cutter so that you may select between a complete or partial cut and an Auto Status Back function. The EPSON fiscal printers, because of their constant research and innovation plus production in keeping with the modern standards create a synergy between the excellent quality of its hardware and the most reliable fiscal card developed in the Market.

Picture	Description
	**OKI Model ML1120 FP** OKI offers the only 80-column impact matrix Fiscal Printer approved by the DGII. The OKI ML1120 affords speed, resolution and reliability with an easy to use compact design. Designed for general and point of sale (POS) businesses, the 9-pin ML1120 FP fully satisfies a wide range of applications, such as invoices, receipts, reports, etc., allowing users more results in less time. Highly versatile and easy to use; neat and clear printing in loose leaves and continuous forms of up to 5 parts, will allow you to print, day after day, with the highest printing speed in its class and in the fiscal card with the latest technology, you will be acquiring the best in value and reliability for your matrix printing requirements.
	**OKI Model POS 407II FP** OKI offers the fastest POS thermal Fiscal Printer in the market, with a compact and reliable design that combines high yield at low operational costs. The OKIPOS 407II FP has a maximum speed of 4.7 lines per second (250mm/sec), which results in 53 receipts per minute, with clear and neat results thanks to its 203 ppp. of resolution and its fiscal card with the latest technology, allowing for more fiscal transactions per hour in high volume printing environments. Its incorporated flexibility makes the OKIPOS 407II FP the ideal election for a wide range of applications at retail points of sale (POS), supermarkets, restaurants, points of customer assistance in all commercial and manufacturing branches, interactive kiosks and many more.
	**BMC Model TH34-EJ** BMC offers a high speed thermal fiscal printer, with a compact, robust, versatile and reliable design, capable of withstanding the strictest levels of operation. It can be easily maintained. It also has an easy paper loading system, bar codes printing and graphic heading, connection to a display screen, automatic paper cutter. Includes a high capacity transaction memory which allows for storing a minimum of 2 million fiscal vouchers. It has been approved and widely accepted in other countries in Latin America, Europe and Asia, thus affording experience when responding to their business requirements. This and many more things makes it the ideal choice for a wide range of retail businesses; restaurants, supermarkets, fast food restaurants, etc.
	**STAR Model TSP650** The STAR TSP650 is a high yield, speed and quality thermal printer. It includes an automatic cutter and wall support. It has high quality printing of 203 dpi with the capacity for printing graphs, bar codes including 2D for receipts, coupons, tickets, etc. It is a highly versatile printer which allows for the easy loading of paper and the use of two widths, 58mm or 80mm. The STAR TSP650 integrates the VMAX fiscal technology, approved in other markets of Latin America, affording the required technical and legal specifications, with the experience and quality of service which your establishment requires.

Annex 4

Areas created with the project



COMMUNICATIVE ACTION IN THE TAX EDUCATION: PROMOTING SOCIAL SOLIDARITY IN BRAZIL

Maria do Carmo Martins

SUMMARY

This document presents an analysis of the potential approach of tax education actions based on the communicative action theory of Habermas to promote social solidarity. The purpose is to analyze how the activities of agents can provide tax education tools to help society cope with the pathologies of modernity, which are the results of neoliberal ideas. We try to reflect on how to promote social solidarity based on awareness of the social-economic value of taxes and the need for social participation for the proper use of public resources.

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CONTENT

It is time to think about the social-economic model that we want. It is necessary to think broadly and globally, given that globalization is here to stay and that its effects are not necessarily negative.

In this scenario, Tax Education can be a great starting point for discussion about issues concerning the need of promoting social solidarity with economic development.

The question I propose to discuss concerns the role and position of the agent that promotes Tax Education to make progress in the pursuit of social solidarity based on an effective tax justice. Another point of reflection is related with how the actions of Tax Education can approach the ideal speech situation indicated by the Theory of Communicative Action of the German philosopher Habermas. The goal is to promote the discussion on the social-economic value of taxes and the need for social control of public expenditure.

One objective of the National Tax Education Program - PNEF[1] developed in Brazil is that the awareness of society on socio-economic value of taxes and on the need for social control of public spending is a way of promoting citizenship. This occurs as the individual wakes up and plays the protagonist role by the State, exercising his rights and complying with his duties at the society in which he lives.

This awareness depends, in the first place, on a taxation system based on fiscal justice and human dignity. It also depends on the correct application of resources aimed to the promotion of social welfare and fair distribution of wealth. Thus, so not only to give priority to economic growth, market development and expansion of technical–scientific knowledge, but also to promote the expansion of the number of those who have access to the benefits of development and progress.

The purpose of this work[2] is to promote Tax Education agents reflexion regarding the posture to be adopted so that the the citizen recipient of the action goes from a passive acceptance of social inequality situations and unethical behaviors to an active position of co-responsible on social transformation. It means ceasing to see fraud, corruption and embezzlement of public money as a normal situation with no possibility of change.

Therefore, we intend to contribute to the achievement of PNEF objectives of being an instrument of social transformation for the promotion of social solidarity in Brazil.

1. *The National Tax Education Program was established by an inter- ministerial act assigned by the Ministries of Finance and Education of Brazil, Act No. 413/2002.*
2. *This article is an excerpt of the main ideas developed in the communicative action paper Tax Education actions: Meeting the challenges of modernity in promoting social solidarity, presented by the author in 2011, as the paper to complete the Specialization Course on Tax Education and Citizenship sponsored by the ESAF.*

1. SOCIAL SOLIDARITY AND TAXATION

In this study, when we speak of social solidarity we have in mind not the type of emergency solidarity that unites human beings in disaster situations or extreme necessity as in the case of the trapped miners in Chile or the victims of earthquakes, or the one that hit Haiti in 2010, mobilizing people all over the world.

We refer to the concept of solidarity developed as the evolution of the concept and the National States, precisely from the conception of a social model based on solidarity. The development of this model began in the late XIX and early XX century, from the ideas of French theorists, known as "solidarism." It is a solidarity concept linked to the institution of public law which, according to Nabais (2005) is an idea of modernity. This model aimed to propose a solution to the social problems that became urgent, due to the industrialization process that exposes workers to new social and economic risks.

This concept of solidarity is related to the feeling of belonging to groups or social formations in which man is part of, and within he behaves as a social being. One of this groups is "[...] the community paradigm of modern times - the State. It follows that solidarity can be understood both in an objective sense, which refers to the relation of belonging and, therefore, sharing and co-responsibility that connects every individual to the vicissitudes and fortune of the other members of the community, and in a subjective and social ethic sense in which solidarity expresses the feeling, and the awareness of that same sensation of belonging to the community".[3]

According to Nabais (2005), the model of solidarity promoted by the State presupposes a two way road that passes through the vertical solidarity or solidarity by rights, carried out by the State in fulfilling its duty to ensure the basic rights to health, housing, education, etc. The other way is the horizontal solidarity or solidarity by duties which is defined as fraternal solidarity, and is directly related to the compliance by individuals of their fundamental or constitutional duties, to use the term outlined by Casalta Nabais who identifies the fundamental duties enshrined in the Constitution.

In the concept adopted by Nabais (2009), the classic fundamental duties constitute the real purpose of existence and functioning of the society in the democratic State. Nabais (200?) identifies three basic types of costs that are materialized in the fundamental duties, which shall be supported by the organized community for the proper functioning of the modern State: the costs for the existence and survival of the State, enshrined in the duty of the legitimate defense of the country, integrated or not in the right to the military defense; the costs related to the democratic functioning of the state, enshrined in the duty to vote, and, finally, the costs of public funds, which are reflected in the duty to pay taxes. These duties "are closely related, respectively, to the existence of economic performance and democratic functioning of the state community".[4]

In other words, social solidarity, which is carried out by the action of the State in ensuring the rights and requiring the compliance of the fundamental duties, have to be financed somehow. According to Sanchez and Da Gama (2005) "there is no state without rights, nor rights without taxes, nor taxes without money".

3. *NABAIS, José Casalta. Solidariedade Social, Cidadania e Direito Fiscal. In: GRECO, Marco Aurélio; DE GODOI, Marciano Seabra (Coord.). Solidariedade Social e Tributação. São Paulo: Dialética. 2005, página 112.*
4. *NABAIS, José Casalta. O Dever Fundamental de Pagar Impostos - Contributo para a compreensão constitucional do estado fiscal contemporâneo. 2ª reimpressão. Coimbra: Almedina, 2009, p 102.*

According to these authors, "The principle of social solidarity implies at least that all contribute to the collective cost of a State, according to its capacity, taxing citizens in order to reduce or extinct effective inequalities between them, providing to each one, a more dignified and free life. In situation of not-chosen inequality, there is always less freedom".[5]

That freedom comes with a responsibility which rests in the fulfillment of duties to ensure the means for the State to exercise its function.

The concept of tax-financed State refers us to the concept of the Fiscal State, which is defined as the "state which financial needs are covered primarily by taxes"[6]. For Nabais[7] to speak about a Fiscal State is talking about taxes. If keeping the current model of socio-political organization based on tax-dependent fiscal State, it is concluded that "taxes are an obligation of citizens and their compliance should be an honor"[8]

However, according to Buffon what we see today is the "dereliction of duty and hypertrophy of rights"[9], especially after World War II. On the other hand, the neglect of duties is also strengthening by the growing individualism of the contemporary world, which "cooled down and made anachronistic and the indispensable social solidarity"[10] It follows that: "the hypertrophy of fundamental rights, in addition to neglecting the fundamental duties cause an adverse effect on the structural basis of society because the idea of solidarity becomes empty and, little by little, the expectations for achieving the most fundamental rights gets frustrated, specifically for those who substantially need that these rights were not only part of a 'beautiful literary work' (Constitution)".[11]

About the forgotten duties, we are particularly interested in the fundamental duty of paying taxes, because they don´t oblige a direct counterpart. It allows the effective distribution of wealth in achieving the ideal of social solidarity, promoter of tax justice. Therefore, we conclude that the fair taxation is one of the main methods, in most societies, to promote social solidarity as a way to reduce social inequalities caused by the unequal distribution of wealth derived from human activity.

Therefore, we have two main concepts for the promotion of Tax Education as a means of promoting social solidarity: a fair taxation and an equitable distribution of wealth which lead to the duty to pay taxes and the social control for an efficient use of public resources.

We limit our analysis to the question of awareness of the fundamental duty of paying taxes, since we are interested in promoting social solidarity through taxes. To do this, we must reflect on how our taxes models are built; if, in fact, they are based on tax justice. On the other hand, we will reflect whether the society has in fact been able to participate on equal terms in the formulation of tax laws, which is the basis of the desired social solidarity.

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5. *SANCHES, J. L. Saldanha; DA GAMA, João Taborda. Pressuposto administrativo e pressuposto metodológico do princípio da solidariedade social. In: GRECO, Marco Aurélio; DE GODOI, Marciano Seabra (Coord.). Solidariedade Social e Tributação. São Paulo: Dialética. 2005, página 90.*
6. *NABAIS, José Casalta. Algumas reflexões sobre o actual estado fiscal. Brasília:AGU, 2001. Revista Virtual da AGU, Ano II nº 09, de abril de 2001. Disponível em: <http://www.agu.gov.br/sistemas/site/TemplateTexto.aspx?idConteudo=104461&ordenacao=1&id_site=1115>. Acesso em: 20 out. 2010, página. 2.*
7. *NABAIS, José Casalta, ob. cit.*
8. *NABAIS, José Casalta, ob. cit, página 2.*
9. *BUFFON, Marciano. Tributação e dignidade humana: entre os direitos e deveres fundamentais. Porto Alegre: Livraria do Advogado. 2009*
10. *BUFFON, Marciano, ob. cit., página. 82*
11. *Idem.*

In contemporaneous modernity, that goes from the 70's, and especially in the late XX and early XXI century, the idea of promoting awareness of the fundamental obligation of paying taxes is almost an anachronism.

Despite the undeniable progress promoted by technological advances and the globalization of information, knowledge and capital, today's world is governed strongly by the liberal market logic, the "free enterprise", the absence or minimal intervention of the State, the need of maximizing profits at any price and by the globalization brought by technological achievements. In this context, the gap between those who have privileged access to modernity and the ones condemned to live outside of these benefits becomes wider.

In Brazil, this inequality is reflected in the dichotomy of being ranked among the world's largest economies in terms of wealth production and its tenth position within the countries with the highest rates of social inequality. This paradox is spread through tax system, strongly regressive, in which people who earn up to two minimum wages commit up to 48.8% of their income to taxation, direct and indirect, while those earning more than thirty times the minimum wage compromise only 26.3% of their income to tax payments[12].

To understand the process that generates this state of affairs, it is necessary to briefly get into the evolution of the capitalist model that is intrinsically linked to the evolution of the State model, especially the State of Law and its role in relation to society and economy.

When discussing the current model of the State of Law adopted by most contemporary nations it does not refer to any State or legal system, but "only to the State or legal system which lives under the premise of Law, understood as a system of rules "democratically" established (emphasis added by the author) provided that at least the following basic requirements are met:

a. rule of law, as an expression of general will;
b. separation of powers: legislative, executive and judicial;
c. legality of administration acts: acting under the law with sufficient judicial control, and
d. the rights and fundamental freedoms: ensuring their formal, legal and effective attainment".[13]

The format of the State of Law was the result of conquests, through historical advances and regressions. "The State of Law, in any of its natures: the liberal state of law, State of Law, democratic state of law, is [...] Each one established or tried to establish, by fighting against the structures of power , i.e., the Liberal State of Law against the Old Regime, the Social State of law, against the individualism and the Non-liberal State, the Democratic State struggling with socio-political structures of the former one: the individualistic remnants, the oppressor neo-capitalism, the privileged established system with[14].

Mendes, Coelho and Branco (2007) identify three stages through which the current Democratic State stepped from: liberal, social and democratic. The State of Law in its liberal phase begins with the French Revolution to meet the demands of the bourgeoisie against the Absolutist State. In its primary form, the State of Law appears to set against the absolutist State, as "a limitation of State power by the law, but not the possibility of legitimizing any criteria giving it force of law.[15]

12. *Data from 2004. Available in: http://www.ibge.gov.br/observatoriodaequidade/relatoriotributario.htm*
13. *MENDES, Gilmar. , COELHO, Inocêncio Mártires, BRANCO, Paulo Gustavo Gonet. Curso de Direito Constitucional. São Paulo: Saraiva. 2007, páginas 36-37.*
14. *VERDU, 1975, apud MENDES, COELHO y BRANCO, 2007, ob. cit., página 37.*
15. *GARCÍA-PELAYO, Manuel. apud MENDES, COELHO y BRANCO, 2007, ob. cit., página 38.*

According to Mendes, Coelho and Branco (2007), the detention of political and economic power by the bourgeoisie made the State of Law model became an instrument of legitimation of the liberal ideology.

The liberal-bourgeois State of Law attempted to ensure the " 'bourgeois freedom' in all its aspects: personal freedom, private property, freedom of contract and freedom of industry and commerce, among others".[16]

These rights, which are summarized in: the rights to life, liberty, property and equality before the law are characterized by being the first generation of human rights. The guarantee of these rights by the State was of absent, non-interventionist character, leaving economic development in the hands of market self-regulation.

The transition to the Social State of Law was carried out from the observation that the model of State based on liberal individualism was not enough to account for the needs of new social risks of the economic model, for example, the threat of unemployment, work accidents, abandonment at old age. This effects were produced worldwide by the Industrial Revolution which began in England in the seventeenth century causing "a change in the profile of the labor market (before mainly agricultural and now sharply industrial and urban)".[17]

The first idea of this kind of social security with the support of the State arises in the year 1883 in Germany with the so called Bismarck Law. It arises from the finding that the liberal State model was not sufficient to cope with these new social demands, which were not covered by the classic design of the Constitutional Charters.

What characterizes the constitutional guarantee of social rights is the fact that these rights "Do not pretend to be an absence of the State, but require positive benefits. They are the second-generation of rights, through which a true freedom and equality for all is purposed, by the corrective action of public authorities. They refer to social help, health, education, work, leisure, etc." .[18]

Until the late 60's and early 70's there were no doubts that the Social State would succeed given the unprecedented levels of development achieved so far. That is, until the economic crisis caused by "the deregulation of the international monetary system and two oil crises (1973 and 1979) that in the early 70's, stopped the pace of growth in industrialized countries". [19]

Since the Social State model is based on full employment, the model itself is unable to cope with the effects of the crisis, particularly the high unemployment generated. Without work, the citizen loses their contributive capacity and becomes dependent on the benefit of the State. Unable to bear the burden of social guarantees, the State is brought into debt, resulting in the inflation process, aggravating the situation.

At the same time, the unprecedented decline of job places promoted by the technological revolution and the incorporation of women into the labor market as a result of the feminist movement has led to increased competition for the same jobs, exacerbating the situation. On the other hand, improved living conditions and technological progresses increase life expectancy of the population, adding additional strains to social security systems. Therefore, the crisis that began in the 70´s deepens during the

16. *MENDES, COELHO y BRANCO, 2007, ob. cit., página 39.*
17. *PINHEIRO, Maria Cláudia Bucchianeri. A Constituição de Weimar e os direitos fundamentais sociais: a preponderância da Constituição da República Alemã de 1919 na inauguração do constitucionalismo social, à luz da Constituição mexicana de 1917. Jus Navidandi. Teresina, ano 11, n. 1192, 6 out. 2006. Disponível em: <http://jus.uol.com.br/revista/texto/9014>. Acesso em: 20 dez. 2010.*
18. *MENDES, COELHO y BRANCO, 2007, ob. cit., página 223.*
19. *INFOPÉDIA. Crise Mundial dos Anos 70. In: Infopédia [on line]. Porto: Porto Editora, 2003-2010. Disponible en www: <URL: http://www.infopedia.pt/$crise-mundial-dos-anos-70>.Acesso em 20 dez. 2010.*

90's, creating the ideal environment to carry out the neoliberal ideal, claimed to be the solution to these problems.

Neoliberalism proposes that the State "removes" the whole social burden leaving the free market in charge of the "burden". In theory, market liberalization would bring development that would "grow the pie" and then share it. It was believed that economic development alone would be able to reduce inequalities.

What happened was exactly the opposite: we have a picture of worsening social inequalities, as a phenomenon not limited to the so-called peripheral societies. "According to estimates by the 2001 World Bank Annual Report in a hundred countries worldwide real income *per capita* is below the level of the fifteen years ago. Similarly, the relationship between the 20 % top layer income and the 20% lowest income, which was 1 to 30 in 1960, has increased from 1 to 72. Even more surprising is the resurgence of new poverty and social exclusion in societies in Europe and North America: 65 million Europeans according to estimates by the Commission in Brussels, 18% of the population have incomes below the poverty level. In the United States poverty has already reached 15% of the population. More worryingly, the incidence of poverty and exclusion, rather than diminish, is surprisingly growing - in the European Union, there were 38 million poor in 1975, 44 million in 1985, 53 million in 1992, 57 million in 1998, 65 million in 2001, according to estimates by the Commission in Brussels".[20]

According to Buffon (2009) from the new dominant ideology a new tax model was designed. This model exempted the capital, taxed the consumption and wages, away from the idea of the welfare state: the pillar of the solidarity. Adopting this model, called by the author "neo taxation", was "reinforcing the idea of tax only in the sense of exchange for public services at the expense of the classical ideas of taxation according to economic capacity and the use of taxation as an instrument of income distribution.

Therefore, like the adopted model of globalization, neo taxation is in crisis, since it has demonstrated to be an important instrument of income redistribution, literally "upside down". That is, taxes play an important role in the exacerbation of social inequalities, especially in relation to the countries where the welfare State is designed only as a "literary work", since it only exists in its formal aspect (Brazil is the best example)". [21]

For our study it is important to emphasize the role of the tax model in support of neo-liberalism, understood here as the economic model under which the State's role should be only just to guarantee life, liberty and property, putting aside the interventionist Keynesian model, and finally, leaving the "invisible hand" of the market to work in promoting human development.

This reverse income distribution that this model promotes is one of the points to consider if, one really wants to promote social solidarity as a way to reduce inequalities. Taxation appears here as an important factor in the deepening of social inequalities between and within countries, especially in Brazi

Assuming that the construction of this tax model is somehow a consensus that, in the modern States of Law, promotes social integration by means of positive law, we believe that the Theory of Communicative Action proposed by the contemporary German philosopher and sociologist Habermas, borned in 1929 can help us to face the challenge of promoting Tax Education in this context.

20. VERGOPOULOS, 2005 apud BUFFON, Marciano, 2009, ob. cit., página 49.
21. BUFFON, Marciano, 2009, ob. cit., página 24.

2. COMMUNICATIVE ACTION AND THE PATHOLOGIES OF MODERNITY: THE ROLE OF LAW

Taking as a starting point Weber´s ideas on the origins of the modernity pathologies, including the deepening of inequalities, Habermas (1999) asserts that this state of affairs is the result of the rationalization process identified by Weber. This process begins with the differentiation of the images of the world derived from mythical and metaphysical visions which legitimized the ethical consensus of human activity. The differeciacion advanced to the point of power and money have been settled in autonomous systems. Thus, communication with the lifeworld is therefore the development of a consensus ensuring social integration which no longer takes place by means of language; it is mediated by the speecheless medium of money which is immune to any reasonable argument. In the ethics of the market "the end justifies the means." It is a paradox: the same process that in one hand allowed, and allows, a continuous human development, on the other hand it is for Weber, and corroborated by Habermas, the origin of the pathologies of the modern world.

"The main idea of the Theory of Communicative Action is the following: the pathologies of modernity can be attributed, without exception, to the invasion of economic and bureaucratic rationality at spheres of the lifeworld in which these forms of rationality are not appropriate, and therefore, lead to loss of freedom and sense. Habermas' communicative action is designed in a way to open opportunities for a wide non restrictive understanding"[22].

The invasion to which refers Habermas (1999) involves the use of a kind of rationality called instrumental in situations that requires the use of communicative rationality. Instrumental rationality is based on science and technology, and it is defined, according to Gonçalves (1999) "by the means-ends relationship, i.e. the organization of the proper means or the choice of alternative strategies to achieve a its objectives"[23]. Communicative rationality in which communicative action is established is the one from which "people interact and, through the use of language, are socially organized to achieve consensus free from internal and external coercion ".[24]

This analysis leads to Kant's thought (2009). Kant states that ethical behavior should be guided by obedience to the "categorical imperative" that "orders" to act so that action can be universalized, that is, legitimate and valid for all and any person. This means to act considering the other as a an end in itself and never as a means to achieve an objective. This way of acting rationally in seeing the other as an end, regardless of the communication channel, is a key vector for human dignity.

On the other hand, the hypothetical imperative, adequate to the knowledge of nature and ideal for understanding the evolution of the objective world, when it becomes a mentor to the actions in the framework of human relationships, changes the person into a means to achieve certain purposes.

In his Theory of Communicative Action, based on ethics of discourse, Habermas (1991) states that the categorical imperative has "The role of a justification principle that selects as valid the rules of action capable of being universal: what is justified in a moral sense all rational beings must be able to desire it. [...] In the

22. *GONÇALVES, Maria Augusta Salin, 1999, op. cit., página 133.*
23. *GONÇALVES, Maria Augusta Salin, 1999, op. cit., página 127.*
24. *GONÇALVES, Maria Augusta Salin, 1999, op. cit., página 133.*

ethics of discourse, the place of the categorical imperative is occupied by the process of moral argumentation. And it should be extracted from the 'D' principle which says:

- Only those norms that may have the consent of all the ones involved as participants in a practical discourse can claim validity.
  In turn, the categorical imperative is degraded to a universal principle of universalization 'U' tha adoptes in of the practical discourse the role of an argumentacion rule:
- In the case of valid rules, results and side effects that for the satisfaction of each one interests are expected to be followed by the general observance of the rule has to be accepted by all without coercion of any kind".[25]

According to Freitag (1989), Habermas proposes to replace the paradigm of Kantian philosophy of consciousness with an interaction theory. This means leaving a monological concept of action to a concept of communicative action, which is supposed not to require any epistemic subject, in this case, it is replaced by the group. The truth is no longer the result of an individual reflection in the consciousness of the subject, but the result of a dialogue building process in which language plays an important role.

To understand the role that language plays in this argumentative process it is important to analyze the rationality potential of emissions in a communicative action oriented to understanding. According to Habermas (1999) a topic or manifestation, to be considered rational, must include a reliable knowledge, even with the possibility of failures. It must also be an expression with meaning, open to the possibility of an inter-subjective recognition of a pretension of validity open to criticism to which the agent must be able to respond by means of reasoning. Therefore, it must meet the essential requirement for rationality: to permits reasoning and to be open to criticism.

For Habermas (1999), rationality defined only from the cognitive point of view using only the reference to a descritive knowledge does not consider that this concept can be developed in two different directions: towards the concept of cognitive-instrumental rationality, whether descriptive or propositional knowledge is used in a non-communicative way in a teleological action or to the broader concept of rationality that goes with the old idea of logos.

In the first case, the concept of rationality "has a successful self-assertion connotation in the objective world, made possible by the ability to manipulate information and adapt to a contingent environment".[26] In the second case, the concept of communicative rationality "has connotations that go back to the central experience of the ability to collect and build consensus without coercion that has a argumentative speech in which different participants overcome the subjectivity of their initial views and, thanks to a rationally motivated set of convictions shall assure the unit of the objective world and the inter-subjectivity of the context in which they live". [27]

The communicative action concept presents one additional assumption: the linguistic environment as a mechanism to coordinate the actions necessary to achieve non-violent social integration in a way that allows the "least confrontational as possible of intentions and actions, and, therefore the emergence of patterns of behavior and social order in general". [28]

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25. *HABERMAS. Jürgen. Escritos sobre moralidad y eticidad. Tradução: Manuel Jiménez Redondo. Barcelona: Ediciones Paidós/ I.C.E.-U.A.B, 1991. Colección Pensamiento Contemporáneo 1991, páginas 101-102.*
26. *HABERMAS. Jürgen, Teoría de la Acción Comunicativa I: Racionalidad de la acción y racionalización social. Tradução de Manuel Jiménez Redondo. Madrid: Taurus, 1999, página 27.*
27. *HABERMAS. Jürgen. 1999, op. cit. página 27.*
28. *HABERMAS. Jürgen. Direito e Democracia: Entre facticidade e validade. 2.ed. Tradução de Flávio Beno Siebeneichler. Rio de Janeiro: Tempo Brasileiro, 2003. v. I., página 36.*

"While the language is used only as a means of transmitting information and redundancies, coordination of action passes through the mutual influence of the actors who interact in functional terms. However, while the illocutionary[29] forces of the speech actions assume a coordinating role, the language itself is being used as the primary source of social integration. Therein lays the "communicative action". In this case, the actors, as speakers and listeners, try to negotiate a common understanding of the situation and harmonize their respective plans through a process of understanding, therefore, through unconditional search for illocutionary purposes". [30]

The main concept of communicative action is the "interpretation" concerning to the definition of the situation that can reach consensus through negotiation. In this model of action, language plays a fundamental role. "Only the communicative action concept presupposes language as a means of understanding without abbreviations, in which speakers and listeners relate, from the pre-interpreted horizon that their life world represents, simultaneously to something in the objective world, in the social world and in the subjective world, to negotiate definitions of the situation that can be shared by everyone".[31]

Communicative action which is based on the use of language oriented to understanding derives from two assumptions: (a) the participants of the communication must rely on a common or translatable language, and (b) that the "participants of the interaction must attribute reciprocally to each other's the awareness of their actions, i.e. they have to assume that they are capable of guiding their actions with validity claims".[32]

The rationality of individuals interacting communicatively in the argumentative process is manifested not only in the ability to interpret their needs in light of the patterns of values learned in their culture, but especially in "the ability to adopt a reflective attitude towards the standards of values with which they interprets their own needs".[33]

According to Habermas, the arguments that allow an opinion to be transformed into knowledge are the means on which the applicant relies on inter-subjective recognition of the validity of a statement made in a hypothetical form of a problematic issue (conclusion) and the reason or reasons upon which the validity of this statement will be determined.

Depending on the aspect under which we consider the argument, we can see that it present different structures: "the structures of a particularly ideal speech situation immunized against repression and inequality, competition structures, ritualized, for the better arguments,

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29. *"Every action performed through speech is called a speaking action. The actions carried out through speech actions can be very different. So there is a need to distinguish the different dimensions that the action of speaking has. We talk about the dimensions, because in a single expression different speech actions can be performed. For example, the phrase "You are stepping on my foot", perform at the same time three actions of speech.*
The first is the locutionary action, i.e. the act of saying the phrase. The second action is what Austin calls the illocutionary; the actions performed through the speech act performed, or utter the locutionary act. In this case, saying "You are stepping on my foot" did not intend to describe a simple situation, but to protest or to warn the other person to stop stepping on the foot. Finally, a third action, called per-elocutionary, which is to cause an effect on another person through my speech, and to act on his feelings or thoughts. In the described situation, it intends the other person takes his foot off from mine as a result. Thus we have the speech action to say something, the illocutionary action that performs an action through the words and when there is an intended effect, the per-elocutionary aspect of causing certain effects on the audience (convincing, take a decision, etc.)". (Da Silva, Josué Cándido Disponible en: <http://educacao.uol.com.br/filosofia/filosofia-da-linguagem-6.jhtm>
30. *HABERMAS. Jürgen., 2003. op.cit., página 36.*
31. *HABERMAS. Jürgen. 1999, op. cit. páginas 137-138.*
32. *HABERMAS. Jürgen. 2003, op. cit. página 38.*

and finally, the structures that define the shape of the internal arguments and relationships between arguments". [34]

Reese-Schäfer summarizes the four conditions which in Habermas's theory are necessary for the creation of an ideal speech situation making possible to establish a consensus of truth, "not only of those who are momentarily present, but a general consensus of rational beings, which in extreme cases also include the unlimited scientific community in the future".[35] The preconditions for procedural understanding of truth can be summarized as: public sphere, the equitable distribution of communication rights, nonviolence, and authenticity. This, as the author states, means that:

a) All potential participants in a discourse must have the same opportunity to use communicative acts of speech, so that at any time, they can initiate or perpetuate a discourse through interventions and replies, questions and answers.

b) All participants in the discourse must have the same opportunities to make interpretations, declarations, recommendations, explanations and justifications, and discuss, support or refute their claim of validity, so that no judgment was subtracted in the long term from discussion and critics.

c) For the discourse are only admitted participants that, as agents, have equal opportunities to use representative speech acts, i.e., to express their opinions, feelings and desires. Because only the mutual agreement of the universe of individual expression and the additional symmetry between proximity and distance in the contexts of action ensures that agents and participants in the discourse are also true to each other and make transparent their inner nature.

d) For the discourse are only admitted participants that, as agents have the same opportunity to use regulatory speech acts, i.e., to order and object, to allow and prohibit, to make and withdraw promises, to give and to require accounts. Because only full reciprocity of behavioral expectations, which exclude privileges in the sense of rules of action and validation that are unilaterally required, can ensure that the uniform distribution of opportunities to initiate and continue a discussion are also used to reality coercion and move on to the communicative dimension of speech, free dimension of experience and relieved from the action.[36]

The more the discourse approaches the ideal conditions of speech, the more the universality of claims is increased. The more representatives and free are those who interacts in the discourse bigger is the possibility that the consensus established is based on the consent of all the concerned ones.

"The observation of a valid moral rule that has withstood the test of generalization must only be required of people who in turn may have an expectation that this standard will also be effectively followed by everyone else. In the world as we know, it is often not the case. For this reason, the legal regulations and the introduction of political power by force can become necessary to guarantee the performance of an act considered legitimate. The behavior obtained from these two channels is legitimate only if in turn the Law and political institutions meet the criteria of legitimacy. God knows that this is even rarer" (verbal) [37].

33. *HABERMAS. Jürgen. 1999, op. cit. página 39.*
34. *HABERMAS. Jürgen. 1999, op. cit. página 48.*
35. *REESE-SCHÄFER, Walter. 2009, op. cit. p. 24.*
36. *HABERMAS, Jürgen,1984-apud SCHÄFER Reese, 2009, op. cit. página 24s.*

To do this, besides the conditions for the establishment of the ideal situation of speech, in the discourse of moral reasoning, the universalization is not anymore obtained monologically by the ethical subject. It is established as a principle of the discourse, "D" which states that "valid rules of action are those in which all possibly affected ones can give their consent, as participants in rational discourses".[38]

From this principle follows the principle of the universality of the ethic of discourse which reads as follows: "All existing rules must comply with the condition that the consequences and side effects which presumably will result from the general observation of this rule to satisfy the interests of each individual can be accepted without coercion by all those involved".[39]

One consequence of the rationalization process was precisely the replacing of the legitimacy process of the rules of action, obtained from the argumentative discourse mediated by language, by negotiations based on instrumental rationality, even in the field of human relations, where this kind of rationality is not adequate.

Individuals acting communicatively necessarily share an understanding of the abstract world that allows them to understand each other about what is happening in the world or what will occur in the world. Therefore, when referring to some issue in the world, they operate in what Habermas, quoting A. Schütz[40], calls the lifeworld: a "horizon thematically co-given in which the participants of an interaction move together"[41]. This lifeworld is constituted by the cultural tradition shared by a community; individual members find it are already interpreted in relation to its content. This lifeworld (Lebenswelt) inter-subjectively shared forms the background of communicative action, it is the place where morality is rooted. "The live world is the place for spontaneous social relations, for pre-reflective certainties, for the links that were never put in doubt. It has three structural components: culture, society and personality. Culture is the accumulated knowledge of the community, which contains the semantic content of the tradition, where individuals provide themselves of the models of interpretation needed for social life. The society, "strictu sensu", consists of legitimate orders through which community members regulate their solidarity. Personality is a set of skills that qualify a person to participate in social life. The social relations that take place in the lived world typically take the form of communicative action".[42]

What happens in the rationalization process is that the constituent parts of the life world – culture, society and subjectivity – differentiate from each other to the point of becoming independent systems, not mediated by the language. Thus, language loses its integrative force to the nonlinguistic means of power and money. In his theory, Habermas concludes that once the language has become unable to promote social integration and that money has

37. *HABERMAS, Jürgen. Jürgen Habermas fala à Tempo Brasileiro: Entrevista por Bárbara Freitag. Revista Tempo Brasileiro. Rio de Janeiro: Tempo Brasileiro nº 98, 1989, ´páginas 20-21.*
38. *HABERMAS. Jürgen. 2003, op. cit. página 142.*
39. *ROUANET, Sérgio Paulo. Ética e antropologia. Revista Estudos Avançados. São Paulo:USP, v. 4, n. 10, Dez. 1990 . p. 111-150. Disponível em: <http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0103-40141990000300006&lng=en&nrm=iso>. Acesso em 07 nov. 2010, p. 115.*
40. *Alfred Schütz (1899-1959), sociologist, phenomenologist, tried to relate the thought of Edmund Husserl to the social world and social sciences. His Phenomenology of Social World provided the philosophical basis for sociology and economics of Max Weber. His work influenced new sociological movements such as the methodological ethnos conversational analysis. Available at: <http://plato.stanford.edu/entries/schutz/>. Consultado el: 25 de febrero En El Año 2011.*
41. *HABERMAS. Jürgen. 1999, op. cit. página 119.*
42. *ROUANET, Sérgio Paulo. 1990, ob. cit., 114.*

become the medium of communication, we need other means to establish a bridge between the world of life and autonomous systems. Habermas believes that the Law has the power to translate for the language of the law the issues that have become a problem. Law, in turn communicates with the systems of power and money.

Given that the integration of society is not only achieved through social integration what presupposes communicative action and conceives society as a "lifeworld", Habermas (1992) draws a distinction between social integration and systemic integration: in the first case, "the system of action became integrated, or by means of a normative consensus insured normatively, or by a communicatively achieved consensus." In the second case, the integration is carried out "by means of a non-normative control (Steuerung) of particular subjective decisions lacking coordination ".[43]

Habermas (1992) then presents a concept of society "as a system that must meet the conditions for maintaining their own socio-cultural worlds of life"[44]. He understands the society "as an entity that, in the course of evolution, was differenciated as a system and as life world. The systemic evolution is measured by the increasing in its control ability (Steuerungskapazität), while the separation of culture, society and personality are an indicator of the evolutionary state of a life world whose structure is a symbolic structure". [45]

This process of differentiation of the constituent and maintenance elements of social integration – culture, society and personality – is intrinsic to social evolution itself, understood by Habermas (1992), both from the internal viewpoint of the participant to be adopted by the members of the life world, and from the perspective of an outside observer who is adopted by systems theory under these two approaches, he believes that "with the increasing of the complexity of one and the rationality of the other, system and world of live not only difference internally as system and lifeworld, but they simultaneously differs from each other." [46] "As the structures of the life world become differentiated, both systemic and social integration mechanisms are also separated. This evolutionary process gives us the key to the problem of Weber's social rationalization". [47]

In the evolutionary process, involving the differentiation of the images of the world, primitive societies, traditional societies or state-organized societies and modern societies, with a differentiated economic system, represent socio-evolutionary stages. These stages can be characterized "by the new systemic mechanisms they present and the levels of complexity that these mechanisms have".[48] Analyzing this evolution from a systemic point of view it is observed that "the decoupling of the system and the life world is reflected as follows: the world of life, that, in the beginning is co-extensive with a poorly differentiated social system, is progressively degraded to a subsystem among others. In this process the systemic mechanisms are increasingly disconnected from social structures through which social integration take place. Modern societies come to reach [...] a systemic level of differentiation in which the connections between organizations that have become autonomous end up being established through nonlinguistic means of communication. These control mechanisms controls a systemic social trade largely away from norms and values, i.e. rational economic and administrative subsystems of action purpose-oriented which

43. *HABERMAS, Jürgen. Teoría de la Acción Comunicativa II: Crítica de la razón funcionalista. Tradução de Manuel Jiménez Redondo. Madrid: Taurus, 1992, página 213*
44. *HABERMAS, Jürgen, 1992, op. cit., página 215.*
45. *Idem.*
46. *HABERMAS, Jürgen, 1992, op. cit., página 216.*
47. *HABERMAS, Jürgen, 1992, op. cit., página 232.*
48. *HABERMAS, Jürgen, 1992, op. cit., página 217.*

according to the diagnosis of Weber became independent from their practical and moral foundations" [49].

As the world of life is the subsystem that defines the coherence of the whole social system, systemic mechanisms require being rooted in the world of life, and therefore it should be institutionalized. From the internal perspective of the life world it is observed that, while the systemic differentiation in primitive societies only leads to greater complexity in the structures of kinship system "in the higher levels of integration new social structures are born, namely the States and sub-systems ruled by the medium"[50]

With the organization of the state, relations move out of the scope of family ties and new social levels are created, with the transferring of the power relations to the political sphere. Interactions begins to be determined by those who are in positions of the administrative power; offices and positions which in turn are defined by formal law.

Following differentiation advance, which is moving towards a greater degree of abstraction in the relationship of trade and power, the capitalist economy and the administrative power come to be autonomous action systems, emancipated from the normative contexts. Relations, not anymore mediated by language, are now based on money, which becomes the medium of inter-systemic exchange.

"In the framework of state-organized societies surge markets for goods that are governed by terms of trade relations symbolically generalized, i.e., through the medium of money. But only with the separation of the economy and the state, this medium generates structural effects to the social system as a whole. In modern Europe, in fact, a different subsystem mediated by money emerges with the capitalist economy, what in turn requires the State to be reorganized. In the subsystems complementarily referred to each other – the market economy and the modern state administration –, the mechanism represented by the means of control *(*Steuerungsmedien) called by Parsons as **symbolically generalized media of communication** find **appropriate** social structure". [51]

With the differentiation process, the social integration, previously carried out by the values, norms and processes of understanding and thus, through communicative action, came to be integrated systematically through markets and administrative power.

"Money is a special mechanism of exchange that transforms the values of use in exchange values, the natural traffic of goods in cargo traffic"[52]. Even in traditional societies there are domestic and foreign markets. Only with "capitalism emerges an economic system that runs through monetary channels, both internal traffic between firms and exchanges with the non-economic counterparts environement, which are the domestic sphere and the State "[53].

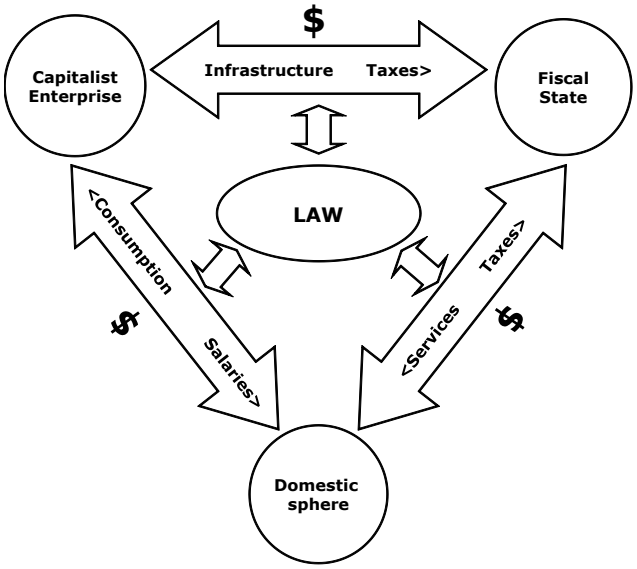
Thus, besides the capitalist enterprise, the institutionalization of wage labor and the creation of the Fiscal State are essential for this new form of production. Figure 1 describes how money flows between the domestic sphere and the capitalist enterprise by the institutionalization of wage labor and by the relations of labor and consumption. It also shows the existent flow between the Fiscal State, business and society.

"Only when the money becomes a **medium of inter systemic exchange** it produces effects that generates structures. The economy can

49. HABERMAS, Jürgen, 1992, op. cit., página 217.
50. Idem.
51. HABERMAS, Jürgen, 1992, op. cit., página 233-234.
52. HABERMAS, Jürgen, 1992, op. cit., página 242
53. Idem.

only be constituted as a **monetarily governed subsystem** to the extent that exchanges with the social environment are generated through money as mediator. These environments are formed due to the production process based on paid labor and the commitment with feedback of the state apparatus with the production through taxation. The apparatus of the state becomes dependent on the economy subsystem governed by a systemic means of control, this requires a reorganization that leads, among other things, that political power is absorbed by a systematic means of control, power is assimilated to money"[54] (emphasis added by author).

Graph 1
Systemic interactions mediated by money in modern capitalist societies



In summary, the differentiation process that leads to modernity, in its principles, "is dominated by the differentiation process of an economic system managed by a political dominant order passing through the "medium" of money, assuming, in turn, the figure of an administrative system. Both subsystems formations mean that civil society has disconnected from the economy and the State. Traditional forms of the community modernize in the form of a civil society which, following religious pluralism moves away from their own cultural systems".[55]

By means of power, we have the figure of the modern State that no longer concentrate within itself the whole society capacity of action. So, the State specializes in "the implementation of collective goals through binding decisions" represented by the public administration, maintenance of the army and the administration of justice. Other functions are depoliticized and transferred to non-state subsystems.

By means of exchange, the capitalist economic system, which is responsible for the "emergence of this new level of system differentiation, owes its birth to a new mechanism, a systemic mean of control which is money".[56]

In this scenario, according to Habermas (2003), positive law appears as an element that allows interaction between the world of life and the systems of economic and administrative power, in three different ways. (i) The interaction of autonomous systems of administrative power and money with society is made possible thanks to its rooting in the world of life through the legal institutionalization of markets and bureaucracies. (ii) At the same time, conflicts that were previously resolved ethically on the basis of habit, loyalty or trust, "are rearranged so that the participants in proceedings may appeal to claims of law"[57]. And (iii), "the universalization of the status of the public and legally institucionalized citizen is the necessary complement to the possibility of "judicialization" of social relations. The core of this citizenship consists of the civil rights of political participation advocated in the new forms of exchange of civil society, the network of spontaneous associations

54. Idem.
55. HABERMAS, Jürgen, 2003, op. cit., página 104.
56. HABERMAS, Jürgen, 1992, op. cit., página 241.
57. HABERMAS, Jürgen, 2003, op. cit., página 105.

protected by fundamental rights, as well as forms of communication of a political public sphere produced by the media".[58]

The instrumentalization of the life world is produced by the introduction of non-linguistic media which takes the place of language in establishing relations between the world of life and economic and political systems. These means do not allow the establishment of a consensus bay means of communicative action, because what prevails in this case is not the co-action without coercion of the best argument. The argument is replaced by the economic and political power, aimed at achieving the goals, that are, in this case, increasing profit and income for the capital or increasing power in the political arena.

3. COMMUNICATIVE ACTION AND THE TAX EDUCATION

By bringing our thoughts to the Theory of Communicative Action we take into account that the values promoted by the Tax Education presupose the superiority of man over the State, freedom, equality and social justice. This brings us to the possibility of supporting the Tax Education on the basis of communicative action, in order to bring society to the formation of a new consensus based on the reflection of the main issues proposed by Tax Education.

We realize that the kind of transformation PNEF seeks to promote relies on the tripod of the structures constituting the life world: culture, society and personality, and that for the desired changes to occur, the actions of Tax Education must originate from a new consensus established through communicative action.

For this to happen, the first requirement is that efforts to promote tax education must not be characterized as mere transmission of knowledge through cognitive-instrumental means. By this means, can be conducted actions to give to society the knowledge about the public administration, legislative and budgetary processes and information relating to the national tax system and tax administration. It is an important path to improving tax compliance by means of a better comprehensión by society about the role played by taxation system in the maintenance of Stete. Another connribution of this kind of action is that it makes esier to citizens to deal with government institutions in resolving administrative issues. It is particularly important in the presentation of the possibilities of democratic participation, as provided in the Constitution and laws, but little known and little used by most of the society.

However, with regard to the intention to stimulate a change in the acting of the recipients of communicative acts it is necessary to adopt another approach in order to promote a new understanding in society about the socioeconomic value of taxes and the role that these individuals must play. Listeners should be encouraged to abandon a position of passivity in relation to the knowledge received and opt for a position to internalize the values and assumptions of Tax Education.

Tax Education can release that communicative potential to the extent that the Tax Education agent adopts two positions: (i) internally to the institution to which he belongs, that is part of the administrative power of the State the Tax Education Agent should adopt the same reflective

58. Idem.

position of a “social scientist”, positioning himself outside the system, (ii) externally to the institution, the agent must adopt the position of a participant in communicative action, giving to the discourse the arguments that he has privileged knowledge, regarding the matter in question. In this case, the agent should be able to propose questions for reflection to society object of their action.

By adopting a critical posture, the Tax Education agent must also take advantage of the critical options that these communicative structures offer “[...] to enter a context, and make it jump from inside and outside, to open the way, if necessary, through a factual consensus which we can be used to and check errors, correct misunderstandings, etc.”.[59] (Emphasis added by the author).

By taking a critical view of the system the tax education agent may be able to release the potential of critic that communicative action itself embodies. It is essential that the tax educator can use this potential systematically “when introduced as a virtual participant in the context of daily activity using it in those contexts agaisnt their own particularity”. [60]

In Brazil, the government institutions involved in promoting Tax Education are part of the State administration system. Therefore they have a key role to enforce the compliance of rules “democratically” stablished by the legislative process. To perform their functions they also have their actions bounded to the law. By way of legal positivism, these institutions end up developing a non-reflective or poorly reflective way of acting regarding the legitimacy and validity of the laws that they are required to comply with. This is the characteristic feature of the two sides of the bureaucratic organization. On the one hand they help to establish a secure relationship between State and society, protecting each other from abuse. On the other hand, they help to put a veil over the ethical duty to evaluate the compliance of rules positivated in Law as regards to the legitimacy and universality of those rules. Thou, bureaucracy contributes to an attitude of acomodation and passivity, both by those who must enforce law compliance as those who are required by law to comply with them, even in cases where both consider them unfair or contrary to human dignity or equity.

Promoting Tax Education aims to act on both components that support the model of democratic State of Law under which Brazilian society is organized: the uptake of resources from society and its application in the promotion of development and welfare of that society.

It is not enough to have a fair taxation system and to reduce the rates of tax evasion. This, no doubt, would hep to “grow the pie”. It would be useless to the aim of promoting justice and social welfare if efforts are not invested to improve the quality of the application of resources. It can be obtained either through democratic participation in the formulation of budgets, or through the effective use of legally established control instruments, or even through the fight against corruption. Therefore, Tax Education must act on all these fronts.

In both cases, the PNEF proposal is to provide society with more tools for democratic participation in decisions on the two sides. This positive “instrumentalization” of the society will take place from an educational process, not only at the cognitive-instrumental field, but in the design of an integral education that takes into account the moral-practical rationality perspective embodied in the rules of law and morality. We feel that this path points to the effective exchange of values, beliefs and culture in society, and will make it better with the introduction of reflective mechanisms in the learning process in order to provide a continuous and differentiated production of knowledge.

59. HABERMAS, Jürgen, 1999, op. cit., página 170.
60. Idem.

We emphasize the reflective character that should guide the tax education actions. It is needed reflection "inside" the institutions, in the sense of questioning their own "praxis" and consistency, and the agreement between practice and discourse. It is also necessary internal reflection to discuss the legislation and procedures inherent in institutional responsibilities to give value to the validity claims embedded in the existing rules and propose changes or reject them when they offend the foundations of legitimacy and justice, using for this aim the available legal and institutional mechanisms.

The external reflection is necessary to promote debate with society about tax legislative and administrative issues. The aim is to bring to society the necessary knowledge which enable individuals to question the established legal framework. The process must lead people to question even non-positive rules that ultimately enhance and even legitimize unethical behavior such as abuse of power, the private use of public goods, tax evasion, corruption, misuse of public resources, to name a few.

From this communicative process, Tax Education promoted by PNEF can really achieve its purpose of "contributing to strengthening the social transformation mechanisms through education, disseminating information to allow the construction of public awareness and expand popular participation in the democratic management of the State" and "to be a permanent instrument for strengthening the democratic State".[61]

Tax Education has the potential to provide society of the instruments (in the sense of providing tools) by means of knowledge in order to make it able to participate in the legislative and administrative process, in more equal conditions. This knowledge allows people to act more effectively in the formulation and reformulation of the rules governing the tax law and the procedures for the provision and allocation of public resources.

Thus, important steps will be taken towards effective social solidarity, which depend less and less on the isolated action of individuals and is consolidated in collective action. What is desired is to build solidarity on the basis of rules from a broad consensus legitimized by the participation of stakeholders on equal conditions, prevailing the best argument. It is intended that the consensus is not established to serve the private interests of the holders of coercion holders, but because it is the best possible consensus established in that historical time for that community.

4. CONCLUSIONS

In our societies organized as in the form of the State of Law, more precisely in the form of Fiscal State, social solidarity is possible due to compliance with the fundamental obligation of paying taxes, which is the first step to carry out an equitable distribution of wealth. To make this possible it is not only necessary that society is aware of this fundamental duty, but the formulation of the tax model have to be based on the principle of human dignity. It must guarantee, in fact, the progressivity and the respect of each one contribution capacity. That is, the basis of the framework of tax legislation must be fiscal justice, in parallel with the correct application of

61. *PROGRAMA NACIONAL DE EDUCAÇÃO FISCAL - PNEF. Programa Nacional de Educação Fiscal. Versão 8. Brasília, [2003?]. Disponível em: http://leaozinho.receita.fazenda.gov.br/biblioteca/ Arquivos/PNEF_versao_8.doc>*

resources. This must be carried in a way that the interests of economic development are balanced with other interests and needs of society, like health, education, security, among others.

In this regard, we believe that tax education, by becoming a place of reflection for society, has the potential to provide people with tools that enable them to enter the political arena on more equal terms, in establishing the rules that must governs the activities of the society towards a more just and fraternal world, which presupposes solidarity between them. For this, the Tax Education Agent should seek dialogue with society, participating in the debates on major issues proposed.

In a context of a clearly regressive taxation system, where the legislative and democratic process is flawed by the interests of power and money, it is not enough to have a cognitive understanding that paying taxes is a duty. It is necessary that the taxation is materialized in daily life of citizens translated into better living conditions, which means access to the blessings of progress. Besides being legitimized by its use and necessity, taxation must be legitimated because it comes from an ethical consensus established throughout society by means of a real democratic process.

It is required that the knowledge and participation in the democratic process goes over the limits of the power systems and money which they were encapsulated in order to bring them back to the world of life. We need to awaken the communicative potential of the society, preparing it to participate in core decisions on equal terms.

By adopting a reflective position, tax education has the potential to become a place of reflection in the Brazilian society on the core topics to social solidarity that are fair taxation and a correct application of public resources. A reflective position should be based on the dialogue with society and not on the power of an authoritarian monologue that is present in the relations between the State and society.

Without pretending to exhaust the possibilities opened up to social solidarity through the actions of the Tax Education, we summarize some points from which we believe that dialogue can be engaged with society, leading the receptors to a reflective process that can eventually lead to social change:

- Promoting reflection on society not only about the socio-economic value of the taxes, but also on the need for a tax that is actually a tool to promote social solidarity, through the distribution of wealth;
- Instrumentalization of society through the knowledge to participate in the legislative and administrative process in a more equal condition capacitying people to work more effectively in the formulation (reformulation) of the rules governing civil service and tax law;
- Establishing a bridge between the “language” of specialist of administrative and tributary areas - tax to make it understandable to the audience looking for the stablishment of a dialogue with the various spheres of society, in line with the harmonization of the relationship between State and society;
- Promoting the discussion of fiscal justice issues internally to tax system, so that tax agents pass from being a mere executor of the rules to a more active participant in the establishment of norms and law;
- Creating spaces for public opinion, promoting dialogue with society through the media, and
- Supporting the development of citizens autonomy through knowledge of the processes by which legislation is established, raising their feeling of belonging and their ability to take responsibility for their actions.

The release of the communicative potencial in tax education actions can open new horizons by the power of action oriented to understanding, focused on sharing the world of life and on the knowledge that each individuallity brings to argumentative process.

The Tax Education may become an important tool in the awakening of the Brazilian society of its "eternal dream of splendor"[62] so that, assuming his personal and community responsibility every Brazilian citizen could have an equal right to enjoy all this splendor on equal terms, with full respect for their human dignity, as a free, ethic and solidary individual.

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62. Term coined the National Anthem of Brazil: "Deitado eternamente em berço esplêndido"

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FRONTIER ANALYSIS AS TOOL FOR THE MANAGEMENT OF EFFICIENCY IN PROCESSES OF AUDIT AND CONTROL IN PERU

José Antonio Miranda López

SUMMARY

This article raises the possibility of using the frontier analysis technique known as Data Envelopment Analysis - DEA as a tool to manage the degree of relative efficiency with which the various types of monitoring and control process are performed in the processing units. First, the frontier analysis technique is exposed. Then we discuss aspects of management control in Peru, and then we face the challenges ahead and finally develop the conclusions.

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CONTENT

The frontier analysis also known as data envelopment analysis (DEA) is a technique to compare the relative efficiencies of operating units executing processes within an organization.

In a private sector organization, such analysis could be used for example to assess the relative efficiency with which the various production lines of an industrial company are performed or, the evaluation of the relative efficiency of different centers providing a type of services or team works in a service company[1].

In the case of a public sector institution, such analysis has been used for example to assess the efficiency with which State resources are spent, for example at level of the government expenditure executive units, in the case of social support programs (social spending).

To calculate the relative efficiency with which the operating units are performing, the theoretical basis is provided by the microeconomic theory and using the tools provided by Operations Research; disciplines which, with the support of theoretical concepts and methods calculation respectively, allow comparing the relative efficiencies of decision units within a private or public institution.

The technique of data envelopment analysis allows identifying the efficient and inefficient operating units within an organization and to quantify the degree of efficiency. Then from the results obtained by the most efficient units, a "benchmarking" of the best procedures used by these units can be performed, thereby implementing process improvements for future periods..

1. MEASUREMENT OF EFFICIENCY THROUGH THE FRONTIER ANALYSIS

Before explaining how we measure efficiency through envelopment analysis, we need to clarify some concepts related to this issue, and then theoretically address what the frontier analysis is.

1. *For example: For a company dedicated to wholesaling, the analysis could be used to assess the relative performance of sales teams.*
2. *Such output may be a good or a service.*

1.1. Technical efficiency, economic efficiency and effectiveness "x" in the field of an organization

According to the Microeconomic Theory an organization reaches its technical efficiency in a situation where it is impossible - given the technology and the quantities of inputs available (labor, supplies, equipment, etc.) – to produce a greater amount of product or output[2]. Alternatively, an efficient situation from the technical point of view can be understood as one where it is impossible for the organization to achieve the amount of production already achieved with a lower amount productions factors, given the available technology.

By contrast, economic efficiency refers to the achievement of a quantity of product (or service) at the lowest possible unit cost. In this case, the idea of unit cost in itself implies the existence of prices that serve to value the cost and thus the existence of markets or other institutional orders that allow allocating prices to production factors and final products. Obviously, technical efficiency is a necessary but not sufficient condition for achieving economic efficiency.

If an economic system could behave similarly to an abstract model of perfect competition, it would tend to naturally meet the technical and economic efficiency in private sector organizations; in this case, the incentive to achieve efficiency is the competition. However in practice there is a situation of imperfect competition among private sector organizations (imperfect markets) and in the case of public sector institutions the absence of competition (monopoly) is observed, so we have to resort to additional incentives similar to market prices, which should act as mechanisms for achieving technical and / or economic efficiency[3].

To evaluate the efficiency achieved in situations of imperfect competition or lack of competition situations the concept of efficiency "X" or inefficiency "X" was coined, the first one being defined as the degree of efficiency achieved by organizations in a position of imperfect competition, and the second as the difference between the degree of efficiency in a hypothetical situation of perfect competition and efficiency gained in a real situation by the organization.

In the area of empirical work, an approximation of the degree of economic efficiency in the private sector can be obtained from the estimation of unit costs. In the case of Public Administration, however, the estimation of inefficiency "X" leads to major problems, since they are organizations which decisions of production (of goods or services) and therefore supply of factors are guided by public goals[4] without being market related.

Therefore, a first step in the analysis of efficiency in public sector organizations, could be obtained by the measurement of technical efficiency, which, seen as "relative efficiency" depends entirely on internal factors of the organization, i.e. available technology and resources and available production factors(labor, equipment, supplies, etc.).

In the frontier analysis, the results of the processes (amount of product - good or service) are referred to as "outputs" and the inputs of the process (number of production factors, i.e.: inputs, labor (man - hours), capital goods (hours - machine), as "inputs".

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3. *The Theory of Organizational Management has studied in depth various relationships between variables that influence organizational behavior and in this way serve to build incentives that influence the productivity of factors of production, just to name a few variables related to incentive for performance, leadership styles (Theory X / Y), motivational management, teamwork, conflict management and power, among others.*
4. *For example, service coverage or control coverage, regulation, provision of public goods, etc..*

For tax administrations, particularly in the case of control processes, the measurement of technical efficiency involves determining which variables can be considered as "outputs" of the process and which variables can be considered as "inputs" i.e. those entries that explain the behavior of the outputs.

After defining the inputs and outputs, the next step is to quantify what are the amounts and combinations of input used by the various units that execute the process to achieve output quantities and combinations.

Finally, before addressing the measurement of technical efficiency, it should be distinguished from the concept of efficiency which is defined as "the fulfillment of the objectives" or "the extent of results achievement"[5]. From this definition, the emphasis on the planned achievement follows, without making emphasis on how the inputs are used to achieve the goal.

As discussed later, the emphasis on the achievement of goals within an administration often makes that management look for effectiveness more than for efficiency. However, parallel management efficiency can achieve similar results at lower cost and has a positive feedback for the future because it allows identifying the best techniques or methods used to generate the output in the operating or executive units implementing the process.

1.2. The measurement of technical efficiency

According to the definitions of technical efficiency set out in paragraph 1.1., there are 2 ways to address the concept of technical efficiency at the time of its measurement:

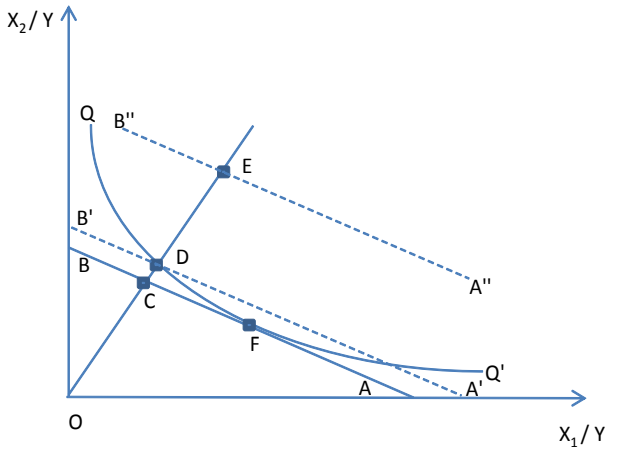
1.2.1. Efficiency measurement oriented by input

This way of measuring the efficiency serves the idea of producing a given amount of output with the least possible amount of inputs given the technology available and can be represented graphically by the geometrical QQ' called Isoquant in graphic 1.

Usually the axes represent the quantities of inputs (man hours, machine hours) being the geometrical QQ 'the amount of output, but if what we need to evaluate are the unit quantities of inputs per unit of output[6] "Y" these unit requirements can be represented in the axes being QQ' the unit production. The importance of representing unit quantities of inputs per unit of output is that we can compare on the same graphic the status of operating units that operate at different scales.

Graph 1

Efficiency oriented by input



5. *Definition proposed by Idalberto Chiavenato in his book "Introduction to the General Administration Theory", Seventh Edition.*
6. *The unit amounts represent the inverse of the productivity of inputs.*

The graphic represent the combinations of inputs X_1 and X_2 per unit of output that are technically efficient for the line QQ '. It is assumed that if the production factors duplicate the product is doubled.[7] For example, a technically efficient production point is the point D. If an organization achieves the same level of production with a greater ratio amount of input / output (point E), it is an inefficient organization. However, point D does not reflect economic efficiency since the same level of production could be achieved at lower cost at point F. In this regard the tangent line AB named the isocost line reflects the lower cost at which a predetermined level of production can be achieved.

In geometrical terms the technical efficiency ratio can be defined by the ratio OD / OE ϵ [0,1]. The further away the point E from the Isoquant border, the more inefficient the organization and the ratio tend to approach zero. Once the technical efficiency achieved at point D, economic efficiency can be measured by the ratio OC/OD ϵ [0.1]

The measurement of efficiency oriented by Input or Entries invites to adjust the requirements of inputs or factors of production to achieve economic efficiency. In the context of Public Sector Organizations adjustment of inputs is often not feasible or applicable, for which there is also a measurement of the efficiency oriented by the output or the product, which is discussed below.

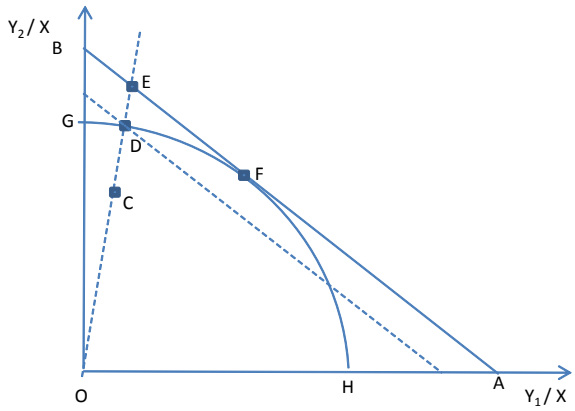
1.2.2. Efficiency measurement oriented by the product (output)

This way of measuring the efficiency serves the idea of getting as much output given the technology available and the quantity of inputs available and can be represented graphically by the geometrical GH called Frontier Production in graphic 2

Usually the quantities of outputs are represented in the axes (Y_1, Y_2) being the geometrical GH the production frontier, but if what we need is to assess the productivity of the inputs (quantities of output per unit of input (Y_1 / X, Y_2 / X)[8]) these productivities can be represented on the axes, with GH's being the productivity frontier. Again, the importance of representing the productivities in the axes is the feasibility of comparing on the same graphic the status of operating units that operate at different scales.

Graph 2

Efficiency oriented by the output



The graphic represents the productivity levels of inputs (Y_1 /X, Y_2 /X), which can be achieved in a technically efficient way by using the X input assigned in a specific way to the production of (Y_1, Y_2)[9]

For example a technically efficient production point is the point D. If an organization achieves a lower level of productivity with the same

7. *This property is called constant returns to scale*
8. *The amounts represent the average productivities of inputs or simply the productivities.*
9. *A situation where there are 2 Outputs (Y1, Y2) and one input or factor of production (X).*

amount of inputs (e.g. point C), it is an inefficient Organization.

Point F reflects economic efficiency since the organization's benefit is maximized and no greater benefit can be achieved with other combination of products (Pareto efficiency).

In geometrical terms the technical efficiency ratio can be defined by the OC/OD ϵ [0, 1]. The further the point C is far away from the productivity frontier, the more inefficient the Organization and the ratio tends to approach zero.

Measurement of the Output-oriented efficiency is compatible with the initiative to maximize the product to achieve efficiency in public sector organizations because in the first instance they do not work with any adjustments or reductions of inputs but reallocations of inputs to move closer to the productivity frontier (line GH).

2. DATA ENVELOPMENT ANALYSIS (DEA) TECHNIQUE

Using data envelopment analysis seeks to calculate the efficiency of operating units that develop or execute a same process, designed to obtain similar outputs.

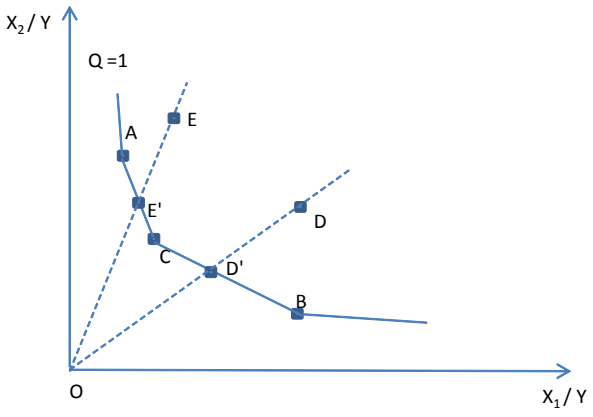
The commercially available software for data envelopment analysis is diverse and consists of algorithms that based on the results obtained by each operating unit and the inputs used, allow approximating the efficiency frontiers or Isoquants. Once close to the Frontiers or Isoquants, the efficiency of each operating unit can be quantified.

In this context, it should be emphasized that we are talking about "relative" technical efficiency because the efficiency frontier is determined only on the basis of the results observed in the Organization[10] .

For example, graphic 3 presents the hypothetical case of an organization which has 5 production units (A, B, C, D, E), three of which are efficient (A, B, C) and two inefficient (D and E). If an analysis of the input-oriented efficiency using the available software is performed, for example the ratio [OE '/ OE] which represents the savings of inputs X_1 and X_2 per unit of output Y can be calculated. For this, the point E 'is approximated by using the software, which calculates the linear combinations of inputs [X_1 and $X_{2]}$ I that the E unit could use to produce the level of output [Y] so that the units requirements inputs (inputs per unit output) are minimized. Accordingly, the software selects the combination yielding the least or most efficient use of inputs.

Graph 3

Estimation of efficiency oriented by the input



10. In theory, the analysis could consider all existing operational units, i.e. if there are units belonging to other similar organizations that develop the process with the same technology and inputs. The DEA methodology can be used in all cases.

It is a minimization problem of inputs savings parameter (Θ)subject to restrictions, which can be expressed as follows:

$$MIN_{\Theta,\lambda}\ \Theta$$

$$S.A. \quad -Y_i + Y\lambda \geq 0$$

$$\Theta X_i - X\lambda \geq 0$$

$$\lambda \geq 0$$

Where:

Θ = Coefficient of saving inputs

Yi = N x 1 matrix containing N outputs produced by the unit "i"

X_i = M x 1 matrix containing the M inputs used by the unit "i".

Y = N x J matrix containing as elements the outputs of all J operating units.

λ = the J x 1 matrix containing as elements the weights [$\lambda_{J]}$ assigned to each operating unit. It is understood that $\sum \lambda_J = 1$

X = M x J inputs matrix containing the quantities of the M inputs used by J operating units.

The minimization problem analysis shows that the objective for each "i" is to minimize the value of the scalar "Θ" subject to the obtainable output – combining in different ways the techniques used by the different units – be greater than or equal to the output originally achieved by the unit "i" [11]. Similarly, the use of each of the inputs resulting from combining available techniques must be less than or equal to the input originally used by each unit.

It should be noted that the minimization problem presented must be run through software for each operating unit.

Graphic 4 shows the hypothetical case of an organization which has 5 units of production (C, D, E, F, G), each of which produces 2 outputs [$Y_{1,}$ $Y_{2]}$ using a single input [X]. In this case 3 units are efficient (C, D, E) since they produce at the peak efficiency obtainable, given the border HI, 2 units are inefficient (F and G) since they are found within the productivity frontier[12]. If an analysis of the output-oriented efficiency using the software available for example the ratio [OF / OC] that represents the inefficiency of unit F can be calculated, in the sense that the quantity of inputs which are provided, could achieve a higher productivity level, such as the point C, however it only manages to reach the point F.

This point on the frontier can be approximated by using the software, which calculates linear combinations of inputs assignable to each output [Y_1 and $Y_{2]}$ that could use the F or G units to improve their efficiency and locate them closer to the border of productivity using the provision of inputs which organizes more efficiently, i.e. reallocating the envelope of the input between their processes [Y_1 and $Y_{2].}$This implies a change in production technique, for example by adopting the best practices available in other production units (i.e., operating units executing the process). Therefore, the software selects that reassignment which shed higher levels of productivity for the input X.

11. This is expressed in the first restriction

12. Points F 'and G' are not obtainable under the current state of the technique. But if technological change occurs that involve the displacement of the frontier in graphic terms, these points could be reached.

In this case it is a problem of maximizing an increased output parameter (Θ) subject to restrictions, which can be expressed as follows:

$MAX_{\Theta,\lambda}\ \Theta$

S.A. $-X_i + X\lambda \leq 0$

$\Theta Y_i - Y\lambda \leq 0$

$\lambda \geq 0$

Where:

Θ = coefficient of increase of output

X_i = M x 1 matrix of inputs of the unit "i"

And $_i$ = N x 1 matrix containing the N outputs produced by the unit "i".

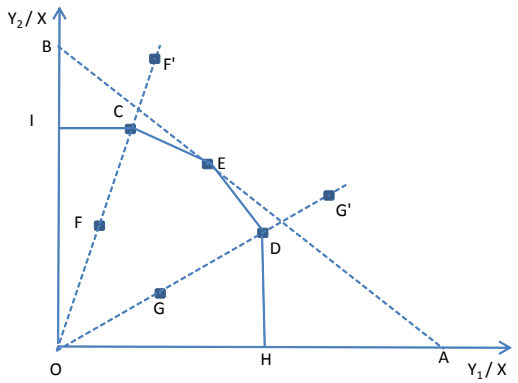
Y = N x J matrix contains as elements the outputs of all J operating units.

λ = the J x 1 matrix containing as elements the weights [λ_J] assigned to each operating unit. It is understood that $\sum \lambda_J = 1$

X = M x J matrix of inputs containing the quantities of the M inputs used by J operating units.

Graph 4

Estimation of efficiency oriented by the output.



The maximization problem analysis shows that the objective for each "i" is to maximize the value of the scalar "Θ"subject to the input obtainable - combining the techniques used differently by different units [X λ] - is less than or equal to the input originally used by the unit "i" [13]. Similarly, the output obtainable by combining the techniques available in the "J" units must be greater than or equal to the original output achieved by each unit.

It should be mentioned that the maximization problem presented must be run through software for each operating unit.

3. EFFICIENCY IN AUDIT PROCESSES AND CONTROL MANAGEMENT IN TAX ADMINISTRATIONS

As mentioned in paragraph 1.2.2. , measurement of the output-oriented efficiency is a permissible approach in organizations where there is complexity to achieve technical efficiency on the basis of reduction in inputs.

The improvement in the efficiency of each operating unit is then achieved, in this case through reallocation of inputs, adopting production techniques used in other operational areas of best performance (benchmarking) in

13. The points of productivity F' and G' are not obtainable given the state of the technique. However, if a technological change occurs, which in graphical terms implies a border shift, these points could become within reach.

order to approach the productivity frontier, since the new techniques to adopt will allow higher marginal returns.

In the control process it is necessary first to define the outputs, which may be associated with the "types of action," such as tax audits or inspections, inductive control actions or concurrent control types. An important issue is to define in a precise manner how the output will be measured, for example through: the number of audits or inspections, the monetary returns of control actions, the number of concurrent type actions, among others.

As for inputs, the typical production factor in examination processes are the man-hours. Differentiations are necessary to establish the quality of man-hours, depending on the employee professional profile[14], and hours of different qualities may be weighted by coefficients, so that measurement can be homogenized in the aggregate input.

The terms of management control of control processes, it should be noted that traditionally in the case of Peru, control has tended to focus on achieving effectiveness rather than efficiency.

This is observed in the setting of incremental annual targets for each type of control program.

In terms of frontier analysis, the focus of effectiveness does not necessarily lead to an increase in factors productivity and hence be in a better position in the productivity frontier, because the objectives are achieved often by increasing working hours, which in terms of the model presented in this article, is equivalent to increasing the use of inputs (man - hours) [15] or reducing the quality of the output[16].

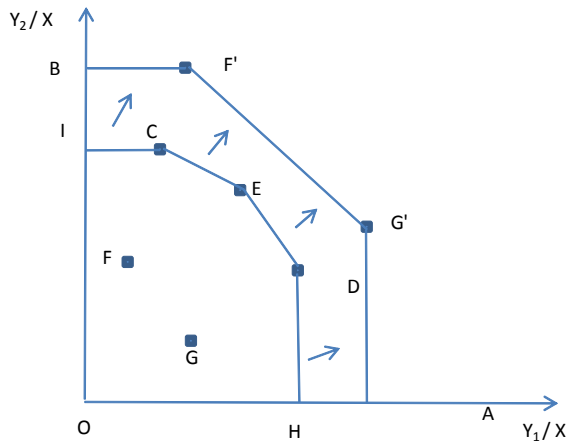
The analysis must also take into account the effect of technological change that in the case of examination processes can be represented by the emergence of new software that facilitates the work of supervision and control (e.g. time reduction for filing).

In terms of the proposed model, technological change implies a reduction in process execution times for the same level of output, therefore, less use of man - hours and therefore an improvement in productivity ratios.

Regarding this point differences in productivity that could eventually arise between the various operating units implementing the process should be taken into account because of the use of different software as a support tool in the process.

Graph 5

Technological change



In the case of Peru, for example, the fact that in previous year there was a greater differentiation in terms of the support computer applications

14. *For example, senior auditors, verifiers, personal notary, among others.*
15. *The increase of the factors with an equivalent increase in the product remains unchanged the productivity ratio.*
16. *For example, bypassing regular work processes, reducing the quality of work records, or comply with strict control protocols.*

that were used during the development of control processes at each operating unit should be discussed.

The above would, in terms of the model, imply technological differentiation between operating units, to be assessed when evaluating the efficiency gains. The situation would be different with tax administrations working with fully homogeneous computer applications support

4. FUTURE CHALLENGES

The analysis of efficiency in the control and monitoring processes through data envelopment analysis (DEA) technique requires adequate support data and information concerning the processes of monitoring and control.

This information will quantify the inputs and outputs obtained during the process at the level of each operating unit implementing the process.

To obtain such data requires a system of survey of process information. In the case of Peru this system is called Control System for Monitoring Orders (RSIRAT-COF) and is included within the larger system for managing the collection and auditing processes (RSIRAT).

While this system provides valuable information for the analysis of efficiency, such as: types of activity (types of output), audit times (hours-man, kind of tax assessment (types of outputs), the monetary returns of taxes (output), cash performance of inductive actions (output), among others, it is clear that the system should be improved in order to capture more specific information about processes, such information must be relevant to the construction of the productivity frontier.

Among the information to be added, the estimated times for each stage of the process of monitoring and control (inputs) may be mentioned in order to identify bottlenecks that cause significant delays in the process. Before that, it should be mentioned that the construction of a mapping system of prior processes to rigorously identify critical points, and capture data as the process runs. The capture of qualitative variables inputs that reflect the quality of the outputs obtained could also be important.

As for outputs, it is necessary to add information relevant to analyze the improvement in productivity, such as some indicator of taxpayer behavior change in future periods to the date on which the taxpayer is audited. This is important since an objective of any control program could be changing the taxpayer behavior towards voluntary compliance as a result of the perception of risk.

5. CONCLUSIONS

- In the case of Peru the management analysis of the monitoring and control processes tends to prioritize the management of the efficacy or effectiveness. However it would be desirable to also focus on efficiency since it contributes to the achievement of the objectives through a better use of resources available through the inputs productivity gains.

- Data envelopment analysis technique (DEA) can be considered as an alternative for the efficiency management of monitoring and control processes given that it leads to identify the efficiency levels of the operating units which execute the process.

- As a result of the efficiency analysis we can identify the operating units that perform the best practices, which serve as "benchmarking" for other units, and from this, the monitoring process is fed-back with the best practices in the future monitoring and control plans.

- It is noteworthy that there is not always a single operating unit that serves as a "benchmark" for other units, this will depend on the inputs and outputs that are considered for the analysis, many of the units in specific states of the process (activities or tasks) could be used for benchmarking.

- The analysis of efficiency requires good data and information support from the systems for the follow up and monitoring of the control actions, thereby providing a challenge for improving tax administration systems which collects information relative to inputs and process outputs (inputs, outputs), because with them better efficiency analysis could be performed.

- The data envelopment analysis (DEA) technique as well as the monitoring control processes may be extended to the other operating processes of a Tax Administration.

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THE RETURN OF IMPROPER OR EXCESSIVE TAX PAYMENTS IN CIAT MEMBER COUNTRIES

Sérgio Rodrigues Mendes

SUMMARY

This article deals with the refund of improper or overpayments, made, by way of taxes, in CIAT member countries. We examined the taxation laws of CIAT twenty-two member countries. The items listed were as follows: name of the claim, deadline for submission, calculation of the term, interruption/suspension of the term, nature of the term, prescribed obligation, right of action and protest/reserve. It was concluded that there are several similarities between different tax systems and that most of these orders follows, very closely, the CIAT Tax Code Model guidelines.

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CONTENT

This article aims to point out some characteristics of the refund of improper or overpayments, by way of taxes, in member countries of the Inter-American Center of Tax Administrations (CIAT), analyzing the tax practice in these countries, in a way that will facilitate comparison and international harmonization.

The research and compilation work, covering twenty-two member countries, have, basically, been based on the Tax Codes of these countries. Given the size limitations, in this work have not been covered improper or overpayments made to customs areas (import, export and customs procedures) and Social Security (contributions and fees), as well as the sanctions and penalties, although, in many cases, the rules are the same for all these situations.

Nor were cited countries in which the grounds for refund of improper or overpayments, by way of taxes, are extracted from the respective civil legislation, as is the case of Italy (Italian Civil Code, Articles 2033 and 2946).

It should be also noted that the deadlines specified in this paper refer to the filing of claims in the administrative sphere; has not been set terms for initiating legal actions, such as, for example, in Portugal (Practice and Procedure Tax Code - Decree-Law 433, 1999, Article 145, 2) and in Brazil (National Tax Code - Law 5172 of 1966, Article 169).

On the topic - the refund of improper or overpayments, by way of taxes - it is worth noting that, as important as to collect taxes, is to return them. In this sense, Ramon Valdez Costa said: "This is an essential topic for the appropriate application of the modern tax system since it affects constitutional law principles directly related to discipline, as legality and equality of the parties, without prejudice of their relationship with other common law institutions, such as the unjustified enrichment and the improper payment by mistake." [1]

1. RESEARCH ON TAX LEGISLATIONS OF CIAT MEMBER COUNTRIES

To make this study, we examined the tax legislations of the CIAT twenty-two member countries, as follows.

ARGENTINA[2]

Name of the claim: *Acción de repetición.*

Deadline for submission: five years.

Calculation of the term: begins to run, according to the case, from January 1st. following: (a) the year that the fiscal period is expired, for payments or income within the period, while it still was not completed; or (b) the year of the date of each

1. *Cf. COSTA, Ramón Valdez. Curso de Derecho Tributario. Santa Fe, Bogotá: Editoriales Depalma, 1996. p. 365.*
2. *Cf. Ley de Procedimientos Fiscales - Ley 11.683, de 13/07/1998, Articles 56, "c" and Paragraph, 61, 69 and 81. Available in: <http://biblioteca.afip.gov.ar/gateway.dll/Normas/Leyes/%20procedimiento%20tributario/tor_c_011683_1998_07_13.xml>. Access in: 29 Mar. 2012.*

payment or income, independently for each of them, if the payments or income refunded are from the expired fiscal year. When the refund includes payments or income for the same fiscal period, before and after its expiry, prescription begins to run independently for some and others, and according to the previous standard.

Interruption/suspension of the term: the period is interrupted and is suspended: (a) by deducting the administrative claim for refund from the Federal Administration of Public Revenue; and (b) by the filing of claim for refund with the Tax Court of the Nation or to the National Justice. In the first case, the new prescription period shall begin from January 1st. following the year that include the three months of filing the claim. In the second case, it is from January 1st. following the year in which expire the deadline within which to issue a sentence.

Nature of the term: *prescripción.*

Right of action: indirect taxes can only be reimbursed to taxpayers when they demonstrate that the tax will not be transferred in the price, or when, if they had been transferred, demonstrate their refund on such terms and conditions established by the Federal Public Revenue Administration (AFIP).

BOLIVIA[3]

Name of the claim: *Acción de repetición.*

Deadline for submission: three years.

Calculation of the term: is calculated from the date on which the improper or overpayment took place.

Interruption/suspension of the term: the end of the period is suspended for the same causes, forms and deadlines established in the Bolivian Tax Code, Article 62, including administrative resources or judicial processes by taxpayers.

Nature of the term: *prescripción*.

Prescribed obligation: what was paid to satisfy a prescribed tax liability shall not be entitled to the refund, even if the payment was made without the knowledge of the prescription.

Right of action: withholding or collection agents can request the refund of taxes withheld or collected improperly or in excess and transferred to the Treasury, as long as there is a express autorization by the taxpayer.

BRAZIL[4]

Name of the claim: *Pedido de restituição*.

Deadline for submission: five years.

Calculation of the term: the period shall begin: (a) from the date of the extinction of the tax credit; or (b) from the date on which the administrative decision or the judicial decision, that has reformed, annulled, revoked or terminated the sentence, becomes final.

Nature of the term: *prescrição*.

Right of action: the refund of taxes that include, by their nature, the transfer of the respective financial burden, will be made only to those who prove they have taken the charge or, if there is any transfer to a third party, it must be duly authorized to receive it.

3. *Cf. Codigo Tributario Boliviano - Ley 2.492, de 02/08/2003, Articles 62, II, 121, 122, III, 123 and 124. Available in: <http://www.impuestos.gob.bo/images/normativa/leyes/ley2492-cdigotributario.pdf>. Access in: 29 Mar. 2012.*
4. *Cf. Código Tributário Nacional – Lei 5.172, de 25/10/1966, Articles 165, 166 and 168. Available in: <http://www.planalto.gov.br/ccivil_03/leis/L5172.htm>. Access in: 29 Mar. 2012.*

Protest/reserve: the taxpayer is entitled, regardless of his prior protest, to the full or partial refund of improper tax or greater than the payment due.

CHILE[5]

Name of claim: *Solicitud de devolución.*

Deadline for submission: three years.

Calculation of the term: it is calculated from the act or event which serves as legal basis.

Interruption/suspension of the term: being a period of decay, cannot be any interruption or suspension.

Nature of the term: *caducidad.*

Right of action: the amounts that the taxpayer has improperly or in excess transferred or received, by way of taxes, shall be delivered to the Treasury. He cannot claim the refund, except in cases where it is convincingly demonstrated, in the sole judgment of the Regional Director of Internal Revenue, that such amounts were refunded to people who actually suffered the undue economic burden.

Other observations: Once the deadline is completed, it extinguishes the right of the taxpayer to request the refund. As a result, if the Treasury, in error, returns a certain amount under a request filed after the expiration of such term, it does not refer to the payment of a natural obligation; therefore, the taxpayer will have no excuse for returning that amount to the Treasury.

COLOMBIA[6]

Name of the claim: *Solicitud de devolución.*

Deadline for submission: five years, corresponding the prescription period of executive action established in Article 2536 of the Colombian Civil Code.

Calculation of the term: it begins from the date that the improper payment was done.

Nature of the term: *prescripción*.

Prescribed obligation: what was paid to satisfy a prescribed tax liability shall not be entitled to the refund, even if the payment was made without the knowledge of the prescription.

COSTA RICA[7]

Name of the claim: *Acción de repetición.*

Deadline for submission: three years.

Calculation of the term: it begins: (a) from the day following the date on which each improper or overpayment was made; or (b) from the date of submission of the tax return which originated the credit.

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5. *Cf. Codigo Tributario – Decreto Ley 830, de 27/12/1974, Articles 57, 126, and 128. Available in: <http://www.sii.cl/pagina/actualizada/noticias/2002/dl830.htm>. Access in: 29 Mar. 2012, and Circular 72, de 11/10/2001, 5.1, "a" and "e". Available in: <http://www.sii.cl/documentos/circulares/2001/circu72.htm>. Access in: 29 Mar. 2012.*
6. *Cf. Estatuto Tributario - Decreto 624, de 30/03/1989, Articles 819 and 850. Available in: <http://www.dian.gov.co/dian/15servicios.nsf/etributario?openview>. Access in: 29 Mar. 2012; Decreto 1.000, de 08/04/1997, Articles 10, 11 and 21. Available in: <http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=7460>. Access in: 29 Mar. 2012; Orden Administrativa 0004, de 30/04/2002, subitems 13.1 and 14.2. Available in: <http://insitu.dian.gov.co/descargas/procesos/procesos/procedimientos/normatividad/OrdenAdmon_0004_de_2002.pdf>. Access in: 29 Mar. 2012; and Ley 791, de 27/12/2002, Article 8. Available in: <http://www.secretariasenado.gov.co/senado/basedoc/ley/2002/ley_0791_2002.html>. Access in: 6 Apr. 2012.*
7. *Cf. Codigo de Normas y Procedimientos Tributarios - Ley 4.755, de 29/04/1971, Articles 43 and 56. Available in: <http://www.cesdepu.com/nbdp/cotri.htm>. Access in: 10 Apr. 2012.*

Nature of the term: *prescripción.*

Prescribed obligation: what was paid to satisfy a prescribed obligation cannot be object of repetition, though the payment has been made without knowledge of the prescription.

Protest/reserve: taxpayers and responsible can claim the refund of improper payments, by way of taxes, even if, at the time of payment, they had not made any reserve, unless the Administration chooses a direct compensation, in which case the remaining credit balance will be refunded, if it exists.

CUBA[8]

Name of the claim: *Solicitud de devolución.*

Deadline for submission: one year.

Calculation of the term: is counted from the day the wrong payment or overpayment was made.

Interruption/suspension of the term: this term is interrupted: (a) for any act of the taxpayer or responsible who claim the refund of improper or overpayment; and (b) for any act of the Tax Administration recognizing its existence.

Nature of the term: *prescripción*.

Prescribed obligation: they are considered improper payments when the tax debts have been paid after the prescription of the action to demand payment.

DOMINICAN REPUBLIC[9]

Name of the claim: *Acción de repetición.*

Deadline for submission: three years.

Calculation of the term: shall run from the day following the expiration of the deadline to pay the tax liability.

Interruption/suspension of the term: the term may be suspended by an appeal to the administrative or judicial sphere, in any case, until the decision or judgment has the authority of *res judicata*.

Nature of the term: *prescripción.*

ECUADOR[10]

Name of the claim: *Acción de pago indebido o del pago en exceso.*

Deadline for submission: three years.

Calculation of the term: calculated from the date of payment.

Interruption/suspension of the term: the term is interrupted by the submission: (a) of a claim to the administrative authority; and (b) of a demand to the Fiscal Districtal Court, as the case.

Nature of the term: *prescripción*.

8. *Cf. Normas Generales y de los Procedimientos Tributarios - Decreto-Ley 169, de 10/01/1997, Articles 83, 84, "b", 88, 89, "d", and 91. Available in: <http://www.aeec.cu/doc/doc49.pdf>. Access in: 30 Mar. 2012.*
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10. *Cf. Codigo Tributario - Codificación 2005-009 - R.O. Suplemento nº 38, de 14/06/2005, Articles 122, 123 and 305. Available in: <http://eva.utpl.edu.ec/door/uploads/379/379/index.htm>. Access in: 30 Mar. 2012.*

EL SALVADOR[11]

Name of the claim: *Acción de devolución*.

Deadline for submission: two years.

Calculation of the term: it counts: (a) from the expiry of the term for filing the corresponding original tax return, in the case of credit balances; or (b) from the date of improper payment.

Interruption/suspension of the term: the term will be suspended in cases of credit balance, with the filing of the corrected tax return, until the Tax Administration rules whether or not it proceeds.

Nature of the term: *caducidad*.

Prescribed obligation: the payment of prescribed obligation shall not give right to the refund of what was paid.

Right of action: Third party, who have carried out the improper collection or withholding of taxes, by taxpayers, cannot request the refund or compensation to the Tax Administration, and their action is limited by common law provisions, without prejudice of the refund or compensation by the taxpayer who made the improper collect.

GUATEMALA[12]

Name of the claim: *Solicitud de devolución.*

Deadline for submission: four years.

Calculation of the term: is counted from the expiration of the obligation to pay the tax.

Interruption/suspension of the term: the term is interrupted by the claim for refund of improper or overpayment, presented by the taxpayer or responsible.

Nature of the term: *prescripción.*

Prescribed obligation: shall mean renounced the prescription, if the debtor pays, wholly or partly, the prescribed debt. This payment will not be, under any circumstances, refunded.

HONDURAS[13]

Name of the claim: *Solicitud de devolución*.

Deadline for submission: five years.

Calculation of the term: it begins to run: (a) from the day following the date on which payment was made, except as provided by a special tax law; or (b) from the declaration of nullity of the taxable event, if the improper payment had been made complying with a decision or final judgment.

Interruption/suspension of the term: the term will be suspended in case of death of the taxpayer or the responsible in favor of the heirs, only once for a period of three years from the date: (a) the filing of tax returns; or (b) the occurrence of the taxable event of the tax liability.

Nature of the term: *prescripción*.

Prescribed obligation: what was paid to satisfy a prescribed tax liability shall not be entitled to the refund, even if the payment was made with or without the knowledge of the prescription.

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11. Cf. Codigo Tributario - Decreto 230, de 14/12/2000, Articles 70, 104, 212 and 213. Available in: <http://www.transparenciafiscal.gob.sv/portal/page/portal/PCC/SO_Administracion_Tributaria/Leyes/Codigo_Tributario_reformas_2011_CSJ.pdf>. Access in: 30 Mar. 2012.

12. Cf. Codigo Tributario - Decreto 6-91 de 25/03/1991, Articles 47, 49, 50, 9, 51 and 153. Available in: <http://portal.sat.gob.gt/sitio/index.php/leyes/doc_download/632-decreto-6-91-del-congreso-de-la-republica-.html>. Access in: 11 Apr. 2012.

13. Cf. Codigo Tributario - Decreto 22-97, de 08/04/1997, Articles 122, 123, 124, 125, 137, 141 and 143. Available in: <http://www.dei.gob.hn/website/documentos/documento.php?doc=223&t=21>. Access in: 11 Apr. 2012. Includes the modifications established in the Decreto 210-2004, de 29/12/2004. Available in: <http://www.dei.gob.hn/website/documentos/documento.php?doc=306&t=21>. Access in: 11 Apr. 2012.

Right of action: previously authorized by the taxpayer or responsible, the collection or retention agents may request the refund of amounts improperly paid by the taxpayer or responsible.

Protest/reserve: taxpayers or responsible and third parties have action to claim the refund of improper payment, by way of taxes, even though, at the time of payment, they did not have any reserve.

MEXICO[14]

Name of the claim: *Solicitud de devolución.*

Deadline for submission: five years.

Calculation of the term: starts from: (a) the date on which the improper payment can legally be requested; or (b) from the annulment of the act of authority, if the improper payment was made under that act.

Interruption/suspension of the term: the term is interrupted: (a) by filing the claim for refund made by the individual, except when he desists from such application; and (b) by the express or implied recognition, by the Tax Administration, of the existence of the improper payment.

Nature of the term: *prescripción*.

Right for claim: In the case of indirect taxes, the refund of improper payments will be made for people who have paid the tax to whom it was transferred, if they have not authorized it; so, who transferred the tax or included it in the price is not entitled to claim the refund.

NICARAGUA[15]

Name of the claim: *Acción de repetición*.

Deadline for submission: four years.

Calculation of the term: shall run from the date on which the improper payment was done.

Nature of the term: *prescripción*.

Right of action: when a taxpayer or a responsible transferred or improperly withheld taxes, will only be entitled to submit an action for refund or reimbursement if he proves to be authorized by the person who has suffered the undue economic burden of the tax, or that he reimbursed the respective amounts. Otherwise, the refund must be requested by those who actually suffered the undue economic burden of the tax.

PANAMA[16]

Name of the claim: *Solicitud de devolución*.

Deadline for submission: three years.

Calculation of the term: is calculated from the last day of the year in which the improper payment was made.

Interruption/suspension of the term: the term is interrupted: (a) by any action of the taxpayer seeking the refund of the improper or overpayment; and (b) by any action of the Tax Administration which recognizes the existence of the improper or overpayment.

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14. Cf. Codigo Fiscal de la Federación - Diario Oficial de la Federación, de 31/12/1981, Articles 22 and 146. Available in: <ftp://ftp2.sat.gob.mx/asistencia_servicio_ftp/publicaciones/legislacion06/CFF06.doc>. Access in: 11 Apr. 2012.

15. Cf. Codigo Tributario - Ley 562, de 28/10/2005, Articles 76, 77 and 78. Available in: <http://www.dgi.gob.ni/documentos/Ley_562_CODIGO_TRIBUTARIO_DE_LA_REPUBLICA_DE_NICARAGUA_CON_SUS_REFORMAS.pdf>. Access in: 11 Apr. 2012.

16. Cf. Codigo Fiscal - Ley 8, de 27 de Enero de 1956, Article 737, Paragraph (according to Article 38, Ley 8/2010). Available in: <http://webdms.ciat.org/action.php?kt_path_info=ktcore.actions.document.view&fDocumentId=5378>. Access in: 11 Apr. 2012.

Nature of the term: *prescripción*.

Other observations: The decay of the claim for refund is governed by the provisions on the decay of jurisdiction of the Judicial Code. The decadent claim for refund does not interrupt the prescription term.

PARAGUAY[17]

Name of the claim: *Solicitud de repetición.*

Deadline for submission: four years.

Calculation of the term: is counted, on a monthly basis, from the date on which the credits can be claimed against the authority.

Interruption/suspension of the term: the term shall be suspended until obtaining the final resolution of the claim, by administrative or judicial review, claiming the refund or payment of a specified amount.

Nature of the term: *caducidad.*

Prescribed obligation: what was paid to satisfy a prescribed tax liability shall not be entitled to the refund, even if payment was made without the knowledge of the prescription.

Right of action: The right to the refund in case of transfer, retention or misappropriation or in excess, by way of taxes, depends on the evidence they have authorization of who suffered the undue economic burden of the tax or that the respective amounts were refunded. Otherwise, the refund must be done for those who actually suffered the undue economic burden of the tax.

PERU[18]

Name of the claim: *Solicitud de devolución.*

Deadline for submission: four years.

Calculation of the term: it is calculated from January 1st. following the date: (a) in which the improper or overpayment was made; or (b) in which the payment became improper or excessive.

Interruption/suspension of the term: the term is interrupted: (a) by filing a claim for refund or compensation; (b) by notification of the administrative act recognizing the existence and amount of the improper or overpayment or other credit; and (c) by automatic compensation or any other action, by the Tax Administration, to make a directed compensation. The term shall be suspended: (a) during the procedure of claim for refund or compensation; (b) during the processing of tax process; (c) for the application for judicial review, the summary proceedings or other judicial process; and (d) during the suspension period for the control procedure.

Nature of the term: *prescripción.*

Prescribed obligation: the voluntary payment of prescribed obligation does not give the right to claim the refund of the amount paid.

PORTUGAL[19]

Name of the claim: *Pedido de revisão dos actos tributários*, started by the taxpayer and based on any illegality.

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17. *Cf. Nuevo Régimen Tributario - Ley 125/91, de 09/01/1992, Articles 167, 217, 219, 220 and 221. Available in: <http://www.set.gov.py/pset/agxppdwn?6,18,249,O,S,0,626%3BS%3B1%3B88>. Access in: 11 Apr. 2012.*
18. *Cf. Codigo Tributario - Decreto Supremo 135-99-EF, de 19/08/1999, Articles 38, 43, 44, 5, 45, 4, 46, 3, and 49. Available in: <http://www.sunat.gob.pe/legislacion/codigo/index.html>. Access in: 12 Apr. 2012.*
19. *Cf. Lei Geral Tributária - Decreto-Lei 398/98, de 17/12/1998, Articles 43, 78, 1, 2, 3, 6 and 7, and 100. Available in: <http://info.portaldasfinancas.gov.pt/NR/rdonlyres/87CAB3CA-4ED1-411A-9BDE-3E9725C24F21/0/LGT_2012.pdf>. Access in: 12 Apr. 2012.*

Deadline for submission: four years.

Calculation of the term: begins from the settlement date (the determination of tax liability).

Interruption/suspension of the term: the term is interrupted by the taxpayer's request, addressed to the competent entity of the Tax Administration for this review.

Nature of the term: *prescrição* [there is no explicit definition in the LGT, as for the nature of that term, accepting to be the prescription, taking into account the prevision of its interruption].

SPAIN[20]

Name of the claim: *Solicitud de devolución.*

Deadline for submission: four years.

Calculation of the term: the period for the right to request the refund of improper payments starts counting from the day following: (a) in which the improper payment was done; (b) of the end of the term for filing of their tax return, if the improper payment was made within that period; or (c) in which the final judgment or administrative decision declares, wholly or partly, inadmissible the contested act. The period for the right to obtain the refund of improper payments is counted from the day following the notification date of the agreement that recognizes the right to the refund.

Interruption/suspension of the term: the legal term to request the refund of improper payments is interrupted: (a) by any act of the taxpayer seeking the refund or correction of his tax return; and (b) by the filing, processing or resolution of claims or resources of any kind. The legal term to obtain the refund of improper payments is interrupted: (a) by any action of the Tax Administration directed to make the refund; (b) by any taxpayer act requiring the payment of the refund; and (c) by the filing, processing or resolution of claims or resources of any kind.

Nature of the term: *prescripción*.

Prescribed obligation: The prescription shall automatically apply, even when the tax debt has been paid without the taxpayer requests or exceptions. The prescription extinguishes the tax liability, making possible the refund of improper payments made after expiry of the indicated terms.

Other observations: There are two stages in the process for claim for refund of improper payments: (a) the recognition phase of the right to the refund; and (b) the execution of the refund recognized.

UNITED STATES[21]

Name of the claim: Claim for refund.

Deadline for submission: usually three years (if a tax return is filed), or two years (if there is no tax return filed), as the case.

Calculation of the term: is counted from the date of filing the original tax return (three years) or the date when the tax was paid (two years), the one of the two dates which expires last. If the tax return was not filed, there is a term (two years) from the date the tax was paid.
Nature of the term: period of limitation.

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20. Cf. Ley General Tributaria - Ley 58, de 17/12/2003, Articles 32, 66, "c" and "d", 67, 1, 68, 3 and 4, 69, 2 and 3, and 221, 1, "a", "b" and "c". Available in: <http://www.boe.es/diario_boe/txt.php?id=BOE-A-2003-23186>. Access in: 11 Apr. 2012.

21. Cf. United States Code, Title 26 – Internal Revenue Code, Subtitle F, Chapter B, Sec. 6511, "a" and "b", 1. Available in: <http://uscodebeta.house.gov>. Access in: 11 Apr. 2012.

URUGUAY[22]

Name of the claim: *Acción de repetición.*

Deadline for submission: four years.

The calculation of the term: it is counted, on a monthly basis, from the date on which the claim for credit can take place.

Interruption/suspension of the term: the term shall be suspended until final determination of the demand of the interested, via administrative or judicial review, claiming the refund or payment of a specified amount.

Nature of the term: *caducidad.*

Right of action: the taxpayer or the responsible cannot claim the refund of what was overpaid, when the amount has been included in the respective invoices and received from the buyer or user.

VENEZUELA[23]

Name of the claim: *Reclamación de repetición.*

Deadline for submission: four years.

The calculation of the term: is calculated from January 1st. of the calendar year following that in which: (a) the taxable event that gave right to claim the refund the tax was verified; (b) the improper payment was made; or (c) the applicable credit balance was established, as the case.

Interruption/suspension of the term: the term is interrupted: (a) by any action of the taxpayer who seeks to exercise the right for refund to the Tax Administration; and (b) by any government act recognizing the existence of the improper payment or credit balance. The term is suspended during the period of resolution of the administrative claim (not exceeding two months counted from the date its receiving).

Nature of the term: *prescripción.*

Prescribed obligation: what was paid for a prescribed obligation cannot be object of refund, unless the payment was made under any specific request to assert their right.

Protest/reserve: to make the claim for refund, it is not needed to have paid under protest.

22. *Cf. Codigo Tributario - Decreto-Ley 14.306, de 29/11/74, Articles 75, 76 and 77. Available in: <http://www.dgi.gub.uy/wdgi/agxppdwn?6,4,205,O,S,0,7908%3BS%3B1%3B877>. Access in: 12 Apr. 2012.*
23. *Cf. Codigo Orgánico Tributario - Ley 42, Gaceta Oficial 37.305, de 17/10/2001, Articles 55, 3, 60, 3, 61, 5, 64, 194, 196, 197 and 199. Available in: <http://www.seniat.gob.ve/portal/page/portal/MANEJADOR_CONTENIDO_SENIAT/02NORMATIVA_LEGAL/2.2COT/2.2COT.pdf>. Access in: 12 Apr. 2012.*

2. COMMON CHARACTERISTICS OF THE VARIOUS TAX LEGISLATIONS

Through an extensive research conducted in the tax legislations of the CIAT twenty-two member countries, in relation to the refund of improper or overpayments, by way of taxes, we highlight the following common characteristics among them, as follows.

With regard to the name used by the respective legislations to claim the recovery of amounts unduly paid, it was commonly verified, in the Spanish language, the "**Solicitud de devolución**" in eight countries (Chile, Colombia, Cuba, Guatemala, Honduras, Mexico, Panama and Peru), followed by "**Acción de repetición**" in six countries (Argentina, Bolivia, Costa Rica, Dominican Republic, Nicaragua, and Uruguay).

The other Spanish-speaking countries have their own names for their requests, namely "**Acción de devolución**" (El Salvador), "**Acción de pago indebido o del pago en exceso**" (Ecuador), "**Solicitud de repetición**" (Paraguay) and "**Reclamación de repetición**" (Venezuela).

In the United States, this claim is called a "**Claim for refund**". In Brazil, it is known as a "**Pedido de restituição**".

In Portugal, the recovery of undue payments is made indirectly, through the annulment of the act which held that payment, either by judicial review, either by administrative claim and, more commonly, by "**Pedido de revisão dos actos tributários**".

In Spain, there is the prevision of two procedures: one for the request for refund of improper payments, and other for the requirement to pay that refund, which right has been recognized.

As for the term in each of these legislations, to present the corresponding claim, ranged from a year in Cuba up to five years in five countries (Argentina, Brazil, Colombia, Honduras and Mexico), prevailing within four years, observed in eight countries (Guatemala, Nicaragua, Paraguay, Peru, Portugal, Spain, Uruguay and Venezuela), followed by a period of three years in six countries (Bolivia, Chile, Costa Rica, Dominican Republic, Ecuador and Panama), two years in El Salvador and two or three years in the United States, as the case.

With respect to the calculation of the terms, the survey noted that, in a majority of eighteen countries, the starting date is the improper or overpayment date (thirteen countries) or its expiration date (Guatemala), or the day following such dates (Costa Rica, Honduras and Spain, in the first case; Dominican Republic, in the second).

An exception in this regard, Argentina, Peru and Venezuela, where the initial term occurs on January 1st. the year following the improper payment, and Panama, where the initial term is the last day of the payment year.

With regard to nature of the term for the recovery of amounts unduly paid, resulted that this period is considered as a "prescripción" or "prescrição" in seventeen countries, with the exception of Chile, El Salvador, Paraguay and Uruguay, where it is treated as "caducidad", and the United States, which identifies it as "period of limitation".

In countries where the "prescripción" or "prescrição" is verified, the interruption and/or suspension of the term is generally expected, particularly through the filing of administrative claims and/or legal proceedings for refund of amounts unduly paid. In countries where there is "caducidad", there is express provision to suspend this term, which is not the case in Chile.

As for prescribed obligation, in eleven countries that address this issue in their respective taxation laws, nine do not support the refund in this case (Bolivia, Colombia, Costa Rica, El Salvador, Guatemala, Honduras, Paraguay, Peru and Venezuela), with the exception only of Cuba and Spain.

In relation to the right of the action, in order to proceed with the claim for refund of improper or overpayments, by way of taxes, it is required from third parties who made the collection: (a) not to have transferred the tax burden; (b) to have reimbursed to whom it was charged; or (c) be duly authorized by him (Argentina, Bolivia, Brazil, Chile, Honduras, Mexico, Nicaragua, Paraguay and Uruguay). Only in the case of El Salvador, such requirements were considered unnecessary.

Finally, as to the protest or reserve to be able to claim the refund of improper or overpayments, by way of taxes, four countries explicitly recognize that this is unnecessary: Brazil, Costa Rica, Honduras and Venezuela.

3. CONCLUSIONS

In the analysis and comparison of tax systems, in regard to the refund of improper or overpayments, by way of taxes, it is possible to find many similarities between them.

These similarities are very clear in stating that most of these tax systems follow, very closely, the guidelines contained in the CIAT Tax Code Model[24], as follows:

a. **Name of the claim: "**Acción de repetición" (six countries use that denomination, which is second only to the "Solicitud de devolución", used in eight countries);
b. **Deadline for submission:** in the CIAT Tax Code Model, there is no established term defined for the right for refund or reimburse of improper payments or credit balances, for taxpayers. This model merely proposes that the term is common with the prescription of the right of the Administration to determine their obligations, imposing sanctions and requiring the payment of the tax debt. It is said that the consecration of an equal term to all of these cases allows the homogeneity of the various situations in which the prescription institute can operate. Among the twenty-two countries surveyed, the "four years" term was the most used, observed in eight countries;
c. **Calculation of the term:** "the term is calculated from the following day in which the improper payment or the credit balance was paid" (three countries have adopted this system - Costa Rica, Honduras and Spain - and thirteen countries the same date of the payment);
d. **Interruption/suspension of the term:** the term is interrupted: (a) "by any action of the taxpayer who seeks to exercise the right to refund to the Tax Administration"; or (b) "by any act of the Administration which recognizes the existence of the overpayment or credit balance." The term will be suspended "by the filing of administrative or judicial resources up to ___ days after the notice of resolution or

24. *Cf. CIAT Tax Code Model (2006), Articles 54, 57, "d", 59, "d", 60, "d", 61, 109, 1, 110, 1, and 112, "a". Available in: <http://www.ciat.org/biblioteca/opac_css/index.php?lvl=notice_display&id=819>. Access in: 12 Apr. 2012.*

final decision is received" (fourteen countries explicitly provide for the interruption and/or suspension of the term in these situations).

e. **Nature of the term:** "prescripción" (seventeen countries considered the same nature);

f. **Prescribed obligation:** "what was paid or reimbursed to satisfy a obligation or a right of claim prescribed shall not be entitled to a refund, even if the payment was made with or without the knowledge of the prescription"[25] (in eleven countries that address this issue in their respective tax legislations, nine do not support the refund in this case, with the exception only of Cuba and Spain);

g. **The right of action:** in the Model, the withholding or collection agents must have the authorization of the taxpayers to exercise their rights of refund (in ten countries that refer to this situation in their respective tax legislations, nine have adopted the same standard, with the exception of El Salvador); and

h. **Protest/reserve:** "the taxpayer and third parties responsible have action to claim a refund of improper payment, by way of taxes, [...], even though, at the time of the payment, there had not made any reserve" (four countries recognize, without the need of a protest or reserve, the right to claim the refund of improper or overpayment, by way of taxes: Brazil, Costa Rica, Honduras and Venezuela).

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INTERNATIONAL TAXATION AND STOCK MARKET: THE CASE OF PANAMA

José Andrés Romero Angrisano

SUMMARY

This work explores the meaning of the term “beneficial owner” as it has been used internationally, during the last five decades, in the agreements to avoid double taxation and in foreign case law, and compares it with the terms “indirect holder”, “beneficial owner” and “real owner (propietario efectivo)” as are currently used in Panamanian securities law. In such contexts, the author also addresses a recently enacted law in the United States of America (FATCA), which impacts the U.S. tax liability of foreign financial institutions and capital markets.

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CONTENT

I find suitable to start by saying that all agreements to avoid double taxation that Panama has signed to date, include the term "beneficial owner" in its articles 10 (Dividends), 11 (interests) and 12 (royalties), thus following the model convention for the avoidance of double taxation suggested by the Organization for Economic Cooperation and Development (hereinafter "OECD"). So it makes sense to stop and examine the origin of the term used by the international tax technique and the various nuances that have been applied since it was used for the first time in an agreement between States to avoid double taxation. It is not exaggerating to assert that the term "beneficial owner" is one of the fundamental pillars of international taxation and probably the least defined term in the domestic legislation of civil law countries. It is definitely a very controversial term, in my opinion, because of the difficulty of interpretation involved in both domestic and cross-border arenas.

It is claimed that the UK was the first country that requested the inclusion of the term "beneficial owner"[1] in agreements to mitigate double taxation. See for example the 1966 Protocol for the 1945 treaty between United Kingdom and the United States of America, and the 1966 treaty between the United Kingdom and Canada.[2] It is also argued that, at that time, the purpose of this term was to replace a more rigorous content phrase - "subject to tax in the state of residence" - and then allow exempt entities in the United Kingdom- pension funds and charitable entities, receiving payment - qualify for more favorable treatment with respect to the withholding of dividends, interest and royalties that are effected in the country of source.

It is not surprising that the term is then incorporated into the OECD convention model in 1977 in response to the express request of the British delegation, among others.[3] The United Kingdom was concerned that the 1963 OECD convention draft model would allow British agents and proxies provide access to third-party-

1. *"beneficial owner", in English and as it appears today in Articles 10 to 12 of the OECD Model Convention, the United Nations Model Convention and the United States of America Model Convention("beneficially owned").*
2. *"The Origins of Concepts and Expressions Used in the OECD Model and Their Adoption by States by John F. Avery Jones et al. ", Page 249, note 65.*
3. *Report of Professor Philip Baker "Possible Extension of the Beneficial Ownership Concept", presented at the Fourth Session of the United Nations Economic and Social Council, Committee of Experts on International Cooperation in Tax Matters, Geneva, 20-24 October 2008.http://www.un.org/esa/ffd/tax/fourthsession/index.htm*

country beneficiaries to the benefits of Articles 10 to 12. So, apparently the functionality sought by the United Kingdom, by attempting to insert the term in the OECD Model in 1977, was not the same as in 1966 that led to their inclusion in the agreements with the United States and Canada. In 1966 the goal was to allow certain British resident entities exempted from tax in the UK to have access to the more favorable treatment of the treaty, while in 1977 the intention was to prevent other entities not resident in treaty partner countries, to access the benefits of Articles 10 to 12 in scenarios in which the United Kingdom was the source country. We interpret that in 1966 the intent was to allow British institutions - to which income being paid by a resident of the other Contracting State could be attributed to but were nevertheless exempt from tax in the UK - to have access to more favorable withholding tax rates provided by bilateral agreements. However, in 1977, the term "beneficial owner" in the OECD model convention was intended differently: to prevent the tax evasion that could be achieved by bringing leaders and figureheads who are residents of a contracting state to simulate before the other Contracting State - state of source - the condition of real creditor of the amount to be paid by the source country entity. In 1977, the intention of including the term responded to the concerns of counteracting the evasive behavior internationally known as "treaty-shopping."

So far we see that in the context of agreements to avoid double taxation: (i) the term "beneficial owner" was initially proposed as an attribution of income rule to benefit potential payees who were tax-exempt in the country of residence; (ii) the term "beneficial owner" can also be used as an anti-abuse rule which counteracts the simulation of the resident status through the use of resident figureheads and representatives; and (iii) residence is not equivalent to "beneficial ownership".

1. TREATMENT OF THE TERM "BENEFIAL OWNER" AND ITS CONCEPTUALIZATION IN FOREIGN CASE LAW IN THE FIELD OF AGREEMENTS TO AVOID DOUBLE TAXATION

While the term "beneficial owner" remains without clear and uniform definition especially in the international arena, it is also true that there is enough case law in comparative law to help us discern what has been the focus of discussion in other jurisdictions on the conceptualization of that term and, as such, to facilitate the work of interpretation that we should carry out in Panama as economic agents, as well as the tax administration and competent courts.

Basically, the argument focuses on the following questions:

- Does the term "Beneficial owner" include a clause in the treaties to implicitly limit treaty benefits in order to prevent tax evasion typically attempted by the simulation behavior known as "treaty-shopping"?
- ¿Does the term "Beneficial owner" incorporate into the treaties an attribution of income rule for tax purposes? In the latter case, then, what tax legislation should be used to attribute income: the tax legislation of the country of source or the tax legislation of the payee's country of residence, or perhaps none of the aforementioned but a tax concept of an international nature?
- What would be the responsibility of a withholding agent if the source country authorities determine that the recipient of a certain income, while being a resident of the other Contracting State, is not the "beneficial owner" of such income?

The attention to these questions has been the concern of foreign fiscal and judicial authorities. Next, we will refer to four of the most emblematic cases on the definition of the term "beneficial owner" included in Articles 10 to 12 of the treaties to avoid double taxation.

USA: Aiken Industries, Inc. (1971)[4] - Interests

This is one of the most emblematic cases of "treaty-shopping" in the United States. The facts were as follows: Ecuadorian Corp., Inc. (ECL), a company incorporated in the Bahamas, owned 99.99% of the shares issued by Aiken Industries, Inc. (Aiken), which in turn was a resident entity in the United States for federal income tax purposes. At the same time Aiken owned 100% of the shares issued by Mechanical Products, Inc. (MPI), another resident company in the United States.

On April 1, 1963, ECL granted a loan to MPI in exchange for a promissory note at 4% interest, maturing in 20 years. In March 1964[5], Industrias Hondureñas, S.A. of C.V. (IH) is incorporated which shares are owned 100% by ECL; and ECL assigns to IH the promissory note issued by MPI. Originally and as took into account the tax planning, Aiken (then absorbed by MPI) would have been required to withhold 30% of interest paid to ECL if it did not assign the promissory note to IH. Honduras (country of IH incorporation) maintained a treaty with the United States and this treaty eliminated the withholding tax at source from payments of interest. Aiken, the withholding agent, focused its argument on IH being a company resident in Honduras and therefore, IH having the rights to treaty benefits and therefore Aiken not being required to withhold any tax. Aiken argued that with IH residence it complied with the legal requirements to obtain the treaty's benefits.

However, the Court held that Aiken was responsible for the non-performed withholdings because IH did not receive the interest in its own right - "received as its own ", emphasized the Court - but IH acted as a mere conduit - "conduit" – because IH was obliged to transfer the payments received to the ECL headquarters established in the Bahamas.[6] The Court held that the established structure did not have a valid business reason other than the fiscal purpose pursued.

Thus, the Court restricted the benefit of article 9 from that treaty and ruled that it only applies to circumstances where the interest will be paid to the true beneficiary and it also made it clear that the Court would fight against "treaty-shopping." So in the United States in the field of treaties to avoid double taxation on income, the term "beneficial owner" is defined since then as an anti-abuse rule to avoid "treaty-shopping."

Spain: Real Madrid and Hungarian Corporations Case (2007)[7] - Royalties

This is another case of use "conduit" companies and discussed the concept of "beneficial owner" of the payments made by a football team for the rights of image of two professional players. The facts were as follows: the Real Madrid team paid certain amounts to several Hungarian entities as consideration for the use of image rights of "Roberto Carlos" and "Mijatovic" who played for Real Madrid at the time. Such Hungarian companies, in turn, transferred almost all of

4. *Aiken Industries v. Commissioner, 56 TC 925 (1971)*
5. *There was still no treaty to avoid double taxation between the U.S. and Bahamas, but there was a treaty in force between the U.S. and Honduras.*
6. *At that time, Article 9 of the treaty between the U.S. Honduras stated that the interest from a Member State "received by" a resident, corporation or other entity of the other Member State, was exempt from tax in the source State. The Court also added that the phrase "received by" did not refer to temporary possession but to the full domain and control of interest received.*
7. *SAN March 26, 2007, appeal 280/2006 (WBO 2007/101877).*

the income to other companies resident in the Netherlands and Cyprus, and this transfers were made on the same day or the day after receiving payment and without having received yet the invoices.

The question was whether the Hungarian companies were the "beneficial owners" or if the treaty between Spain and Hungary was used as a "tax free" path for the royalties paid by Real Madrid. The court wondered whether the exploitation rights of the Communitarian brands "Roberto Carlos" and "Mijatovic" were assigned to Hungarian companies precisely because the agreement between Spain and Hungary[8] allows the Hungarian residents not pay taxes in Spain on royalties derived from the exploitation of industrial property rights in Spain.

The National Court ruled that (i) the main purpose of the "beneficial owner" concept is to prevent "treaty-shopping", (ii) the meaning and impact of the "beneficial owner" concept is analogous to the Spanish anti-abuse rules, and (iii) this concept allows the state of the source to exclude from the article on royalties any situation in which the purpose of tax evasion is identified without the need to apply the internal law.

The National Court ("Audiencia Nacional") concluded that, in light of the facts and specific circumstances of the case, the Hungarian companies were not the "beneficial owners" of the royalties paid by Real Madrid, but the "beneficial owners" were companies to which Hungarian entities remitted such payments almost immediately.

So for the Spanish National Court, the term "beneficial owner" means an anti-abuse clause which is defined independently with an international meaning, arguing that there must be no reference to national law in accordance with Article 3(2) of the OECD Convention Model.

UK: Indofood International Finance Ltd. (2006)[9] - Interests

It seems important to begin by saying that the Indofood case is not about English Law, but an English court that decided, in principle, as an Indonesian court would have done so if the same case had been presented to it based on the laws of Indonesia. The only link with English law was that the parties contractually chose English courts as the suitable ones to decide any dispute between them.

The facts were as follows: A parent company from Indonesia interested in raising funds in international markets as working capital for its business, instead of directly issuing debt - in which case it would have had to apply 20% withholding in Indonesia - decided to go to market through an entity of the Republic of Mauritius in order for the Indonesian retention to be reduced to 10% as defined in the treaty between Indonesia and the Republic of Mauritius. Additionally, the interest payments made by the entity incorporated in Mauritius were not subject to withholding in Mauritius. However, subsequently, Indonesia denounced the treaty with the Republic of Mauritius to finally end it in 2005, which caused the Indonesian parent company to try to redeem the bonds, not only because it would have had to apply the withholding of 20% but because of the high interest rates that had been paying to the holders of the bonds issued by their subsidiary incorporated in Mauritius. There was a clause in the bonds that allowed the issuer to redeem the securities early in order to mitigate additional fiscal charges, unless "reasonable steps" were

8. *Only the agreements with Hungary and Bulgaria give this treatment to royalties in Spain.*
9. *Indofood International Finance Ltd. v. JP Morgan Chase Bank NA London Branch, English Court of Appeals (Civil Division), March 2, 2006.*

available for a different solution. The trustee and the holders of securities - JP Morgan Chase Bank NA - opposed the early redemption in order to protect their customers, and claimed that to bring a Dutch company to replace the Mauritius one was a "reasonable measure" since Indonesia also had a similar treaty with the Netherlands. The English court had to decide whether this substitution was a "reasonable measure" and assess whether the proposed Dutch entity by JP Morgan could be considered as the "beneficial owner" of the interests that came from Indonesian source, according to the articles of the treaty between Indonesia and the Netherlands. It is important to note that the Mauritius / Holland company could not pay interest but with funds from the Indonesian parent company, the interest rate that the subsidiary would charge to the Indonesian parent was the same that would pay the Mauritius / Holland subsidiary to the holders of the securities, and that the Indonesian parent made payments directly to JP Morgan without going through the Mauritius entity.

The English court then ruled that (i) the term "beneficial owner" should receive an international fiscal meaning not derived from the internal law of the Contracting States; that is, the English court decided to exclude any meaning of the term under English and Indonesian laws, (ii) the concept of "beneficial owner" is incompatible with purely formal ownership that do not enjoy "the privilege to benefit directly from income", (iii) who merely administers income cannot be considered as the "beneficial owner", and (iv) an interposed company with no other function than to disburse and pay the same amount it receives, cannot be considered as the "beneficial owner".

The Court decided that not even the Mauritian company was the "beneficial owner" of the interests that had been receiving from Indofood. According to the Court, the tax authorities in Indonesia were within their rights, even under the original structure, to deny the reduction of the withholding to the the Mauritius Company according to the Convention between both States.

Canada: Prévost Cart Inc. (2009)[10] - Profits

I included this judgment in this dissertation to close this report on cases that deal with the "beneficial owner" concept. This is an important case because it brings an alternative view to the other three aforementioned. There are two sentences in this case: first, a decision of April 22, 2008 issued by the Tax Court of Canada ("CTC") and the second, the confirmation of the first one by the Canadian Federal Court of Appeal ("CFCA") of February 26, 2009. Both decisions relate to the treatment of holding companies as "beneficial owners".

The facts were as follows: a holding company incorporated in the Netherlands received dividends during the period 1996-2001, from a Canadian subsidiary which it owned 100%. The Canadian tax authorities concluded that the Canadian subsidiary could not apply the lower withholding rate under the treaty between Canada and Holland (1987), because they interpreted that the "beneficial owners" of dividends were actually the shareholders of Dutch company: Henlys (resident in the UK) and Volvo (based in Sweden).

However, the Canadian courts, did consider the Dutch holding company as the "beneficial owner". After consulting its domestic law, OECD literature and the Indofood case decision referred above, plus two experts on Dutch law (Van Weeghel and Raas); the CTC produced a tight concept of "beneficial owner" which diverges from the interpretations of the other three referred cases in this dissertation. The CTC departed from its domestic law (source country) and in this regard did not consider the anti-abuse rules of its own legislation, but interpreted the term "beneficial owner" from the Dutch law (country of residence of the recipient) perspective. The CTC interpreted the term as an attribution of income

10. The Queen v. Cart Prévost Inc., 2009 FCA 57.

tax rule and not as an anti-abuse rule to prevent "treaty-shopping." According to Dutch law, the holding company was the owner of the dividends - despite its minimal economic substance and not having office or employees - which were reflected in its income financial statement (P&L) and until distributed, were considered assets and were subject to the common pledge of the creditors of the Dutch holding company. There was no predetermined obligation of the holding company to distribute the profits after received. Thus, the CTC decided that the Dutch holding company was the "beneficial owner" of profits for the purposes of Article 10 (2) of the treaty between the Netherlands and Canada.

As a result of the appeal filed by the Canadian tax authorities, the CFCA upheld the judgment of the CTC and emphasized that this last decision was based primarily on the OECD Comments and the "Conduit Company Report "of the OECD. In that sense, it was very important, that the CFCA refused to give an economic interpretation to the term "beneficial owner" because it could turn the term in a very broad and vague anti-abuse clause.

Preliminary conclusion: From the comparative analysis of foreign tax law in respect of treaties to avoid double taxation, we conclude as follows: the term "beneficial owner" in the context of tax treaties to avoid double taxation, that is, the harmonization of taxation powers between contracting states, is defined as (i) an anti-abuse tax rule that focuses on economic substance and takes into account the source country domestic law in order to avoid "treaty-shopping"; or (ii) as a tax rule for the attribution of income which fills the term with "international" content and resorts to domestic law of the country of residence of the payee of royalties, interest and profits in order to identify the " beneficial

2. AGREEMENTS BETWEEN GOVERNMENTS ON COOPERATION AND EXCHANGE OF FISCAL INFORMATION

Whether the agreement is a bilateral contract between governments, as the "Agreement between the Government of the Republic of Panama and the Government of the United States on fiscal cooperation and information exchange in tax matters" executed in Washington, DC on November 30, 2010[11]; or consists of the exchange of tax information under an article of a treaty to avoid double taxation and prevent tax evasion with respect to income taxes[12], such as the ones Panama has signed over the past 2 years, the truth of the matter is that the purpose of the obligation of information exchange is the assistance and cooperation between States for the administration and application of domestic tax laws of each contracting party.

It is worth highlighting that neither Article 25 of the OECD Model Convention to avoid double taxation or the entire text of the articles of the model agreement for tax information exchange of the OECD use the term "beneficial owner". And it makes sense, because the purpose of those provisions is not to harmonize the tax power of two contracting states, but to go after tax evasion as drawn in each domestic legislation. In the same order, for the specific purpose of preventing tax evasion according to the domestic law of each contracting state, the concept of residence in the domestic legislation or agreements between states is also irrelevant. This clause entitles the contracting States to request information on individuals or entities that

11. *See Article 1 of the "Agreement between the Government of the Republic of Panama and the Government of the United States for Cooperation and Exchange of Information in Tax Matters."*
12. *For example, Article 25 (1) the "Convention between the Republic of Panama and Barbados for the Avoidance of Double Taxation and the Prevention of Tax Evasion in respect to Income Tax."*

may even not be residents of either State, but that is within the reach of the requested State.

These articles have a tax-police investigation and cooperation purpose under the internal procedures of tax assessment and pursuit of illicit behavior under the tax legislation of the requesting State. The main purpose of these articles is not tax harmonization.

However, similarly interesting is that the exchange of interpretative notes between United States and Panama, specifically in note 5 (a) the term "substantial owners" is used, referring to the scenario where the shares of a company are owned by another corporation and it is the obligation of the resident agents (law firms) of Panamanian entities to have such identification information of individuals involved in an ownership chain. We interpret that the scope of that term is described in Article 5 (4) (b) from the Agreement between Panama and the United States: "ownership information of all persons in an ownership chain, in the case of trusts, information on settlors, trustees and beneficiaries and in the case of foundations, information on founders, founding board members and beneficiaries". The "substantial owner" is the taxpayer which the U.S. considers as such and which is being investigated under its domestic legislation.[13]

Preliminary conclusion: From the above mentioned we infer that:

a. When the purpose has been to avoid double taxation, (ii) the term "beneficial owner" has been internationally used as an anti-abuse rule against the behavior known as "treaty-shopping", in which cases the courts have used the domestic legislation of the country of source or an international conception, and (ii) the term "beneficial owner" has also been used as a fiscal rule for the attribution of income, in which case the resident country's legislation has been used to determine the nature of beneficial ownership.
b When the purpose is to provide a taxpayer identification on which an administrative process of tax assessment is carried out, or that may fall within any evasive behavior, the term "beneficial owner" will always have the scope of the entire arsenal of anti-abuse and "treaty-shopping" rules of the State requesting the information. It is also clear that in this context the concept of residence is not relevant. Therefore, when we come to the arena of tax offenses, involving or not criminal responsibility, we reach the domestic rules of the demanding State law to give a concept to the term "beneficial owner".

3. THE TERM "BENEFICIAL OWNER" – IN THE DOMESTIC TAX LAW OF THE UNITED STATES OF AMERICA

Given that Panama recently held an agreement with the United States for tax information exchange, it is relevant for us to understand the content of the term "beneficial owner" in the domestic tax legislation of the United States of America, since it is based on this legislation that the U.S. tax authorities carry out the determination of the obligations of taxpayers and carry out the requirements for information to other governments with which they have signed executive agreements for the exchange of fiscal information.

13. *This same effect is attributed to the scope of Article 5 (4) (b) in the 50 technical comments to the OECD Model Agreement on Exchange of Tax Information. It is important to note that in this commentary the OECD uses in English the term "beneficial ownership", the same term used in the English version of Articles 10 to 12 of the Model Convention to avoid double taxation.*

We must begin by saying that the United States imposes income tax on the "beneficial owner", which is not the one formally receiving the income or not necessarily the recipient which in first instance accrues it under financial accounting.

The Internal Revenue Service ("IRS"), the federal tax authority in the United States, defines "beneficial owner" according to the withholdings returns that withholding agents must file when they make payments from U.S. source to non-residents persons (Form 1042 - S), as follows: for payments other than those for which a reduced rate of withholding is claimed under the protection of a treaty to avoid double taxation, the "beneficial owner" of income is generally the person which, under the tax law of the United States, must include such income in gross income in tax return, which leaves out for tax purposes, the nominees, representatives, trustees or transparent entities.[14]

So the term assumes significance according to its own internal tax rules on attribution of income of the United States, and based on those rules, the United States requests tax information to their counterparts in agreements to exchange tax information and outside the treaty to avoid double taxation, except as referred to in Article 26 of those treaties (tax information exchange)[15].

Currently, the withholding rules in the U.S. are applied using a self-certification system. Thus, a US non-resident investor who hopes that a withholding tax from U.S. source income is not applied, must provide the U.S. withholding agent a certification included in the IRS Form W-8, declaring his non-resident status.

There are 4 types of W-8 forms. Three of them are designed to be supplied by the "beneficial owner" to the U.S. withholding agent: (i) W-8BEN[16], which must be supplied to the withholding agent with respect to U.S. source income not from an active business within the United States but from passive income of the non-resident, (ii) W-8ECI, which must be supplied to the withholding agent with respect to U.S. source income deriving from an active business within the United States and therefore that income should be included in the income return of the "beneficial owner" in the United States, (iii) W-8EXP, which must be supplied to the withholding agent by exempt organizations or foreign governments. The fourth type of Form W-8 is (iv) W-8IMY, which must provide the recipient of a payment of U.S. source when it receives it as an intermediary and on behalf of the "beneficial owner" not resident in the United States. Form W-8IMY must be accompanied by the corresponding W-8BEN, W-8ECI or W-8EXP, as appropriate.

Preliminary conclusion: The term "beneficial owner" in the domestic legislation of the United States serving the cross-border flow of wealth complies, primarily, with the attribution of income purpose to identify the subject to be taxed in the United States on such income as provided by US tax principles.

Foreign Account Tax Compliance Act (FATCA) New withholding tax system for foreign financial intermediaries

On March 18, 2010 was enacted a new Chapter 4 of the Internal Revenue Code of the United States (new sections 1471, 1472, 1473 and 1474

14. *The definition goes on to describe cases of trusts ("trusts") and of partnerships ("partnerships") but for our discussion it is enough.*
15. *Specifically, Article 26 of the Convention Model on double taxation used by the United States of America.*
16. *For example, the W-8 BEN form is to be supplied by foreign savers not residents in the United States to prevent the U.S. bank paying the interest to withhold 30% of those interests. According to the Internal Revenue Code of the United States, all payments on fixed, determinable, annual or periodical income ("FDAP income"), U.S. source, and which are made to nonresident aliens are subject to 30% withholding, unless the withholding agent can show the IRS that the "beneficial owner" of the payment is eligible for an exemption or a lower rate of withholding under a treaty. Interest earned on bank deposits, known as "portfolio interest" and capital gains from the sale of movable property (including securities) by non-residents are exempt from withholding since 1984. See section 871 (a), (h) and (i) and section 865 (a) (2) of the Internal Revenue Code of the United States. These exemptions are directly affected by FATCA (new Chapter 4 of the Internal Revenue Code of the United States).*

of the Code),included in the Foreign Accounts Compliance Act, called FATCA by its acronym in English. By the FATCA, the U.S. Congress established a new reporting r regime for foreign financial institutions (banks, depositaries, brokerage houses, mutual funds, etc.), which term will begin on January 1, 2013. Recently, on February 8, 2012, the Treasury Department released 388 pages of regulations (by way of proposals - not definitive) that implement the application of the 4 articles of the code referenced above, with respect to the duties of the foreign financial institutions.

The aim of this new regime is to discourage tax evasion by U.S. citizens and residents generally using offshore accounts to conceal investments. This legislation is a direct result of the U.S. approach to fight tax evasion that is implemented by using off-shore accounts. This was proposed as a mechanism to correct the deficiencies in current methods used by the IRS and the Justice Department of the United States to identify U.S. citizens and residents with offshore accounts and complement the existing IRS Qualified Intermediary Program ("Qualified Intermediaries ").

For this purpose, establishing a withholding tax regime which forces Americans paying fixed, determinable, annual or periodical ("FDAP income") income or income from the alienation of securities issued in the United States to withhold 30 % of gross income payable for these concepts to foreign financial institutions. The foreign financial institution may avoid the withholding if it legally signs an agreement with the IRS, by becoming a participating entity, under which it undertakes to provide to this taxing authority, information identifying the "beneficial owners" of accounts that are U.S. persons, as well as information on those accounts. The accounts are covered by the so-called FATCA by the Act as "U.S. Accounts" and generally defined as those financial accounts directly or indirectly owned by a US resident, citizen or legal entity which are not publicly-held entities.

FATCA will have a direct and profound impact on Panamanian financial institutions that have (i) investments in the United States, and (ii) U.S. account holders. The impact is magnified by the cascading effect on international financial transactions that flow through multiple entities. Every time a Panamanian financial institution receives or makes a payment subject to withholding, it will be impacted by the FATCA, taking into account that under U.S. tax law a foreign financial institution participating in the FATCA system will receive a withholding agent treatment and will be adjudicated the legal responsibilities that withholding agents in the United States have. Take note that FATCA is a U.S. law with unilateral cross-border reach imposed by the United States, and which affects foreign financial institutions even though they, in turn, are also regulated by the local laws in the jurisdictions in which they operate. FATCA forces these foreign financial institutions to obtain, verify and transmit information to the IRS, to close accounts of people considered "recalcitrant" or withhold 30% of U.S. income tax on the payments made to these defaulting accountholders. Obviously, these FATCA obligations are in direct conflict with local legislations of foreign financial institutions, including Panamanian law which forces to maintain the confidentiality of customer information and refraining from providing information except to competent authorities in Panama that request it through legally established procedures. Moreover, the withholding of a foreign tax in Panama would require at least prior consent of the affected customers.

Foreign financial institutions will be in the position of having to choose between complying or not with the FATCA requirements. Those financial institutions that wish to continue investing on their own or for their customers in the U.S. capital markets must comply with the obligations under the FATCA or suffer the 30% withholding and be unable to compete with other institutions that do comply with FATCA. However, the governments of Spain, England, France, Italy and Germany,

published jointly with the government of the United States a statement in which they expressed their willingness to explore in the multilateral arena a common mechanism for implementing the FATCA international fiscal transparency system through treaties signed with each other to avoid double taxation and to achieve the automatic and routine tax information exchange among these governments. This multilateral FATCA system would exempt financial institutions located in Spain, England, France, Italy and Germany from signing the contract with the IRS.

The Tax Information Agreement signed between Panama and the United States could be used by the United States to further investigate in Panama and through the Department of Revenue, the "Recalcitrant Account Holders" and the U.S. account holders reported as such by a "Participating Foreign Financial Institution" based in Panama (banks, insurance companies, pension funds, mutual funds, brokerage houses and custodians.)

Panamanian Financial institutions that choose to comply with FATCA shall sign the contract with the Internal Revenue Service no later than June 30, 2013 for the Panamanian entity to be classified as a "Participating Foreign Financial Institution" and avoid the 30% withholding stick.

Preliminary conclusion: The term "beneficial owner" in the domestic law of the United States - which deals with the cross-border wealth flow - obeys to a tax-police purpose in order to avoid tax evasion by the subjects to be taxed in the United States under U.S tax law.

4. INDIRECT HOLDER REGIME IN PANAMA - THE TERMS "INDIRECT HOLDER" AND "BENEFICIAL OWNER"

I consider appropriate to consider the Indirect Holder Regime introduced to the Panamanian legal system by Law Decree 1 of 1999 ("Securities Market Law"), amended by Law 67 of 2011, just after having discussed the FATCA issue. Indeed, the Securities Exchange Act provides an alternative regime – to the traditional provisions of the Civil Code and the Commerce Code - on the ownership of securities, and that focuses on the leading role of financial intermediaries as formal holders and trustees of the investors rights who they represent and on whose behalf they act in the markets.

The purpose of this alternative regime is eloquently described in Article 198 of the Securities Market Law, which is written below:

"Article 198: Objectives

The purpose of this Title is to allow the issuance of securities represented by book entries, as well as the creation and operation of an indirect holding of financial assets regime through custody accounts according to standards that increase the efficiency of the securities negotiation and facilitate the Panamanian securities market integration in international custody, clearing systems and securities settlement" [17]

This is a system for the immobilization of securities held by a third party (custodian) who is recognized by the issuer, at first, as the formal holder of such securities. The custodian, in turn, register within their own accounts the changes in

17. *The bold characters are our emphasis.*

ownership according to the negotiated values in the markets, but the issuer continues to recognize the custodian as the owner and does not keep track of negotiations on the secondary market. It is a special regime in order to print agility, safety and efficiency in capital markets. But for this regime it is essential that the issuer does not know who the custodian is acting on behalf of .The custodian, [18] in principle, does not know who are the indirect holders on whose behalf the broker-dealers participate in negotiation of securities.

We then see how this regime is based on a chain of interposed persons acting on their own behalf but for the account of others, being the indirect holders - one with the power to exercise the rights deriving from the securities - the last link in the chain to the extent that such person is also the "real owner" as defined by the Securities Market Law, in Article 1:

"Article 49. Definitions ...

52. When used in connection with a security, the person or persons who, being or not registered as the owner of the same, have directly or through an intermediary entitled to the return of that security\y, to exercise the voting rights in relation to the same, to dispose of the security or to receive the proceeds from the sale or disposal of such security. For the purposes of determining the number of owners of a security, when two or more persons entitled to exercise the above rights in relation to the same, all such persons shall be counted as if they were one real owner.

It is precisely the "real owner", the one whose intent motivates legitimate investment in a security for investment use, who uses the efficiency of the indirect ownership regime to go in and out of the market with respect to a security. From reading the legal definition, it is my opinion that the term "real owner" points to realities of rights legally acquired and not mere factual realities of economic use of a security. The term "real owner" implies legitimate rights economically and ultimately used by its undisputed holder in law, not by that who has a mere appearance of formal owner.

Preliminary conclusion: Clearly the Panamanian Securities Markets Law does not use the term "real owner" for tax purposes but for the purpose of defining the person whose legitimate desire of self-profit activates the investment into or divestment from a security[19] and which legitimately and ultimately enjoys the security. We insert the term "legitimate" because in order to hold the legitimate right of ownership of a security, the money used for the acquisition of such value should not derive from crime, in particular, from money laundering and terrorist financing. The term by itself implies that the "real owner" may not appear as indirect holder of a security: i.e. the "real owner" may not be the financial institution's customer, but another person that directly or indirectly controls the client, or another person higher up in the chain of ownership, but the rights of the "real owner" are legally undisputable.

18. In Panama, LatinClear.

19. The "real owner" can also be a financial institution when acting for its own account and not as an intermediary.

5. PREVENTION OF MONEY LAUNDERING AND TERRORIST FINANCING – CRIMES THE BINOMIAL "REAL OWNER AND / OR BENEFICIAL OWNERS"

The Securities Markets Law ordered the Panamanian regulator to issue in coordination with the Financial Analysis Unit, rules of conduct to be followed by securities firms and brokers to prevent drug-related activities or other illegal activities In the same line, Law 42 of 2000 ("Law 42") established "Measures for the Prevention of Money Laundering crimes."

Law 42, Article 1 (1), forces financial institutions in general, including, among others, stock exchanges, custodians, brokerage houses, securities dealers and investment managers to maintain the diligence and care that leads to prevent their operations to be carried out with funds from crime-related activities and money laundering and to prevent them. In this sense, financial institutions are forced to "properly identify their customers" and to "properly document and establish the true owner or directly or indirect beneficiary." This piece of legislation marks the difference between the owner and the beneficiary but does not conceptualize either the term "owner" or the term "beneficiary".

Moreover, the Agreement 5-2006 of the National Securities Commission of Panama, issued on June 9, 2006 (the "Agreement"), and which develops "rules of conduct" that should be complied by custodians, stock exchanges, brokerage houses, brokers and investment managers for the "prevention of money laundering and terrorist financing crimes" in this context, sets the rules regarding the "Know Your Client Policy" to be fulfilled by the regulated subjects.

The Agreement uses the terms "client", "real owners" and "beneficial owners" without defining them. It establishes as mandatory to request from clients - the person who will sign the corresponding contract with the financial institution - to provide information on the identity of the "real ownerrs and / or beneficial owners." This research work of identifying the "real owners and /or beneficial owners" should be conducted with a "professional skepticism" by the regulated subject as mandated by the Agr

It is very striking that former National Securities Commission (now the Securities Market Superintendence) used throughout the Agreement, the binomial "real owner and / or beneficial owners." We say binomial because obviously the two terms "real owners" and "beneficial owners" do not have the same meaning. The term "real owner" is defined by the Securities Market Law, while the term "beneficial owner" is again orphaned of definition in the capital markets context. We saw the difficulties that international tax case law faces to define the term "beneficial owner" in its context, but nevertheless, the term is also used in this other context of prevention of money laundering and again without express definition by law or regulation. It seems that for the Superintendence of Securities, both terms are not synonymous because it could be inferred that the condition of "real owner" presupposes in the same person the condition of "beneficial owner"[20], but it will not necessarily always be the case due to the binomial contrasts of these terms by the conjunction "or."

20. When using "and / or", the Commission foresees the possibility that the "real owner" "and" the "beneficial owner" be the same person, but also provides the possibility to only exist the "beneficial owner" but not the "real owner", since it also uses the conjuction "or" to separate and oppose them.

In comparative law, the European Parliament on Money Laundering Third Guideline is illustrative[21]. This guideline applies to a wide spectrum of people, including financial institutions and certain professionals such as auditors, accountants, tax consultants, notaries, lawyers, casinos and others. In regard to the rules on Know Your Client policy, the Guideline also uses the terminology and requires identification and verification of the "real owner - beneficial owner" and understanding of ownership and control structure of the customer in addition to the basic customer identification procedures. However, the Guideline does define the term "real owner - beneficial owner", and refers to the individual who "ultimately" owns or controls the customer and / or the individual on whose behalf a transaction is carried out. Thus we see that the European Parliament defined the term "real owner - beneficial owner" emphasizing that it will always be an individual. A legal entity is not the "real owner - beneficial owner" in the context of this legislation to prevent money laundering, unless for companies listed on a regulated market and that are subject to disclosure requirements consistent with Communitarian legislation or equivalent international regulations. [22]

Preliminary conclusion: From the above, we reaffirm our position that the term "real owner" ("propietario efectivo") as defined by the Securities Market Law follows indisputable economic rights, also noting that in our opinion the term "beneficial owner" - undefined as it is but used in the referred legislation "Know Your Client" of the former National Securities Commission of Panama - serves the wide range of factual situations to point out towards the individual who takes an economic advantage of a security and that these realities include not only legitimate indisputable exploitation of economic rights, but can also refer to realities in fact away from the law. That is, we understand that the circumstances determine, in this context the terminology of prevention of money laundering in the capital market, in the absence of a "real owner", a true and rightful owner, in last instance direct or indirect, but a "beneficial owner" who in fact economically enjoys a financial asset without being the rightful owner. These are the situations - where the conditions of "real owner" and " beneficial owner" do not converge to the same individual - which due diligence standards of "Know Your Client" [23] are expected to detect: the situations where in fact a mere beneficiary intends to appear as the owner by law.

6 CONCLUSIONS

Proposal for the harmonized interpretation of the term "beneficial owner" in Panama

If we have recognized the relevance of the term "beneficial owner" in light of the case law and legislation that its definition carries, in different jurisdictions and contexts, we must necessarily recognize the interpretative controversy that frames it.

Panama is weaving a network of treaties to avoid double taxation to catch up with fiscal transparency required by the OECD as an international standard, and it also has signed an

21. *Directive 2005/60/EC of the European Parliament of 26 October 2005.*
22. *However, the Guideline does not distinguish between owner / and beneficiary, but both concepts were included in the term "beneficial owner".*
23. *See 3-2009 opinion of the National Securities Commission of Panama (June 10, 2009). We use the term "beneficiary" repeatedly but did not address the content and definition. It is available on the website of the National Securities Commission of Panama.*

agreement to exchange tax information with the United States of America. In parallel, the United States has enacted the FATCA - which begins on January 1, 2013 - to prosecute the undeclared enrichment of its tax residents and citizens hidden in offshore accounts. Additionally, Panama is an international financial center which must comply with international standards for preventing money laundering. In all these contexts, the content given internally in Panama to the term "beneficial owner" has preponderance as well as the understanding that we should have in Panama of the meaning given to it in other jurisdictions and particularly in the United States of America in view of the coming FATCA.

Given the current lack of definition of the term "beneficial owner", we consider it appropriate to propose the following interpretive guide for Panama:

a. **In the context of harmonization of treaties to avoid double taxation:** the term should be defined as an international tax rule for the attribution of income, and in that sense, to serve the internal law of the payee Contracting State to identify the "Beneficial owner". The recipient's state of residence commercial rules must determine if the recipient must register the income as its own, in which case it must be considered the "beneficial owner"; taking into account the international standards for the preparation of financial statements, regardless that the payee must pay or not taxes for such income in the contracting state that serves as a residence for tax purposes. The term "beneficial owner" should not be defined as an anti-abuse rule against "treaty-shopping", since that position leads the term to the field of domestic tax law of the country of source and its internal rules for determining tax, which may reduce the applicability of treaties.
b. **In the context of the articles for tax information exchange included in both treaties to avoid double taxation agreements as in agreements between governments for tax information exchange:** since they are contractual provisions to cooperate with the other signatory state in pursuit of their tax cheats, it is clear that the term will take the content that the requesting state gives to it for tax purposes. In the scenario of the United States of America, a country with which Panama has signed an agreement to exchange tax information, the meaning of that term will be the one given by U.S. tax law, being Panama the country required and obliged to provide information to the extent that the United States request is framed within the parameters of the agreement. Regarding the remote possibility that the requesting country is Panama, the letters exchanged did not define that the concept "substantial owner" would be a concern for Panama.
c. **In the FATCA context:** Since FATCA is a domestic tax law of the United States of America, even with cross-border reach, the meaning of the term "beneficial owner" shall be that given by the U.S. tax law. It is an unusual situation, since the rest of the financial world - given the importance of capital markets in the United States - is bound to know, understand and comply with tax rules inside the United States, including its arsenal of anti-deferral rules. Since Panama is a financial center with over 60 licenses issued to securities firms, and emerging as the hub of Central and South American securities, we can not delay the monitoring and understanding of FATCA. The FATCA will affect the Panamanian intermediaries and ultimately their customers.
d. **In the context of rules for preventing money laundering:** the call is for a definition of the term by todays Securities Market Superintendence, making it clear that the "real owner and / or beneficial owner" will always be an individual, except in the case of companies listed in authorized stock markets, following the European Parliament guideline. Given the central importance of the term "beneficial owner" in the Panamanian regulations for the prevention of money laundering, it should not remain an unclear

definition. In this regard, it should be clear to the interpreter that the customer is an indirect holder, that the customer may or may not be "real owner", that the "real owner" will always be the "beneficial owner", but that the "final beneficiary" may not be the "real owner" in those cases where apparently the rights are vitiated by the unlawful origin or destination of the assets. A drug dealer can be "beneficial owner" but should never be considered "real owner" of assets deriving from crime, hence the criminal's effort will be to simulate and adopt the appearance of "real owner".

e. **As a final thought:** We must recognize that the term "beneficial owner" has been imported from foreign legislation and that internally is undefined in Panama. To give content to the term, it is essential to first address the context in which it is to be used and not try to extrapolate the tax content given, eventually, to the context which purpose is the prevention of money laundering, and vice versa[24]. However, in the fiscal area and in the field of crime prevention of money laundering, the term deeply impacts the capital markets from different sides, locally in Panama and also internationally.

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24. That, in our opinion, should aim for an individual, except in the case of a company listed on a stock exchange.

EFFECTIVE IMPLEMENTATION OF INTERNATIONAL TAX INFORMATION EXCHANGE IN THE REPUBLIC OF ARGENTINA

Juan Carlos Sansinena

SUMMARY

This paper covers the main factors that justify international information exchange between Tax Administrations, identifying the profile of the Republic of Argentina with regard to its effective implementation, the mechanisms adopted in the various intergovernmental and inter-institutional agreements signed, the legislative regulatory framework and the internal rules of the Federal Administration of Public Revenues (AFIP) with respect to management and procedures..

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CONTENT

The process of economic globalization has developed a new world scenario characterized by the constant mobility of capital and qualified labor, generalization of transnational entrepreneurial investments, expansion of international electronic trade and electronic financial or stock exchange transactions, thereby affecting the economic, political and social structures.

Within this context, the States have been forced to redesign and harmonize fiscal policies as structural protection of their local tax systems, considering the high volatility of the displaced tax bases and the need to guarantee levels of transparency and equity in the distribution of the internal tax burden.

Such specific issues as transfer prices, undercapitalization, tax havens constitute highly sensitive and complex reactors that favor harmful tax planning through related companies located in countries with special systems of low or null taxation, for which reason Tax Administration require reliable and timely information that may activate the internal control systems and contribute to an adequate fiscal order.

In that sense, one may observe a change of attitude of the countries in the area of international cooperation relative to the relevance and functionality of information exchange as mechanism for preventing fraud and tax evasion, by indirectly protecting the intangibility of the world tax base, eroded by a subjacent tax competition linked to economic events with a transnational profile.

Based on the relevance of international information exchange as substantial support tool of the collection and examination actions, the competent authorities of the Republic of Argentina have signed such instruments as “Agreements to Avoid Double International Taxation”, with a specific clause, “Mutual Cooperation and Assistance Agreements” and “Specific Information Exchange Agreements”, whether intergovernmental or inter-institutional, oriented at providing juridical support to the international legislations of the contracting parties.

Likewise, by means of regulations, the Federal Administration of Public Revenues (AFIP) has been given legal powers to agree, apply and interpret rules provided in the agreements or other instruments signed as international information exchange, by implementing strategic organizational and operational changes intended to promote the traffic of reliable and timely information of international businesses, taking into account the adoption by our legal tax system, of the world income criterion in relation to Profit Tax and the declaration of properties located or placed abroad by residents in the country, for purposes of the assessment of Personal Property Tax.

Based on the foregoing, it will be necessary to specify the regulatory framework in force in the country’s internal legislation, with respect to the international tax information exchange instruments, the administrative rules for their management and processing and the characteristics, scope and identification of the mechanisms adopted in the Agreements and Conventions signed by the competent authorities of the Republic of Argentina.

1. COUNTRY PROFILE

Competent authority

The Federal Administrator, according to the provisions of paragraphs e) and f) of article 9 of Decree Nº 618/97 is authorized to request and provide direct collaboration to the foreign Tax Administrations and International Organizations specialized on the subject matter, as well as carry out investigations abroad intended to gather elements of judgment to prevent, detect, investigate or curb illegal tax and customs actions as well as smuggling.

Resolution N° 336/03 of the Ministry of Economy and Production has authorized the Federal Administration of Public Revenues (AFIP) to intervene directly in processing the Exchange of information relative to collection and examination actions with other Tax Administrations of countries signatories of Agreements to Avoid International Double Taxation entered into by the Republic of Argentina.

The Federal Administrator is the competent authority with respect to Inter-institutional Agreements of International Information Exchange (IIA): Therefore, on behalf of the National Government, he may sign Conventions and/or Intergovernmental (INTG) International Information Exchange Agreements for combatting evasion and/or avoidance and guaranteeing a correct assessment of taxes and/or customs duties.

He is also empowered to designate an official, service or dependency of the respective jurisdictions as responsible for undertaking communications for better carrying out the procedures leading to achievement of the purpose of the International Mutual Cooperation and Assistance Agreements.

In that sense, through Provision Nº 258/10 (AFIP), the Deputy General Director of the Deputy General Directorate of Examination, the Head of the International Taxation Directorate, the Head of the International Information Management Department and the Head of the Tax Information Exchange Division – according to structure approved by Provision Nº 19/2010 (AFIP) -, have been appointed as responsible for:

a. Signing the correspondence as competent authority for processing international information exchange in relation to taxation, according to the Agreements to Avoid International Double Taxation in force or which may be signed in the future, and Specific Agreements on Information Exchange agreed or which could be agreed in the future by the Federal Administration of Public Revenues (AFIP).
b. Signing requests processed before the Ministry of Foreign Relations, International Trade and Cult.
c. Undertake direct communications with the contracting Competent Authorities, in specific cases wherein, when processing the international information exchange, it would be necessary to specify certain matters.

Likewise, through Provision Nº 259/10 (AFIP), the Deputy Director of the General Deputy Directorate of Examination, the Head of the International Taxation Directorate, the Head of the International Information Management Department and the Head of the R.I.L.O. Division of AFIP have been appointed to act as “Liaison Officer” in communications generated in accordance with the provisions of the International Agreements and Conventions in force, or which may be signed in the future, in order to coordinate all the requests for cooperation and assistance in relation to customs issues that may be made and/or received from the Contracting Parties.

Internal management and processing

The Federal Administration of Public Revenues (AFIP) has issued General Instruction Nº 894/2010 (DI PYNF) in order to specify the scope of intervention of the Directorate of International Taxation in all information requests and spontaneous reports related to countries and organizations abroad, with a view to ensuring the correct and timely application of international legal instruments, on the basis of which the information exchange takes place.

The operational guidelines are limited to the information exchange modalities that are found in the instruments in force in relation to:

- Specific information exchange (upon request) in cases when the Tax Administration makes a specific request in relation to a particular case to another country.
- Spontaneous information exchange regarding the provision of information which is considered of fiscal relevance for the Tax Administration of another country, without there being a previous request.

In this respect, the channels through which specific information requests may be made abroad are:

- Countries with which the Republic of Argentina has entered into Agreements to Avoid International Double Taxation.
- Countries with which the Federal Administration of Public Revenues (AFIP) has signed Specific International Information Exchange Agreements, as provided in Resolution N° 336/03 of the Ministry of Economy and Production.
- Countries with which there is no instrument for regulating the exchange of international information.

In the request for specific information sent abroad, the data one endeavors to obtain must be based on a sufficiently probable and possible hypothesis of fiscal interest linked to identified individuals with respect to which all instances within the national territory may have been exhausted.

The requesting areas requiring information of the nature indicated must make the pertinent request in writing, in a clear, simple and specific manner.

The procedures will cover the following aspects:

a. Identification data of the local individual (filiation, social and fiscal)
b. Identification of the investigation or examination procedure (number of procedure or intervention order; taxes and periods that are under verification; brief description of the situation analyzed, with precise identification of the indications of fiscal interest detected, including documents that may specifically guide the inquiry and contact data of the investigator, examiner and supervisor.
c. Country to which the information exchange is intended, with indication of the International Treaty invoked (Agreement to Avoid International Double Taxation and/or Specific Agreement for Information Exchange), with indication of the pertinent articles, or process suggested.
d. Referential and descriptive data on the individual from abroad o whom the consultation is based and his relationship with local individuals under examination or investigation.
e. Concrete, clear and precise specification of the data and/or documents required and their special formal requisites, with indication of the time period to which the requested information and/or documentation refers.
f. Indication of the reason that justifies the request, with specific reference to the importance of counting with the data and/or documents requested abroad.
g. The level of urgency in receiving the response, indicating the deadline for the receipt of the information.

As soon as the Federal Administration of Public Revenues (AFIP) receives requests for specific international information Exchange addressed to our country and originating in foreign States, it shall forward them to the Deputy General Directorate of Examination, which through the Directorate of International Taxation will proceed to their registration and analysis of the contents, in order to determine the procedure to be followed with the respective request and, if appropriate, shall forward it to the pertinent area for carrying out the appropriate procedure.

The respective Directorate will initiate an investigation or preventive intervention order in order to compile the information and/or documentation request by the treasury abroad.

Once the providing area concludes the tasks involving the compilation of the information required by the foreign treasury, it shall send the procedure together with the respective report to the International Information Management Department in order that the corresponding technical and administrative controls may be carried out, depending on the type of request in question and that the pertinent draft response may be prepared and sent through the authorized channel.

With respect to spontaneous reports abroad, it is anticipated that when the providing areas, during the course of their control and/or verification tasks, detect situations, events or documentation that could be relevant in order that the foreign States may achieve the purposes of their respective Tax Administrations, regarding the application, verification and assessment of the taxes they collect, the officials shall proceed to select the respective background information, prepare a report and send the results to the Directorate of International Taxation.

This office shall proceed to evaluate the convenience of carrying out a spontaneous information exchange, making the respective foreign treasury aware of such issues.

The providing area proposing a spontaneous report abroad, must consider the following aspects:

a. Country to be spontaneously informed, with indication of the international legal instrument to be invoked (Agreement to Avoid International Double Taxation and/or Specific Agreement of Information Exchange), with specification of the pertinent article(s).
b. Identification of the individual(s) abroad to whom the information refers: name and surname, denomination or trade name, type and identification number, domicile, etc.
c. Description of the information and or documentation gathered and explanation of the reasons why it is considered of interest to the other competent authority.
d. With respect to the local individual(s) from whom the information and/or documentation was obtained:
   - Number of procedure or intervention order.
   - Taxes and period(s) under verification.
   - Brief reference of the situation analyzed.
   - Contact data of the investigator or examiner and supervisor.

e. Mention whether there is any objection to disclosing all or part of the information provided.
f. Mention whether it is necessary to request the receiving country to return information, specifying its scope.

When the Federal Administration of Public Revenues (AFIP) receives a spontaneous information exchange from foreign treasuries, one will proceed as previously provided with respect to the entry and processing of requests for information from abroad.

Once received by the corresponding operational areas according to the jurisdiction, the latter will evaluate the information and/or documentation reported from abroad and in case of deeming it convenient and/or timely, will generate an investigation action or intervention order.

On concluding said action or intervention order, an "Exchange evaluation report" will be prepared with respect to the requests for information from abroad, in relation to the usefulness of the information received, indicating its use and the results achieved or the reasons why said information was not useful or relevant.

In general terms, the requesting areas, when proposing a request for information, according to the rules provided in the international legal instruments in force, as well as internationally known uses and practices on the subject, must fulfill the following previous conditions:

- Having used all possible means available in the national territory for obtaining information, exhausting the possibilities.
- Compliance of the request made with the country's administrative laws and practices, in the sense that this Federal Administration could obtain the information if it were available in the national territory.
- If there are reasons whereby it is convenient to avoid notification to the individual abroad, it should thus be put on record, given the possibility that the other contracting State may grant such right.
- With respect to the deadlines for executing a request for information and given that, the International Specific Information Exchange Agreements provide terms for complying with a request for information, the areas executing the tasks must take into account its application.
- The competent authority of the requested party must act with maximum diligence, not exceeding the deadline of 3 months for its response, when the information is internally available, or 6 months when efforts must be undertaken for obtaining the requested information.
- With respect to request from abroad, the Directorate of International Taxation, in keeping with the circumstances of the specific case and in order to ensure timely compliance, will set a maximum time deadline so that the providing areas may comply with sending the respective data and/or background information requested, although it may be partial.
- As regards translation and with respect to requests received from abroad in a foreign language, it may be carried out with the collaboration of the Directorate of International Affairs and in accordance with the provisions of article 28 of Decree Nº 1759/71, and likewise, the requests originating from this Federal Administration must be sent in Spanish.

Confidentiality

The regulatory legal instruments of information Exchange provide for a clause of confidentiality in order to guarantee adequate protection of the information received from another contracting Party.

In Agreements to Avoid International Double Taxation, using as reference the one signed with the Kingdom of Spain - Act N° 24.258 – the confidentiality clause is included in article 26, according to the following terms:

a. The competent authorities of the Contracting States shall exchange the necessary information to apply the provisions of the present Agreement or of the internal Law of the Contracting States in relation to taxes comprised in the Agreement, to the extent taxation demanded by it, is not contrary to the Agreement. The information received by a Contracting State shall be kept secret, in the same way as the information obtained on the basis of said State's internal Law and shall only be communicated to individuals or authorities (including the administrative courts and entities in charge of managing or collecting the taxes provided in the Agreement, of the filing or executive procedures related to these taxes or the solution of appeals involving these taxes. These individuals or authorities shall only use these reports for these purposes. They

may disclose this information in the public hearings of the courts or in legal judgments.

b. In no case may the provisions of section 1 be interpreted in the sense of obliging a Contracting State to:
   - Adopt administrative measures contrary to its legislation or administrative practice or those of the other Contracting State;
   - Provide information that cannot be obtained on the basis of its own legislation or in the exercise of its normal administrative practice or those of the other Contracting State, or provide information that may disclose a commercial, industrial or professional secret, or a commercial procedure or information whose communication may be contrary to public order.

On its part, the Model Tax Convention on Income and on Capital - article 26, paragraph 2, 2008 version -, considers in depth the accuracy to be attributed to the term "confidential", noting that the exchanged information shall be treated as secret in the same manner as the information obtained by virtue of the internal legislation.

In the Tax Information Exchange Agreements, according to the model promoted by the Organization for Economic Cooperation and Development (OECD), using as basis the one signed with the Principality of Andorra on October 13, 2009, item 8 of its article 4, provides, for the modality of Information Exchange upon Request, that:

- All information received by a contracting Party shall be considered secret, as well as the information obtained by virtue of the national laws of its State, or in accordance with the confidentiality conditions applicable in the jurisdiction of the state of the Party providing them, if such conditions are more restrictive and shall only be disclosed to individuals or authorities of the State of the requesting Party, including judicial and administrative bodies participating in:
  a. The determination, assessment and collection of the taxes that are the subject of the Agreement.
  b. The collection of fiscal credits derived from such taxes.
  c. The application of the tax laws.
  d. The prosecution of offenses involving taxation.
  e. The solution of administrative appeals regarding those taxes.
  f. The supervision of all of the above.

Said individuals or authorities should use the information solely for tax purposes and may disclose it in public judicial processes before courts or in judicial solutions of the State of the requesting Party, in relation to these matters.

Likewise, article 8 of the aforementioned Agreement provides that all information received by a contracting Party shall be deemed secret and may only be disclosed to individuals or authorities (including administrative courts and bodies) of the jurisdiction of the State of the contracting Party related to the assessment or collection, the application or procedure or the solution of appeals in relation to the taxes applied by the State of a contracting Party. Such individuals or authorities must use said information solely for these purposes and may disclose them in public judicial processes before the courts or in judicial solutions. The information cannot be disclosed to any person, entity, authority or jurisdiction without the express consent in writing form the competent authority of the requested Party.

With respect to the Model Agreement for Tax Information Exchange of the Inter-American Center of Tax Administrations (CIAT), using as basis the one signed with Chile – Agreement Act N° 10/06 (AFIP) – its articles specify that all information received by a contracting State shall be considered secret, as well as the information obtained by virtue of the national laws of said State, or in accordance with the conditions of confidentiality applicable in the jurisdiction of the State providing it, if such conditions are more restrictive and shall only be disclosed to

individuals or authorities of the requesting State, including judicial and administrative bodies participating in the determination, assessment, collection and administration of the taxes that are the subject of the Agreement, in the collection of fiscal credits derived from such taxes, in the application of tax laws, in the prosecution of tax offenses or in the solution of administrative appeals regarding those taxes, as well as the supervision of all of the foregoing. These persons or authorities must use the information solely for tax purposes and may disclose it in public judicial processes before courts or in judicial solutions of the requesting state, in relation to those matters.

As regards, the scope of confidentiality in the internal legislation of our country, article 101 of Act N° 11.683 provides for Tax Secrecy, which constitutes a legal imperative to be strictly observed, taking into account its incidence as factor contributing to voluntary compliance with the tax obligations by the taxpayers or those responsible.

The aforementioned rule provides that sworn declarations, statements and reports which those responsible or third parties submit to this Federal Administration and the lawsuits when they provide that information, are secret, with the judges, officials, judicial employees or dependents on the latter, being obliged to maintain the most absolute secrecy of all that they may become aware of in the performance of their functions, without being able to communicate it to anyone, not even at the request of the interested party, except to their hierarchical superiors.

Specifically, paragraph d) of article 101 of Act N° 11.683 provides for lifting of tax secrecy in cases of remittance of information abroad within the framework of International Cooperation Agreements entered into between the Federal Administration of Public Revenues (AFIP) and other Tax Administrations, on condition that the respective Administration abroad commit itself to:

a. Treat the information provided as secret, under equal conditions as the information obtained on the basis of its internal legislation.
b. Deliver the information provided only to staff or authorities (including administrative courts and bodies) in charge of managing or collecting taxes, of the declarative or executive procedures relative to the taxes or, the solution of appeals related to them.
c. Use the information provided only for the purposes indicated in the foregoing paragraphs, and being able to disclose this information in public hearings of the courts or in judicial verdicts.

The Federal Administration of Public Revenues, through Provision Nº 98/09 (AFIP) and General Instruction N° 8/2006, has established management guidelines for the provision of information, specifying as general principle, under the protection of the concept, that of economic and net worth contents dealing with taxpayers or persons in charge which it possesses, with the following exceptions:

a. The administrative-type data, namely: surname and names, denomination or trade name, Single Tax Identification Code (C.U.I.T.), domicile, postal address, type of activity, taxes under which a taxpayer is registered, provided it does not comprise information on the respective individual of a net worth contents of any nature, nor allows the possibility of access to the latter.
b. Global or statistical data.
c. Information on noncompliance with tax obligations:
   - Nonfiling of returns.
   - Nonpayment of obligations due.
   - Amounts resulting from firm official assessments and adjustments made.
   - Firm sanctions for formal or significant violations.

- Surname and names, denomination or trade name of the taxpayer or person in charge and offense attributed, in the penal accusation for violation of Acts Nº 23.771 or Nº 24.769 and their amendments, or for common offenses linked to compliance with tax obligations.

With regard to the requesting individual, the Federal Administration of Public Revenues (AFIP) may provide information protected by tax secrecy when the request is sent by any of the entities or individuals mentioned hereunder:

- The national, provincial, municipal collection entities or the Government of the Autonomous City of Buenos Aires provided that the request indicate that the information is directly linked to the application, collection and examination of the encumbrances under its responsibility. In those cases, the delivery of the information may be limited or restricted based on reasons of timeliness, merit or convenience, linked to the strategic objectives of the federal tax administration.
- The Nation's Ombudsman, within the framework of the provisions of Article 24 of Ley Nº 24.284 and its amendment.
- The persons, businesses or entities to whom the Federal Administration entrusts administrative tasks, compilation of statistics, information processing, preparation of surveys and others necessary for compliance with its objectives.
- The Honorable Chambers of Representatives and Senators of the Nation, when carrying out their investigative functions, when the request is signed by the Presidency of the respective Chamber, according to the criteria established by the Attorney's Office of the Treasury of the Nation in its Decision Nº 3, of March 7, 1993. When such powers are delegated to an Investigating Commission, it will be sufficient for the request to be signed by the president thereof.
- The Public Prosecutor's Office and the specific investigation units comprising it, through an order from a judge entertaining jurisdiction or request from the intervening prosecutor himself. In the latter case, when he may be in charge of conducting the investigation, as provided in Articles 180, second paragraph and 196, first paragraph of the Nation's Criminal Code of Procedures or if it is the case of denunciations made by this entity.

According to the purpose or reason for the request, scopes and guidelines have been determined for special situations:

International Agreements

Exempt from tax secrecy is the information sent abroad in compliance with Agreements to Avoid International Double Taxation, in force and ratified by the national law, or in International Cooperation Agreements which, having been signed by this Federal Administration, consider the Exchange of information; the foregoing, regardless of what may be in particular provided by each one of the International Conventions or Agreements.

Judicial causes

The information must be provided only when it has been requested by means of an official letter as evidence in the following processes:

- Family matters.
- Criminal proceedings for common-law crimes (when there is a direct relationship with events being investigated).
- Proceedings wherein the request is made by the interested party and the latter is contrary to the National, Provincial, Municipal Treasury or the Government of the Autonomous City of Buenos Aires, provided that third-party data are not disclosed.

In the case of processes or assumptions, other than those mentioned, the request for information must be rejected within the fifth working day after having received the letter, in accordance with the provisions of the second paragraph of Article 397 of the Nation's Civil and Commercial Procedural Code.

Transfer prices

Exempt from tax secrecy is the information dealing with third parties which is necessary for determining transfer prices, when it must be used as evidence in cases processed at the administrative or judicial level.

For purposes provided in the third paragraph of article 15 of the Profit Tax Act, text ordered in 1997 and its amendments, it shall be considered that there is administrative case as of the notification of initiation of the examination.

Financial Information Unit

In accordance with the provisions of Article 14, item 1 of Act Nº 25.246 and its amendments:

Tax secrecy is not in effect with respect to information provided to said entity, in cases wherein the report of suspicious events or activities would have been prepared by said entity and in relation to individual(s) or corporation(s) directly involved in the reported operation.

In the remaining cases, the Financial Information Unit must request the lifting of tax secrecy to the federal judge with competency in criminal issues of the place where the information must be provided or of the domicile of the aforementioned unit.

Anti-corruption Office

It is not suitable to approve requests for information protected by tax secrecy made by the Anti-corruption Office (cfr. Decision of the Attorney's Office of the Treasury of the Nation, of November 2, 2000 - Decisions 235:316-).

General Auditor´s Office and General Receivership of the Nation

When the General Auditor's Office or the General Receivership of the Nation, request information protected by tax secrecy, the latter must be provided by leaving out all those data that may allow for identifying the taxpayers or persons in charge.

Financial and stock exchange information

The financial and stock exchange information is protected by secrecy provided in Article 39 of Act Nº 21.526 and its amendments and in Articles 8, 46 and 48 of Act Nº 17.811 and its amendments, with the scopes provided in article 1 of Act N° 23.271.

This collecting entity is obliged to provide or request, if it were lacking, the strictly financial or stock exchange information which in compliance with their legal functions would be requested to them by:

- The Central Bank of the Republic of Argentina.
- The National Securities Commission.

With respect to confidentiality of taxation of foreign trade, Act Nº 23.311, which approves the Agreement relative to the application of article VII of the General Agreement on Tariffs and Trade, signed in Geneva on April 12 and on November 1st, 1979 provides for the confidentiality of customs information, unless it must be necessarily disclosed within the context of a judicial process.

In such sense, the aforementioned Agreement in its article 10 provides that "all information which by its nature may be confidential or which is provided as such for purposes of customs valuation, shall be considered strictly confidential by the pertinent authorities, who will not disclose it without express authorization from the person or government that may have provided said information, except to the extent it may be necessary to disclose it in the context of a judicial process".

As far as confidentiality is concerned in the sphere of Mercosur, General Resolution (AFIP) N° 2389/2008, incorporated to the national legal system the Decision of the Common

Market Council - MCC N° 26/06 -, relative to the "Cooperation Agreement, Exchange of Information, Consultation of Data and Mutual Assistance between Customs Administrations of Mercosur" for purposes of counting on an updated legal framework that may provide for information exchange, officially as well as upon request, given the notorious technological progress in the computerized systems of the Customs Administrations and the need to unify the rules in force on cooperation and mutual assistance, consultation of data and information exchange between the Customs Administrations of Mercosur, considering article 22 of the aforementioned General Resolution regarding confidentiality and protection of the information.

Probatory sphere

Article 28 of Decree N° 1759/72 provides that the documents must be submitted duly legalized if thus requested by the administrative authority and those drafted in a foreign language must be accompanied by the corresponding translation by a certified translator.

The Federal Administration of Public Revenues (AFIP), through Decisions N° 16/94 and Nº 46/97 of the Legal Counseling Directorate has interpreted that the information compiled through the mechanisms provided in the Agreements to Avoid International Double Taxation must fulfill specific legal provisions in order to be valid in internal fiscal assessment, stating the need that:

a. It be requested by and to the competent authority, which is the application authority in the Agreements.
b. The information requested be related to the taxes that are the subject of the Agreement.
c. The Contracting State receiving the information must protect tax secrecy in the same way it would do in relation to information obtained on the basis of its internal right and would solely use it for the purposes for which it was requested.
d. Between the legislation of a Contracting States and the provisions of the Agreement, the most restrictive rule is applicable.
e. The Contracting States are not obliged to adopt measures contrary to their legislation or administrative practice.
f. The Contracting States are not obliged to provide information that may disclose a commercial, industrial, professional secret that may be contrary to public order.
g. The requisite of reciprocity as limit or exception to information exchange should be in operation.

With respect to the full value as evidence of the requested information:

- The international rule is to respect the local right of each State as well as the administrative and practical rules and guidelines in each case. The probatory elements obtained through other means and procedures, whether contrary, or not fully in keeping with the local legal principles of the country in question, would lack value as evidence for purpose of being used in administrative and/or judicial procedures in another State, thus being in this way easily objected and therefore, no process could be based thereon.

Likewise, with respect to the conditions to be fulfilled by foreign documents in order to acquire full value as evidence in the administrative and jurisdictional sphere of the Republic of Argentina, the Ministry of Foreign Relations, International Trade and Cult – has issued Proceeding Nº 6198/2007- based on the following considerations:

- The Hague Convention – approved through Act N° 23.458 - is aimed at exempting the signatory countries thereof from the consular legalization of foreign public documents. In order to be valid abroad, the documents only require an apostille, which consists of a single seal by the competent authority of the State where the document originated.

- The purpose of the apostille is to attest to the authenticity of the signature, the capacity with which the signatory would have acted and, if appropriate, the identity of the seal or stamp which the document bears.

According to the Convention, public documents are:

- The documents issued by an authority or official of a state court, including those issued by a court prosecutor, secretary or officer.
- The administrative documents.
- The notarial certificates.
- Official certifications in documents signed by private individuals, such as the certification of registration of a document or of a specific date and the authentication of signature in documents of a private nature.

The Convention also provides for exceptions, noting that it will not be applicable to:

- Documents issued by diplomatic or consular officials.
- Administrative documents directly related to a commercial or customs transaction.

Article 3 of the Convention states that the apostille cannot be required when the legalization, regulations or practices in force in the State where the document is presented, or an agreement between two or more contracting States rejects, simplifies, or exempts the document from the legalization requisite.

The International Tax Information Exchange Agreements do not provide for an express exemption of legalization, but it must be noted that they ensure that the information comes directly from the requested foreign Treasury, which circumstance, within the framework of a Bilateral Agreement, is sufficient to consider valid the information thus obtained, without it being necessary to request the apostille or some other consular legalization.

On the other hand, according to the Specific Agreements on Tax Information Exchange – models of the Organization for Economic Cooperation and Development (OECD) and the Inter-American Center of Tax Administrations (CIAT) – the information obtained shall constitute legal evidence when it may have been issued by the competent authority of the State of the requested Party, unless there is proof to the contrary.

2. INFORMATION EXCHANGE MECHANISMS

The reference framework adopted by our country for establishing the information mechanisms is based on guidelines established in the Manual on the Implementation and Practice of the Exchange of Information for Tax Purposes of the Inter-American Center of Tax Administrations (CIAT) and the General and Specific Manuals on Information Exchange of the Organization for Economic Cooperation and Development (OECD).

In general terms, the Manuals consider the following modalities of information exchange, by identifying their thematic and operational contents.

Information exchange on request

The information exchange following request describes a situation wherein a competent authority requests specific information to another competent authority.

The information requested deals with an examination, inquiry or investigation of the tax obligations of a taxpayer during specific tax periods.

Before sending a request, the contracting party must use all means available in its territory for obtaining the information, including attempts at obtaining the information in the other contracting party by means, for example, of the use of Internet, and when practical, by means of commercial data bases or the diplomatic staff located in that country in order to obtain publicly available information.

The competent authority's request must be made in writing.

Nevertheless, in urgent cases and when allowed by the law and applicable procedures, an oral request may be accepted to begin, on the condition that the latter be accompanied by a confirmation in writing.

The request should be as detailed as possible and include all the pertinent facts, so that the competent authority receiving the request may be aware of the needs of the requesting contracting party.

Automatic exchange of information

The automatic exchange implies "massive" transmission of taxpayer information, in a systematic and periodic manner by the source country to the country of residence, in relation to several categories of income, without having been previously requested.

The foreign source information received in magnetic or digital form may be introduced in the receiver's tax data base and be automatically considered in relation to the income declared by the taxpayer.

The automatic exchange may be based on the article on information exchange of the Agreement on Income and Net Worth between the countries or article 4, paragraph 3 of the Model Agreement for the Exchange of Information of the Inter-American Center of Tax Administrations (CIAT).

The article on information exchange of a Double Taxation Agreement or, the article on information exchange of a Mutual Assistance Instrument, constitutes the legal basis for the automatic exchange of information.

Spontaneous exchange of information

The spontaneous exchange of information consists of facilitating information that may be foreseeably relevant for the other contracting party, and which may not have been previously requested.

The efficacy and efficiency of the spontaneous information exchange depends to a great extent on the motivation and initiative of the officials in the country providing it.

There may be various circumstances that may give way to the spontaneous exchange of information:

- When there may be reasons to suspect that there could be a significant loss of taxes in another country.
- When there may be payments made to residents in another country and there may be suspicion that they have not been declared.
- When a person subject to taxation obtains a tax reduction or exemption in a country that could originate an increase in the tax burdens to be encumbered in another country.
- When the commercial agreements between a person subject to taxation in a country and another person subject to taxation in another country are carried out through one or more

countries in such a way that there may be a tax savings in one or both of these countries.
- When a country has reasons to suspect that from the artificial transfers of benefits within the business groups there may be a tax savings.
- When there is the probability that other taxpayers may be using a particular tax avoidance or evasion scheme.

Information exchange for specific activities

The sectorial information exchange consists of the exchange of information that affects in a global and specific manner an economic sector and not taxpayers in particular.

The purpose of such exchange is to ensure some exhaustive and reliable data on world industrial practices and behavioral guidelines, thereby allowing the tax examiners to carry out the examination of the taxpayers of the sector with additional knowledge and greater effectiveness.

The competent authority for undertaking the sectorial exchange of information is inferred from the tax agreements based on the Model Tax Convention of the Organization for Economic Cooperation and Development (OECD) or in other applicable instruments for information exchange.

A sectorial information exchange begins with the exchange of official letters between the competent authorities of the contracting parties of the treaty.

Such exchanges may be either bilateral or multilateral, provided that the countries involved may have available the adequate mechanisms for exchanging information between them.

Simultaneous examination and officials abroad

Within the framework of the conventions or agreements, the countries may opt for carrying out simultaneous examinations and the presence of officials abroad.

Simultaneous examinations

This is the case when two countries agree to examine simultaneously and independently, each one in its territory, a taxpayer with respect to which both Administrations have a common interest for exchanging information.

These examinations are useful with respect to transfer prices and in identifying operations with low taxation jurisdictions. An important practical consideration in these examinations is to bear in mind the existence of different scopes of the regulations governing the statute of limitations of the recovery and assessment of the taxes between the intervening countries.

Each Tax Administration examines in its own territory the tax situation of the individuals on which there is a common or related interest.

Simultaneous Examination is only provided in some Inter-institutional Tax Agreements (Brazil, Chile, Spain and Peru).

Examinations by officials abroad

The examinations abroad or joint tax audits imply the presence of tax officials from one State in examination or inspection tasks carried out by the tax authorities of the other State.

The Administrations must previously determine the conditions and procedures to be followed and abide by the principle of reciprocity**.**

With respect to what has been stated, we may specify that the Agreements on Tax Information Exchange, according to the Model proposed by the Organization for Economic Cooperation and Development (OECD) adopts the specific or on request modality and authorizes tax examinations abroad. (Ex. Agreement N° 28/09 with the Principality of Monaco of 13/10/2009).

The Specific Agreements on Tax Information Exchange, according to the Model of the Inter-American Center of Tax Administrations (CIAT) provide for the application of the mechanisms in all their modalities, including general information on sectors of economic activity, simultaneous examinations, and carrying out examinations abroad (Ex. Agreement N° 2/05 (AFIP) with the Secretariat of Federal Revenues of Brazil; Agreement N° 14/04 (AFIP) with the National Superintendency of Tax Administration of Peru; Agreement N° 7/04 (AFIP) with the State Agency of Tax Administration of the Kingdom of Spain (AEAT); Agreement N° 10/06 (AFIP) with the Internal Revenue Service of Chile).

3. INFORMATION EXCHANGE INSTRUMENTS

Agreements to Avoid International Double Taxation (IDA)

These are agreements entered into in writing, between States or other International Law entities, intended to produce legal effects and governed by International Law regulations.

The most important objectives are to avoid international double taxation, prevent fraud and tax evasion, avoid discrimination, promote information exchange and constitute a tax harmonization instrument.

The provisions included in the IDAs, once ratified and published in the Official Gazette of the Republic of Argentina, become part of the internal legal code – paragraph 22 of article 75 of the National Constitution – and since its provisions can only be repealed, amended or suspended in the manner provided in said instruments, they enjoy primacy over the internal Law because of their specialty.

The IDAs, as rules of International Law must be interpreted in accordance with articles 31 through 33 of the 1969 Vienna Convention on the Law of Treaties, which provides for the general principles of good faith, primacy of the text and consideration of the subject and purpose of the Treaty.

The model Convention of the Organization for Economic Cooperation and Development (OECD), generally in its articles 26 to 29, expressly provides a standard clause on the exchange of tax information.

Intergovernmental Conventions / Agreements on International Information Exchange (INTG)

These are Conventions / Agreements between governments that may be signed by the Federal Administrator in representation of the National Government (Ex. Agreement with the Principality of Monaco N° 28/09 (AFIP) of 13/10/2009)

Inter-institutional Agreements on International Information Exchange (IIA)

These are inter-institutional or administrative agreements exclusively designed for exchanging information aimed at strengthening the administration, verification and compliance with tax obligations and/or combating internal taxes and/or customs duties evasion and/or avoidance. (Ex. Agreement Act N° 10/06 (AFIP) of 24/10/2006)

The Federal Administration of Public Revenues (AFIP) is empowered to sign such agreements by virtue of the provisions of paragraph e) of article 9 of Decree N° 618/97 which authorizes the tax

organization to undertake reciprocal cooperation tasks with foreign entities, within the framework of its functions.

In this respect it is worth mentioning that the Specific Inter-institutional Information Agreements (IIA) signed by the Republic of Argentina are essentially based on the guidelines established in the Model Agreement for Information Exchange of the Inter-American Center of Tax Administrations (CIAT), while the Intergovernmental ones (INTG), signed with the countries of low or null taxation, consider the guidelines of the Model Agreement for Tax Information Exchange proposed by the Organization for Economic Cooperation and Development (OECD).

Main information exchange instruments signed by the Republic of Argentina

Agreements to avoid International Double Taxation

- Germany - Act Nº 22.025 /Act Nº 25.332
- Australia - Act Nº 25.238
- Austria (In force 17/01/1983 through 31/12/2008) - Act Nº 22.589 / External Note Nº 6/2008 AFIP
- Belgium - Act Nº 24.850
- Bolivia - Act Nº 21.870
- Brazil - Act Nº 22.675
- Canada - Act Nº 24.398
- Chile - Act Nº 23.228 and N° 26.232
- Denmark - Act Nº 24.838
- Spain - Act Nº 24.258
- Finland - Act Nº 24.654
- France - Act Nº 22.357 and Nº 26.276
- Italy - Act Nº 22.747 and Nº 25.396
- The Netherlands - Act Nº 24.933
- Norway - Act Nº 25.461
- United Kingdom - Act Nº 24.727
- Russia - Act N° 26.185
- Sweden - Act Nº 24.795
- Switzerland (Provisional enforcement) (Amendment Protocol and Additional Protocol) - 23/4/1997.

Mutual Tax Cooperation and Assistance Agreements

- Agreement with Bermuda - 22/8/2011
- Agreement with Chile – Agreement Act N° 10/06 (AFIP) - 24/10/2006
- Agreement with China - 13/12/2010
- Agreement with Ecuador – Agreement Act N° 3/11 (AFIP) - 22/05/2011
- Agreement with Spain – Agreement Act N° 7/04 (AFIP) - 30/04/2004
- Addendum to Agreement with Spain
- Agreement with Guardia di Finanza - Italy - Memo 4/10 - 15/10/2010
- Agreement with Principality of Monaco - Agreement N° 28/09 - 13/10/2009
- Agreements with Andorra, Bahama (3/12/09), Costa Rica (23/11/09), Guernsey, India, Cayman Islands, Jersey and San Marino (7/12/09). They are currently in the process of concluding procedures required by the respective legislation.

In this respect, it is worth mentioning that during the course of this edition, the Honorable Congress of Argentina has approved the following acts:

- **Act Nº 26.747** – Published in the Official Gazette on 6/7/2012 – Approval of the Agreement for the exchange of information on tax issues between the Republic of Argentina and the Republic of Costa Rica, entered into, in San Jose, Republic of Costa Rica on November 23, 2009.
- **Act Nº 26.748** – Published in the Official Gazette on 6/7/2012 - Approval of the Agreement between the Republic of Argentina and the Commonwealth of the Bahamas for the exchange of tax information, entered into, in Buenos Aires, on December 3, 2009.
- **Act Nº 26.749** – Published in the Official Gazette on 6/7/2012 – Approval of the Agreement for the exchange of information on tax issues between the Republic of Argentina and the Republic of San Marino, entered into, in San Marino, Republic of San Marino, on December 7, 2009.

- **Act Nº 26.750** – Published in the Official Gazette on 6/7/2012 - Approval of the Agreement between the Republic of Argentina and the Government of the Principality of Andorra for the exchange of information on tax issues, entered into, in Andorra La Vella, Principality of Andorra, on October 26, 2009.

Likewise, an Agreement has been signed between the Republic of Argentina and the Oriental Republic of Uruguay for the exchange of tax information and method for avoiding double taxation, which fulfills all the standards of the "Global Forum on Transparency and Exchange of Information for Tax Purposes" of the Organization for Economic Cooperation and Development (OECD). It will enter into force once ratified by the Parliaments of both countries. Also, an agreement on mutual administrative assistance for the prevention, investigation and repression of customs violations was entered into, between the Republic of Argentina and Ucrania (4/24/2012).

Mutual Customs Cooperation and Assistance Agreements

- COMALEP - Protocol of Amendment of the Multilateral Convention - Acts N° 22.663, N° 24.208 and N° 26.642
- Memorandum of Understanding on Mutual Cooperation and Assistance in Customs Issues with Korea - 26/11/10
- Azerbaijan - 22/02/11
- Spain - Act N° 22.057
- Addendum to Agreement with Spain - 7/12/1994
- Addendum with Spain – Exchange of Information through Computerized Means. Agreement Act N° 6/08 (AFIP) - 25/02/2008
- United States - Act N° 24.332
- France - Act N° 26.311
- Hungary - Act N° 25.075
- India - 26/04/2011
- Agreement with Italy (Argentina Act N° 26.069; Italy pending approval) - 21/03/2007
- Mercosur Agreement - RG N° 2389/08 (AFIP) Dec. CMC N° 26/06
- Libya - Agreement Act N° 38/08 (AFIP) - 22/11/08
- Russia - Act N° 25.138
- Protocol with Russia of Information Exchange regarding Goods and Means of Transportation - Protocol 01/10 (AFIP) - 12/10/2010
- Agreement with the Republic of Bolivia on Integrated Border Controls - Act Nº 25.253
- Treaty on Integrated Border Controls with Chile - Act Nº 25.229

Joint Mutual Cooperation and Assistance Agreements

- Agreement with Brazil – Agreement Act Nº 02/05 (AFIP) - 21/4/2005
- Agreement with Peru – Agreement Act Nº 14/04 (AFIP) - 7/10/2004

Social Security Mutual Cooperation and Assistance Agreements

- AFIP – OISS Agreement - Convention Nº 11/05 (AFIP) - 7/7/2005

Tax Commitment Acts

- Russia – Memorandum of Understanding N° 2/10 (AFIP) - 11/10/10
- China - Agreement N° 11/06 (AFIP) - 20/10/2006
- Spain – Agreement Act N° 2/ 2003 (AFIP) - 31/3/2003

Customs Commitment Acts

- Vietnam - November 2010 – Memorandum of Understanding Nº 05/10 (AFIP) - 18/11/2010
- Russia - Memorandum of Understanding Nº 03/10 (AFIP) - 12/10/2010
- United States - Agreement Act Nº 7/06 (AFIP) - 17/7/2006
- United States - Agreement Act s/nº - 17/11/2005
- United States - Agreement Act Nº 3/05 (AFIP) - 9/5/2005

4. CONCLUSIONS

The process of economic globalization, understood as an increasing transactional interdependence between all the countries, caused by the increased flow of goods and services, capitals and speedy dissemination of technology and information have modified the international economic relations models and the problems linked to the maintenance of national fiscal sovereignties.

The main feature of the new scenario, characterized by high mobility and volatility of its economic factors, favors the delocalization of tax bases between different jurisdictions, which circumstance, together with the generalized adoption of the personalistic principle of tax allocation, requires mutual assistance and cooperation between the different Tax Administrations, through the exchange of information as a means for controlling due compliance with tax obligations.

In this regard, by means of different models developed by international organizations, information exchange mechanisms and instruments have been structured for controlling and preventing tax fraud, evasion and avoidance and, subsidiarily, maintaining the inalterability of the internal tax systems and the intangibility of the world tax base, which is being eroded by harmful tax competition.

In particular, the specific exchange instruments are presented as a valid alternative for satisfying the information needs of the Tax Administrations which have adopted the world income criterion, given its characteristics of integrality, flexibility, timeliness and reliability.

In this regard, our country has achieved significant progress in the effective implementation of international tax information exchange by entering into intergovernmental and inter-institutional agreements with other countries and Tax Administrations, within a framework of mutual cooperation and legal transparency, as well as by implementing organizational reforms in the Federal Administration of Public Revenues (AFIP) and in its internal rules for managing and processing such information, as strategic objective for the prevention of tax fraud and evasion resulting from harmful tax practices.

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PROPOSAL FOR THE USE OF A PREDICTIVE MODEL FOR DETERMINING THE RISK PROFILE OF TAXPAYERS

Beatriz Steinberg

SUMMARY

To control the behavior of individuals and enterprises plays a main role in the implementation of policies that are the duty of AFIP.

This work is just a proposal to improve the control process, focusing on optimizing the detection of risk groups. It proposes to add to the AFIP battery of resources, the use of neural networks for the establishment of risk profiles, guiding the process and making more rigorous the classification of taxpayers based on potential non-compliances.

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CONTENT

At present, most countries have been working on the formalization of strategic planning processes of their public administrations in general and particularly of the tax administrations.

A comparative analysis published by the Federal Administration of Public Revenues (AFIP) in January 2007 - Covering Argentina, Chile, Costa Rica, Mexico, Colombia, Nicaragua, Peru, Dominican Republic, Australia, USA, Canada, Venezuela, Ireland, Holland, Brazil, shows that the considered tax administrations mostly develop strategic plans with the tendency to direct the mission of these organizations to provide quality service to taxpayers, ensure the efficient implementation of laws and seek voluntary compliance with tax obligations.

In accordance with this mission surges the trend to set the strategic vision in achieving a quality service to taxpayers and the modernization of organizations relying primarily on the use of new technologies and information systems and a qualified staff. To effectively implement this Vision, the Strategic Objectives focus on the need to optimize the control and fight tax evasion, improving the service provided to the taxpayer, increasing efficiency in managing the organization, the application of new technologies processes and systems, and human resource development.

In the implementation of policies that compete to the AFIP, which rise from the above mentioned strategic objectives, policing the behavior of individuals and enterprises plays an essential role.

The first link in the control process is the research tasks, to analyze cases that are likely to have a significant fiscal interest. The investigations that are of interest are subject to monitoring tasks that may or may not be successful, understood as adjustments made and charged- they point to the taxpayer and the consequent avoidance of disputes, both administrative and judicial-and sanctions that can be applied.

Both research and the different types of existing controls are time-consuming human resources, the choice to initiate and continue some of them implies not to be able to address other options.

In this context it is important to make the process efficient as a whole, and pursue those investigations that will conclude successfully. This problem is not unknown to the AFIP, which invests efforts and resources on the widespread use of computer tools, both in qualifying taxpayers based on their potential risk and in the implementation of management control processes.

1. THE PROPOSAL

This work arises from the detection of a need - which the tax administrations faces when evaluating strategies for the promotion of tax compliance - collects and processes a series of data, and obtains a model for defining and qualifying a particular group of taxpayers - the Large National, according to their risk profile.

The choice of the universe of analysis is based on the smallness of the group - about 0.03% of total taxpayers - and the interest generated in the AFIP for their participation in the collection, more than 48%.

The present proposal is in the context of a working methodology suitable for such developments: CRISP-DM 1.0, hierarchical methodology that provides an overview of the life cycle of a data mining project. [Chapman and others 2000]
Concerns about the feasibility and desirability of the proposal are answered in the following statements:

- The tax administrations have permanent storage for a large volume of data
- There is a high correlation between the reinforcement of the audit tasks and the decrease of tax evasion.
- The perception degree of fiscal behavior of the other taxpayers and the impunity of the big fraudsters are operating as a justification of evasion.
- The characterization of Large National taxpayers as pragmatic compliers - at any time, they decide if they do or do not comply based on a selfish calculation of chance or the result of the equation time spent for complying versus the obtained benefit by complying, for them, a more efficient administration in its oversight task becomes the most effective tool to improve compliance with tax obligations.
- The trend to minimize or avoid the tax burden by taxpayers in the absence of effective control tasks
- The need to identify, as early as possible, related practices, related to, at least, breaches of regulations. [Russo, 2010].
- The AFIP conception of control as a logical and systematic process that requires the development and implementation of processing tools and detailed analysis of individuals, transactions and operations, to identify segments which implement specific actions that lead to increased voluntary compliance and detect and prevent criminal, evasive and elusive maneuvers.

1.1 The innovative nature of the proposal

This paper proposes an innovation process – understood as the application of new ideas to old problems, always looking for significant improvements in efficiency, effectiveness and quality - and the possibility of the use of Information Technology and Communication (ICT) to make possible this process. [Estevez, 2009].

All innovation involves risk, which can be minimized [ANAO, 2009]. In this sense the innovation associated with this work has the following characteristics, all risk-reducing:

a. It is a refinement of an existing process.
b. It does not extend the changes to new areas.
c. It is not a radical change from current practice.
d. It is formulated with clear objectives and precise boundaries.
e. Its implementation does not seem complex once the research stage is over.
f. The application fee does not exist and significant benefits are expected.

1.2 The Information and communication technologies (ICTs)

An analog society is taking place, moving from real objects such as paper to digital ones, where bits are moving through broadband networks and in which information in text, voice and image formats is being unified in the concept of multimedia. According to Juan Hernandez "Talking about Information and Communications Technologies(ICT) for the Tax Administration Service is equivalent to talk about ICT for the facilitation and efficiency in the execution of processes in organizations".

On that basis it is striking that among the technical issues addressed in all CIAT Technical Conference, from 1997 to date, there are paper works related to the ICT

Regarding the linkage between ICT and CIAT tax administrations, today in most of them, the use of information in the fight against tax evasion is no longer discussed. All of them work with different sources of information, whether provided by taxpayers, through legally enforceable claims, or obtained from third parties through agreements, compliance with information conventions, international agreements and integrated information systems- . All are present as essential requirements the quality and security of the information. All prioritize Internet use. Most of them have developed specific IT tools to fight tax evasion.

As in other areas, the introduction of ICT in tax administrations requires placing them to the service of objectives; in this case what is wanted is to identify ways to make more efficient the processes for the management of taxes, to achieve this information technologies must be developed in line with the strategic objectives of the AFIP. This coincidence requires explicit information technology policies, since their absence allows the establishment of implicit policies that, in general, are potentially harmful to the organization, since their foundations are not clear in all cases, they are not documented (or they are but in a very precarious way) and generally responds to the interests of information technology providers, seeking to create a captive market.

Once actions have been taken, it is necessary to measure their impact on the organization, or detect if they have impacted the strategic objectives of the organization or if they were reduced to a mere mechanization, with or without reduction of costs. In the Tax Administrations there are criteria added to the above measurement:

a. The consideration by society in general and taxpayers in particular on the efficiency, transparency and credibility of the administrations
b. The increase of voluntary compliance by taxpayers.
c. The increase in collection.
d. The need to comply with the requirement of publication of accessible services by society.
e The construction of a useful reservoir, from the large volume of data for predictive systems.

Thus an intensive use of ICT should not leave out their use to expand the analytical capacity of tax administrations, transforming data and information processes raw pursuit of knowledge, so as to help improve policy development and decision-making. In this line appears the Data Mining.

1.3 Data Mining

Data Mining can be defined as the exploration and analysis, by automatic or semiautomatic means, of data to discover patterns and rules; the preceding description, using the concept of "discovery" points to patterns and rules that should be hidden until that moment, not known and that it is not necessary to have previous questions or insights to reach them. Similarly Jiawei Han highlights the features that standards and rules should have: be non-trivial, previously unknown, implicit in the data and potentially useful. The emphasis on the notion of discovery

must reconsider the role of verification as part of the taxonomy of data mining.

Tax administrations are among the largest producers, collectors, consumers and disseminators of information in each country. The possession of large amounts of data permanently stored place them in a position to appeal to automatic or semiautomatic procedures on that data to find hidden knowledge to date and interesting hidden patterns, associations, changes, anomalies and significant structures in the data. The great computing power they possess, coupled to said data volume, and enables them to address given data mining processes.

The Data Mining, for what has been said, is then a subsequent process to obtain the data, which looks for generating information similarly to the one,, useful and understandable a human expert would produce, which is, it is a link in a broader knowledge production process and involves the application of algorithms for extracting patterns, using the previously available data, which thus acquire more value.

Because neural networks will be used, some approach to the subject seems appropriate. It is about the adaptation of interconnection of brains neurons with digital computing models. Neural networks are defined by their topology (organization and arrangement of neurons of the network layer), learning mechanism (creation and destruction of connections between neurons as well as changes in their weights trying to minimize the error), the type of association between information input and output (forwards, backwards, recurrent, or any combination of them) and how to represent the data and outputs (values continuous, discrete). They are used for classification problems, estimation, and pattern detection.

1. 4 Segmentation

The formulated problem statement refers to Large National Taxpayers. This implies a previous segmentation, grouping the elements of the universe being studied in homogeneous segments with respect to predefined criteria, which are precisely the determinants of segmentation.

The concept of segmentation in the case of tax administrations generally aims to identify, based on a concept of reliability-defined from the standpoint of taxation, customs and social security, those segments which run, timely, reasonable and affordable different control actions. This is for taxpayers for whom special procedures are defined both in attention and control.

In the CIAT member countries this segmentation process has two levels: while all of them offer the partition of “computer science” from taxpayers to offer a differentiated service according to their size, activity, tax regime, nature of their main income, etc., some take the concept of segmentation to the organization by types of taxpayers, as in Argentina.

The need for segmentation surges in the AFIP on the detection of a small group of taxpayers, with distinct characteristics and a high participation in the collection. The distinct characteristics of this group are:

- Complexity in tax-related operations.
- Propensity to litigate (have advice of professionals from law firms and / or accounting major).
- Rejection of the adjustments identified in inspection stage: involves starting the official process of determination in most inspections.
- Non-acceptance of most of the resolutions and appeals before the National Tax Court Office.

The response of the AFIP is segmentation at various levels.

The structural correlation of the segmentation is the creation of the Central Sub-zone, incorporated into the Organizational Structure of the Internal Revenue Service by Decree No. 1.745/74, which then created the National Taxpayers Directorate

by Resolution 278/87

At the computer level, segmentation acquires influence with the TWO THOUSAND System - Special Differential Control System-which was established in an attempt to minimize tax evasion and tax non-compliance of the most interesting taxpayers and that decentralizes the capture of information in places where it occurs. At the end of 2006 it is absorbed by the 2000 REGIONAL SYSTEM. Finally from July 2008 the system called TAX ACCOUNTS - designed to register and provide information on debts and loans from taxpayers and third parties as well as the means used for their cancellation, is mandatory for the Large National Taxpayers while 2000 REGIONAL remains only for the administration of obligations prior to that time.

At the level of risk analysis, by RG 1974/2005, amended by RG 2166/2006, the computer system "Risk Profile System (SIPER) is approved, in order to categorize taxpayers and / or representatives, previously divided into groups by trading volumes and activity- according to the degree of compliance with their tax formal and / or materials tax obligations, in five (5) categories or segments (A, B, C, D and E), in increasing order indicating the risk of being audited (Category A: low risk of being audited, category E: high risk of being audited). And this system is precisely the starting point for the proposal of this work.

2. DEVELOPMENT

2.1 Basis for Development

It is convenient to explain the critical success factors of the proposed solution both from a business perspective as well as from the process of Data Mining.

Critical success factors of the proposed solution are the maximization of the collection - which should result in a reduction in non-compliance in the National Large Taxpayers segment-, improving the external image of the AFIP - measurable by the number of taxpayers who accept / appreciate the performance and the number of cases in which the assigned risk profile is questioned - the prevention of fraud - which should result in an increasing number of successful audits suggested by the tool and an increase of the recovered amount - and the costs involved in the project - measured in terms of the relationship between resources employed and tax revenue achieved -.

With regard to critical success factors of the process itself, there are the typical measures of efficiency models, the acceptance of the result by experts and display of the results to the community.

The tools to be used are those available from the desktop and, for the discovery of patterns, Weka 3.6.1 (Acronym for Waikato Environment for Knowledge Analysis, produced by the University of Waikato, New Zealand). WEKA is an environment for experimental data analysis that allows applying, analyzing and evaluating relevant techniques of data analysis, mainly those from automatic learning, for any set of user data. It has open source packages -adaptable for any project with potential to be enriched with new algorithms for the users, which include initial technical data preprocessing, as well as classification, clustering, association, and finally displaying of the results.

2.2 Understanding the data

The initial data collection is greatly simplified, due to the high level of computerization of the AFIP, which records in its data base centralized

all the new data of taxpayers and unify them, whenever this is possible, around the Single Tax Identification Code. The initial data to explore are the ones stored quarterly in working files to meet the requirements of the risk profile Measurement System, which bring together, for each taxpayer and in one single registry, all data pertaining to their tax behavior.

The data thus collected are 3547 records with 88 fields per record, including data about the tax behavior of the National Large Taxpayers for the quarter of 2009.

As for the characteristics of variables

- Most of them are of categorical type and indicate the presence or absence of divergence.
- There are discrete numeric variables (number of criminal cases, number of employees) and some continues variables (debt), for the large amount of securities offered, must be treated at the time of using them.
- The existence of out of range values detected in determined variables that must be treated as discrete, creating ranges and grouping in one of them all the uncommon excessively large values.
- There are missing values in all cases for certain attributes, which represent situations that managers have decided not to keep collecting, so they decided to eliminate them
- The dominance of certain values in certain attributes in every category, which leads to the assumption that the variable will have little predictive value
- Redundant attributes are detected, which are eliminated
- The presence of some data that do not apply to the entire universe under study is detected, in which case the calculation of correlations with respect to the class confined to the group to apply throws correlation coefficients not too different from those obtained by working the total universe of Large National, so the issue is not considered a problem.

As to the semantic of the data

- Taxpayers from the selected universe are composed of a 36.48% of individuals and 63.52% of legal persons, of which the majority, 89.3% are corporations.
- In a first approach to data it is possible to detect that the percentage of penalized taxpayers or with detected non-compliance is low and less than the percentage that results from considering the total universe of taxpayers. And the number of trials pending litigation (30%) is high compared to the completed ones in favor of the AFIP, even partially. (5% and 2% respectively).

2.3 Preparation of data

Once the class variable is defined, the preliminary use of the weka tool sheds light on the most significant attributes using a series of selection reviews, thus adding to the use of correlations to delete attributes with very low predictive value.

Missing values for an attribute do not require the construction of special values, on the contrary, the absence of values, when given, far from being a problem concerning an unknown value; it is relevant and marks a real event (e.g. the absence of submitted affidavits when they are not required).

The volume of available records makes working with samples neither necessary nor advisable.

A series of new attributes that group and weight divergences are created, building indices.

Sets of differential data are built in which the prediction attribute is numeric or categorical and in which independent taxes are nominal, using S / N when there are two options and Good / Fair / Poor when working with three options for assigning scores to the divergence.

2.4 Preliminary Modeling.

In a preliminary attempt to create a grouping scheme of taxpayers included in this study using cluster analysis, with the belief that knowledge of available data will increase and that this is a good starting point for all subsequent search for hidden patterns in the data.
This attempt to find a natural grouping between the considered instances according to the similarity that the observed variables show between them is implicit expectation that the grouping sought, when working on attributes that indicate deviations in fiscal performance, resulting in convergence with classification according to the current risk profile and let the "good payers" in a group and the "regular" and "bad" in others.

It is therefore not the result despite the use of the tool in various forms.
It can be assumed that the allocation of categories by the user, by defining fixed and potentially arbitrary cuts in certain scores stop other side of the "frontier" to similar instances, which in a clustering algorithm are left to the same group. In itself the idea of working with score also summarizes those divergences with very low incidence, which a grouping routine does not consider. From the experiences we conclude that cluster analysis cannot generate clusters in solidarity with the categories today defined by the user.

3.5 Neural Networks

The attempt here is to use neural networks for classification of taxpayers in the five categories previously defined by the AFIP. To do this, from an existence of a finite number of classes and assignment to a set of training data, to build a model for each class that can be used for classification of future data

The chosen parameterization, the method of testing during model building and the command used are the followings:

Decay	FALSE	Causes the decrease in the rate of original learning, helping avoid divergences
Autobuild	TRUE	Added and connects the hidden layers of the network.
Hidden Layers	-H a	Defines the number of nodes in the hidden levels of the network, separated by commas. Supports wildcards 'a' = (attribute + classes) / 2, 'i' = attributes, 'or' class = 't' = attribute + classes
LearningRate	-L 0.3	Learning rate or proportion in which the weights are modified
Momentum	0.2-M	Momentum applied to weights during the modification
Nominal Tor Binary Filter	<-B / ~~b~~> <T/F>	Preprocess to instances with a filter. Increases performance if atribut or nominal s and n dat you. It is irrelevant in this case
Normalize Attributes	TRUE	Normalizes the attributes, even nominal, between -1 and 1, to increase performance
Normalize Numeric Class	<-C / ~~b~~> <T/F>	Normalize the class if it is numeric, and only for internal ma, between -1 and 1. It is irrelevant in this case
Reset	TRUE	Allows the process to start automatically re with a lower learning rate if detected divergence.
Seed	-S 0	Used to initialize the random number generator for of the setting of the initial weights of the connectionsbetween nod or s.
Training Time	-N 500	Number of cycles for training.
Validation Set Size	V-0	Percentage of valid set If it is not 0, training continues until the error in the validation set is reduced or training cycles are covered. If 0, the validation set is not used and the training is for the number of indicated cycles
Validation Threshold	-E 20	Used to determine validation. The value indicates how many times within an instance, the error must be reduced for ending the training.

Test Options	Cross Validation 10 Folds	

Java weka. classifiers.functions.MultilayerPerceptron -t-totalweka -L 0.3-M 0.2-N 500-V 0-S 0-E 20-H a-G-R-d modeleclasify.out

The resulting model, with 21 nodes, has a low error level and high level of coverage, as shown in Table 1 which also discriminates both concepts for each class.

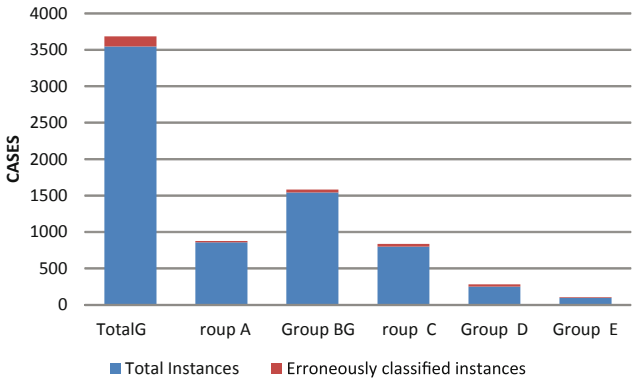
Table 1

Proportion of error in the model

CASES	COVERAGE		ACCURACY	
A: 857	0,989	848/857	0,977	20/868
B: 1543	0,985	1520/1543	0,975	39/1559
C: 799	0,939	750/799	0,955	3 9/789
D: 251	0,849	213/251	0,869	3 2/2 4 5
E: 97	0,804	78/97	0,907	8/86
Total: 3547	0.97		0.961	

Graphic 1

Proportion of error in the model.



3. EVALUATION

The evaluation is an inevitable stage in a Data Mining project and is subject to certain conditions as determined by the type of model (descriptive or predictive), the business to which the model is applied, the initial objectives and the intention of the model recipient. It does not only deals with technical issues, but with the business and can expose issues such as pattern matching not important to the business, poverty in terms of the knowledge generated, "over learning" or need to enrich the basic data in terms of size of records or attributes.

In this case, since it tries to achieve a correct classification of taxpayers based on their compliance, precision is crucial; so for this the metric chosen to test the behavior of the model is determining the percentage of misclassified tuples and it is applied to a new data set, 1362 relative records on the first quarter of 2010, which is performed on the same preparation as the one aforementioned.

It is also important to note that at the time of evaluation it must be established if all misclassification have equal weight or if it is more serious to evaluate as safe in terms of tax compliance a really risky taxpayer than to consider as high risk a taxpayer who is not.

The evaluation result is almost 70% correct (916 cases for 1362)

The first issue to be analyzed in order to understand the errors of the model is to compare the incidence of categories proposed by the model with the real incidence of those categories.

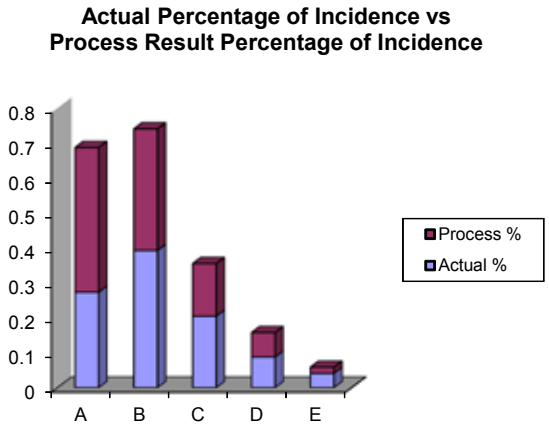
Table No. 2

Incidence of each category after the application of the model

CATEGORY	REAL IMPACT	AWARD
A	0.27312775	0.41409692
B	0.3928047	0.34801762
C	0.20484581	0.15051395
D	0.08810573	0.06975037
E	0.04111601	0.01762115

Graphic No. 2

The actual impact of each category in the evaluation



The model seems to be "generous" in determining the potential level of non-compliant taxpayers, which may be explained by the presence of deviations with little support, that the classification algorithm does not consider. The tool to better place taxpayers in a category better than the one assigned by users, increases the share of category A in the universe, bringing it from 27% to 41% and decreases the participation of category E, moving it from 4% to 2%.

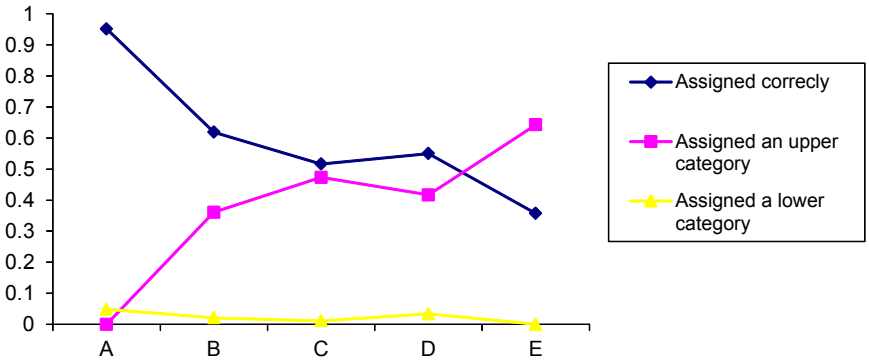
It is necessary then to evaluate for each category the percentages in which the model is correct and those where it is wrong, discriminating whether the error is in the sense of providing a lower risk to the taxpayers (qualifies better) or providing them with increased risk (qualifies worst).

Table No. 3

Details of the categorization of instances in the Assessment

	Hit	BEST RATE	WORST RATE
A	0.9516129	0	0.0483871
B	0.61869159	0.36074766	0.02056075
C	0.51612903	0.47311828	0.01075269
D	0.55	0.41666667	0.03333333
E	0.35714286	0.64285714	0

Graphic No. 3
Successes and failures in the evaluation



Again we can see that the errors have more to do with the location in a category better than assigned by the users, than with a worst location, in this last case the error is less significant since it only occurs in 4% of cases of category A, 2% of cases in category B, 1% of cases in category C and 3% of cases in category D, and in total, the error is less than 3% considered for the universe used in the model evaluation.

It is evident that the model would improve its accuracy if fictitious cases were generated in the presence of deviations of poor support.

4. CONCLUSIONS

The optimization of the control tasks in the tax administrations is essential. While the medium-term objective is to increase voluntary compliance with the obligations, in the short term it is essential to increase the level of compliance; in that context control is a key part, and its optimization is an essential need.

Tax administrations are bound to their achievement, it is possible and comes on the heels of a change of culture that seeks not to increase the number of inspections or enforcement actions, but direct them to qualitatively better results with less consumption of resources, this is based on a series of pillars, between which we can mention the taxpayer segmentation, application of differential measures for these segments, the emergence of specialized areas for their attention, policies for early detection of fraud, the analysis of the political and economic context in which taxpayers are evolving and the impact of economic globalization, the contributions of fiscal sociology, the construction of risk profiles using in a centralized and integrated approach all the information available, and organizational changes.

Risk control is at the center of the new orientation of the control tasks, rather than ex post management it aims to optimize the detection of risk groups.

This raises the need for automated tools that can contribute to the establishment of risk profiles of different groups. For viable innovations using ICT is essential, since, given the volumes of information to process and the geographic areas to cover, it could not be conceived without their use. In this line the growing presence of ICTs in the administrations of the countries included in the CIAT fits, and the reorientation of their use, which evolved from a simple calculation assistant to become a facilitator of cultural change, which places them in the dominant mechanics of communication in the society, facilitates exchanges with other national and international organizations and enable them to facilitate their tasks with taxpayers.

In that context, this paper focuses on the construction of models for the description and classification according to risk of default of Large National Taxpayers, the group of most interest to the AFIP and the search for rules that explain both maintenance and the variation of the pre-sorting.

In particular, it implements neural networks on data in the AFIP about the deviations recorded by the Large National Taxpayers for three periods of 2009.

On the other hand, we proceed to define an experimental environment to validate the results, in order to evaluate the effectiveness and success of the proposed solution. To do this, performance measurement of the degree of precision are used, which is measured as the percentage of misclassified tuples.

Tests using the proposed model to demonstrate that it is possible to apply classification algorithms and have a taxpayer risk prediction model of interest for tax administrations, the degree of confidence found in this work is 70% and is superior to that obtained with other data mining tools, for obtaining rules through trees classifying future taxpayers in 5 categories according to their deviations shows only 61% of matches.

In the future, data collection with more time coverage may provide time series in the search for sequential patterns, the completion of innovative data source by creating test cases covering the entire universe of divergences can increase the precision of predictive models, and work on partnership between divergences can guide research, through the appearing of some

of them, from the presence of others who appear with the first.

In summary,

It is possible to optimize the inspection process using innovative criteria, without major risks, with the help of ICT, providing the tax administrations of useful models for determining risk profiles.

The importance for government to have these types of models is manifold: they make effective and useful use of the large volumes of data, enable universal access to centralized information, guarantee transparency, quality and safety and equal treatment to the same behavior and improve the image that taxpayers have of them.

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