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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 Board formed by CIAT officials (The Executive Secretary, the Director of Tax Studies and Research, the Training & Development of Human Talent Directorate and Heads of the Spanish) is responsible for determining the topics and select the articles for each edition of the Review.

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

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Author's Responsibility

The opinions expressed by the authors do not represent those of the institutions for whom they work or those of the CIAT Executive Secretariat.

CIAT/AEAT/IEF
Tax Administration Review

Content

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Message from the Executive Secretary

Dear Readers

Márcio Ferreira Verdi

I feel grateful for the great reception given to the call to submit articles for this 40th edition of our IAT/AEAT/IEF Tax Administration Review, published within the framework of the Technical Cooperation Agreement that CIAT maintains with the Ministry of Finance, the Institute for Fiscal Studies (IEF) and the State Agency for Tax Administration (AEAT) of Spain.

This Review presents (8) articles on topics of particular interest and relevance to the tax administrations such as: The Informative Statement of Assets, its feasibility in Cuba; The tax burden in Brazil: to be resized and redesigned; the new legal regime for online gaming and betting in Portugal: regulation model and global framework; Litigation vis-a-vis the tax assessment. Repression of the illegal action and the subsequent procedural actions: the Argentine experience; Remission of interest and fines as a tool for tax debt recovery: the case of Chile; Brazilian perspectives on secret, cooperation and international tax competition; The limitation of interest expense deductibility in corporate taxation: the Spanish experience

Finally, we include an article about combining data and technology with analysis, strategy, operational planning, education and improved enforcement activities to promote tax compliance

Congratulations to the selected authors, as well as to those who sent their contributions, for the effort and dedication that the preparation and development of these studies requires.

I reiterate our commitment to disseminate information of interest that contribute to stimulate the transfer of knowledge, the transformation of information into learning, and this in turn into a useful resource for the international tax community.

With my most cordial greeting.

Márcio Ferreira Verdi
Executive Secretary

THE TAX BURDEN IN BRAZIL: TO BE RESIZED AND REDESIGNED

José Roberto Afonso and Kleber Pacheco de Castro

SYNOPSIS

The overall tax burden of Brazil has been counted as the highest in the world, especially among emerging economies. Its trajectory and its current level were substantially reduced after changed the national accounts methodology, which resulted in substantial elevation of the amounts of gross domestic product in current values. The purpose of this article is to revisit the evolution and composition of the tax burden in the country, including with re-reading of its new indicators. The historical trend of increasing the burden but with a less sharp curve and a level lower than observed with the previous national accounts was obtained. The structure of the collection remained marked by poor quality, with regressive and inefficient taxes

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Content

A recurring political debate in Brazil is related to the size of the State in the economy. This discussion have gained strength with the Constitution of 1988 – the starting point for the effective establishment of a welfare State in Brazil – and it has intensified in recent years, due to the fiscal imbalance experienced by the public sector. It faces, on the one hand, high demand for social policies and for investments in infrastructure, and on the other hand a tax burden which seems to be close to the bearable limit for national economy.

The vicious circle between "spending increase" and "increasing collection" that Brazil has experienced over the past 25 years seems to have reached its maximum point, what imposes on Brazilian rulers challenges never observed in the recent history of the country. Today, there is a clear need to revise rules of social benefits and to discuss again the binding between revenue and compulsory expenditure, otherwise the debt expansion would continue and/or this would force (unsustainable) tax increases.

These measures, of course, do not prevent a larger reform of the Brazilian State as a whole. Varsano et ali (1998) warned on this point: "Among other tasks, we have to redefine the roles of the State and its distribution among the three levels of Government, carry out administrative reform, promote tax reform and social security, improve the administration of public finances and restructure the productive sector. The reforms must not be restricted to the Executive, but also applicable to the other powers, improving the political process and by bringing more agility to justice "(Varsano et ali, 1998, p. 1).

While most of these reforms would purpose to reduce and improve the management/resource allocation, tax reform alone could contribute to the improvement of tax policy by the side of the revenue – and that is why the topic is relevant to the current political, economic and social agenda of the country.

Thus, a review of the tax burden in various aspects is an important topic. The conclusions of a keen analysis of the global tax burden of Brazil, certainly, are good indicators of possible tax reform proposals.

The most common way to evaluate the performance of the tax revenue of a country is to investigate and analyze the tax burden indicator, which expresses the ratio between the collection and the gross domestic product (GDP). Despite the relative simplicity of the concept, methodological differences in the calculation of what should or should not be counted as "revenue" can provide different results of the indicator for the same location in the same period.

The concept of tax burden as used in this article can be considered as "broad methodology", by departing from the basic premise that everything that the State remove compulsorily from economy, based on any legislation, no matter the legal conception of the tax type (tax, contribution, rate etc.). As highlighted by Afonso Soares and Castro (2013), this idea is adapted from the concept of Governmental taken, common to literature on oil and gas.

This article aims to give an overview of the Brazilian tax burden. Without getting into specifics of the national tax system, the work is divided

into four sections: the first section presents the methodology for calculating the burden. The second section presents the historical evolution of taxes in Brazil; details the tax burden – with the description of key features – from the last consolidated data (2014) are presented in the third section; and finally, the fourth section deals with the international comparisons related to the indicator that is the article's main topic.

1 METHODOLOGY

As is widely known, the tax burden is a simple relationship between all tax revenue of a given location in a given period and their production (GDP) in the same period. All data used in the calculation of this relationship in our methodological proposal have official publications as primary sources.

The Brazilian GDP is the variable easiest to access for official data: the calculation is carried out by IBGE (Brazilian Institute of geography and statistics), published quarterly and annually in the framework of national accounts (SNA 2010)[1]. The latest annual data available is for 2014 and the quarterly is the third quarter of 2015 – that helps to define the timeframe with which this article will work.

The information relating to taxation (collection) are a little more difficult to obtain and handle. Two federal institutions provide reliable data on central government tax collection: National Treasury Secretariat (STN) and Internal Revenue Service of Brazil (RFB). The difference between the information these sources relate to the methodology.

The information from RFB is administrative, providing the gross revenue (without discounting refunds and compensations), it indicates how much was collected from the taxpayer in a given period (even if the resource just get in the box in the following period), and not always accurate (e.g. judicial deposits). Another limiting factor in RFB is the fact that only the central government data are published. Other spheres of Government does not have their revenue data by institution regularly disclosed. STN data is responsible for the accountancy of the Union and for the consolidation of the balance sheets of all units of Government (i.e., presents statistics of the three spheres of Government), so that the figures are listed when rendering accounts. In this case, the revenue is cash and include all what actually went into the coffers of governments.

By presenting a more complete information and which is based on accounting balances (as recommended internationally), the STN was chosen as a primary source for obtaining tax collection data. More specifically, three publications of this institution are the basis of this calculation of tax burden: General balance (BGU)[2], Budget Execution and States finances of municipalities (Finbra)[3].

In addition to the data of the STN, two other are data necessary for calculating the tax burden: Guarantee fund for time served (FGTS), obtained from Caixa Economica Federal (CEF)[4]

1. Available at: http://goo.gl/qYXFUm .
2. BGU data can be obtained on the website of STN so disaggregated by type of revenue: revenue, revenue from tax, contributions, assets and revenues other revenues (https://goo.gl/azBCmj).
3. The budget execution data and Finbra States can be obtained on the same page: https://goo.gl/0Pg45W .

and the so-called S system (employers' entities of professional training and social assistance), and obtained by calculation of the tax burden by RFB[5].

For the purposes of this study, are considered taxes, for the purpose of calculating the tax burden within the "broad methodology", revenues compulsorily obtained (taxes, social contributions, economic contributions and fees) for the current period and previous period (fines, interest and charges), totaling the product of each taxation. This scope is a little larger than the official calculation adopted by the RFB, because it does not compute royalties and special participations on the extraction of oil, minerals and electricity as taxes. It neither includes penalties and interest on arrears of debt and with the rate of the compulsory vehicle insurance (DPAVT) – all counted in the calculation of tax burden presented in this article.

This methodological distinction is reflected directly on the size of the tax burden in each case: in 2014, taxes, calculated by the broad method adopted in this article, was 33.32% of GDP, while the same account for the RFB was 32.49% of GDP. That difference, of 0.83% of GDP between the two methodologies, has been higher, reaching almost 1% in the previous year (2013) – a change explained by sharp drop of oil royalties in 2014. Even in comparison with the official data on the tax burden – produced by IBGE – the broad method presents more impressive numbers: in 2013 (last tax burden calculated data by IBGE), the tax burden calculated using the method this article was 33.71% of GDP, while for the IBGE[6] it reached 33.62% of GDP[7].

Since not all the information used for this methodology are available in a historical perspective, the taxation data presented until 1996 were extracted from Varsano et ali (1998). Updates of the subsequent years follow the methodological scheme proposed here.

2. HISTORICAL EVOLUTION OF TAX BURDEN

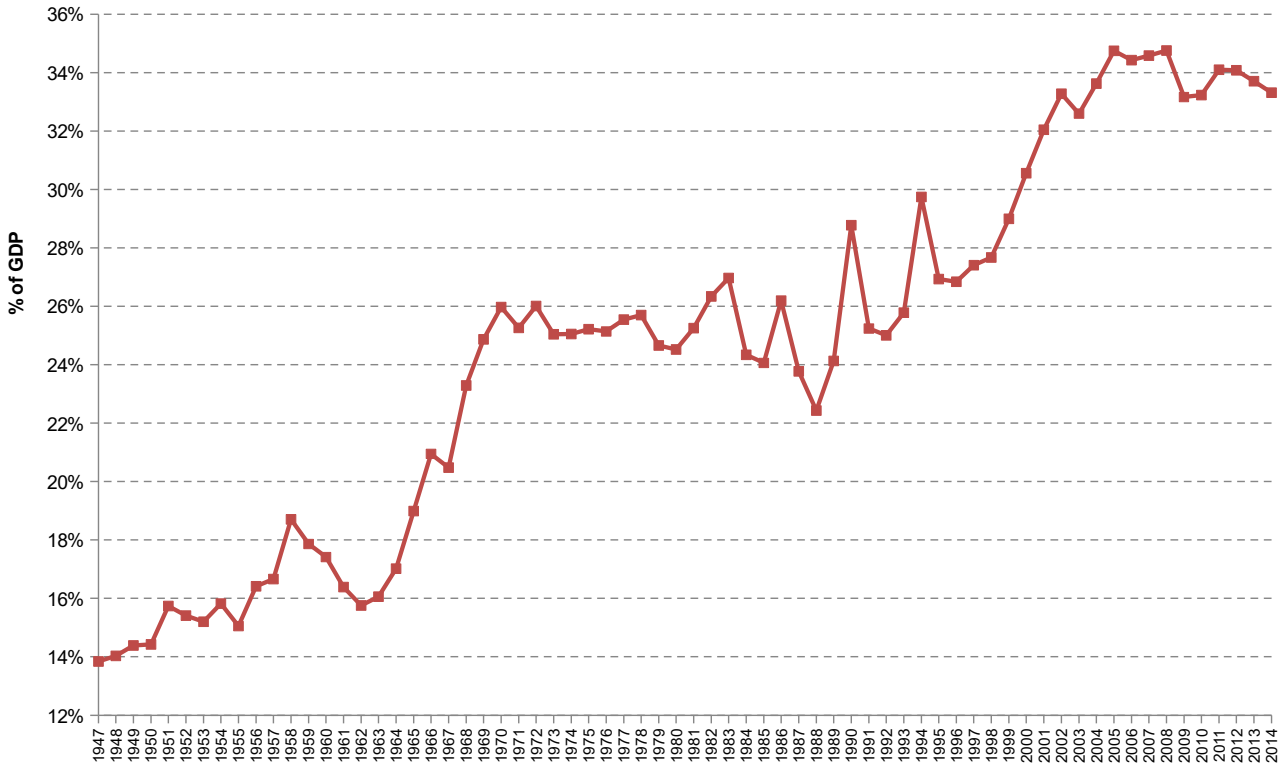
The national tax system underwent several changes over time, which are still ongoing. Although some tax reforms that have occurred during the 20th century have been more emblematic, such as the National Tax Code (1966), in fact the current tax system is the result of a continuous process, in which taxes were "improved slowly over time." The slowness [...] reflects the strong resistance of society and the state itself to change, it is not by chance that it take a long time between the first demands for reforms and their implementation", (Varsano, 1997, p. 17).

Even if the purpose of this section shall not be exactly analyze the evolution of the tax system over time, this point is important because it reflects directly on the result of the tax burden. That is, the tax burden shouldered by the Brazilian economy derives directly from the social

4. Available at: http://goo.gl/V4iWV5 .
5. Available at: http://goo.gl/QqAPOb .
6. Available at: http://goo.gl/5axCCT .
7. The data of the RFB and IBGE were recalculated by the authors on the basis of the revised series of GDP to maintain comparability with data from the method.

choices at each moment in time. The changes are sensitive. In the early 20th century, with the role of the State being relatively small, most of the country's tax collection came from taxes on foreign trade, resulting in a tax burden very small. Currently, with a wide network of social protection and the constant need to balance the budget, the tax burden is significantly high, counting on taxes of all types. No wonder that the long-term trend of the overall tax burden in Brazil is growing, as can be seen in graph 1.

Graph 1
GrossTax burden in the post-war period: 1947 a 2014



Compilation by author. Primary sources: Varsano and ali (1998), STN, CEF, RFB and IBGE

Graph 1 presents post-World War II period (1947) onwards. Precisely from this period until the mid-1970, the world's capitalist economy entered the *Golden Age* (golden age) of capitalism and characterized by the significant increase of the State's participation in the economy. This was due to the adoption of Keynesian policies, as well as the growth of the conception of the *Welfare State* (Social Welfare State). In this way, with the expansion of the role of the State to the level of social protector and producer, a greater volume of resources (funding) flowed from the economy to the State as a way to pay for the new programs. The increase in the overall tax burden, as well as the increase in the public debt, was a nearly universal characteristic within the Group of capitalist countries.

In Brazil, it was no different. In 1947, the national tax burden was 13.84% of GDP. This result,

compared to that of 1978, when the burden has reached a level of 25.70% of GDP, reveals a growing taxation of almost 100% over the period (31 years). The early 1960 to early 1970 – a period of 10 years-is the stage at which the Brazilian tax burden suffers intense acceleration: in 1962, the burden had varied little with respect to 1947, staying at 15.76% of GDP. However, already in 1972 it reached 26.01% of GDP, which represents a relative increase of just over 65% in the period (10.26% of GDP). The increase of taxation during this period coincides in part with the "economic miracle" (1968/1972)-period of greater economic growth in the history of Brazil – which might explain in part the increased taxation.

Throughout the decade of 1970, the taxation in the country has remained more or less constant, showing a few fluctuations. From the late 1980, coinciding with the global and national economic crisis ("lost decade"), the tax burden has become more volatile, but maintaining the characteristic of long-term growth.

In late 1990, especially after the implementation of the Real plan (1994), with the end of hyperinflation and the return to macroeconomic stability, the tax burden appeared similar to the late 1960, showing steady growth, year after year. In 1999, the last year of the decade, taxation approaches the mark of 30% of GDP. This trend is maintained – with lesser intensity-for the next few years, with the overtaking of the 30% of GDP and nearing the peak of 34.76% of GDP in 2008. Comparing the early series (1947) with the final (2014), an impressive increase of 19.5 points of GDP in Brazil's overall tax burden is obtained.

An interesting comparison of the two phases of greater burden increase in Brazil (decade of 1960 and the 1990/2000) can be seen in Afonso and Meirelles (2006): "[...] in the past, the tax revenue showed high elasticity in relation to gross domestic product, i.e., the tax burden increased when the economy was growing, especially during high rates of expansion. At the turn of the century, the tax burden has grown, and importantly, while the economy slowed down and began to introduce annual fees reduced, in relation to those for obtained in the postwar period "(Alfonso and Meirelles, 2006, p. 67).

In general, it is interesting to note that the size of the tax burden has a direct relation to the size of public spending. Periods of strong expansion of the tax indicator coincide with periods of acceleration of expenses. Other factors also are singled out to explain the dynamics of the tax burden, such as partisan fragmentation of the Chamber of Deputies (Charles and Adam, 2008).

3 CHARACTERISTICS OF THE BRAZILIAN TAX BURDEN

In 2014, the gross global tax burden reached 33.32 percent mark of GDP – only the ninth highest taxation year of the country. The greatest tax burden in Brazil records were obtained in 2008 (34.76% of GDP) and 2005 (34.75% of GDP). Such level of revenues represented a monetary volume of R$ 1,895 billion. In per capita terms, the taxation of that year represented a burden of 9345 R$ for each Brazilian. On average, each resident of the country had to work approximately 122 days a year (365 days), just to pay the tax imposed by the public sector. Table 1 presents data from the 2014 burden by categories (sources of income).

Table 1
Global tax burden by tax base: 2014

Taxable base	R$ billion	% GDP	% Total	Per cápita (R$)
GDP	5,687.3			
Population	202,768,562			
TOTAL	**1,894.9**	**33.32**	**100.0**	**9,345.1**
Goods and services	781.4	13.74	41.2	3,853.5
Salaries and labor	505.7	8.89	26.7	2,494.1
Income, profits and earnings	393.6	6.92	20.8	1,940.9
Assets	71.7	1.26	3.8	353.4
Foreign Trade	36.8	0.65	1.9	181.3
Fees	31.3	0.55	1.7	154.3
Financial transactions	29.7	0.52	1.6	146.7
Others	44.8	0.79	2.4	220.9

Source: by author (Balance Oficial de la Unión, STN; Balance de los Estados, STN; Finbra, STN; SRF)
Taxes calculated by category
- Goods and service: IPI and ICMS (Valor Agregado); COFINS, PIS-PASEP, Contrib.Económicas (incluyendo CIDE), ISS (Acumulativas), Contribution for PIN, Especial Control seal, free zones stores and Royalties
- Salaries: Social Security Contribution (INSS), Sistem S and salary-education; FGTS; Contribution agents (3 niveles), Contr.Rel for abusive firing of employee, Contr. on Remuneration due to worker.
- Income = IR, CSLL, IR withheld at source by sttes and municipalities, Contributions to Federal Lottery, Bingo Contributions and contributions for improvement
- Assets = ITR; IPVA e ITCD; IPTU e ITBI.
- External Trade = taxes on exportation and importation.
- Fees = 3 levels of government (including contribution municipal for public lighting)
- Financial transactions = IOF and CPMF.
- Othe taxes = other taxes include revenues from outstanding debts, fines and interests

One of the aspects that draws most attention on the Brazilian tax burden is its concentration in few tax bases. Indeed, only three bases ("goods and services", "wages and labor" and "income, profits and gains") accounted for 88.7% of all taxation in 2014.

Worse than the concentration in a few (but different) bases is the fact that the indirect taxes ("goods and services", "trade", "rates" and "financial transactions"), accounted for almost half of the tax burden in 2014. This means that approximately 15.46% of GDP have been taken from the national economy with only the indirect taxes. In practice, each resident paid, on average, R$ 4336 of taxes in 2014 just to consume goods and services.

This is a negative characteristic for the socio-economic environment of Brazil, by making the system rather unfair, favoring inequality. As the indirect tax focuses, in General, on the value of goods and services, the tax paid is the same for all agents who acquire goods and services. The predominant understanding in literature on taxation is, admitting the existence of a bad distribution of income in which some agents are less wealthy than others, the tax weight on the goods or services purchased, usually, is relatively higher to some agents (lower income) than to other agents (higher income). This kind of tax is the economic literature called "regressive tax", precisely because it places the burden, in relation to income, more on the poor and less on the rich (especially because low-income consumers tend to have a marginal propensity to consume more than the higher income).

In the work that makes a review of studies on distributive impacts of consumption taxes in countries of the Organization for Economic Cooperation and Development (OECD), Warren (2008) is categorical in saying: "The discussion in this paper has clearly indicated that consumption taxes have a regressive impact on the distribution of household annual income" (Warren, 2008, p. 57).[8]

8. This dominant reading of regressive taxation is disputed by some. They claim that some indirect taxes could be phased in, case of selective (about automobiles, fuels); a general VAT tax would only be clearly regressive only when really focuses on the consumer (which is not always true). In addition if the propensity to consumption of the poor is greater than that of richer (which, again, may not always be true), outside the VAT life cycle it could fail to be regressive because , in old age, the non-poor tend to consume more than the current income.

Notably, due to the weight of the indirect taxes on Brazilian tax burden, national taxation shows an important regressive degree. The more advanced tax systems are not based predominantly in indirect taxes but rather on direct taxes, although there is currently a growing proportion of indirect taxes in total taxation in these countries, including with increased tax rates in many countries, such as, for example, in Japan (Keen et ali, 2011). There is an old debate if even direct taxes levied on companies, as in the case of income tax on profits, not end up being transferred to the prices in the same way as indirect taxes.

Independently of the duality of the effects of indirect taxes in an economy, the Brazilian tax system maintains some peculiar (negative) characteristics: the burden on exports and productive investments; the pro-importation bias; the frightening complexity; the higher *compliance cost* in the world; the uneven impact on taxpayers; the regressive taxation (already cited); the cumulative; and other distortions. In this case, the biggest challenge of a tax reform in Brazil would not necessarily to reduce the amount of indirect taxes, but to restructure the collection in order to cause less side effects on the economy.

Revenue from the tax on income reinforces the thesis prepared previously about the regressive character of the national tax system. With a contribution of less than 1/5 (one-fifth) of the total, this taxation if shows very little participation in a system that aims to be fair. When added to another category of direct impact ("Wealth", with 1.22% of GDP), the percentage of participation in the total collection comes to 22.2%, which could be taken as the total contribution of direct taxation in Brazil. Once again, the types of taxes that would be fair from the distributive point of view have a secondary role in the Brazilian tax system, increasing its distortions. Such taxes tend to be much more representative in most advanced economies.

A second way to analyze the tax burden is from the sphere of government. That is, how much each federal entity collects in taxes, before the constitutional transfers. Table 2 shows this repartition.

Table 2
Global Tax Burden by Government Level: 2014

Government Level	R$ Billions	% GDP	% Total	Per capita (R$)
GDP	5,687.3			
POPULATION	202,768,562			
TOTAL	**1,894.9**	**33.32**	**100.0**	**9,345.1**
UNION	**1262.5**	**22.20**	**66.6**	**6,226.2**
Taxes	393.7	6.92	20.8	1,941.7
Social contributions	365.5	6.43	19.3	1,802.5
Social security	312.8	5.50	16.5	1,542.7
FGTS	104.7	1.84	5.5	516.6
Other	85.7	1.51	4.5	422.8
States	**503.9**	**8.86**	**26.6**	**2,485.0**
ICMS	381.2	6.70	20.1	1,880.2
IPVA	31.3	0.55	1.7	154.2
Others	91.4	1.61	4.8	450.5
Municipalities	**128.5**	**2.26**	**6.8**	**633.9**
ISS	49.8	0.88	2.6	245.6
IPTU	25.0	0.44	1.3	123.5
Others	53.7	0.94	2.8	264.8

Source: Own elaboration (Official balance of the Union, STN; accounts from the states, STN; Finbra, STN; SRF)

Tax collection in Brazil (read, autonomy and capacity to raise tax revenue) can still be considered rather centralized, despite the decentralization process promoted by the Constitution of 1988. In 2014, more than two-thirds (2/3) of the tax burden was generated by the central Government (22.2% of GDP), which collects more contributions than taxes - approximately 66% of– tax collection of the Union in 2014 are deriving from contributions. The remainder of the burden (approximately one-third (1/3) of revenues) is delegated to sub-national Governments

The states, even if they charge the highest tax collected in the country (ICMS), obtained an income well less than the Union: just under 9% of GDP or approximately R$ 504 billion. The municipalities also had a collection far below, only 2.26% of GDP (almost R$ 129 billion).

The weak fiscal decentralization in direct collection is partially reversed when analyzing the share of income available for each government level — that is, government revenues after constitutional transfers between governments. In this case, it is possible to notice a more effective participation of States and, in particular, municipalities. Together, the sub-national governments held almost 45% of the taxes available in 2014, as shown in table 3.

Table 3
Tax Revenue Available by Government Level: 2014

Available income	R$ Mil Millones	% PIB	% Total	Per cápita (R$)
GDP	5,687.3			
POPULATION	202,768,562			
AVAILABLE REVENUE	**1,894.9**	**33.32**	**100.0**	**9,345.1**
UNION	**1,054.2**	**18.54**	**55.6**	**5,199.0**
STATES	**475.1**	**8.35**	**25.1**	**2,343.0**
MUNICIPALITIES	**365.6**	**6.43**	**19.3**	**1,803.1**
Constitutional transfers				
Union towards states	**106.5**	**1.87**	**5.6**	**525.0**
FPE	58.1	1.02	3.1	286.5
FPEx	3.9	0.07	0.2	19.2
IOF ORO	0.0	0.00	0.0	0.0
SEGURO REC. ICMS	1.2	0.02	0.1	5.8
FUNDEB	16.5	0.29	0.9	81.2
SAL.EDUCACIÓN	12.2	0.21	0.6	60.1
FEX 1/	1.5	0.03	0.1	7.2
CIDE	0.1	0.00	0.0	0.4
ROYALTIES AND SHARES	13.1	0.23	0.7	64.7
Union towards municipalities	**101.8**	**1.79**	**5.4**	**502.2**
FPM	64.2	1.13	3.4	316.4
ITR	0.7	0.01	0.0	3.4
IOF ORO	0.0	0.00	0.0	0.0
SEGURO REC. ICMS	0.4	0.01	0.0	1.9
FUNDEB	25.7	0.45	1.4	126.5
FEX 1/	0.5	0.01	0.0	2.4
CIDE	0.0	0.00	0.0	0.1
AFM	1.5	0.03	0.1	7.4
ROYALTIES AND SHARES	8.9	0.16	0.5	44.0
States towards municipalities	**135.3**	**2.38**	**7.1**	**667.0**
ICMS	74.3	1.31	3.9	366.4
IPVA	15.6	0.27	0.8	77.1
FPEX	1.0	0.02	0.1	4.8
FUNDEB	44.4	0.78	2.3	218.7

Fuente: Elaboración Propia (STN, ANP y ANEEL).
1/ Fondo destinado al fomento de las exportaciones (hasta 2004, era considerado como parte de la Ley Kandir)

Inter-governmental transfers such as FPE, FPM and Fundeb promote a redistribution of resources towards local governments, decreasing the degree of centralization of resources.

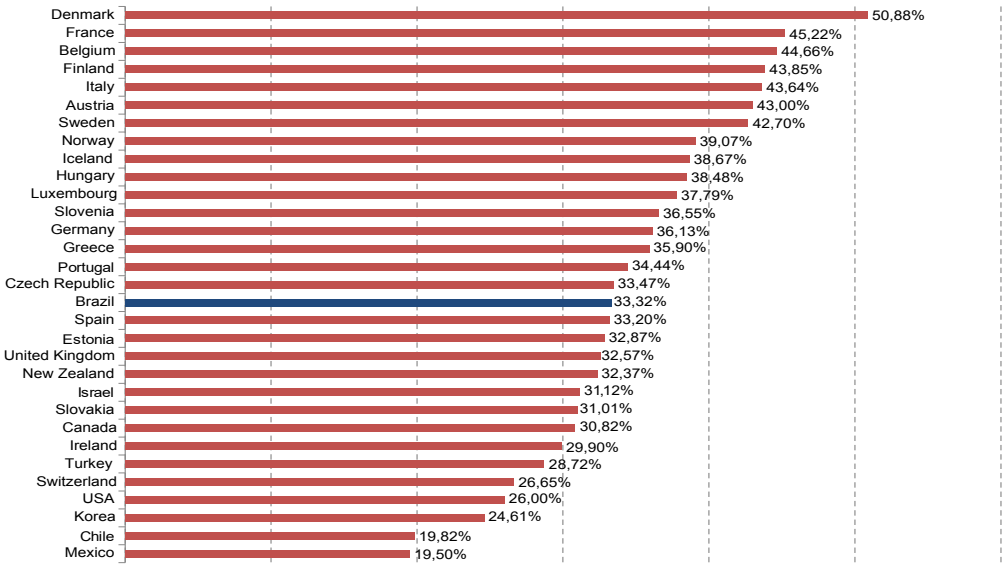
However, it should be noted that only the municipalities have presented net gains of resources after transfers: in 2014, local Governments had a budget of approximately 6.5% of GDP, while they only collected 2.3% of GDP. Interestingly, States lose resources with transfers. This is explained by the fact that what this entity transfers to municipalities (mainly via a Quota, part of the ICMS) is not compensated for what they receive from the Union. Because of this curious behavior, some researchers have called the Brazilian federalism "municipalism", because the redistribution of resources is effective in this level of government.

4 INTERNATIONAL COMPARISONS

The size of the tax burden imposed on the Brazilian economy and society is the subject of frequent debates. In recent years, the discussions were no longer limited to the size itself, but if the tax burden is adequate to the socio-economic profile of the country. Most experts in public finance in the country considers the current tax burden incompatible with the level of development of Brazil. One way to try to answer these questions is through international comparisons.

From this comparative exercise, we can verify that the Brazilian tax burden is at a level very similar to most developed countries, especially those of the European continent, where the volume of government spending with social protection programs (within the scope of the *Welfare State*) is very high. The chart 2, drawn from OECD (2015), makes an international comparison of tax burden between OECD member countries and Brazil in 2014.

Graph 2
Tax burden of Brazil and OECD countries- 2014

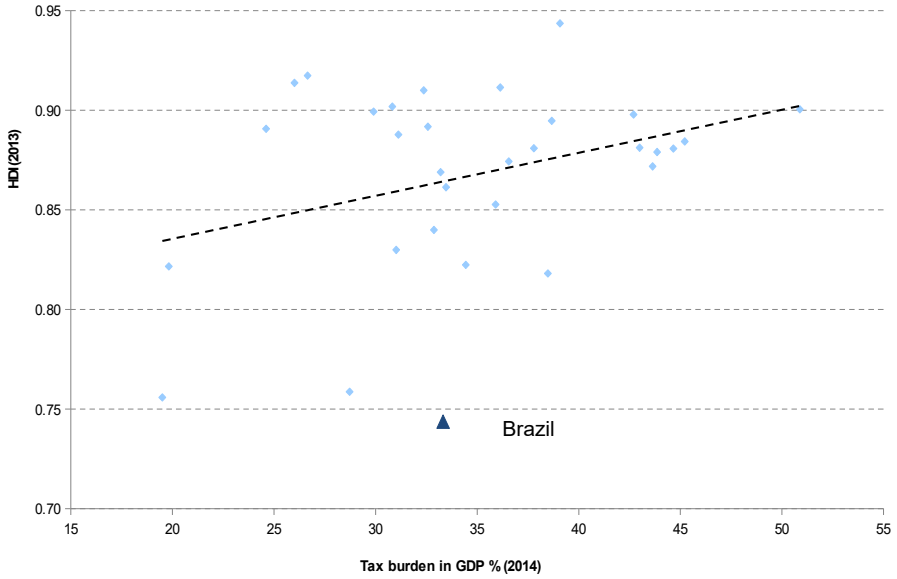


Original compilation. Primary sources: STN, CEF, RFB, IBGE and OECD (2015).

Note that the national tax burden in 2014 (33.3% of GDP) appears very close to the tax burden of Germany (35.9% of GDP) and Portugal (34.4% of GDP). Many other developed countries appear in the chart below of Brazil, as is the case of Spain (33.2% of GDP), United Kingdom (32.6% of GDP), Canada (30.8% of GDP), Switzerland (26.6% of GDP) and USA (26% of GDP). It is worth to mention that developing countries, in general, present a lower level of taxation than the Brazilian's does. This is the case of our neighborhood: Mexico (19.5% of GDP) and Chile (19.8% of GDP). Turkey (28.7% of GDP) and Slovakia (31% of GDP) are other examples of countries with similar development to that of Brazil, but with lower tax burden.

Another way to perform such a comparison is through the individualization of the development level. This can be done through the HDI (Human development index), which serve as development proxy. Graph #3 (scatter) relates tax burden with HDI, looking for any correlation between the two variables:

Graph 3
Tax burden x HDI: Brazil and OECD countries - 2013/2014



Original compilation. Primary sources: STN, CEF, RFB, IBGE, OECD (2015) and UNDP (2014).

As you can notice, there is a positive relationship between the two variables in question: the higher the level of development, the higher tends to be the tax burden of a country. This relationship is captured by the dashed line in the middle of the graph. Brazil's position is marked by a blue triangle. In this case, the Brazilian position is noted as significantly below the dashed line (average of countries), revealing a high level of taxation for a low development level.

In this sample, the only countries that have an HDI similar to that of Brazil are Mexico and Turkey – in both cases, the tax burden is significantly lower than the Brazilian is. Chile[9] is the most remarkable case, because it presents

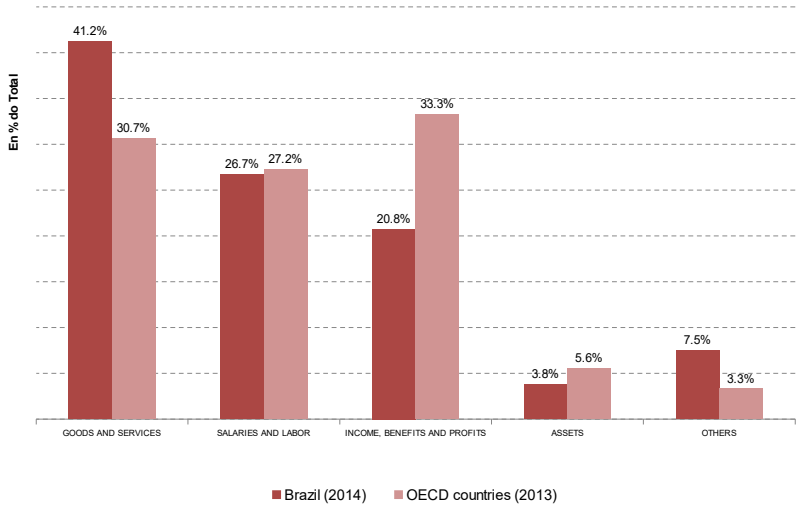
9. It is worth noting that the Chilean pension system is mainly run by the private sector (Amaro, 2000), which greatly reduces the need for tax collection and underestimates their global load compared to other countries.

a low tax burden and a high HDI (the largest in South America), of 0.822. Another interesting fact to be cited is that all countries presenting a tax burden higher more than Brazil's also feature HDIs much higher than the national HDI.

It is important to point out a limitation of this comparison: the HDI was taken as a proxy of development. Because there is no other better indicator that measures the level of government spending on activities that actually benefit the population and economy of the country, such as spending on health, education, social protection, infrastructure, housing, sanitation etc.

A comparison of the level of taxes *versus* the development points to a limitation of the tax burden structure. As shown in the section that dealt with the characteristics of the national tax burden, some common aspects to the taxation of most advanced countries are the largest participation of direct taxes ("revenue and earnings" and "assets") and the lower participation of indirect taxes ("goods and services"). The graph 4 compares the participation of each base in the composition of the tax burden of Brazil and of the OECD countries[10].

Graph 4
Participation of tax bases in the total tax burden - 2013/2014



Original compilation. Primary sources: STN, CEF, RFB, IBGE and OECD (2015).

Between the two comparison groups, Brazil features, notably, the lowest level of taxation on "incomes and profits": 20.8% of total tax revenue. In the OECD general average, this participation reaches 33.3%- 60% higher than the Brazilian case. This striking feature is a key factor to understand why taxation in Brazil is characterized as unfair, especially when compared to the taxation of countries that feature a much better income distribution than the Brazilian. The base "assets" is closing the group of direct taxes contributing to tax equity. In this case, Brazil also has a participation lower than the OECD countries: 3.8% of the Brazilian

10. By the unavailability of data for the year of 2014 group excluded from Australia, Japan, the Netherlands and Poland.

tax burden are composed of this type of taxation, while the OECD average has this percentage at 5.6%.

Revenues from "goods and services" are presented with great prominence in Brazil, in relation to other groups of countries. About 41.2% of the total national tax revenue came from this base. In the OECD, the average percentage drops to 30.7% of the total, underscoring once again the better quality of those tax systems, in terms of equity, compared to the Brazilian tax system.

There is no basis for stating that the Brazilian taxation, even if less unfair (less fair and less progressive), is more neutral than the OECD countries by using a large volume of resources from indirect taxes. That is because such taxes in Brazil are usually cumulative, differentiated (taxation regimes and sectors) and highly complex. In this way, the system, which could be efficient from the point of view of economic efficiency, promotes strong distortions in the allocation of resources.

The other two tax bases presented in graph 4 ("salaries" and "other") can be summarized as follows. In the first case, when the origin of the resources deriving from the payroll, there is almost equality between Brazil and OECD countries, since the total share is almost the same: close to 27% of the total. In the case of "other" taxes, Brazil comes to 7.5% of the total, while in the OECD countries these have little participation in excess of 3% of the total. This relatively high percentage of Brazil is composed basically by taxes on "financial transactions" and "international trade", which could easily be included in indirect taxes ("goods and services"), emphasizing the national dependence on this kind of taxation and the deficiency of the Brazilian tax system.

5 CONCLUSIONS

This article revisits the sizing and the analysis of basic aspects of the overall Brazilian tax burden through the methodological aspects, analyzing historical series of the indicator, pointing out the main characteristics of the Brazilian burden from the latest data and showing some international comparisons.

It is to note that the method here employed for the calculation of the burden is more "comprehensive" than the officially adopted by the Ministry of Finance (RFB) and even in the national accounts (IBGE), in that it considers as taxation all the resources that is taken compulsorily by the public sector economy- it includes, for example, all para-fiscal contributions, royalties and levies on the extraction of oil and other minerals, and fines and interest for late payment of the tax debt. The adoption of new national accounts methodology by IBGE and the significant review of the annual series of GDP nominal amount caused significant changes in the size of the annual index of global gross tax burden.

From these methodological aspects, the Brazilian tax burden is re-examined and keeps showing a growth bias when taking the longer term, following or allowing the same expansion of the expense and the size of the Brazilian State. However, after the global crisis of the end of the last decade, especially from 2011, he bias has turned into global burden stability.

In the opening of the structure of tax revenue, the concentration in taxes on the domestic market of goods and services is maintained, denoting a

high degree of regressive taxation in the national system. Despite the reform of the Constitution of 1988 aimed to decentralize the Brazilian system, the collection returned to be more concentrated in the central Government, due to the creation and increase of contributions, especially social and social security, exclusive competence of the central level, to the detriment of taxes, usually shared between governments.

Finally, international comparisons have shown that the level of the Brazilian tax burden, even if reduced after the revision of the national accounts, can still be considered relatively high considering our social and economic development. Worse than that, the composition of its revenue structure differs from the average of the OECD countries (usually developed) for being more focused on indirect taxes instead of direct taxes. This brings to debates on tax fairness – see Afonso (2013), which only in very recent times has been included on the national agenda of discussion, albeit in its infancy and limited only to technicians.

The serious and continuing recession affecting the Brazilian economy since the end of 2014 and the consequent reduction in tax revenue, while expenses increase, along with the primary deficit and public debt, can finally change the perception of economic and parliamentarian authorities and opinion leaders about the scope of tax change required. There is a unanimous support for the urgent implementation of a tax reform but there is still a predominant idea that only modest adjustments are needed to correct distortions and restore the collection and quality of taxation. The main reason to oppose a structural change was that this could cause an important loss of revenue but this is already occurring since the end of 2014. The acceptance of proposals aimed at building a new system of taxation, rather than reforming the existing one, may soon rise. This new system would reconciles quality and quantity, i.e. collect more revenue but in a way more equitable for the society and more competitive for the productive sector.

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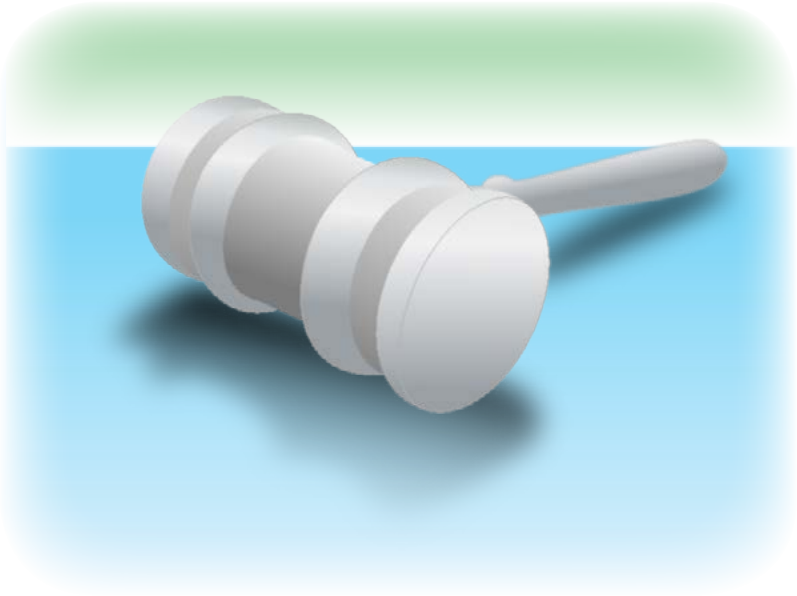
LITIGATION VIS-A-VIS THE TAX ASSESSMENT. REPRESSION OF THE ILLEGAL ACTION AND THE SUBSEQUENT PROCEDURAL ACTIONS: THE ARGENTINE EXPERIENCE

Luis María Capellano



SYNOPSIS

This paper endeavors to show the reader the most important characteristics of tax assessment, within the framework of the official assessment process provided in the regulations on the subject applied in the Republic of Argentina. Subsequently, details on the subsequent procedural stages will be provided regarding the role played by the Nation's Fiscal Court with respect to the new discussion mechanisms in the Treasury-taxpayer relationship. In addition, other repressive actions will be dicussed.

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Content

The purpose of this article is to introduce the reader to an issue of such current importance as that of fiscal adjustments and their appealable instances, limiting it in this case, to the framework of the regulations in force in the Republic of Argentina.

Given the fact that its consideration is obviously extensive and that the doctrine and jurisprudence are abundant, it has been decided that the issue be analyzed from an extremely practical standpoint. In fact, the idea is, first, to point out the characteristics of the "self-assessment" process provided in the national tax procedure to then explain the nature of the assessment act and thus, indicate the appealable instances in the case of divergences between that resolved by the Tax Administration and that sustained, in the specific case, by the taxpayer.

After clarifying these introductory issues, the second part of this research is focused on the role of the Nation' Fiscal Court, jurisdictional body which, within the framework of the aforementioned appealable process, acquires particular importance due to its interrupting effect as a result of resorting to this sphere of competency.

Its characteristics, the distinguished work that motivated its integration into our country's tax law and its role before the different examination strategies currently applied by the collection entity, are aspects for considering in greater depth. This way, we can analyze its competency and the limitations vis-a-vis administrative acts, which even though they substantially respond to the characteristics of an assessment resolution (which, for example, may imply a modification of the taxable activity) may be somewhat different by nature.

Finally, the study proposed here describes the sanctioning duty of the tax organization against specific illegal tax action, the framework and the details of the litigation process.

In sum, the idea presented in the next pages is to sketch the obligation's assessment process and its subsequent stages, from the fiscal standpoint as well as that of the taxpayer, by nurturing the work with abundant doctrine information and jurisprudential background from the lower instances up to the Highest Level Court.

1. THE ADMINISTRATIVE ACT OF AN ASSESSMENT NATURE

To establish whether an administrative act is a jeopardy assessment is of significant importance, inasmuch as an affirmative response to said question raises two aspects of utmost importance in the sphere of the tax procedure. On the one hand, the Tax Administration's obligation to abide by the procedure regulated in article 17 of Act 11.683 on the Tax Procedure; and, on the other,

the determination of the recourse procedures referred to in article 76[1].

The tax law provides for a specific taxable event in abstract terms, whose fulfillment at the factual level, calls for applying the corresponding assessment and for proceeding to the subsequent entry of the corresponding amount in the State's treasury. The tax assessment thus consists of the series of acts or procedures intended to establish the exact amount of the tax obligation, or else the right to credit in favor of the taxpayer in the juridical-tax relationship.

In our country, the aforementioned assessment is in the "self-declaration modality". Nevertheless, the Treasury is qualified to carry out the jeopardy assessment[2] to the extent the taxpayer:

- does not comply with the described obligation; that is, does not file the sworn return;
- the return filed is objectionable, or
- there is a will to render effective the joint responsibility.

In this respect, the collecting entity assumes, in principle, the role of receiver of the tax returns filed and of the amounts paid; its activity being carried out within the formal framework of the juridical-tax relationship, since it controls precisely that taxpayers and those responsible abide by the formal duties, for example –terms, formulas, etc., when presenting them.

If the taxpayer would fail to comply with said obligation or would do so by declaring erroneous or false values or items, the Treasury will adopt a more active role, by implementing a procedure intended to quantify, assess and demand payment of the tax. Accordingly, it will interfere to the extent the returns filed by the taxpayer are objectionable, giving way to the assessment procedure which begins with the pertinent visit to the party involved and concludes with the administrative resolution, which in sum, results in its objection.

Then, the activity of the taxpayer of the tax obligation, when preparing the return and assessing the tax is at the same level as that carried out by the authority when making the assessment. The latter manifests it through an "administrative act", while the former does so through the execution of appropriate acts that are subjected to verification by the Tax Administration[3].

In this respect, the jeopardy assessment has been defined as the act or series of acts originating from the Administration, from individuals, or both in coordination, intended to establish in each particular case, the configuration of the de facto presupposition, the measure of what is taxable and the scope of the obligation. It considers likewise that it is the procedure through which the situation provided by the law is materialized and disclosed in a specific case[4].

It has also been said that the tax assessment is the act or series of acts, intended to specify in each particular case, if there is a tax debt; if so, who is obliged to pay the tax to the Treasury (taxpayer) and what is the amount of the debt[5].

In this line of thought, said act thus consists of a regulated, contradictory administrative procedure, which tends to safeguard the guarantee of the due process (which means

1. Appeal for reversal of decision before the Hierarchical Superior or motion for appeal before the Nation's Tax Court.
2. The Treasury may also assume an intermediate position if the taxpayer files a sworn return with inadmissible items (for example: withholdings, on account payments, accreditation of balances in its own favor or that of third parties, etc.). Given that in those cases, it suffices with the simple demand for payment of the claimed items or the difference generated by the result of said sworn return, without the need to undertake the jeopardy assessment procedure (cfr. article 14 of Act 11.683). Other assessments have been considered in this respect and their resources of appeal, given their nature, have raised discussions that we will consider further.
3. MICHELI, Gian Antonio - Curso de derecho tributario – Ed. de Derecho Financiero, Madrid, 1975 - Op. cit. pág. 264
4. GIULIANI FONROUGE, Carlos C.; NAVARRINE, Susana C. y ASOREY, Rubén O. - Derecho Financiero - Ed. Depalma, 5º edición, Bs. As., 1997 - Op. cit. pág. 493
5. VILLEGAS, Héctor - Curso de finanzas, derecho financiero y tributario - Ed. Depalma, 6º edición - Bs. As., 1997 - Op. cit. pág. 329

that one must ensure the right to be heard, offer and produce evidence and to a well-founded resolution). In fact, it allows for the exercise of the right of defense before the decision is made, and from there follows its importance as procedure prior to the access to the judicial recourse[6].

It is an administrative act originating from the Examining Entity that rejects or denies a right, verifying the existence of substantive and demandable tax obligation, with respect to a specific individual.[7].

In broad terms, the jeopardy assessment is thus an administrative procedure that quantifies the taxable activity or the tax violation, as appropriate, and which assesses the corresponding tax, done officially by the Examining Entity through a procedural scheme that tends to safeguard the guarantee of the due process. It is subsidiary to the sworn return that must be filed by the liable party, considering that it shall only proceed in view of its absence or objection or when one may render effective the joint responsibility of the liable parties for someone else's debt, as provided in article 8 of the Tax Procedure Act 11.683.

2. THE APPEAL PROCEDURE BEFORE THE JURISDICTIONAL ENTITY

2.1. Outstanding characteristics

The power of the judges and courts in the resolution of conflicts and controversies between the parties involved in the process is delimited by their jurisdictional capacity.

It is the capacity or aptitude that the law recognizes to a judge or court to exercise its functions with respect to a specific category of affairs or during the course of a stage of the process. In other words, it is the measure or scope set by the law for exercising the jurisdiction.

In our country, as in the greater part of comparative law, the system in force is the so-called "system of jurisdiction attributed to administrative courts with the necessary review by the agencies of the Judiciary". The court is within the Executive Branch, but separated from the exercise of active Administration in order to ensure its total independence. Its impartiality lies in that it must pronounce what is appropriate according to the law in the particular case, by virtue of its own decision[8].

In the Republic of Argentina, the Nation's Fiscal Court[9] is a jurisdictional entity that is within the sphere of the National Executive. Its objective is to pronounce judgment with respect to acts originating from the Federal Administration of Public Revenues (from the General Taxation Directorate as well as the General Customs Directorate)[10], which are not accepted by the taxpayers, other liable and sanctioned parties.

6. SOLER, Osvaldo H. - Derecho Tributario - Ed. La Ley, 3º edición - Bs. As., 2008 - Op. cit. pág. 433
7. DÍAZ SIEIRO, Horacio - Tratado de Tributación, T. I, V. II, Capítulo "Derecho tributario procesal" - Ed. Astrea, Bs. As., 2003 - Op. cit. pág. 295
8. CELDEIRO, Ernesto; GADEA, María de los Ángeles e IMIRIZALDU, Juan José - Procedimiento Tributario - Ed. Errepar - Bs. As., 2012 - Op. cit. pág. 644
9. With jurisdictional capacity throughout the national territory but with headquarters in the Autonomous City of Buenos Aires [at calle Julio A. Roca 651 (since 2001)and previously at Cangallo -currently Juan D. Perón- 524 (from 1960 to 1980) and at Reconquista 954 (from 1980 to 2001)]
10. This autarchic entity in the administrative order originated from the merger ordered by the National Executive through Decree 1156/1996 (BO: 16/10/1996), of the then national collection entities called National Customs Administration (NCA) and General Directorate of Taxation (GDT). With the subsequent issuance of Decrees 1589/1996 and 6/18/1997 (BO: 20/1/1997 and 14/7/1997, respectively), the aforementioned merger process was concluded, thereby dissolving the aforementioned entities. Thus, the last of the decrees mentioned includes in a single normative body all the rules regarding the organization and operation of AFIP and of the two Directorates that comprise it, that is, the General Directorate of Taxation (GDT) and the General Customs Directorate (GCD). Its organizational structure was expanded with the issuance of Decree 1231/2001 (BO: 5/10/2001), which included the General Directorate of Social Security Resources within its sphere.

It is a court of a technical nature, established to settle technical issues, with independence and impartiality.

According to statements by professor ATALIBA[11], there are well-founded reasons whereby it is advisable to establish a fast and effective system for resolution of "conflicts" arising between the Treasury and the taxpayers. They tend toward harmony between both parties, given the public interests at stake, because "… if all divergences were brought before the Judicial Body, the latter would be overloaded by the weight of an unbearable accumulation of issues to be judged", and accordingly "… it would take too long to obtain solutions, to the detriment of the parties involved." This is valid to the extent that the resources at the administrative headquarters are structured in such a way as to ensure the guarantee of the due process (right to be head, to offer and produce evidence and to a well-founded resolution). Likewise, that the jurisdictional powers recognized to the organization will not prevent the subsequent and sufficient judicial control.

In this sense, the Supreme Court of Justice of the Nation, as ultimate interpreter of the National Constitution, as of the "Fernández Arias c/ Poggio"[12] precedent, lay a doctrine that has continued unchanged until this date. Whereby the constitutionality of administrative courts is admitted, provided they are created by law, their independence and impartiality is guaranteed and the litigants are recognized the right to file an appeal before the courts that are dependent on the Judiciary, against the resolutions of those administrative courts.

Based on the foregoing and focusing the attention on the legislated previsions, article 153 of Act 11.683 of the Tax Procedure provides as follows:

"THE NATION'S FISCAL COURT will issue procedural rules to complement the provisions of this law, in order to afford the process greater speed and effectiveness. Said rules shall be obligatory for the FISCAL COURT and the persons acting therein, as of its publication in the Official Gazette and may be amended to adjust them to the needs required by the procedure.

The Chairman of the NATION'S FISCAL COURT may issue complementary rules of the Procedural Regulations of the Court, intended to standardize procedural processes and administrative issues when not provided therein."

The rules that regulate the procedure of the Nation's Fiscal Court are included in:

- title II of Act 11.683 of the Tax Procedure (ordered text in 1998 and its amendments) and its regulatory decree (N° 1397/1979);
- The Customs Code (Section XIV, Title III, Chapter three of Act 22.415 and its amendments); and
- court Resolution 840/1993, known as "Procedural Regulation of the Fiscal Court", issued by the jurisdictional entity for the purpose of rendering the process greater speediness and effectiveness.

It should be observed that the competency also considers customs. Article 1.140 of the Customs Code (Act 22.415 and its amendments) provides that "The headquarters of the Fiscal Court, its constitution, the appointment of the Members, their removal, the incompatibilities, the self-disqualification, the distribution of files, the plenary proceedings, the calculation of the terms, the regulation and other powers shall be governed in the customs area. This is according to the pertinent provisions of act 11.683".

11. ATALIBA, Gerardo: "Recursos jurídicos del contribuyente" - Boletín DGI N° 297, op. cit. pág. 275
12. "Fernández Arias, Elena y otros c/Pogio" - CSJN - 19/9/1960. Criterio reiterado desde entonces y ratificado por la actual composición del Más Alto Tribunal en autos "Ángel Estrada y Cía. SA" de fecha 5/4/2005
13. GARCÍA VIZCAÍNO, Catalina - El procedimiento ante el Tribunal Fiscal de la Nación y sus instancias superiores e inferiores - Ed. Abeledo-Perrot - Bs. As., 2011 - Op. cit. p. 21

As provided in article 154 of Act 11.683, it acts as autarchic entity in the administrative and financial order, dependent for budgetary purposes, on the Secretariat o Finance of the Ministry of Economy and Public Finances of the Nation.

2.2. Background and comparative legislation

The law for creating the Nation's Fiscal Court in the Republic of Argentina originated from a project prepared by Drs. Jorge G. Tejerina, Carlos M. Giuliani Fonrouge and Juan C. Sorondo. They were members of the Commission which, together with Dr. Juan E. BELLO (who developed another initiative in dissidence), had formed the National Executive for such purpose, thereby ensuring a desire which had an unsuccessful background. In fact, for example, in 1942, Dr. Carlos M. Giuliani Fonrouge presented –within the framework of the research carried out at the Seminar of Juridical and Social Sciences of the Law Foundation of the University of Buenos Aires – a draft Fiscal Code. Its article 62 provided that in the judicial level fiscal affairs had to be litigated before the Fiscal Court, although noting the convenience of creating in the future another specialized court of an administrative nature.

As stated by García Vizcaíno[13], the immediate background that served as basis for its creation are:

1. The conclusions arising from the First Tax Law Conference held in Montevideo (1956), wherein, within the framework of the topic "Autonomy of Tax Law", item 6 which reads as follows was highlighted: "Tax litigation should be incumbent upon independent bodies of the active administration"- that "the courts in administrative litigation should enjoy independence with respect to the Executive. If not located within the Judiciary, this independence should be the same which is ensured to the agencies of this jurisdiction."
2. The conclusions prepared by the Second Conference held in Mexico (1958), wherein, the Topic: "The tax litigation process", respectively sustained items 2 and 3, which read as follows: "The Tax Litigation Courts must enjoy independence with respect to the Executive. If not located within the Judiciary, such independence must be the same as that granted to the other entities of this body" and "The Magistrates or the Judges of the Tax Litigation Courts must be lawyers with knowledge of the technical, related and necessary subjects for the correct application of the Tax Law". On the one hand, "… it is essential to count on easy and expeditious steps and procedures capable of adequately determining the rights and duties of the Treasury, the taxpayers and the organizations before which such procedures are carried out, in such a way that they may be capable of providing the jurisdictional guarantees sought". On the other, that, "one should eliminate as legal basis in filing administrative appeals as well as in the litigation, previous payment of the taxes, regardless of the guarantees that were necessary in cases where there is risk of noncompliance with the fiscal debt."
3. The operation of the Fiscal Court of the Federation of Mexico (which dates back to 1936) as well as the authorized precedent of the "Tax Court" of the United States, which is the Court that deals with the decisions of the General Tax Administration in said country.

We thus arrive at Law 15.265 regarding the creation, organization and competency of the National Fiscal Court, approved on 12/2/91959, promulgated on 1/14/1960 and published in the Official Gazette on 1/27/1960. Its provisions were incorporated, through mandate of its article 55- Law 11.683 on Tax Procedure[14] as sole Title. The jurisdictional body began to operate on 4/28/1960.

14. Which entered into force in 1933, and being in force in early 1960 the ordered text through Decree 10.945/59 (BO: 7/9/1959), being then again ordered through Decree 9.744/60 (BO: 18/8/1960)

Currently the NFC is a member of the Ibero-American Association of Courts of Fiscal or Administrative Justice (AITFA in Spanish), international organization established on August 21, 1996 in San Juan del Río, Queretaro, Mexico, together with eleven other Courts from:

- **Bolivia**: Tax Objection Authority.
- **Brazil**: Administrative Council of Fiscal Resources.
- **Colombia**: State Council of Colombia – Tax and Economic Affairs Section.
- **Costa Rica**: Administrative Fiscal Court.
- **Ecuador**: Tax Litigation Division of the National Court of Justice.
- **El Salvador**: Internal Taxes and Customs Appeals Court.
- **Spain**: Central Economic Administrative Court.
- **Mexico**: Federal Court of Fiscal and Administrative Justice.
- **Panama**: Administrative Tax Court of Panama.
- **Paraguay**: Government Accounting Office.
- **Peru**: Fiscal Court.
- **Portugal**: Administrative Supreme Court.
- **Dominican Republic**: Superior Administrative Tribunal of the Supreme Court of Justice.
- **Uruguay**: Administrative Litigation Court.

The AITFA holds biannual assemblies in the headquarters of the member countries. It functions through the liaison of an executive secretariat, which coordinates the activities. Its purpose is to collaborate with fiscal and administrative justice through the exchange of ideas and experiences on the issues submitted to the different jurisdictional entities that comprise it.

3. WHICH ARE THE ADJUSTMENTS IN THE FISCAL COURT PROCESS?

Since in the national tax system of Argentina the taxpayer is the one who determines and assesses his taxes, through the so-called "self-assessment" system, the first juridical evaluation is performed by the taxpayer by decoding, identifying and including its juridical acts or transactions in the estimate of the event generating the tax obligation. However, the true juridical evaluation results when the tax self-assessment turns out to be "… objectionable, as a reclassification performed by the Administration within its law application function which takes place in the jeopardy assessment procedure", which is then "… subjected to the jurisdictional control of the review entities"[15].

This task becomes ever more complex with the advent of new and sophisticated forms of business and entrepreneurial organization, at the national and international levels, for which reason the role of the Tax Administration acquires ever-greater importance in the life of the modern State. It must carry forward its juridical evaluation activity in a context of increasing complexity in the ways in which individuals consider and conceive their businesses.

The objectives comprising the Strategic Plan of the Federal Administration of Public Revenues summarize the priority areas in which the Collection Entity focuses itself to maximize the quality of the services offered to the community and to the State. This, through an effective control of compliance with tax obligations and adequate assistance to the taxpayer, as well as efficient internal processes that may allow for a correct

15. TARSITANO, Alberto - Interpretación de la ley tributaria, en Tratado de Tributación, T. I - Dirección GARCÍA BELSUNCE, Horacio - Ed. Astrea - Bs. As., 2003 - Op. cit. p. 411

interrelationship with the rest of the economic and social actors; and these are:

- control fiscal behavior: by strengthening primary control management, promoting examination and face-to-face verification and systematically inducing compliance;
- administer resources efficiently: by developing quality processes, improving human resources competencies and using resources efficiently;
- facilitate compliance: by developing services in keeping with the citizens' needs, simplifying rules and procedures and facilitating foreign trade; and
- Contribute to national development: by promoting social inclusion and tax culture, establishing strategic alliances and proactively participating in the determination of rules.

With respect to the examination strategies currently applied by the Treasury, given the challenges posed by transactions carried out in the context of the current world with particular changing situations and harmful tax planning, there are three pillars. The first is to optimize the technology available; the second is a centralized use of the information and the third is the development of ex-ante as well as online controls of the operations.

According to the Ex Federal Administrator of Public Revenues, Dr. Ricardo Echegaray[16]:

"We are going to work firmly in the centralized use of information, internal from Customs, Social Security and the General Directorate of Taxation, as well as other State agencies and organizations from the private sector obliged to provide information to AFIP. Tax control was generally ex-post, but now we are working with an ex-ante control and online or simultaneous control of operations, and the number of actions and human resources assigned to the ex-post control will be reduced.

"The ex-ante and electronic control are part of the new model promoted by AFIP for the Argentine tax administration, based on the recommendations of the Organization for Economic Cooperation and Development (OECD) made during the Tax Administration Forum of said international organization which was held last year in Buenos Aires."

The simultaneous control actions, for example, are based on information systems established by AFIP. They provide data dealing with: fairs, rural real estate, insurance companies, properties (aircrafts, automobiles, ships, etc.); real estate; information from court clerks; expenses; trusts; bank accounts; public deeds; credit card expenses; ownership and transfer of shares, electronic commerce; electronic invoicing system, lottery agencies, transportation of money, operations in grains, request for foreign currency, donations, labor information, use of public services, among others.

Likewise, it is appropriate to mention RG (AFIP) 3416 -BO: 20/12/2012-, which regulates the operational guidelines of the procedure for controlling compliance with the taxpayer's fiscal obligations known as "electronic examination". The purpose behind this new control procedure is to develop examination modalities that may allow for inferring in advance the magnitude of the tax obligations, -through data crossings. In turn, they may imply a process of change and modernization in taxpayer services.

Another element aimed at a greater control of activities and situations, in line with new times, is the electronic storage of vouchers.

Such strengthening of the National State's examination and collection activity requires, in

16. ECHEGARAY, Ricardo: "Nuevas estrategias de control: fiscalización ex-ante y electrónica" – Conference presented before the Professional Council of Economic Sciences of the Autonomous City of Buenos Aires, on 21/3/2013

parallel, an efficient and effective Administration in the area wherein legal or doubtful issues are solved within the administrative sphere.

With a view to solving delays that affect the guarantee of judgment within a reasonable term, in my position as Undersecretary of Public Revenues I have held meetings intended to include a series of modifications in the structure of the Fiscal Court of the Nation. The goal is providing said jurisdictional body the necessary resources to face this type of challenges. As a result thereof, the recent Administrative Decision (JGM) N° 516/2015 -BO: 22/7/2015- provides for a series of modifications in said bodies organizational structure[17].

3.1. Jurisdictional capacity

As provided in article 144 of Law 11.683, the Fiscal Court has jurisdiction over certain appeals and demands dealing with taxation (in relation to taxes whose examination and collection are under the responsibility of AFIP-DGI) and customs (as provided in Decree-Law 6692/1963 and subsequently in the Customs Code)[18]. However, this does not prevent the judge, according to the application of the "iura novit curia" principle from transforming and correcting the appeal or demand filed, in case it would have been inappropriately filed by the plaintiff. (For example, transformation of the appeal into direct demand for repetition or appeal due to refusal of repetition or appeal for relief or appeal for delay in repetition, etc.)[19].

In cases of assumptions where the demand or appeal were manifestly outside the jurisdiction of the Court, this will reject it by grounded resolution - as stated in article 24 of the judicial rules of procedures (Court 840/1993) - even without conferring their transfer to the AFIP-DGI or the AFIP-DGA, as appropriate.

This being clarified, if can be seen that the competence of the TFN in tax matters legislated by article 159 of the law 11.683, and in accordance with article 165 of the text, it appears that it is competent in the appeals:

- appeals against decisions of the AFIP to determine taxes and their accessories in certain or presumptive form, or adjust losses;
- against decisions of the tax authorities imposing fines and penalties;
- appeal against decisions denying complaints for repetition of taxes, submitted to the collection entity, and demands for repetition which, for the same matters, are addressed directly to the Fiscal Tribunal of the Nation;
- by delay in the cases filed to the Fiscal entity in terms of repetitions; and
- Constitutional appeal (amparo).

As specified in the last paragraph of article 76 of the law 11.683, appeal to the tax court will not proceed with respect to the liquidation of advances and other payments on account, their updates and interests; neither in the settlements of interests when simultaneously the origin of the taxation is not debated.

3.2. The "assessment matter"

Without prejudice to the detailed framework of competence that the reader has noticed, there are also situations in which the collection entity notifies taxpayers of administrative acts that correspond, in substance, to the characteristics of a determinant resolution (since, for example, they involve a modification of the taxable matter). Bu they maintain a distinction in nature every time that they are not determinative resolutions signed by an administrative judge.

17. For an in-depth analysis of this matter it is recommended that the reader see "La nueva estructura del Tribunal Fiscal" de CAPELLANO, Luis M. - Práctica Profesional, Ed. La Ley, 2015-246, 6
18. Cfr. articles 1025, 1053 and 1132 of the Customs Code
19. GARCÍA VIZCAÍNO, Catalina; obra citada; pág. 94

Therefore, it becomes a debate about the jurisdiction of the tax court to understand in which cases, formally, there is no jeopardy assessment.

In this respect, in many decisions, the jurisdictional body made comments on the issue under discussion, arguing, first, that the assessment should establish the existence of taxable income, which is not anything other than the accreditation of existence, through direct and indirect, of the taxable matter, the taxable income and its measurement in legal terms. This result in the tax base on which the final act proceeds, in the process of determining which is the settlement[20].

Then, it sustained that "... even when the National Treasury has renounced to the procedure established in articles 17 et seq. of law 11.683, since the Act involves an interpretative operation and calculation of such assessment." "Through it is described in concrete form the objective aspect of the operative event of the tax liability, specifying clearly its constituent elements, the quantification of the basis of measurement, indication of the responsible subject and, also, the resulting tax is settled and ordered."

In the words of the National Chamber of appeals in the administrative Federal Section[21], if "... in the resolution is mentioned the amount by which proof of payments are required, the underlying concepts and the liable subject. If it also states that so that in the event of non-compliance the executive collection will proceed, we may not deny that the act has a is an assessment, opening - as a result - the jurisdiction of the tax court."

Thus, for example, in 'Pescapuerta SA'[22] a summons issued by the Chief of the Office collection and Verifications, undated, which require a payment in respect of the tax value added, under penalty of enforced collection, and informing the taxpayer that he could challenge it by way of article 76 of the law 11683. The plaintiff raised the jurisdiction of the Court and opposed the exception from the Act in crisis. The Treasury argued the incompetence of the judicial body.

The tax court rejected the incompetence sustained by the tax administration representation by sustaining that the attacked resolution was legally and economically a jeopardy assessment. Then it declared the nullity of the Act every time that argued that it breached the legal procedure of assessment, without legal dispense authorizing it, and in addition not even the signer of the Act had the quality of administrative judge.

In another precedent- "Agroindustrial Cruz del Eje SA" – la Camara[23], the decision of the TFN was reversed, which had declared its incompetence to settle in a ruling by the Department Agency Chief of a town in the interior of the country that "... This was as a result of having detected a deduction in the returns of presumptive minimum tax on profit a release percentage of 100% for the periods 2001-2004 ", being that it did not make incorrect use of promotional benefits to submit the returns by making use of the benefits before the date of implementation (Art. 2 of the law 22.021 and concordant)..." had intimated to the plaintiff to rectify his returns with respect to fiscal periods 2001 to 2004 , and enter the corresponding balances within a period of forty-eight hours informing that in the event of non-compliance, it would proceed to judicial recovery.

In so deciding, the appellant argued that, even if the procedure laid down in articles 16 and following of the law 11.683 was not used, the Act by which the plaintiff was ordered to pay

20. E.g.: "Robert Bosch Argentina SA" - Sala A - 13/11/1997 and "Miguel Pascuzzi e hijos SA" - Sala A - 14/9/2004; among others
21. E.g.: "Álvarez, Mario Roberto" - Sala I - 29/9/1993; "Coop. Agricultural San Martin"- Sala II - 21/4/94 and"Alpachiri Coop. Agricultural Ganadera Ltda."- Sala II - 22/10/91; among others
22. TFN - Sala A - 21/6/2002
23. Sala IV - 7/15/2014

the tax was an assessment of the tax obligation on the taxpayer. Through such summons, AFIP challenged the returns of the recurrent company, since it considered that, contrary to the exemption expected by the company, there was a tax issue with respect to the tax on minimum presumed income corresponding to the period 2001 to 2004.

3.3. Other types of litigation

The expression "other sanctions" contained in subparagraph (b)) of article 159 of the law 11.683 has given rise to various interpretations. We will analyze the cases that we consider transcendent:

a. Resolutions declaring the expiration of a payment facilities regime.

Both the tax court[24] as the of the appeal court[2] were issued about the incompetence of the judicial organism. It sustained that "... the decay of the payment facilities regime constitutes a decision of the collection department that does not fit in any of the assumptions of the 11683 law... as enabling competence... because it is a species within the genus 'Means of extinction of obligations' – matter not included in its competence..." ", which prevents confusing the expiration with a sanction."

(However, subsequently, the Chamber IV[26] and V[27] modified their judgement declaring the TFN competition to rule on the appeal deducted against AFIP resolutions who declare the expiry of plans of payment facilities on the grounds that they fall under article 159, subparagraph (b)), of the law 11.683.

In the first case, the appeal ruled that resolutions which decide the expiration of a plan of payment facilities constitute "other sanctions" referred to in the law, founding its change in the Spanish doctrine that understand the sanction as "... a wrong inflicted by the Administration to a taxpayer as a result of illegal conduct. That wrongdoing (punishment purpose) always consist of deprivation of a good or of a right (reversal of a favorable Act, loss of an expectation or a right, imposition of an obligation of payment of a fine, eventually even arrest or jail for the responsible" (García de Enterría, Eduardo and Fernández, Tomás R.:) "Administrative law course" - Madrid - 1977 - T. II - p. 147). Similarly, Blanca Lozano stated that administrative sanctions of a personal nature are characterized, among other circumstances, with the suspension or restriction of a right ("The extinction of the tax and administrative sanctions" - Madrid - 1990 - p.) (46).

Geraldo Ataliba teaches that the sanction is not always necessarily a punishment, but the legal consequence that is triggered in case of be of noncompliance with the mandate of a standard. Remembering Agustin Gordillo, he says that it may consist of the establishment of a new legal relationship, in the extinction of a pre-existing legal relationship, or coercive execution of a legal duty ("Hypothesis of tax incidence" - 5th ed. - São Paulo - 1992 - pp.) (40/41).

He then concludes that "... within this interpretive framework, the assumption of a penalty is presented when due to a fact subsequent to the recognition of a right, the administration takes a measure that involves the loss of that right,

24. "Automotive credit" – Sala A - 22/11/1999; "Dropchiz, Albert - Hall B - 11/5/1990 and"Consultores Asociados SA"- Sala D - 22/3/1998
25. National Chamber of appeals in the contentious administrative Federal: "El Virabe SCA" - Sala I - 7/10/1997; "Ferrochio y Cía." SA"- Sala II - 11/12/1998; "Bellespín, Hebe Carolina" - Sala II - 11/12/1998; "Juan Carlos Pettina y Cía." - Sala III - 13/8/1996; "Cia. Industrial SHS SRL"- Sala IV - 8/11/2001; "Petersen, Thiele and Cruz SA" - Sala V - 25/6/1997. TFN: "Crédito Automotor" - Sala A - 22/11/1999; "Dropchiz, Alberto - Sala B - 11/5/1990 y "Consultores Asociados SA" - Sala D - 22/3/1998
26. "Combustibles Argentina SA" - Cámara Nacional de Apelaciones en lo Contencioso Administrativo Federal - 6/11/2008
27. "Cine Press SA" - Cámara Nacional de Apelaciones en lo Contencioso Administrativo Federal - 29/9/2006

and not the requirement of compliance with an obligation that the taxpayer was supposed to meet."

The Vth Chamber, on the other hand, explains "... the taxpayer may have the will to follow a plan (option conferred to him by the administration, subject to certain conditions). But this cannot be confused with the administrative power to, on the one hand, verify compliance with the benefits or rights granted and on the other, sanction non-observance, insofar as it is a violation of a previously established legal duty."

Therefore, it is considered that requesting a plan of payment facilities do not configure an administrative act, it is an option that the taxpayer has. On the other hand, it argues that "... Decreeing the expiration of a plan of payment facilities constitutes an administrative act". Therefore, it says "... it becomes essential to analyze, if such an act has a punitive character". It responds affirmatively to this question inasmuch as it believes that canceling the plan generates the extinction of the right granted - with the economic legal consequences - and such situation has a direct and immediate effect on the taxpayer, causing the extinction of the administrative act that was allowing paying the taxes in installments.

Ultimately, it concludes that impose the forfeiture of the payment facility plan belongs the exercise of disciplinary powers by the Administration and therefore fits in the case provided for in subparagraph (b)) of article 159 of the law 11.683.

However, the Chamber II of the Court in the case "Paravant SA" of 24/6/2014, decided that the cancellation of a plan of payment facilities is not in the nature of an assessment of the tax liability, and therefore is not likely to be appealed before the administrative agency concerned with jurisdictional powers. The National Treasury was limited to cancel the benefits of the deferrals, without resorting to the procedure that must be validated only when the taxpayer does not present the return or if the national tax administration challenges the one presented (cf. articles 16 and following of the law 11.683), which did not happen here. On the other hand, it concluded that it is not a sanction that fall within subparagraph (b)) of article 159 of the procedural law, since is not more than the necessary consequence of a breach of the taxpayer to the conditions established in the granting of the benefit.

Recently the Chamber III of the court, referred to what it had resolved in the "Advertising industries Acierto SA" case of 13/6/2013 – in which had revoked the sentence of the Fiscal Court which, in that case, had considered itself incompetent-. The Chamber argued that ordering the revocation of a payment plan in itself constituted an administrative act; therefore, it becomes essential to analyses if this act has a punitive character. For that reason, he added, "... the Act subject of this dispute involved nature of those resolved by article 21 of the law on administrative procedure, which must be characterized as punitive". On these grounds, it revokes the judgement of the Fiscal Court, and therefore admits its competence to analyze whether the declaration of expiration by the Treasury is appropriate[28].

b. Deferrals.

The Tax Court is incompetent to hear, in the resolutions of the Federal Administration of public revenue, which rejected the tax deferral. In effect, this Act does not fit in article 159 of the law 11.683, emphasizing that such decisions may not be framed in the concept of "other sanctions" referred to in this standard. This is because the rejection of a request for deferment of payment does not tend to suppress the violation of legal provisions, guideline considered by the Supreme Court of Justice to determine the criminal nature

28. "Telectric SA" - 30/9/2015

of fines created by public or administrative law or financial law, etc.; they don't make worse the original taxpayer's situation[29].

The Chamber, on identical grounds to those expressed above stated that the Fiscal Court is incompetent to hear the AFIP resolutions that refuses the tax deferral[3]. They clarified that "... the competence of the judicial entity does not cover any question related to tax and customs, even if they are very complex", but only those that result from the text of the law of their creation."

c. Resolutions that impose sanctions of closing.

The tax court[31] has stated that the resolutions will be appealable, granted in all cases with suspensive effect, before the courts of the autonomous city of Buenos Aires and federal courts in the rest of the territory of the Republic, reason by which it corresponds to declare the incompetence of the judicial entity.

d. Disruptions.

In the case 'Frymat SA'[32] the Fiscal Court stated that the appeal does not proceed against the decision of the national tax administration that tax disruptions of the taxpayer be declared absorbed in the returns, rejecting the request that they be converted into tax credit.

However, subsequently, it declared itself competent[33] to hear in appeal against decisions of the Tax Agency that do not adjust the income tax to disruptions, in order to request the referred tax credits, since the resolution has no juridical significance. It was considered, in this regard, that the then General resolution (DGI) 3654 - BO: 17/3/1993-, modified by 3540 - BO: 3/7/1992, to abolish the procedure of assessment of trade regulated in the law on tax procedure may not restrict the review jurisdiction of the Court. This, if the rejection of tax credit constitutes, by its nature, a resolution adjusting bankruptcies. In synthesis, the Court understood that the appealed resolution met the elements to be considered as a jeopardy assessment.

In the words of the appeal court[34], the "... administrative resolution that does not adjust the losses to the profits tax is legal and economically the refusal of a bankruptcy. Therefore, if the legislator decided to establish the expiration of losses from profits tax, imposing the duty to taxpayers to request their transformation into tax credits, this obligation does not change the nature of the activity of the tax administration. When the challenges to the taxable income is due to objections concerning the improper tax qualification of taxable matter, its quantification or other aspect. In all cases, the appeal will be carried out through a jeopardy assessment. The General resolution (DGI) 3654...abolish this procedure but cannot restrict the review jurisdiction of the tax court, if the rejection of tax credit based on challenging the disruption constitutes, by its nature, a resolution adjusting disruptions."

e. Tax on liquid fuels and natural gas.

In plenary, the jurisdictional body pointed out that the tax court is competent to hear the appeal provided for in articles 76, subparagraph b), and 159, subsection a), both from the law 11.683, deducted against notification of income tax on liquid fuels by exclusion from the exemption provided by article 7, subparagraph (c), of the taxation law[35].

29. "Sicorsky, Jaime" - TFN - API - 22/8/2001
30. "Victorio Américo Gualtieri SA" - Cámara Nacional de Apelaciones en lo Contencioso Administrativo Federal - Sala IV - 7/6/2005
31. TFN: "Sibilet SA" - Sala B - 25/6/1998; "Roller, Silvia" - Sala A - 19/11/1997 y "Mux, Susana Margarita" - Sala D - 10/3/1998
32. TFN - Sala A: 19/7/1996 and, in the same sense, "Cofirene Bank of investment SA" - 6/10/1997
33. «Robert Bosch Argentina SA» - TFN - Sala A - 13/11/1997
34. "Emilio Etchevarne SA" - Cámara Nacional de Apelaciones en lo Contencioso Administrativo Federal - Sala II - 24/8/2006
35. "Santiago Sáenz SA" - TFN - API - 20/6/2007

The appellant[36], for his part, has said that the only way envisaged by the procedural law is repetition, for which first the administrative complaint must be submitted to the AFIP, and just then, before the refusal expressed or tacit, to appeal to the judicial body.

Indeed, the Chamber has asserted that "... given the characteristics of the Act contested before the Tax Court, on which there is no doubt about its determinative nature, shows that the issue raised corresponds with the provisions of article 7 of title III 23.966 law. This standard establishes in its fourth paragraph that the assessment of debts shall be enforceable with the simple notification process of payment of the tax and its accessories without another application. In the latter case, the discussion regarding the existence and enforceability of assessment will be deferred a chance to introduce the action of repetition. "Therefore, to the clarity of the letter of the law the will of the legislator to subtract the debated issues of the procedure of the law 11.683, reflected resulting in inability to authorize the appeal before the Fiscal Court".

Finally, warns that our highest Court ratified not long ago, in the framework of a cause that it dealt with the subject under discussion, the importance of the determinative nature of acts in order to enable the competition[37]. This way, rejecting the ordinary appeal by the Treasury against the ruling of the Chamber, which confirmed the decision of the tax court of rejecting the exception of incompetence.

In so deciding, the Supreme Court interpreted that tax assessment must be understood as the act or set of acts emanating from administration, individuals or both together, to establish in each particular case the configuration of the budget in fact, the extent of the assessment and the scope of the obligation. Therefore, the essential and unquestionable content of the assessment consist of checking the relevant facts and legal norms applicable, as the taxable amount resulting from the application of the rules. That is why the Fiscal Court is competent to hear the appeal filed by the taxpayer against the payment order issued by the collector body on liquid fuels and natural gas tax. In this regard, although the AFIP did not resort to the procedure laid down in article 16 of the law on tax procedure, the acts that are summoned to the plaintiff include a real assessment of the tax liability. In particular, they are preceded by a task of auditing to collect data of facts and experts that concluded with the payment of tribute to enter.

4. THE PUNITIVE TAX DUTY

4.1. The repression of the "tax illicit" in administrative and criminal spheres

The public good protected in sanctioning tax legislation is the public interest that compliance with the duty to contribute to the sustainability of public expenditures; In short, the financial activities of the State and completing activities of common interest, whose coverage requires the imposition and collection of taxes.

36. Cámara Nacional de Apelaciones en lo Contencioso Administrativo Federal - Sala III: "Héctor Castaggeroni SA" - 9/11/2006 y "Hugo Rodríguez y Cía. SA" - 31/8/2009
37. "Colorín IMSSA" - CSJN - 2/7/2013

In tax matters, we commonly refer to the "tax illicit" as consequence or effect of a pre-existing legal standard ordering certain conduct, that is, pay tribute or fulfil obligations linked to it; its transgression is punishable and consequently give rise to a sanction or penalty.

In principle, that illicit is regulated by two laws that typify behaviors suppressed at the level:

- administrative: in law 11.683 law of tax procedure, fines are imposed in administrative instance, even if under subsequent judicial review; and
- criminal: in the criminal law 24.769, with specific jurisdiction and custodial sentences.

According to the characteristics of taxation, tax illicit acts have been systematized on a branch that has been termed "criminal tax law". It aims at the qualification of the crime, the assessment of its effects and regulation of its sanctions[38].

Indeed, tax offences have a structure similar to the one of the criminal law with the establishment of illegal actions that respect the postulate of identification and other elements inherent in the legal configuration of crimes. In other words, they have the same normative and dogmatic structure than the ordinary crime, dealing with unlawful and guilty actions that must be analyzed judged and applied based on the general theory of the criminal offence and the basic principles of the law[39]. In this way respecting the constitutional principles of defense at trial and guarantee of due process.

The Supreme Court of Justice has held on a permanent basis (from the judgment issued in the year 1968 in the case "SA silver paraffin" - 2/6/1998-, that continued with dictated pronouncements, among others, in "William look SACIF" - 18/10/1973-, "Usandizaga, Perrone and auto Juliarena SRL"-15/10/1981, "Buombicci, Neli." - 8/6/1993-, "Lapiduz) ", Enrique"-28/4/1998 - and "Fiszman and Cia. SCA"- 6/23/2009-), the criminal nature of the tax illicit act. The lower courts have followed the same line.

In this order of ideas, the 24.769, criminal tax law, considers the denunciation of a tax crime, which, in general terms, can be performed in two ways:

- It could be carried out by AFIP, since this organization, through its powers of investigation and control, usually detects the alleged Commission of the offences set forth in the standard in question. In those cases in which the administrative assessment of the debt does not correspond, the relevant complaint shall be raised immediately once formed the administrative conviction of the alleged commission of the unlawful act.
- It could be made by an individual, which has knowledge of the crime and presents the relevant complaint before the judge, who must refer the actions to the AFIP for the verification and assessment of the debt.

The crime of simple evasion is legislated in item 1 ° of the law 24.769. It holds that " the taxpayer that through misleading statements, malicious concealment or any other ruse or deception, by action or omission, evade total or partially the payment of taxes to the National Treasury to the provincial Treasury or the autonomous city of Buenos Aires shall be punished with imprisonment of two (2) to six (6) years. This applies if the evaded amount exceeds the sum of four hundred thousand dollars ($ 400,000) for each tax and for each tax year, even though it would be an instant tribute or a tax period of less than a year.

Likewise, article. 2nd - referring to the aggravated evasion - argues that: "The penalty shall be three (3) years and six (6) months to nine (9) years in

38. GARCÍA BELSUNCE, H. – Tax criminal law - ed. Depalma, 1st Edition - Bs. As., 1985 - Op. cit. p. 2
39. BERTAZZA, Humberto J.: "On the nature of the tax violation" - Práctica Profesional N ° 105, p. 6 - Ed. The law - Bs. As., 2009

prison, when in the case of article 1º check any of the following cases:"

a. If the evaded amount exceeds the sum of four million pesos ($ 4,000,000);
b. If been involved person or persons brought to hide the identity of the true obligated subject and the evaded amount it exceeds the sum of eight hundred thousand dollars ($ 800,000);
c. If the obligor will use fraudulently exemptions, rebates, deferrals, releases, reductions or any other type of tax benefits, and the amount evaded by such a concept exceeds the sum of eight hundred thousand dollars ($ 800,000);
d. If any mediated the total or partial use of invoices or any other equivalent document, ideological or materially false".

From the concerted reading of both provisions, it is observed that the action is given by the fact of avoiding total or partially the payment of taxes - through misleading statements, malicious concealment or any other ruse or deception – to the tax authorities national, provincial or of the autonomous city of Buenos Aires. In other words, the evasion set there is not to pay what is owed to using one of the mechanisms the law refers to and according to the objective condition of sanction, i.e. to evade an amount specified in provisions transcribed supra.

4.2. The tax illegal action and money laundering

The legislation of our country recognized for the first time the crime of money laundering in article 25 of act 23.737 - BO: 11/10/1989 - (that is, as supplementary of the Criminal Code). It took as a unique antecedent that gave rise to the typical behavior of mentioned crime, possession and trafficking of drugs, which were set forth in this legal text.

It is only as result of its entry into force that a criminal conviction for the crime of money laundering[40] was included in the law. Another one resulted from an agreement of short trial in which defendants acknowledged their co-authorship on the crime in question, as an attempt[41]; also, of 35.705 ROS received in the UIF, just 142 cases were referred to the public prosecutor's Office or a court for inquiry. Only 18 cases were accompanied by the UIF as plaintiff[42].

This led to discussion of a reform that was translated into practice with the enactment of law 25246 - BO: 10/5/2000 - which structure the administrative-preventive regime of laundering of assets of criminal origin and the financing of terrorism, based on the so-called ROS. In other words, the legal text laid the foundations of a regime that aims to prevent and repress the laundering of assets of criminal origin.

The legislator incorporated this new offense of the "Administration of Justice", by replacing the text of article 278[43] of the second book of the Penal Code, title XI "of crimes against the public administration", chapter XIII ("Concealment and laundering of assets of criminal origin"[44]).

Therefore, it was considered that the conduct of money laundering could be typical, with respect to assets from any antecedent offence of which the author of the conduct of washing had not participated, in accordance with the provisions of paragraph 1 of the aforementioned article supra:

"Shall be punished with imprisonment of two (2) to ten (10) years and a fine of two (2) to ten (10) times the amount of the operation, who convert, transfer, administer, sells, tax or apply in any other

40. "Altamira, William and other" - Tribunal Oral Federal N ° 2 - city of Cordoba - 15/12/2009
41. "Acosta Aguilera, Luz María and Francisco Javier Guzman Ramirez" - Oral Court criminal economic N ° 2-6-27-2011
42. DIUVIGILDO, Yedro: "The new offence of money-laundering of illicit origin. Analysis of law 25246 and its reform by law 26.683 "- Práctica Profesional 2015 - 231, 25
43. CF. Article 3, law 25246
44. CF. Article 1, law 25246

way money or other proceeds of a crime which he did not participate. The possible consequence of money laundering is providing goods or the substitutes with the appearance of a lawful origin and provided that their value exceeds the" sum of fifty thousand dollars ($ 50,000), in a single act or by the repetition of various facts linked together."

On the one hand, the public good protected under this reform was the "Administration of Justice", that launderer seeks to outwit by giving appearance of licit to proceeds from a crime committed by a third party. On the other hand, the element of type "a" marked the lack of definition of the offence from where the laundered assets proceeded. i.e., it was decided to adopt at the time an amplitude around the crime, including all the figures typical within the criminal code and special penal laws. Therefore, the reform characterized money laundering as "aggravated species" of the genus "cover-up", holding it in this way to its rules, which should be considered both by the official called to judge as for those bound to report it.

In conclusion, following the anti-discriminatory provisions of law 25246, to be judged for money laundering, the offender should have participated in the offence that produced the illicit assets.

However, this new regime did not show greater effectiveness than the previous one, since no condemnation resulted from its application. This led the FATF, in its assessment of the year 2010, to write a report[45] whereby, inter alia, it recommended the punishment of the self-laundering since, in their opinion, there would be no legal principle banning it in our country, and stressed that tax evasion would be the hypothetical previous crime that would generate procedures of control.

In June 2011, Law 26.683 - BO: 6/21/2011 was sanctioned. Through its entry into force: 1/7/2011 -, substantive aspects of money-laundering regime are modified. The criminal code identify the relevance of an autonomous legal asset and, as a result, creates criminal behavior in an autonomous way, differentiating it from the previous figure of cover-up.

The cited legal text caused a reform in the field of money laundering in our country, modifying the name of title XI "of crimes against the public administration", chapter XIII, which happens to be called "Cover-up" on the one hand.[46] On the other hand, it identified in book II of the criminal code, under the title XIII called "Crimes against the economic and financial order"[47] the assets laundering as an independent offence - the protected public good is the "Economic and Financial Order"[48].

In that sense, article 6 of law 25246[49] was amended, in its paragraph j), incorporating within the competence of the FIU to analyze, treat and convey information for the purposes of preventing the crime of money laundering, as included as a tax offence listed in the criminal tax law 24.769.

It is observed therefore that repressive legislation against money laundering ha evolved for the purposes of being adapted to international guidelines, especially in:

- In law 23.737 of the criminal code, the protected legal asset is 'Public health';
- In law 25.246 and the modification of article 278 of the Penal Code ("concealment and laundering of assets of criminal origin"), the protected legal asset is "Administration of Justice"); and
- In 26.683 law and in the modification of article 303 of the Penal Code ("crimes against the economic and financial order"), the protected legal asset is the "Economic and Financial Order").

45. Mutual Evaluation Report dated 22/10/2010
46. CF. Article 1, Law 26.683
47. CF. Article 4, Law 26.683
48. Thus, the technique used save homogeneity with the one used by countries such as Spain, France and Germany, among others
49. Mandated by article 8 of the Law 26.683

5. CONCLUSION

We have tried to outline a complex process, the one of tax investigation, and the various aspects deriving from its execution.

In fact, and as the reader could notice, the control and inspection constitute the procedural and administrative opportunity that the tax administration has to collect the elements of conviction in order to check conditions and economic relations – with tax relevancy. From the conclusions which will arrive as a result, and attentive to the mechanism used for this purpose (in the Argentina, jeopardy assessment or administrative liquidation), we are faced with different alternatives posed by their further discussion.

Thus, the taxpayer- administration relationship, under the opposition of interests, open a recursive scheme that involves not only debate at administrative headquarters (with the valuable contribution of having a judicial body such as the Tax Court). It also shows aspects edges leading the analysis to the judicial sphere, following the presumptive criminal character of "money laundering" that can arise from the above-mentioned adjustment.

All these rules tend not only to try to ensure compliance with the provisions of the tax sphere but also to suppress the ruse or deception that arose through evasive or elusive maneuvers of those, which in many occasions not only seek a simple omission of the tax but also take advantage of them for criminal purposes in other areas.

Therefore, our present contribution pour is to introduce the reader to the main aspects of each of the topics discussed with their different variants, also contributing with the prevailing rules and relevant jurisprudence, in order to provide tools that deserve a comparative table with what occurs in similar legislation in other countries and, why not, encourage further debates.

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7. ABREVIATIONS AND ACRÓNYMS

AFIP: Federal Administration of Public Revenue.
AITFA: Ibero American Association of Fiscal or Administrative Courts.
ANA: National Association of Customs.
API: Tax Plenary Agreement.
Art. Article.
BO: Official Bulletin.
Bs. As.: Buenos Aires.
Cfr.: conform.
CSJN: Supreme Court of the Nation.
DGI: General Tax Directorate.
DGA: General Customs Directorate.
Dr.: Doctor.
Ed.: Editorial.
Etc.: etcétera.
JGM: Head of the Council of Ministers.
N°: Number.
Op. cit. pág.: opinion quoted in page.
RG: General Resolution.
ROS: Report of suspicious operations.
T.: Tome.
TFN: Fiscal Court of the Nation.
T.o.: Ordered text.
UIF: Unit of Financial Information.
V.: Volume.
V.gr.: verbigracia.

THE NEW LEGAL REGIME FOR ONLINE GAMING AND BETTING IN PORTUGAL: REGULATION MODEL AND GLOBAL FRAMEWORK

José Duarte Cordeiro

Synopsis

In a situation of regulatory vacuum and after more than a decade of promises and expectations described in studies, discussions, reports and projects, Portugal has finally approved the legal regime that legalizes the practice and the exploitation of online gambling and betting with money. It is a landmark in Portuguese legislation on game activity since, in addition to allowing its practice in virtual environment, until now prohibited, it will also attract international cash, i.e. investors and foreign players will be allowed to operate and play online in Portugal

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Content

Gambling[1] -social phenomenon historically regarded as a harmful and unwanted activity- was the subject of absolute prohibition in contemporary societies, repressing and condemning its practice.

However, in view of the increase in underground game and the social problems that this already, just by recognizing its existence as an inescapable reality and regulating their practice and exploitation, as a form of protection of society and of individuals. Also contributed to the liberalisation environment, the realization that the human impulse to the game is a reality, while playful activity that provides pleasure and passion for risk and preferable to legalize, tax and regulate the habit.

However, the moral question has never stopped being raised, such as Climacus (2006: 482), highlighting that "notwithstanding the liberalization that has occurred in recent times, the conservative element that always involved the game for various reasons-cultural, political and above all, moral, still remains."

For his part, Duarte (2001: 89) states, "the values protected by the regulations, in particular criminal, are morality, property and tax interest". The author believes that, more than the addiction in the moral sense, the ideas of idleness and lack of productivity that they represents are not foreign to the purposes of the regulation of gambling or gaming.

The truth is that, in the past, the legal prohibition that in most jurisdictions focused on gambling had moral concerns about its vicious or even sinful nature, which was targeted. But not only. Other aspects also justified the ban as the safeguarding of assets, social peace and the maintenance of public order, thereby avoiding pernicious consequences often associated with gambling- disputes, fraud, scams and other crimes.

It was accordingly that, in 2015, the Portuguese Government approved the legal framework of the online gambling and betting (RJO)[2] -contemplating games of chance, horse betting and sports betting, as well as certain types of bets of territorial base, with definition of the terms and conditions required for the exercise of the activity of online gaming in Portugal.

The new legal framework aimed, on the one hand, to legalize comprehensively and systematically the methods of gambling and betting money still not regulated and, for another, adapt to international best practices the existing legal framework for territorially based games. The whole regulation recognizes a set of values that the State intends to preserve and guarantee, which is positive.

The regulatory powers of the entity that was already responsible for control of territorially based games- the Games Regulatory and

1. In this article, the mention of the word ' game ' refers to the game of chance with bets in cash. The games of chance are games in which the possibility of winning or losing depends on the skill of the player, but only the lucky or unlucky. Its essence is the decision-making under risk conditions, determined by the chosen combination and the statistical probability of getting it right.
2. Decree-Law No. 66/2015-Diário da República nº 83/2015, series I of 4/29/2015 -Approves the Legal Regime of the gambling and betting Online and change the code of advertising and General stamp duty Table.

Inspection Service (SRIJ)[3] – are expanded to cover also the online games, with the necessary powers to meet the demands that the new reality imposes. Thus, the functions of control, inspection and regulation are carried out jointly by SRIJ, which holds inspection and supervision powers on the activity of gaming, and the Gaming Commission[4], which is the agency that supervises and coordinates the activity of the SRIJ with regulatory powers and imposing penalties.

In the solutions applied, taxation[5] is not the only concern. Public interest issues are also underlying, such as ensuring the protection of minors and of compulsive gamblers; to prevent fraud and money laundering; safeguarding the sport integrity and preventing the manipulation of bets associated with the handling of sports scores.

In this way, and considering the defense of the public interest and social order, a model considered sufficiently balanced and transparent has been established, to enable effective prevention and combat the unlawful practice of online gambling in Portugal.

1. THE ONLINE GAMING: A GLOBAL PHENOMENON

The evolution of the activity of gaming during the late twentieth century was marked by the possibility of offer carried out with the use of a new communication platform – the internet. It was quickly realized that this would be a privileged environment for the dissemination of the gaming practice, taking into account the characteristics related to the easy access, privacy, and the variety of offer.

Therefore, the players face a new range of opportunities, with a new format of traditional games (lotteries, bingos, Poker, casino games), now also available in virtual environment – the online gaming.[6].

Gambling via the internet have allowed operators to develop their activity without geographical limitations and in a comprehensive way and players came to practice it at a distance, from their personal devices, anytime and anywhere. However, if emerging online gaming markets were important, some of them were referred to as “greys”, i.e. markets consisting of licensed operators in one country but who also provided services in other countries without authorization to do so by the receiving countries.

The need for regulation was growing along with the proliferation of games accessible through new technologies, leading many national laws to issue normative regulators about the matter, it is not always easy to reconcile with each other. Several factors have contributed significantly to the spread of gambling on the internet, such as the definition of encrypted communications

3. The regulatory and Inspection Service games (SRIJ) pursues the functions of control, inspection and regulation of exploration and practice of games of chance in casinos and bingo halls (territorial-based games), as well as games of chance, sports betting at horse betting and, mutual and dimension, when practiced remotely (gambling and betting online). © 2015 regulation and inspection services games | Turismo de Portugal.
4. The Gaming Commission is the agency responsible for guiding, monitoring and supervision of the activity of the regulatory and Inspection Service games (SRIJ), ensuring the link with the Board of tourism of Portugal, I.P.
5. The term «taxation» should be understood in the sense given to it by paragraph 2 of article 3 of the general tax law (LGT), according to which ‘taxes comprise taxes, including customs and special, and other species, notably law created tax rates and other financial contributions in favour of public entities».
6. In this article , the reference to “online gaming” refers to game with financial betting made throught internet.

protocols, secure monetary transactions and brokers with sites[7] that have been popping up on the internet, where they offer free lines for players to make their bets.

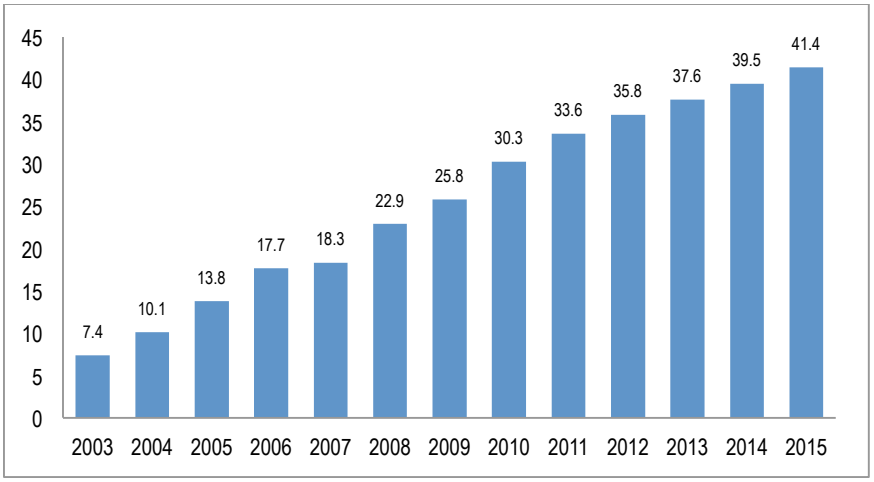
Some countries legalized (or at least began to accept) all forms of online gaming, allowing foreign operators in their market and players from any source in their jurisdictions. They are namely: Gibraltar, Malta, Antigua and Barbuda, the Netherlands Antilles and Panama. On the other hand, there are countries that prohibit most or all of the forms of onlinegame: United States of America (USA), China, Russia and Pakistan (Wood and Williams, 2009).

Currently[8], there are worldwide 3,340 game sites online[9], which exercise activity in regulated markets and the majority of them is not associated with traditional game rooms or casinos, with physical existence. Protectionist policies imposed by several States, caused many online game to settle in small territories or principalities, known to offer more attractive tax systems, with increased interest for game companies on their territories.

According to British consultant H2 Gambling Capital (H2GC)[10], the USA continue to be the nation that, despite the ban, spend the highest amount in online games for consumers, registering today about 25% of the global market value.

The best information available (graph 1) shows that, in 2015, the global market of online games will contribute about of 41.4 billion dollars, in cash game volume, tripling the value since 2005.

Chart 1
Market trends of online game in the world: 2003-2015
(1000 million USD)



Source: © Word Statista 2015.[11]

7. A «site» (or website) is a collection of web pages, i.e. of hyperlinks accessible by HTTP protocol on the internet. The set of all sites comprise the existing public World Wide Web.
8. Information reported on 14 June 2015.
9. Listed in www.online.casinocity.com. Online Casinocity platform is a directory of information on game servicesonline, acting with complete independence from any operator and providing a continuous update of news on game sitesonline available worldwide.
10. H2 Gambling Capital (H2GC) is an international consultant, leader in providing studies and reports about the gaming industry in the global market. H2GC studies have proved to be very influential for policymakers in decision-making on the gaming sector, both in Europe and in the USA. Access available at: http://h2gc.com/.
11. Word Statista-The StatisticsPortal: entity that operates several databases accessible on the internet and provides its users with essential tools for quantitative survey, statistics and related information. Available at: http://www.statista.com/statistics/270728/market-volume-of-online-gaming-worldwide/.

According to recent statements by Simon Holliday, founder and Director of H2GC, "If all States regulate the online game sector, it is likely grow next year by a 20% increase, with an evolutionary growth potential up to 30% within 10 years".

2. FROM THE ROYAL LOTTERY TO ONLINE GAMING IN PORTUGAL

2.1. The first lottery and social games

The first lottery recorded in Portugal dates back to the 17th century, during the reign of King Pedro II, at a time when the public purse was lacking resources due to the war effort that he supported since the restoration[12]. It was the first Royal Lottery, held in 1688[13].

The tax purpose was already evident at the time: Properties and life annuities were offered to the winners; the participation of all, national or foreign, allied, neutral or enemies was accepted; and for the Royal Lottery to be serious, any other lotteries were forbidden, even those of the charities of Lisbon and Oporto[14] (Vasques, 1999).

However, only in 1783, in the reign of Queen Mary I, the first regular lottery was created for the benefit of a Charity of Lisbon[15] and the profits were to benefit some social bodies: the Royal Hospital, The Holy House of the Impaired, and the Royal Academy of Sciences. By associating the results to social support, through an institution managing its own interests, the State would fulfil functions that otherwise would have to be financed through taxation.

Nevertheless, the underground game kept existing and proliferating in the country, especially since the end of the 19th century and during World War I, becoming a sort of social plague. As reports Ataíde (1932): "Lisbon, at the expense of a lot of misery and disgrace, displays a bustling nightlife, fueled only by gaming (...) also in modest villages in the north, in the comfortable villages of Alentejo and Algarve, games are played, with passion, and again without measure".

It was in this environment that, in 1917, the Interior Minister submitted to the Council of Ministers a bill on gaming, to which the Tourism Council gave a favorable opinion, with the recommendation to compel future dealers to build hotels with comfort and facilities recognized as indispensable (Cunha, 2010).

Throughout the 20th century, the Public Finances was gradually gaining ground in terms of distribution of profits and, in 1926, the first authorization is issued[16] to regulate lotteries, assigning their management to the Holy House of Mercy of Lisbon (Santa Casa da Misericórdia de Lisboa - SCML)[17] on behalf of the State. To this day, SCML holds the exclusive right to the

12. The Restoration war consisted of a set of armed clashes fought between the kingdoms of Portugal and Spain, in the period between 1640 and 1668. The clashes began at the stroke of 1 December 1640 (the restoration of independence that ended the dynasty Filipina) and ended in 1668 with the Lisbon Treaty, signed by Alfonso VI of Portugal and Carlos II of Spain where he recognized the complete independence of Portugal.
13. Royal Charter 4 may 1688.
14. However, the charity entities were rewarded with the portion of the profits corresponding to the amounts collected, pursuant to legal prohibition (author's note).
15. Decree of 18 November 1783: first game concession in Portugal-the national lottery.
16. Decree No. 12790, December 9 1926.
17. The Santa Casa da Misericórdia de Lisboa (SCML) is a collective person of private law and public administration, in accordance with their respective Statutes, approved by Decree-Law No. 235/2008, of 3 December. The SCML shall be chaired by the Member of the Government that oversees the area of Social Security and covers, in addition to the powers provided for in the Statute, the definition of the General guidelines.

exploitation of all lotteries and sweepstakes, also called "Social State Games."

In part, it was the recognition of the impossibility to suppress the practice of underground game, on the other hand, the regulation came out to be a good source of revenue and, thus, games of chance began to be subject to an autonomous legal systematic discipline.

2.2. Taxation in the traditional game market

In games of chance, particularly in games in casinos and bingo halls, taxation has acted in Portugal through the excise duty on gaming ("Imposto Especial sobre o Jogo –IEJ")[18], taxing dealers' results and annual counterparts, after deducting the premiums.

A system of legal deposit was established, affecting the development of tourist revenue in counties where casinos and bingo halls are located, in order to compensate them for some negative social burden that gaming represents. This way, investments in works of local interest and capacity in the tourism promotion of the regions were made possible, as well as in the construction of commercial space near the games facilities, with shops, hotels, restaurants and other hospitality services.

According to the "Gaming Law"[19] (in the previous draft), both the exploitation and the practice of games of chance were only allowed in casinos with existing facilities in specific areas, called "game zones". With the recent entry into force of the new comprehensive regulations on gaming, the Portuguese Government has drafted several amendments to the old gaming law, adjusting and framing it with the new rules.

2.3. Sports betting and sport integrity

For more than a decade, the absence of legislation on the online sports betting market has led successive Governments to create working groups in order to submit proposals for their regulation. Probably one of the most important contributions to the clarification of all the problems related to online sports betting was the study carried out in Portugal by the Centre for Research and Training in Marketing of the ISCTE, by Pedro Dionísio, Antonio Carlos Santos, Carmo Leal, Louis Graca and Marta Lousada[20].

This is a very detailed and thorough study about the impacts of the (no) regulation of sports betting online in Portugal. Among other findings, the authors show that legalizing sports betting online is a very positive development for all parties. In addition to compensate the financial shortcut and to provide increased tax revenues, it will be an increased contribution to the integrity of the «Sport».

The study reinforces the idea that once regulated the industry of online game in Portugal; sporting activity will become strengthened, in particular, due to the investment in advertising by clubs, and in terms of sponsorships, in favor of sporting competitions.

According to Dionysius [et al.] (2010: 79): "The truth in sports competitions is a fundamental value for the capture of attention of various audiences, hence the interest of several instances national and international leaders in this topic. The recent match-fixing sport scandal discovered in Germany – the country with the most restrictive practices with regard to online

18. Created in 1927, the excise duty on the game (IEJ) is now provided for and regulated by articles 84 and SS. of Decree-Law No 422/89. One of the features of IEJ accentuates the increased responsibility of dealers by the legality of the practice of leased to a holding game profitable for the benefit in particular of the tourist equipment and animation of the regions and the respective promotion in domestic and foreign markets.
19. Read ' the game ' or Law, framework law of Fortune and Misfortune, as the legal regime that regulates the practice of games of fortune or chance (Decree-Law No 422/89, of 2 December, successively amended by Decree-Law No. 10/95 of 19 January, law No. 28/2004, of 16 July, Decree-Law No. 40/2005, February 17 , Law No. 64-A/2008 of 31 December and Decree-Law No. 114/2011, November 30).
20. Contributions to a regulation of sports betting onlinein Portugal, ISCTE – Business Scholl – GIEM, December 2010.

sports betting – naturally raises question relating to the need to preserve the integrity of sports competitions, but also to know that an effectively regulated practice of online gambling is also discouraging clandestine gambling (...) ".

In view of the size of recent scandals, the supranational cooperation between sports authorities, judicial and police becomes a priority element for the implementation of sports policies and for the regulation of gambling, aimed at combating the manipulation of sporting results.

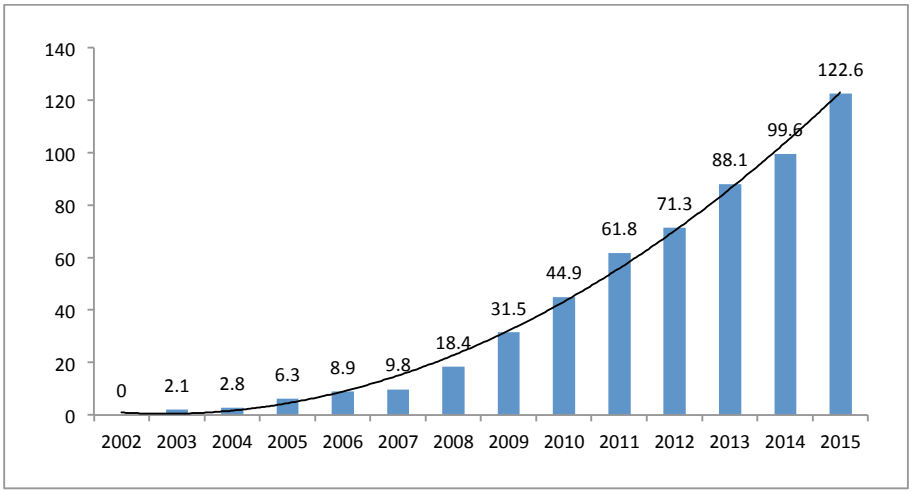
In the absence of regulation, sports agents, clubs and promoters from competition authorities, fail to leverage the potential of online game operators, who are willing to sponsor competitions. As such, the provision of betting services can benefit the sport events, because it increases their exposure and increase public interest, however, there is consensus that inspectors would benefit from a return in accordance with the results of bets.

In the end, sports claim their due legal recognition, the protection of their rights and proper compensation for the commercial exploitation of sporting events.

2.4. Online gaming in Portugal (before the new regulation)

According to the already mentioned international consultant H2GC, the online game in Portugal has grown consistently, both in terms of the typology of games, as in terms of the weight represented by the sector and the amounts involved, following the global growing trend as shown in the following graph.2

Graph 2
Evolution of online game volume in Portugal[21]
(in millions of euros)



Fonte: H2 Gambling Capital (2014), http://h2gc.com/.

21. Gaming revenues correspond to the net gains of the operators, that is, the sum of the bets of the players, deducted from the total of the premiums paid and before deducted any losses or taxes. International nomenclature the GGC terms (Gross Gambling Revenue) and GGY (Gross Gambling Yield).

In the past, the State did not assume any formal position regarding safeguarding the public interests and impact on society and therefore never profited from tax revenues, both from corporate earnings of operators and the premiums paid to players.

If it is true that online games operators, by operating from abroad, did not meet with the national legislation, but it is no less true that the same legislation was older than the phenomenon of online internet gaming, had not been properly reviewed and adapted to this new phenomenon. It should also be mentioned that, in 2011, under the Economic and Financial Assistance Program (PAEF)[22], agreed by the Portuguese authorities and so-called troika[23] (International Monetary Fund, European Commission and European Central Bank), Portugal took measures with a view to balance its public accounts.

These circumstances have also contributed to the creation of the fiscal discipline of online gaming, taking into account the efforts required to Portugal in order to obtain relevant accrued tax revenues" for the fulfilment of the goals of the budget deficit.

3. ONLINE GAMING IN THE EUROPEAN UNION

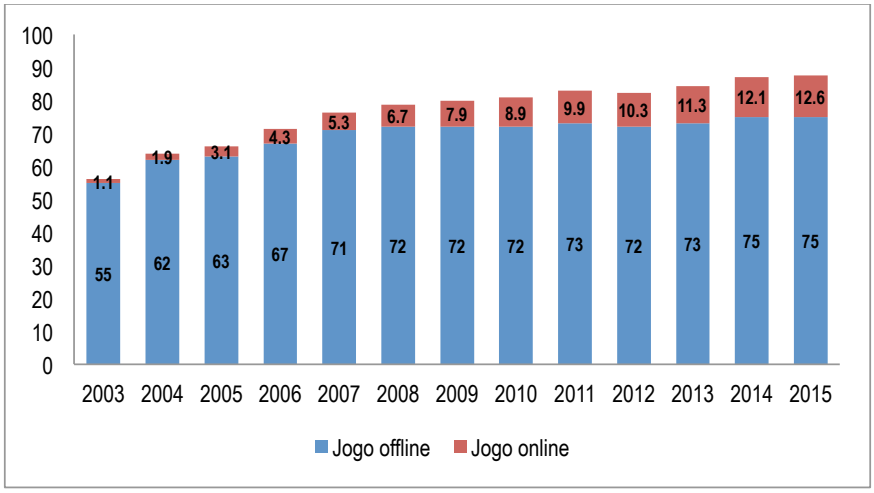
3.1. The industry context

The territorial space of the European Union (EU), both the development of the internet, as the consequent growth of the online game, combined with the fact that the rules of the Member States[24] differ considerably from each other, have led not only to more supply of licensed games, as well as the implementation of many unauthorized operators.

For more than a decade, different regulatory regimes of online gaming are in force in Europe, which range from the lack of legislation and complete ban, to the validity of models more or less liberalized. As a rule, the states grant licenses to entities that intend to provide online games within their territories, under various legal requirements of compliance and conditioned for the payment of fees and taxes.

22. The Economic and financial assistance program (PAEF), memorandum of understanding or troika Plan was agreed in May 2011 between the Portuguese State and the International Monetary Fund, the European Commission and the European Central Bank, in order to balance the public accounts and the increased competitiveness in Portugal. This was a condition for the 78 billion euros loan to be granted to the Portuguese State.
23. Troïka (troika) is a Russian word, which means ' sleigh pulled by three horses '. In politics, is an expression that represents a group of three leaders, States or entities, acting together, forming a triangular leadership. In the case of aid to Portugal, it was called Troika because the redemption process was carried out by a trio formed by the European Commission, European Central Bank and International Monetary Fund.
24. «Member State» – designation of countries belonging to the European Union. In Spelling Vocabulary. Porto Editora, 2003-2015. Available at: http://www.infopedia.pt/dicionarios/vocabulario/estadoMember.

Chart 3
Comparative Evolution (online/ offline) of the activity of gaming in Europe (EU28)
(in 1000 million euros)



Source: H2 Gambling Capital (2015)25

Nevertheless, there is an enormous diversity of legislative solutions to the rules of online gaming, the local license scheme- local licensing market – seems to prevail over other solutions. The local license scheme is based on the existence of licensed operators that provide services in a regulated framework at national level, while the monopoly regime consists of a controlled system owned by the State.

However, regardless of the adopted models, it is noteworthy the regulation of the online game activity with financial bets is growing among European countries. The success achieved in most regimes that have legalized online games results from the revenue generated and the good policies of redistribution. A good example of game revenue affectation is channeling the value of the licensing fees (applied to online game operators) for the funding of the regulatory authorities, what has happened in most Member States.

Although there are no regulatory models alike within the EU, taking into account the particularities of each country-demographic, economic, social and cultural – all share similarities in terms of taxes, fees, offer structures, technical requirements and product type.

However, the specific nature of the interactions in online environment and many game sites available on the internet, cause increased difficulties to the supervisory authorities.

According to Catarino and Guimarães (2012: 516): "(...) the context of globalization in which we live now requires the effort of cooperation measures between States, and the "old" DTC's[26]

25. In, Benchmark of Gambling Taxation and License Fees in European Member States- Final Report (2015). Available at: file:///C:/Users/Duarte/Downloads/lp-v-j-0000006125% 20 (1) .PDF.
26. The agreements or conventions for the avoidance of double taxation (ADT), are intended to mitigate or eliminate the tax on certain transactions subject to tax in more than one territory. The conventions for the avoidance of double international taxation are an important instrument of international tax law. Accessible at: http://www.portugalglobal.pt/PT/Paginas/Index.aspx.

have not been supplying a sufficient response capacity. Everything points to the emergence of a new international tax order, extended to areas of cooperation and of exchange of information, the unitary regulatory or closely harmonised taxation of manifestations of wealth and economic operations and the monitoring of financial flows. The phenomena of international tax competition will be mitigated, new phenomena and contact tools between agents will deal with the new ways of transacting, among others ".

Thus, the change in the paradigm of supply and growing demand for online gambling services pose many challenges to regulators, to guarantee and ensure the objectives of their policies, both locally and across borders.

The reality is that there is no harmonisation in the Community legislation relating to the universe of gaming offered on the internet. In this context, the Court of Justice of the European Union (CJUE) has considered that each Member State must define its own scale of values, to ensure their interests.

3.2. Law and case law of the European Union

Similar to the traditional game, online game has come to be regulated by many countries because of the ineffectiveness of the prohibition regimes in the past; however, the illegal online gambling remains a serious problem that keeps challenging a number of countries and jurisdictions.

The EU never intended to consider gaming as a service to harmonize and, as such, did not establish provisions for the exercise of the freedom of establishment of operators and free access to their activity. Therefore, each Member State must outline the regime to adopt on its territory, bearing in mind the principles of EU law[27] (proportionality, non-discrimination, freedom of establishment and freedom to provide services) as well as the case law of the CJEU in the matter. This can be measured, firstly, in the guidelines on services in the Internal Market[28] that expressly disclaims their applicability to gaming activities that involve wagering a stake with monetary value in games of chance, including lotteries, gambling activities in casinos and betting transactions. Additionally, the Electronic Commerce Directive[29] expressly disclaims its applicability to the betting of money on games of chance. Here also, the EU decided not to include gaming in the rules relating to the Information Society services.

Thus, EU law does not require the mutual recognition of legally installed operators in a Member State, with the consequent restrictive effect on the freedom to provide services, which can be seen as a sign that the Court is not willing to replace Union law as regards the practice of gaming online in its territorial space. However, the law and the case law in force in the EU, confirm that the services related with the activities of gaming, fall within the scope of application of the Treaty on the functioning of the European Union (TFEU)[30] in relation to services. By applying the fundamental principle according to which "restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals established in a Member State other than that of the users of the service"

The issues that have been ruled by the TJEU, related to gaming, refer precisely to the assessment of the restrictions that some

27. European Union law enjoys the principle of preference over national law. On this principle, the Court has been successively the comment acknowledging the following: Community law could not be invalidated by the national law, even constitutional level in effect in this or in that Member State. See Proc° par. 36 to 38 and 40/59, Case Comptoirs de vente du Charbon de la Ruhr, Col. 1960, p. 890.
28. Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (2006/123/EC).
29. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market (2000/31/EC).
30. Under the treaties, the European institutions adopt legislation, which is then applied by EU countries. The full text of the treaties, legislation, case law and legislative proposals can be found in EUR-Lex database.

countries place on online gaming and the risk they can violate fundamental principles long established in EU legislation. As such, the operators authorised in one Member State can provide services to consumers in another Member State, unless they impose restrictions for reasons relating to essential public interest.

3.3. Towards a common market of gaming in Europe

In Europe (UE28), it is not possible to establish clearly a univocal trend of legislative adaptation in Member States, but it is possible to affirm that the regulation of online gambling is an imperative. However, the technical, legal and social issues that Governments face in regulating processes are not adequately addressed by Member States individually, especially due to the cross-border dimension that characterizes online gaming.

As stated, the main reasons for the regulation of online gaming in the EU reside in the need to protect citizens, especially minors and the vulnerable, and the need to combat fraud and offences, such as the handling of sports scores and money laundering.

But, when a national system aims to limit the supply, this requires technical means and legitimacy to block access to illegal operators and to control suspicious financial transactions. The political legitimacy of such measures would come out much more enhanced with a decision, preferably binding, at EU level [31]. In this way, all aspects related to the fight against illegal gambling would be reinforced with a general approach, because the measures of restriction of internet access and blocking financial transactions taken individually by each Member State would be much less efficient.

In Rome, on 23 April 2013, before the Committee on Culture and Education of the European Parliament, the Italian MEP Marco Scurria had the following words: “The creation of a single regulation for the whole of the European Union will also serve to promote the regulations in European countries that have not yet done so. The European Union wants to implement a regulation similar to the English one, and avoid the strangulation of the various individual markets. This will be a lengthy process, but hopefully successful”.

However, in 2013, the European Parliament adopted by absolute majority a [32] report on the games of gambling online , encouraging the EU to take greater leadership and effective performance in the sense of ensuring appropriate cooperation between the Member States. Although the report does not refer to a harmonisation of the sector in the EU, it encourages and supports proposals in some areas, such as the rules on services of electronic identification and verification of clients and the strengthening of cooperation between the Member States.

It is concluded that, although the Member States have the freedom to set their own policies, the conformity of national legislation with the TFUE as well as respect for the principle of the primacy of European law[33], constitute essential conditions for the success of the policies adopted.

31. Opinion of the European economic and Social Committee on the communication from the Commission to the European Parliament, the Council, the European economic and Social Committee and the Committee of the regions-Towards a European framework for the full game, from 22 may 2013 (2013/C 271/09).
32. Committee on the internal market and consumer protection-report on the domestic online games-11 June 2013 (2012/2322 (INI)). Rapporteur: Ashley Fox.
33. The principle of the rule applies to all European acts with binding force and, thus, no Member State may apply a national rule contrary to European law. Is a fundamental principle which, although not provided for in the treaties, was consecrated by the Court of Justice of the European Union (cjeu). http://eur-lex.europa.eu/legal-content/EN/TXT/? uri = URISERV: l14548

4. THE NEW REGULATION MODEL OF GAMING IN PORTUGAL

The range of legislation under consideration is ample, given the scope of the included issues, from the creation of a legal regime of online gambling and betting (finally) as to a fiscal discipline, criminal and administrative offences. The measures come to establish a new legal framework in Portugal, now including and regulating the exploitation and practice of the following modalities:

- Games of chance, horse betting (accumulated [34] and [35] in quota) and sports betting in quotas, when practiced from a distance through electronic Interactive media or computers (games and online betting);
- Horse betting (accumulated and in quota) and sports betting of territorial base (offline betting).

The scheme aims to encompass all forms of practice and holding games and betting money, in all its aspects, namely:

-
- A model for the online game, open to competition, through licenses but without exclusive practices;
- A unique territorial model for casinos, without prejudice to the acquired rights and permission to publish their games;
- A unique template to social gaming in the State, operated by SCML;
- In addition, the creation of a new social game of physical sports betting (aka "gambling houses").

According to the Government, the integrity and transparency of game operations will be ensured, safeguarding the possibility of restricting access to online games to minors and individuals declared incapable.

One aspect that deserves to be considered: regardless of the type of model adopted, there will always be that by taking into consideration the existence of a time lapse (from 2003 to the present) in which, in practice the exclusive exploitation by the state has been derogated. The proliferation of illegal online gaming that has occurred since then makes necessary for this recent regulatory scenario to take into account that there are many online games operating in the domestic market for several years, although in a way illegal.

However, if these operators receive legal status (a very likely situation), there is no doubt that they depart for the new online market in a position of competitive advantage, since they already have experience, databases of gamblers, marketing actions targeting clients and customer loyalty systems.

4.1. The legal framework of online gambling and betting (RJO)

The Legal Regime of the online gambling and betting (RJO), approved on 29 April 2015 is the legal instrument that regulate the exploitation and practice of online games in Portugal. The RJO puts an end to the existing legal vacuum until its approval, constituting, on the one hand, a measure to combat the practice of illegal gambling and, on the other, a means to ensure a balanced and transparent exploitation of online gambling and betting.

34. Mutual bet-game in which a percentage of the total wagered amounts is reserved for awards to be distributed by gamblers who have settled on the result, reversing the remainder to the operator.
35. Bet at-game in which participants predict one or more events during a certain event, sporting or otherwise, the occurrence of which is subject to a given probability, defined by the organiser of the game for each fact, called dimension, which enables players to premiums calculated by reference to the amount of the stake held.

In the normative, other matters related to the activity would be regulated, namely: safeguarding the rights of players; illicit criminal schemes sanctions, the applicable tax regime; and provisions concerning advertising rules and the guarantees that game operators should provide.

Preventative and repressive measures will be established regarding laundering of illicit money and the financing of terrorism, transposing to the internal legal order determinations set out in EU Directives on the issue[36].

The exploitation of sites with sports betting and with games of chance will also be legalized. According to this scheme, the authorisation shall be made by means of the allocation of the license to "all entities which meet strict requirements of credentials, and economic, financial and technical standing ". The advertising of gaming is allowed, with some limitations in order to protect the most vulnerable groups. One of the main priorities of the legislature was to prevent the access of minors of 18 years to game floors and online betting.

In this way, any entity interested can now apply for a license to explore online cash games in Portugal, being subject to requirements that ensure compliance with the rules. The Government ensures that the new regulatory regime includes the recommendations of the European Commission[37] and international best practices.

4.2. An open competition model

The universal principle underlying the model implies that only the State has the right to exploit online games. Only the state can assign licenses to "any private entity established as a limited company or equivalent, with location in the European Union or in a State signatory of the agreement on the European Economic Area that is bound to administrative cooperation in the field of taxation and the fight against fraud and money laundering. In the case of foreign companies, they must have a subsidiary in Portugal ".

We are facing a major transformation of the gambling business in Portugal, having regard to the enlargement of the offer to a cross-border scale under the model now open to the foreign market.

The sacred rules [author's italics] long ago implanted in Portugal and that, supposedly, would keep control of online activity in the sphere of the entities that were already licensed to practice the traditional game (the casinos) and those who have held the exclusive of the betting (SCML) have been discarded.

This is not a finished model, since the revaluation of RJO and its control rules is enshrined, within a maximum period of 2 years from the date of issuance of the first license. The measure will make it possible to retrospectively, make changes, improvements and other realities that may appear after the implementation and effective exploitation of online gambling and betting.

4.3. Requirements for the activity of online gaming

The model includes the possibility of licenses conditional to compliance with certain credential requirements, economic and technical capacity. These are, namely: regular tax and fiscal situation; social capital no less than EUR 250,000; provision of guarantees for ensuring compliance with legal obligations; existence of

36. Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005, and 2006 Policy/70/EC of 1 August 2006, concerning the prevention of the use of the financial system and the activities and professions specially designated for the purpose of money laundering and terrorist financing.
37. Communication from the Commission to the European Parliament, the Council, the European economic and Social Committee and the Committee of the regions-Towards a European framework for the online games. Brussels, 23.10.2012. With (2012) 596 final.

a subsidiary or branch in the national territory. A specific web site with domain "pt." must be set up, for the holding of games through the internet, and bank account registered in an institution authorized to exert activity on national territory.

The requisite for operators to have a subsidiary in Portugal, as well as the obligation to identify the players, aim to ensure reliability in the management of payments and the existence of systems to prevent fraud by illegal organizations. However, the measures did not stop there: the Government will also require the operators to develop more and better information in order to monitor the universe of users who register on the games sites with financial bets.

So far, anyone could register and gamble without being asked any documents as proof of age. Only if they wanted to collect the prize, bettors were bound to send an identification document. With the new law, game operators companies must require at least the player's full name, date of birth, nationality, email address, tax identification number and the data of the bank account where payments would be debited and prizes credited.

4.4. Bingo, horse betting and sports betting

The "bingo" is a part of the universe of games of fortune or chance that, under the new legislation, will incorporate two modes-the traditional bingo and the electronic bingo[38]. Once again, based on the latest technological advances, a new electronic bingo will be allowed. It is a more appealing mode, where the physical cards are replaced by devices that simulate the unfolding of the game, allowing interaction with other players.

In another strand, the regulated introduction of horseracing, with "horse betting"[39], aims to promote activities that strengthen the areas relating to the horse industry[40]. Through the horse betting, competitions on racetracks can generate wealth for all parties and contribute to promote the horseracing cluster[41] .

Similarly, requirements are also established for owners of hippodromes for horseracing, objects of horse betting. The state assigns, for the first time and exclusively, the right to exploit territorial horse betting to the SCML- to those who have sufficient ability, integrity and trustworthiness to develop the activity in their name and on their behalf.

Another new feature applies to «sports betting in quotas with territorial base»[42] with the introduction of a new social game in which participants predict events in the course of one or several events and the premium is determined based on a previously defined quota. It is intended that the sports betting in quotas of territorial base be no longer prohibited. They enter into an appropriate regulatory framework, reducing interest for illegal gambling.

In this case, also, the State assigns to the SCML, through the Gaming Department, the right to exploit, in exclusivity, nationwide, sports betting in quotas of territorial base. Indeed, the

38. Decree-Law No. 65/2015-Diário da República nº 83/2015, series I of 4/29/2015 -the first amendment to Decree-Law No. 31/2011, of 4 March, which regulates the exercise of the activity of operation of the bingo game.
39. Decree-Law No. 68/2015-Diário da República nº 83/2015, series I of 4/29/2015 -Approves the legal regimes of the exploitation and practice of horse betting place-based mutual and assigning the operation of racetracks, and amending the statutes of the Santa Casa da Misericórdia de Lisboa.
40. «Horse row ' means the set of aspects associated with horses, since the breeders, trainers, jockeys, veterinarians, farriers, horse stables, to the own production of food for the animals.
41. According to Porter, M.E., in "The Competitive Advantage of Nations" (Free Press, New York, 1990), a cluster "is formed by companies and related sectors, through vertical relations (customer/vendor) and horizontal (technology), in a given region, and the dynamics of cooperation are composed by integrated logical synergies of cooperation perpetuate in time and relate to each other.
42. Decree-Law No. 67/2015-Diário da República nº 83/2015, series I of 4/29/2015 -Approves the legal framework of the exploration and practice of sports betting at an elevation of territorial base, and changes the General stamp duty Table, and the statutes of the Santa Casa da Misericórdia de Lisboa.

SCML already have, have long time, a network of mediators in physical locations throughout the country that offer the public the social games of the state [43] without threats to the public order.

The Government understand, therefore, that the benefit from this network and from this accumulated experience to provide sports betting with territorial base a safe and controlled procedure is the solution that best preserves the public interest and protect the players.

4.5. Taxation and a new tax-the IEJO

In addition to mitigating the problem of illegal gambling, Portugal will now be able to tax revenue that were omitted, since the bets made in the past by Portuguese players in other jurisdictions were not subject to any tax payment in Portugal.

The big news in taxation is the creation of a new tax – the Duty on Online Game (IEJO in Portuguese) – whose rates will vary depending on the modalities:

- In the case of games of chance and accumulated online horse betting, it is proposed to apply a variable tax rate between 15 and 30% of gross revenue;
- In the case of bets in quota (sports and clubs) carried out online, the tax will be levied on the income amount, with a rate between 8 and 16%, depending on the total volume of bets.

It is confirmed that the existing taxation system to the entities operating the territorial based games will remain in the sphere of IEJ and the rates (IEJO and IEJ) will vary according to the type of game but always with a premise- the gross income-. This is included in the new law as being the amount that results from deducting the amount awarded in prizes from the total value of the bets made ". Thus, according to the logic underlying the proposed taxation system, we will have more favourable rates than others:

- In IEJO (online): games of chance – 15% to 30%; sports betting at-8 % to 16%; horse bets – 15% to 30% and horse betting in quotas at-8 % to 16%.
- In IEJ (offline): horse betting at-8% to 16%; horse bets – 15% mutual 30% and video-bingo-10%.

The Government opted for progressivity, safeguarding that when revenues are smaller, also the tax payable shall be reduced, introducing the payment of fees for the licensing of operators. With these licensing fees, the tax agency will collect 18,000 euros for the approval of each technical game system and between 2 and 12,000 euros for issuing each license. The issue or extension of the term of each license will cost 12,000 euros for sports betting in quotas and horse betting, and 2,000 euros for the operation of bingo.

In short, the legislator has managed to create conditions that do not squeeze out operators with excessive taxes and fees, trying to implement solutions with the guarantees of security and protection essential to a competitive market of online gambling and betting.

43. The SCML gaming Department aims at the regulation of social games granted by the State, ensuring compliance with the national policy, in particular respecting the principle of the prohibition and the respect for public policy that seeks to preserve. The SCML contributes in this way to the satisfaction of the players and to the creation of added value to return results to society through public funding of social actions. http://www.scml.pt/pt-EN/areas_de_intervencao/Games/.

4.6. Control, inspection and regulation

Exploitation and practice of games and online gambling are subject to the authority of the State, through the SRIJ, under the Institute of tourism of Portugal I.P.[44] with functions of control, inspection and regulation.

The recent legislation brought a set of additional powers to the SRIJ, reframing it, in order to integrate new competencies (so far, it only regulated and inspected territorial based games) especially with regard to "systems and information technologies and security". This is because the model of inspection and monitoring of online games focuses on the use of ICT tools and not on face-to-face supervision.

Thus, the functions of control, inspection and regulation of exploitation and practice of gaming in Portugal pass then be exercised jointly by:

- The Gaming Commission, a body which coordinates and supervises the activity of the SRIJ, detaining powers of inspection, inspection, regulation and sanctioning powers;
- By SRIJ, who holds powers of inspection, exercises directly control, and regulates the activity of territorial based games and online gambling and betting.

Within the framework of its competences, the SRIJ may establish cooperation mechanisms with other public or private entities, domestic or foreign, when it is necessary and convenient for the improvement of their performances. The regulatory authority has the noteworthy possibility to block access of undocumented operators with the respective internet service providers, without prejudice to the criminal liability they may incur.

The SRIJ is also in charge to create a national registration system of players who are not authorized to play, voluntarily, administratively or judicially. This registration must respect the rules in force for the protection of personal data, subject to a prior ruling by the National Commission for Data Protection (CNPD)[45].

4.7. Income redistribution

A percentage of tax revenues is attributed to the entity of control, inspection and Regulation (SRIJ) and the remaining value is assigned to various entities, seeking a balanced redistribution in order to mitigate the social costs inherent to gaming.

From the amount of IEJO calculated (the focus on gross revenues), 37% shall constitute revenue of the SRIJ and the remaining value, determined a posteriori, will be distributed as follows: 77% for Tourism of Portugal I.P.; 20% for the State budget; 2.5% for the Cultural Development Fund and 0.5% for the service of intervention in addictive behaviors (SICAD).

In the case of sports betting online, 37.5% of the tax will be allocated to clubs and sports societies (85%) and the respective federations (15%). When the competitions are organized by a professional League, this value will be allocated to sports societies (85%) and the respective leagues (15%). SRIJ is in charge of transferring these amounts.

Revenue calculated in sports betting by territorial quotas (in physical format) will be shared by clubs (85%) and respective sports federations (15%). When the competitions are organized by professional leagues, the value will be distributed among the sports societies (85%) and the

44. Turismo de Portugal I.P.-National Tourist Authority, integrated into the Ministry of economy and innovation, responsible for the promotion, enhancement and sustainability of tourism activity. The Mission of the Turismo de Portugal, I.P. consists of qualificar and develop the tourist infrastructures, develop human resources training, support investment in the sector, coordinating the internal and external promotion of Portugal as a tourist destination and regular and fiscalizar the games of fortune and misfortune.

45. The National Commission for Data Protection (CNPD) is an independent administrative authority with powers of authority, which works with the Assembly of the Republic. Has as generic assignment to control and supervise the processing of personal data, in strict respect of human rights and freedoms and guarantees enshrined in the Constitution and in the law.

respective leagues (15%). These amounts are transferred by the SCML, which is in charge of this type of betting.

In accumulated horse races betting, the IEJO will cover the amount of the gross revenue of operators and, in horse betting quotas, will transfer revenue resulting from the amount of bets made. Of the calculated amount, 15% will be income for SRIJ itself, 42.5% will be for the animal sector (Portuguese Equestrian Federation, General Directorate of Food, Veterinary, and equine genetic heritage preservation) and the remaining 42.5% shall be applied as follows: 59% for Tourism of Portugal, I.P.; 40% for the State budget and 1% for SICAD.

In bingo, the portion of the proceeds resulting from the sale of cards (traditional or digital system) not reserved for prizes of for to dealers will be registered in the following terms. In case the dealers are not sports clubs, 10% is sent to the Portuguese Institute of sport and Youth, I.P.; 45% for regional tourism organizations and 45% for tourism of Portugal, I.P.; if the dealers are sport clubs: 75% goes to the Portuguese Institute of sport and Youth, I.P. and 25% for tourism of Portugal, I.P.

Keeping the guideline that was at the origin of the redistribution of the games revenues in Portugal, now the allocation of tax revenues obtained (through the IEJO and IEJ) between various public authorities.

4.8. Games advertising

The new legal regime of gaming in Portugal provide for the possibility of advertising games and financial bets. However, this can only take place in a socially responsible manner, favoring the playful aspect of the activities and not appealing to obtaining easy profit, avoiding suggesting success or social success encouraging excessive gaming practices.

Accordingly, the promotional actions with explicit or implicit references to online gambling and betting or territorial based gaming cannot target minors and cannot take place at a distance less than 250 meters from schools or other sites of minors.

With the new law, the (almost) general prohibition prevailing in the past is repealed, and the new legal regime will allow gambling advertising, however, the content of advertising messages should always take into account all the issues relating to consumer protection.

4.9. Sanctions

The normative framework integrates a strong and effective sanctions framework in protecting all interests involved, both private and public. It is clear that any entity without proper authorization and in whatever manner is not allowed to operate, promote, organize operations of online gambling and betting, nor provide these activities in Portugal from servers located outside the national territory.

Approved regulation describe the criminal activities, defining the respective main and accessory penalties, such as unlawful exploitation crimes of online gambling and betting, illicit exploitation of territorial gambling, crimes of online gambling and betting.

The direction and scope of unlawful administrative actions is also determined, the violations to the rules governing the exploitation and practice of online gambling and betting and place-based, are at least sanctioned as criminal offenses.

The application of the respective sanctions is based, among others, on the duration of the infringement, its gravity, (assessed in abstract according to the circumstances), the degree of guilt, the agent's behavior in eliminating the illegal practice, the agent's economic situation, the benefit that he obtained and his antecedents. The applicable sanction must be appropriate and proportionate.

4.10. Responsible Gaming

For most people, gaming, as a form of entertainment and fun, is considered a recreational activity with a perfectly normal underlying conduct. However, some players lose control in their relationship with gaming and the entertainment become a growing addiction, with serious consequences for themselves, also affecting their familiar, social, professional sphere and the community itself.

The abstract concept of 'responsible gaming' is associated with the behavior of the players who guide their game options consciously and rationally, exercising full control of their time and money without undermining their professional, social and family responsibilities.

In accordance with the concerns reflected in OGR, the operators have a duty to develop plans and adopt measures to ensure the practice of responsible gaming and provide to the public, especially to players, the necessary information, promoting attitudes of moderate gaming, not compulsive.

The rules on the mandatory inclusion of warnings against excessive practices are prevalent, and there is a duty to inform players so they proceed with conscious choices, promoting moderate game behaviors, responsible and not compulsive.

The measures implemented in this area, are inspired by European recommendations[46] and are based on the best practices consolidated in other jurisdictions for the protection of players, the safeguarding of public order and control of social risks associated with gaming.

5. CONCLUSIONS

In general, the model chosen for the regulation of online gambling and betting in Portugal seems to respond efficiently to the necessary adaptations due to the natural developments in the industry sector in recent years.

On the one hand, we are dealing with the implementation of a very competitive market and open to global initiative and, on the other, we have an effective supervision of the activity at state level, as intended. In essence, this scheme is based on a model open to competition that allows the assignment of licenses with unlimited number, without restrictions on the origin of operators and without any granting of exclusivity. Currently, when talking about gambling and betting with money - online – we don't intend to speculate about a new commercial activity, but just about another way of providing games, now available via internet. This indiscriminate offer, often surreptitiously, divert a clientele previously attracted by games in traditional locations, such as casinos and bingo halls. This new paradigm led to strong impacts at various levels, with regard to the lack of effectiveness in the control of illegal online gambling, which has spread because of the lack of regulation.

It is known today that unregulated schemes (legal vacuum), where online games are forbidden have two consequences – an economic one and a financial one, i.e.: the release of high volumes

46. Recommendation of the European Commission of 14 July 2014-on principles with a view to the protection of consumers and users of online gambling services and prevent minors access to online gambling. (2014/478/EU).

of capital without any return for the country, and the loss of tax revenue (potential) resulting from consumption in illegal gambling sites.
Thus, the lack of regulation of online gaming, coupled with the transfer of consumer habits, has significant impacts, not only in tax collection increase that would return to the state, but also in the protection of citizens and the protection of public order.

It seems inevitable that any legal system that legalize the practice of cash games should always present an attitude of openness to possible amendments and adjustments of the law, taking into account the following fundamental aspects:

- Gambling is a special economic activity which, in the interest of the general interest and protection of public order, should be strongly restricted through effective regulation, supervision and effective sanction;
- The suitability of the operators is an essential condition to ensure the integrity of the activity, protecting consumers;
- The accreditation of gambling should be restricted to satisfying pre-existing limited demand and the money spent by the society on games must be returned through prizes and the adequate financing of social policies.

The new regime in Portugal can be considered as an open model, taking into account that the state will grant licenses to entities that, through legally defined requirements, wishes to develop the online gambling and betting activity. As such, this liberalized model allows any operator to carry out its activity on the national territory as long as it satisfies the legal requirements to obtain a license.

The basis for establishing an online gaming framework seems sufficiently appealing to attract and legalize the international players, decrease the illegal gambling, and for the peaceful development of a framework ensuring the safety of users and the public in general.

In addition to the strong moral motivation usually associated, regulating the gaming industry is justified by the need to defend core values, such as the integrity of the sport, the protection of minors and of the most vulnerable people, the security of assets and the prevention of fraud and money laundering. Now, with these fundamental legal assets worthy of protection, the regulations of the online gaming, as maximum dimension of easing access to its practice, urgently needed legislation.

Therefore, the online gaming regulation represents an important step in the right direction, allowing a licit offer of online gaming in Portugal, although it is still early to assess the real impact of approved regulations. However, regardless the final outlook, it is fair to welcome and value positively the work undertaken for this global reform of the gaming activity in Portugal.

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REMISSION OF INTEREST AND FINES POLICY AS A TOOL FOR TAX DEBT RECOVERY: THE CASE OF CHILE

General Treasury Team of the Republic of Chile

SYNOPSIS

The document describes the new policy of remission for interest and fines of delinquent debt that the General Treasury of the Republic will implement in the management support of collection processes. The new policy gathers the results and experience gained in the debt management and constitutes a strengthening of collection policy in the context of the implementation of the 2014 tax reform. The application of remission for interest and fines proved to be a good incentive for taxpayers to comply with their tax obligations.

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Content

All tax administrations face the problem of non-compliance, which gives rise to the tax debt and implies developing a process for complying with the mandate to collect the taxes established by law.

In Chile, the General Treasury of the Republic (Hereafter GTR) is the State body responsible of managing the Treasury and conducting the administrative and judicial recovery of the tax debt. Its main functions include collecting taxes and fines, the distribution of taxes and other fiscal entries, as well as preserving and safeguarding the collected revenues. The institution includes four strategic products in its mission, which correspond to Collection, Distribution, Investments Management and Public Finances Accounting.

This document aims to present a policy instrument used by the GTR to contribute to the process of tax debt recovery, strengthening the Collection function. Since 2006, a policy of remission for tax interest and fines has been implemented permanently. This policy is complemented by extraordinary and provisional campaigns that, in general, establish additional benefits for the taxpayer in mora.

Since these campaigns have shown positive results in collection, this policy was strengthened in the framework of the 2014 tax reform, and a new regime will be in force from 2016.
In order to show its results, we present evidence from 2012, 2013 and 2014, highlighting the change in the payment behavior with and without extraordinary campaigns.

The document is divided into six sections. The first corresponds to the introduction. The second contains the general themes allowing the reader to know the legal aspects and the frame of reference to understand the Chilean case. The third section presents the background of the experience gained through 2015. The fourth and the fifth sections focus on the new remission policy and the technological tools to support the policy, respectively. The sixth section presents the main conclusions.

1. ANTECEDENTS

1.1 Legal

The process of tax and other credits collection of the Treasury in Chile begins with the generation of the tax liability. This is based on the principle of legality, the law being the only source to impose taxes, since the nature of the tax liability belongs to Public Law. These obligations are generated in the respective tax charging institutions that sent the tax credits charge to GTR by an online-computerized process, in order to generate the payment obligation, the tax revenues being the main source of obligations.

Once established the obligation, the payment process is generated. In order for the taxpayers

to fully comply and extinguish the tax obligation, they must complete their payments within the legal deadline. 98.6% of revenue is paid spontaneously1, i.e. without intervention of collection actions, while the remaining is motivated with collection actions, which include various mechanisms to generate payment, and the enforced collection can be either judicial or administrative.

Regardless the origin of the payment motivation, either spontaneous or product of collection actions, it can be done within or outside the deadlines in the obligation. Facing a possible breach of obligation, the Chilean legislator has established ancillary legal fees to the initial obligation, namely:

- **Adjustments**: the original amount will be reset in the same percentage of increase that has experienced the consumer prices index (IPC). This is due to the legal need to update the credit of the State Treasury to its economic value at the date of effective payment, so the income of the state treasury represent the same amount as at the date of the deadline. For this reason, this adjustment is always maintained.
- **Interests**: an interest for late payment is equal to 1.5% for each month or fraction of a month in arrears. Interests applies any kind of taxes and contributions, calculated on the values already readjusted according to PIC.
- **Fine**: determined by the tax administration, as a sanction to the infraction committed according to the severity and type of tax. These fines are ancillary and have a punitive nature for delay or omission in paying the tax liability. This, either in the returns or in reports that constitute the basis for the determination or payment of a tax2. The delay in entering the taxes subject to withholding or surcharge carries a fine of 10% of the tax debt, increased by 2% for each month or fraction of a month of delay. In any case, the total fine cannot exceed 30% of the owed taxes.3

Compliance with the obligation is verified by its full and timely payment. Additionally, the Tax Chilean system includes other ways to extinguish the obligation, such as the full or partial compensation of credits that taxpayers and administration owe to each other tax and delinquent taxpayer up to the concurrence of the lowest value. The obligation can also be extinguished because the taxpayer has the right to oppose the Statute of Limitations to the control action and the executive action for its collection.

In addition, the GTR has the authority to waive interest and fines for the delay in the payment of the taxes that are subject to the GTR administrative and judicial collection.

Procedures allowing taxpayers to reduce permanently part of the interest and fines due on delinquent tax obligations were created in 2006, thus encouraging the payment of overdue debts.

With resolution N ° 698/2006, the tax administration granted the faculty to write off a percentage of interests and some of the accessory fines to the payment of taxes, with a maximum of 50%. Additionally, article 192 of the tax code allowed extending the term of payment to a maximum of one year, through the payment of monthly fees, which also applied to a percentage of debt remission.

It is important to emphasize that the remission in Chile does not affect the tax amount, but only a part of the interest and fines generated by arrears in payments.

For purposes of determining the percentage of remission applicable to each debt, the above-mentioned resolution considered only four elements or criteria:

1. 2015 public account; in www.tesoreria.cl.
2. Tax code Art 97 N ° 2
3. Tax code Art.97 N ° 11

1. **Date of the debt emission:** the older the debt, the lower the percentage of debt remission to be granted.
2. **Debt payment form:** a greater percentage of remission is granted to the payments in cash, in relation to payments by agreement. The exceptional benefit of major debt remission was also considered for the cash payment of the total debt.
3. **Tax rate:** remission of interest percentages were slightly higher for TA taxes, compared to the land tax.
4. **Type of legal surcharge:** Fines associated with taxes subject to return and payment (such as the income tax) are distinguished from those associated to the delay in payment of taxes subject to withholding or surcharge (such as the value added tax, in which the tax is paid by the final taxpayer and whose compliance lies with the tax withholding agent). The last were not susceptible of remission, unless it is paid in full and in cash, in view of the seriousness of the breach.

1.2 Frame of reference

Since fixing the policy of cancellation of legal tax surcharges in 2006, the GTR has used these standards or criteria as a collection tool, complemented by the power based in the General Treasurer of the Republic, to define the waived percentages of legal surcharges for debt issued by other services than tax obligations.

In addition to the power granted to write off permanently, in certain periods, the tax administration could temporarily grant remission with better conditions than usual. This measure sought to provide benefits and facilities especially to micro, small and medium-sized entrepreneurs, according to their level of income or sales. These benefits were granted for fiscal and territorial taxes. Remission rates varied according to the law, the amount owed and by type of taxpayer through sales or income level. Table N°1 show the highest percentages that could be accessed according to the categorization in which the taxpayer was found, according to the previously established differentiation

Table N ° 1
Background information on transient debt remission policy

Resolution	Period		Validity	% Remission	
	Start	End		Cash payment	Payment agreement
Exempt 506 2009	02-05-2009	30-06-2010	2 months	(Fiscal) 80%	55%
			2 months	(Territorial) 90%	70%
Exempt 1014 2010	04-09-2010	31-06-2011	9 months	90%	75%
Exempt 1412 2012	27-09-2012	26-12-2012	3 months	90%	75%
Exempt 49 2014	01-02-2014	31-07-2014	6 months	90%	75%

2. THE EXPERIENCE OF THE CHILEAN CASE

2.1. Situation until 2015

The last Provisional Law Campaign, which granted better conditions both in percentages of remission and in increasing payments agreements for overdue debts for a period of nearly six months, managed to obtain a revenue of $316 million equivalent to 6% of the total existing tax debt before these special conditions.

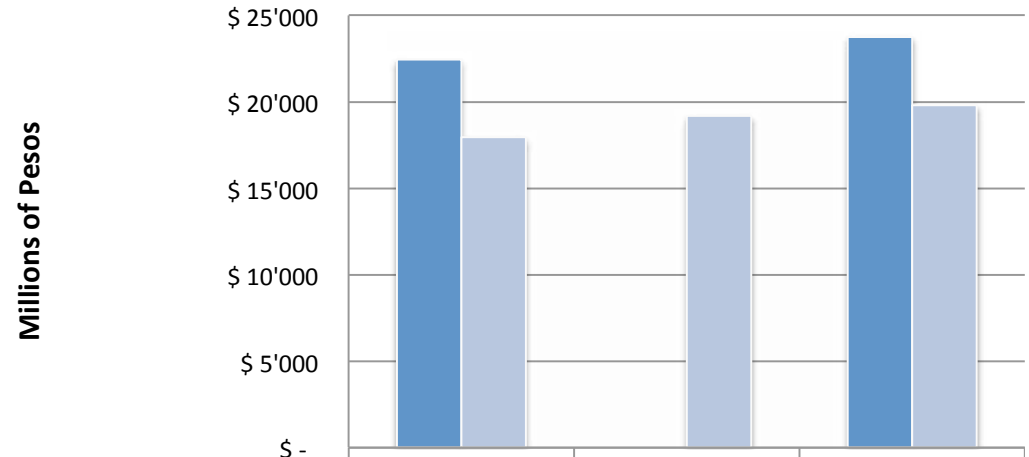
Micro, small and medium-sized enterprises were the major beneficiaries of this campaign, because they accounted for more than 50% of the delinquent portfolio. This campaign opened a space for remission to try to lighten the financial burden of fines and interests, and let practically the capital and its readjustment as a debt easier to absorb for the small and medium entrepreneur.

We compared behavior of payment of debts that were subject of actions of legal collection in periods of collection of 2012 and 2014 (when applied benefit from a transient for the adjustment and payment of delinquent tax obligations) with the period 2013 (in which such prerogatives they did not). An increase in the monthly average revenue is observed in the months of entry into force of the provisional rule. In addition, a clear tendency to increase the net collection in the months of the provisional standard was in force versus the permanent standard, with as consequence the reduction of the delinquent portfolio (see chart No. 1).

During 2012, the rule remained in effect in the last quarter, moment in which the greatest collection increase of the net balance arrears, and increasing the collection tendency, was observed.

By 2014, the result was positive, with a real and direct impact on the taxpayer behavior. Measures were transformed into a tool of effective tax revenue collection: In 2014, the net balance grew 17% over the previous year, though a special regulation was not in force for this purpose.

Graph N ° 1
Collection by Recovery Actions on Delinquent Portfolio
(Monthly average:) V/s months months not in effect)



	2012	2013	2014
PROM REC LEY TRANSITORIA	$ 22'451'030'619	$ -	$ 23'764'764'199
PROM REC SIN LEY	$ 17'944'570'921	$ 19'174'822'742	$ 19'802'489'355

Source: Compilation, based on statistics of revenue CUT, GTR

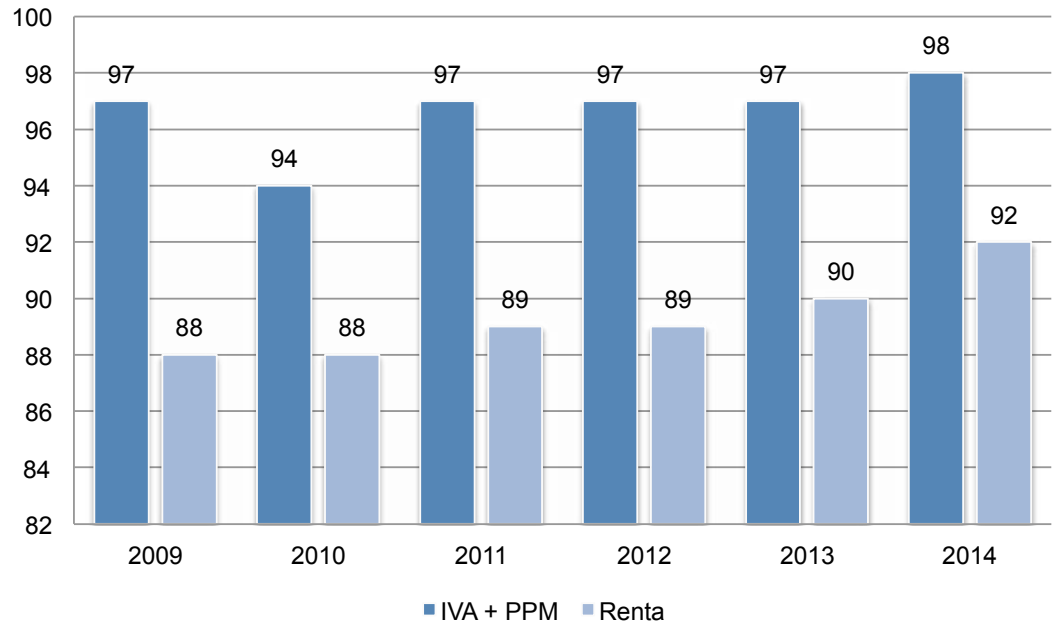
2.2. Effects observed in tax compliance

The presented results regarding the tax compliance of the portfolios in judicial collection suggest that these policies constitute a clear and obvious incentive to the taxpayer and an opportunity to regularize the past due debt, making use of the provisional benefit of remission, without losing sight of the tax interest. In addition, it is relevant to point out that the revenue collected based on timely payments is not affected by remission policies, which could encourage deferred payment further than the legal expiration date.

Indeed, during the 2012 the payment behavior for the value added tax (VAT) and the monthly interim payments had a 97% compliance rate. This compliance is equal to the one reached in the 2013 period, in which the provisional law of greater debt remission was not in force, and increased to 98% 2014, year in which the special privileges were granted.

Likewise, in the payment behavior in term of the tax income a lower compliance rate in the annual periods was not observed. On the contrary, in 2012 we reached 89% of expectations, increasing in 2013 and 2014 to compliance rates of 90% and 92%, respectively.

Chart N ° 2
Timely Payment behavior
(% of timely collection in the respective tax period)



Source: Public accounts 2015, www.tesoreria.cl

If collection is analyzed from the point of view of the subscription and activation of agreements, i.e. agreements that are made with taxpayers as a commitment to pay the debt in arrears, it is observed that most breaches takes place after at least three installments. In the case of agreements generated in the GTR offices, they occur regardless the number of installments agreed. In the case of agreements entered via internet, a uniform behavior is shown, without being affected by the number of agreed installments.

Table N ° 2
Cash agreements

TOTAL RUT with agreements in **cash**		EXPIRED PAYING ONLY INITIAL FEE		EXPIRED PAYING 3 INSTALLMENTS		EXPIRED PAYING MORE THAN 3 INSTALLMENTS	
		N °	%	N °	%	N °	%
TO 12 MONTHS	**82.045**	23.458	29%	25.301	31%	33.286	41%
TO 24 MONTHS	**7.709**	1.703	22%	1918	25%	4.088	53%
TO 36 MONTHS	**27.999**	6.609	24%	7.011	25%	14.379	51%

Source: Compilation, based on CUT registries

Table N ° 3
Agreements via the internet.

TOTAL with agreements by **INTERNET**		EXPIRED PAYING ONLY INITIAL FEE		EXPIRED PAYING 3 IN-STALLMENTS		EXPIRED PAYING MORE THAN 3 INSTALLMENTS	
		N °	%	N °	%	N °	%
TO 12 MONTHS	**15.984**	5.388	34%	5,160	32%	5.436	34%
TO 24 MONTHS	**326**	104	32%	100	31%	122	37%
TO 36 MONTHS	**2.690**	852	32%	775	29%	1,063	40%

Source: Author, based on CUT registries

It is therefore observed that the various provisional benefits meant for the Chilean State, not a mere liberality towards the delinquent taxpayer, but an effective and historical increase in the average amount of monthly revenue. This, without being in detriment of compliance and timely payment of those taxes that constitute the bulk of revenue in the Chilean tax system, such as VAT and Income.

3. NEW POLICY OF AGREEMENT AND REMISSION

The Tax reform enacted in late September of 2014 allowed the GTR, in conjunction with the tax administration, to reflect on improving the agreements and debt cancellation policy as a permanent tool, but viewing the result of the strategies used to date to improve collections.

The new agreements and cancellation policy has its legal basis in law N ° 20.780 on tax reform, which modifies the income tax system and introduces different adjustments in the 2014 tax system.

Accordingly, starting from October 1, 2015, the exercise of the new powers of remission in legal charges lies in the Treasurer General of the Republic. He puts into force the implementation of a new policy of remission, making it extendable to all interests and fines for all forms of prior charges established in the single tax account, whoever is the body issuing them, subject to administrative and judicial collection, through rulings or objective criteria and of general application, to be determined by that service.
For the redesign of this new policy of Agreements and Remission, the historical behavior of permanent regulations and the effects on collection and delinquent generated by the application of the provisional rules of remission portfolio were analyzed.

Subsequently, objective factors that would allow debtors who share similar conditions of payment were qualitatively evaluated; in order to identify and define categories of taxpayers who might be granted the same benefits of remission.

Finally, in the new politics of remission, clearly identifiable parameters in the support systems were considered, in order to create business rules that allow granting differentiated benefits to taxpayers segmented based on behavioral characteristics of payment. Among them, the behavior of the taxpayer, but also new variables, such as the intention to pay (voluntary/ not voluntary), the mode of payment, the debt seniority, the tax rate, the type of taxpayer and the payment channel.

Thus, the new policy includes variables that allow a differentiation of the conditions, creating incentives for early payment and the good behavior of the taxpayer in the maintenance of the established conventions.

Since the differentiation according to payment behavior and other variables had not been considered in previous policies, it was considered that the implementation should be carried out in two stages, with the first stage aimed at achieving an informed transition towards the full policy implementation.

In the first stage, running from October 1, 2015 and effective until December 31, 2015, there was no differentiation for granting benefits; taxpayers could access all the benefits and facilities, regardless of their previous tax behavior and other variables. This stage aims to give taxpayers the opportunity to regularize their debt, primarily the oldest; to inform taxpayers about how their tax behavior will affect them in the future (fully implemented policy); disseminate the new benefits and facilities, as well as the variables involved, to the public in general. It also implies training GTR officials in the new business rules and the skills needed to negotiate with debtors.

A first change that gave this new policy is the expansion of the debt type universe, by extending all forms of prior charges established in the single tax account (TIN), and not only to those strictly of tax origin. This, especially because the figure generated by the policy of remission and conventions is the Treasurer-General, responsible for the collection of taxes and credits from the State, independently of the opportunity in their payment.

For the second stage, the parameters used to differentiate the different percentages of remission to be granted were as follows:

- **Intention of payment:** It deemed relevant to consider whether there is, or not, a taxpayer's willingness to regularize their tax situation, defining the following options:
  - Voluntary payment: the permanent remission policy applies.
  - Payment not voluntary (for example, compensation): the lowest percentage of remission of the voluntary payment, no additional benefits apply.

- **Payment method:** A definition of the current policy is to encourage the prompt debt payment, granting greater debt remission to the cash payment, or the closest thing to it. To differentiate the percentage of debt remission to grant, a difference is made between:

Cash Payment:
- Full debt payment
- Full Payment for debt installment(folio identifies each installment of debt)
- Fractional or partial payment of one or more debt folio (s)

Payment Agreement:
  - Total debt
  - By debt (partial agreement).

- **Tax type:** It was initially contemplated to differentiate between fiscal and territorial tax, but the result of the historical analysis of the policy of remission showed that there was no differentiation between types of taxes at the time of granting the benefits. The final decision was to keep a single policy, with equal percentages of remission, both for fiscal tax as for territorial tax.

- **Type of taxpayer:** are very relevant characteristics for the GTR, as it seeks to benefit the people and businesses of lower income.
- Payment channel: responds to one of the institutional challenges of the GTR, which is to encourage the taxpayer to deal with remote payment channels.

- Debt seniority: The criterion applied at this point is, to oldest debt; lower is the percentage of debt remission to be granted. Thus, the debt payment is encouraged and avoid that taxpayers prioritize another type of delinquencies on over the tax debt.

Proposed segment by debt seniority:

- Payment date for less than or equal to 3 months
- Payment date for 4 to 12 months
- Payment date for 13-24 months
- Payment date for older than 24 months

Considering the exposed points, table 4 summarizes the new permanent remission policy.

Table 4
Parameters for the Remission Policy

Parámetros para la Política de Condonación					Porcentaje de Condonación			
Intensión de pago	Canal de pago o Generación de Convenios	Modalidad de Pago 1	Modalidad de Pago 2	Antigüedad de la Deuda	Presencial			Internet
Voluntario	Presencial	Contado	Pago Total	< = a 3 meses entre 4 y 12 meses entre 13 y 24 meses Mayor a 24 meses	Por Definir (Todos los Tributos)			Por Definir (Todos los Tributos)
			Por Folio	< = a 3 meses entre 4 y 12 meses entre 13 y 24 meses Mayor a 24 meses	60% 50% 50% 40%			70% 60% 55% 50%
			Fracionado	< = a 3 meses entre 4 y 12 meses entre 13 y 24 meses Mayor a 24 meses	40% 30% 30% 25%			no aplica
					% Condonación Pago Convenio			
					Presencial			Internet
					Max Cuotas	Mitad Cuotas	3 Cuotas	
		Convenio	Total	< = a 3 meses entre 4 y 12 meses entre 13 y 24 meses Mayor a 24 meses	50% 40% 40% 30%	55% 45% 45% 35%	60% 50% 50% 40%	50% 40% 30% 30%
			Parcial	< = a 3 meses entre 4 y 12 meses entre 13 y 24 meses Mayor a 24 meses	40% 30% 30% 25%	45% 35% 35% 30%	50% 40% 40% 35%	no aplica
					% Condonación Compensación			
No Voluntario	Procesos Internos	Compensación		< = a 3 meses entre 4 y 12 meses entre 13 y 24 meses Mayor a 24 meses	50% 40% 40% 30%			

Following the guidelines outlined in the reformulation of the Remission Policy, the Agreement Policy was also reshaped with a strong orientation to the prompt payment of the total debt by the taxpayer in the shortest possible time.

The aim is encouraging taxpayers to make the effort to pay in three installments, which is rewarded with 10% additional remission, as long as the agreed Convention includes the total debt. The debtor who wants to regularize his debt in half of the maximum term permitted by laws will also be encouraged with an additional 5% remission.

However, since October 2015, the debtor shall also have the possibility of paying in installments, with a maximum 24 months period.

The new policy of Agreement considers two identifiable objective parameters in support systems and they are weighted based on the risk that exists when providing a payment agreement:

- Previous behavior of taxpayer : 70%
- Seizure on goods : 30%

Considering the high rate of delinquency and the fact that the payment agreement allows the debtor to stop collection actions, while it is in force, it has been determined considering this behavior factor as a precedent for when the taxpayer wants to qualify again for this payment option.

This factor refers to whether, with respect to the conventions of payment that has held on previous occasions, taxpayers have complied with the payment of all fees, or conversely, they have expired for failure to pay them. The benefits are more restrictive for taxpayers who are in the second condition. To catalog them and incorporate an objective segmentation variable, the following sections were determined:

a. Good: this is that the taxpayer has not had agreements previously, or having them, met them in its entirety.

b. Regular: the taxpayer has two agreements for payment expired on his record.

c. Bad: the taxpayer has three or more agreements for payment expired, or has breached agreements of cash payment.

As another risk factor associated with compliance in the debt payment, it is important to consider if there are goods seized by the Treasury, that guarantee the tax credit. Also, their relationship with the debt amount, since the negotiation base will be more favorable for the Treasury to the extent that there is seizure on goods from the taxpayer to ensure the payment of their tax liability.

A lesser relative weighing was granted to the taxpayer's seizure of goods, since it is not possible to determine accurately the relationship between the valuation of the property seized and the existing debt.

Therefore, based on the characterization of the taxpayer, with the risk of expiry of agreements, values are assigned on benefits "amount convention installment" and 'Number of installments agreed'.

As a result, the granting of conventions will differentiate taxpayers in high risk (more likely to default on the agreement of payment), demanding a longer period and giving fewer installments for the payment of their debt. As a counterpart, the taxpayer rated as of lower risk will be given the possibility to negotiate the Convention, paying a lower rate and in a greater number of installments, and may reach the maximum allowed by law (24 installments)

Table 5
Differentiation of taxpayers based on risk

Parámetros para la Política de Condonación				Propuesta de Convenio		
Modalidad de pago	Modalidad de Pago 2	Comport. Previo	Embargo de bienes	Cuotas (HASTA)	PIE (Mínimo) Presencial	PIE (Mínimo) Internet
Convenio	Total	Siempre Cumple		24	10%	20%
		Aveces Cumple	Sin Garantía	18	20%	30%
			Con Garantía	18	30%	40%
		Gral% No Cumple	Sin Garantía	12	20%	30%
			Con Garantía	12	30%	40%
	Parcial	Siempre Cumple	Sin Garantía	24	10%	n/a
			Con Garantía	24	15%	n/a
		Aveces Cumple	Sin Garantía	18	20%	n/a
			Con Garantía	18	30%	n/a
		Gral% No Cumple	Sin Garantía	12	20%	n/a
			Con Garantía	12	30%	n/a

% Condonación por Pronto Pago en Convenio				
Antigüedad Deuda	Presencial			Internet
	Convenio Normal	Mitad Cuotas	3 Cuotas	
< = a 3 meses	50%	55%	60%	50%
Entre 4 y 12 meses	40%	45%	50%	40%
Entre 13 y 24 meses	40%	45%	50%	40%
Mayor a 24 meses	30%	35%	40%	30%
< = a 3 meses	40%	45%	50%	n/a
Entre 4 y 12 meses	30%	35%	40%	n/a
Entre 13 y 24 meses	30%	35%	40%	n/a
Mayor a 24 meses	25%	30%	35%	n/a

Implementation summary

Implementation of significant changes that were generated with the definition of the new policy of conventions and remission was planned with a clear orientation to the citizen, considering the following:

- Transition from a policy that lasted for 10 years to a permanent policy that will be implemented because of the tax reform.
- New variables are automatically incorporated into policy of conventions and cancellations (not manually).
- Adjust the implementation of behavioral history of debt payments.
- Gradual implementation, differing incentives according to debt seniority, prompt payment and payment channels.

Main aspects of conventions and legal surcharges remission policy.

1. Powers granted by the law N ° 20.780 on tax reform
2. Gradual deployment starting in October 2015 until March 2016
3. Confers permanent benefits.
4. Gives higher percentages of debt remission for taxpayers who make the effort to pay cash.
5. Additional benefits in the event of fast payment (older debt, less remission benefits)
6. Incentive to the use of virtual channels
7. Broad term, up to 24 installments for total or partial payment agreements.
8. Benefits are generated automatically through the Internet payment or requesting the coupon payment at any office of the country.
9. Stimulates the good behavior of taxpayer's payment through better conditions and alternatives of agreements.
10. Extensive benefits to all debts charge in single tax account without distinguishing the drawer, with exceptions when the law does not grant these benefits.
11. Benefits subject to the absence of exclusion of taxpayer by the internal revenue service.

4. TECHNOLOGICAL SUPPORT TOOL

In order to calculate the remission, the Treasury has implemented an algorithm in computer systems that allows automatically deducting amounts to waive interest and fines, according to the previously set parameters. The discount occurs when generating the payment document, which is modified when provisional remission processes are generated. When payments are cash, the generation of the payment receipt is through the Tax Identification Number system.

For Agreements, the Treasury has a computational tool called agreement system. This system generates as remission according to the negotiation with the taxpayer, generating automatically the percentage of waiver in each installment.

Because of this new policy, where the variables influencing percentage of remission have increased, whether by instalments or by the use of conventions, the system had to be modified to facilitate and enable a better negotiation between taxpayers and officials.

The existence of a technological tool with a defined algorithm allows that the taxpayer faces standards rules of negotiation in the 48 regional offices and in the customer service channels available to the Treasury Service, also facilitating the officials' work.contribuyente enfrente reglas de negociación estándares en las 48 oficinas regionales y en los distintos canales de atención de los cuales dispone el Servicio de Tesorerías, facilitando también el trabajo de los funcionarios.

5. CONCLUSIONS AND CHALLENGES

In Chile, the remission as a tool to increase collection, for debts resulting from overdue tax obligations has, on one hand, a component towards the taxpayer and, secondly, an edge towards increasing tax revenue through the recovery of past due and delinquent funds. Thus, its implementation should relieve the taxpayer in arrears with the Treasury, decreasing his burden through the remission of interest and some fines, granting benefits that makes possible the continuity of their businesses or companies. In addition, it allows the tax administration to reduce their debt balance, thereby improving the tax collection.

In the Chilean experience, a greater impact on revenue was observed concerning debts already demanded in the 2014 provisional period, which also provided an increase in the efficiency of the enforced collection for the analyzed period, with an increase of delinquent portfolio recovery.

Analyzing the behavior of taxpayers in 2014, with or without provisional law and based on the objectives of the administration, a need to change the existing policy including the object of provisional processes was observed. The existing paradigm needed to change, allowing also recognizing the experience of these last years and the use of variables that, although part of the process, had not been used for decision-making. This is how today the taxpayers' behavior participates in the generation of better conditions to qualify for major conditions as

opposed to those who have access to them in order to delay and to avoid actions of collection, signing conventions of payments that expire early for non-payment.

In the context of the implementation of the tax reform, the objective of the tax administration is reducing evasion and avoidance, and therefore this permanent, systemic and widespread policy of remission for surcharges applied to delinquent debt is part of a support of the GTR collection policy. Thus, the creation of institutional reputation is achieved based on an integral approach towards recovery, marking differences with respect to taxpayers who meet their obligations on time, but also discriminate positively those who voluntarily undertake the regularization of their delinquent tax debt. This tool is aimed at the prompt payment, emphasizing the importance of the recovery, and through a collection policy framework that induce the citizen towards a timely, decisive and effective action to the recovery and control of evasion. The tax collection policy must be a strengthener and distinctive feature of the control process of every modern tax system.

Finally, one of the challenges in medium term is to improve the quality of information regarding the cost for taxpayers of opting out of payments agreements versus purchasing commitments with third parties allowing the settlement of their tax debts.

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BRAZILIAN PERSPECTIVES ON SECRET, COOPERATION AND INTERNATIONAL TAX COMPETITION

Carlos Otávio Ferreira de Almeida and Maria Eliana Pereira

SYNOPSIS

This article examines important topics for the agenda of States: the secret, the cooperation and the international tax competition under the Brazilian perspective. The secret, possible obstacle to the effective exchange of information has been subject to measures to reduce its effects, in national legislation as well as international law under the banner of the necessary fight against tax evasion. Therefore, an atmosphere of cooperation between the States is needed so they do not compete in a deliberately harmful way. It happens that, in some cases, the domestic legislation restrains this impulse, as in the Brazilian case, where the issue of bank secrecy is treated as a fundamental right.

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Content

The growing mobility of goods, services, people and, above all, capital is a factor that stimulates the competition of States to attract revenue. Although it is legal, based on sovereignty, to improve the national tax system to attract investors; It is inevitable, however, that such measures affect other jurisdictions. With different conditions to compete, States use various practices to become more attractive to foreign direct investment (FDI). Some of these practices, however, were considered as harmful for other jurisdictions and damaging their tax base (harmful tax practices).[1]

Once the harmful tax competition affects several jurisdictions around the world, unilateral measures, even when they are adopted by several States, will not be sufficient to combat it. Therefore, the problem of the harmful tax competition cannot find a solution without a broad and effective international cooperation.

The Organization for cooperation and economic development (OECD) is one of the main promoters of international tax cooperation. In order to combat the opacity of tax systems, the organization proposed new international tax rules on transparency and the exchange of information. It has launched the Plan BEPS (Base Erosion and Profit Shifting), following the demand of the G-20, worried about the loss of revenue of the States under the transfer of profits of multinationals to low taxation (offshore) jurisdictions.

In the case of Brazil, the tax policy is focused on the expansion of international tax cooperation. This is evidenced by the participation of the country in the G-20. As a result, discussions were held for the preparation of the BEPS Plan in the Global Forum on transparency of OECD, which integrates the Steering Group and the Peer Review Group; in the regional integration organizations such as ALADI (Latin American Integration Association), UNASUR (Union of South American Nations) and the MERCOSUR. The country has also closer relations with the BRICS member countries (Brazil, Russia, India, China and South Africa); and adheres to the modifications in exchange of information generated by FATCA (Foreign Account Tax Compliance Act).

This cooperative expansion has clear roots in the Federal Constitution, which promote the international relations of Brazil (art. 4, II and IX) in the sense of cooperation between nations for the progress of humanity, but always in the respect of human rights.

Through the peer review process, the Global Forum on transparency of OECD (Global Forum), responsible for verifying the compliance of countries with the standards of transparency and exchange of information, qualified Brazil in 2013 as a cooperating jurisdiction, despite having identified some incompatibility with the proposed rule, such as the timing for sending tax information requested by another State.

1. Work resulting from the activities of scientific initiation of research "International legal cooperation", in the project " would tax secrecy or international cooperation: a question of fundamental right?". It took place from August 2014 to July/2015, in the Faculty of law of the Pontifical University Catholic of Campinas (SP), with support of the National Council of scientific and technological development (CNPq), through the scholarship PIBIC/CNPq.

The timing allowed for the exchange of information is a topic currently debated, in view of the anticipated ruling of the direct action of unconstitutionality No. 2390 (and other enclosed), whose object is article 6 of the complementary law No. 105/01, which empowers the Treasury, under certain requirements, to request banking data to financial institutions directly. The Supreme Federal Tribunal (STF) cited the precedent (RE 389.809/PR) in the sense that access to the banking information would be subject to jurisdiction, therefore under the exclusive competence of the judiciary.

If the country is ready to cooperate actively to combat international tax evasion, it should regulate it in a coherent manner. The excessive granting of tax expenditures can compromise the public budget and the desirable promotion of economic development and human dignity, fundamental precepts of the Brazilian State[2], as well as damage the ability to contribute if it is not compatible with the legitimate rules of mitigation of this valuable principle.

Obviously, in the debate between transparency and privacy, it is vital to design a tax system able to minimize the loss of income arising from harmful tax practices in other jurisdictions. Ultimately, at stake is the formulation of a tax policy effectively promoting economic development and implementing the fundamental guarantees.

This paper aims to investigate, under the Brazilian perspective, possible obstacles to cooperation because of tax secrecy, usually evoked as a fundamental right. The issue has current relevance in view of the expansion of transparency in international practice, aimed mainly at combating harmful tax competition.

1. HARMFUL TAX COMPETITION AND INTERNATIONAL COOPERATION

Currently, the tax collection function stands out as an indispensable instrument for complying the functions of the State in order to guarantee fundamental rights. The contemporary tax is of the fundamental duty to exalt the dignity of the human person,[3] because it is the tool responsible for transferring resources to the State, which, once prepared the necessary means, must implement measures to reduce social inequalities and ensure adequate conditions of living.

Initially the taxation and economic development pertained only to the sovereignty of the State. This understanding did not pose great difficulties to the design of the tax policy, because the Government would impose the tax burden that it deemed convenient, and would spend the revenue according to its deliberations.

The allocation of cross-border capital intensified the competition for income, mainly by foreign direct Investment. Given that the sovereignty of a State reflected a single power - in the middle of two hundred other competing with each other to attract investment -, the reduction in the tax burden could become a genuine strategy to attract revenue.

2. BRAZIL. Federal Constitution. Article 1, III; Article 3, II.
3. JIMENEZ, C. A. Ruiz. Fair Trial Rights on Taxation: The European and inter-American Experience. In: KOFLER, Georg; MATURE, Miguel Poiares; PISTONE, Pasquale (Editors). Human Rights and Taxation in Europe and the World. Amsterdam: IBFD, cap.30, 2011, p.521.
4. DAGAN, Tsilly. The tragic choices of tax policy in a globalized economy. In: BRAUNER, Yariv; STEWART, Miranda (Editors). Tax, Law and Development. Cheltenham: Edward Elgar, 2013, part. I, p.67.
5. EASSON, Alex. Taxation of Foreign Direct Investment. London: Kluwer Law International, 1999, p.10.
6. DAGAN, Tsilly. The tragic choices of tax policy in a globalized economy. In: BRAUNER, Yariv; STEWART, Miranda (Editors). Tax, Law and Development. Cheltenham: Edward Elgar, 2013, part. I, p.57.

Competition, however, has become unacceptable to many jurisdictions threatened with the loss of their tax base by what now is called harmful tax practices. However, to make the difference between harmful competition and acceptable competition is not a simple task, and the absence of clear outlines making possible to distinguish situations.

In General, according to the OECD, the harmful effects of tax competition would depend on of the deliberate invasion of the tax base of a State by the aggressive stance intentionally directed to divert flows of capital and of investment by another State. In fact, according to the report Harmful Tax Competition: an Emerging Global Issue OECD (Report 1988), the potential damage would be linked, among other things, to the distortion of investment flows; a dissuade taxpayers comply with tax obligations; and the collapse of the correlation between tax revenue and spending (which gives opportunity of free riders). With the release of the final report of BEPS action five - fighting more effectively harmful tax practices considering transparency and substance - 2015, the concept was reformulated, which now includes also transparency and substance.

A priori, international tax competition may seem related to economic development, in view of improving the state location factors. However, instead of working infrastructure, reducing the administrative and legal bureaucracy, promoting the simplicity and clarity of the tax systems, states often prefer one simplistic policy, of conceding tax incentives. Give up revenues without the corresponding tax responsibility is putting at risk the taxable base and risk becoming, in last instance, "a race to the bottom".

Identifying and fighting harmful tax competition, which involve transnational corporations, transcends the possible effects of unilateral anti-avoidance measures, especially because these companies make use of the gaps and differences between national laws (mismatches) to create strategies for action. It is thus fundamental to develop mutual assistance among States to strengthen their tax sovereignty and inhibit the effects of low taxation allied with the fiscal secrecy, such as tax evasion, corruption, international terrorism, money laundering, among others .

In search of the neutralization of harmful tax competition, the OECD has encouraged countries to ratify tax agreements. It emphasizes the tax cooperation as an instrument to fight the loss of tax revenue. It may assist that country in administrating and/or enforcing its own domestic laws. It may serves as a mechanism that enables tax authorities to solicit cooperation from foreign governments in cases of tax and white-collar related crime.

Abusive avoidance and evasion undermine important values for the taxation of the 21st century, constitutionally guaranteed by the democratic rule of law, such as the contributory capacity and equality. In addition, the loss of revenue undermines the implementation of public policies, delaying economic development and the implementation of fundamental guarantees. International tax cooperation is therefore an important current issue, which can change the mode of action of States as a useful tool to obtain and maintain satisfactory income levels whenever there is a real political willingness.

7. GEERS, Tonny Schenk. International exchange of information and the protection of the taxpayer. Alpen aan den Rijn: Kluwer, 2009, p.103. On this topic, see also SANTOS, Ramon Tomazela. The expansion of the exchange of information under international agreements to avoid the double taxation of income - the fight against Tax Evasion and the protection of the rights of taxpayers. In: ZILVETI, Fernando Aurelio (coord.), current tax law. São Paulo, n.31, p.117, 2014.

8. Original: the information received from the requesting country is used to ascertain facts in relation to income and capital of a tax treaty partner; (2) the information received from the requesting country may assist that country in administrating and/or enforcing its own domestic laws. And (3) more importantly, the exchange of information serves as a mechanism that enables tax authorities to solicit cooperation from foreign governments and prosecute more effectively tax and related white-collar crime. ANAMOURLIS, Tony; NETHERCOTT, Les. An Overview of Tax Information Exchange Agreements and Bank Secrecy. Bulletin for International Taxation. Amsterdam: IBDF, v.63, n.12, p.618, 2009.

In fact, the scenario in which the States advocate cooperation is the same as when they compete. Several jurisdictions announce measures to fight against harmful tax practices, on the one hand, and offer special regimes more beneficial to taxpayers, on the other.

It happens that external pressure has been growing, as evidenced by the rapid expansion of FATCA and its intergovernmental agreements to open data of nationals and residents abroad. In this sense, the 08/10/2015, in Lima (Peru), the G-20 members expressed their support for the package of measures recommended in the reports of the BEPS and committed to a comprehensive, coherent and coordinated reform of their national tax systems

Ultimately, the concerted action of all jurisdictions in sincere cooperation should lead to changes in the behaviors of multinationals and of states themselves, to offer a more beneficial tax treatment.

2 TRANSPARENCY IN THE INTERNATIONAL ORDER

With the intensification of cross-border capital flows and the consequent erosion of the tax base of the States, the tools developed for international tax cooperation began to combat not only low or null taxation, but also the opacity. Since 2001, the standard agreed internationally to identify tax havens or non-cooperating jurisdictions was based on two criteria: transparency and the exchange of information - requirements that cooperating jurisdictions apply, and, by contrast, tax havens do not apply.

The dissemination of the TIEA (Tax Information Exchange Agreement) models in 2002, as well as updates to the art.26 of the Model Convention, both carried out by the OECD, have materialized the transparency and exchange of information as an international standard for cooperation[9].

The Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum), multilateral structure formed by members and non-members of the OECD, is the body in charge of analyzing the enforcement of the international standard of cooperation. To this end, the internal legislation of the states is subject to revision by pairs (peer review) to measure their compatibility with the newly approved standard on transparency and exchange of information, in two phases. The first phase examined the legal and regulatory framework of the information exchange. The second assesses the applicability of those provisions. In the end, the jurisdiction is classified in three levels: compatible, incompatible, and partially or mainly compatible.[10]

Therefore, the compatibility of the jurisdiction with the transparency and the information exchange will depend on the non-opacity of the tax system. It requires the existence of mechanisms for the exchange of information upon request; access to bank information and property by the administrative authority; for sending data to the requesting jurisdiction in proper timing; and the guarantee of the confidentiality of the information exchanged.[11]

9. Available at:www.ocde.org.br>. Accessed: 05 Nov. 2015
10. Global Forum on Transparency and Exchange of Information for Tax Purposes. Available at: http://www.oecd.org/tax/transparency/GFannualreport2014.pdf>. Accessed: 09 Nov. 2015, p.26/27.
11. Available at: www.ocde.org.br. Accessed: 05 set. 2015

The standard previously established required agreements providing for the exchange of information on request. However, the urgency of the effective fight against harmful tax competition has brought about a change towards the automatic exchange of information and encouraged the multilateralism, with a view to increase the spectrum of data exchange, to the detriment of bilateral agreements.

Published in 1988 by the OECD, the Multilateral Convention on mutual administrative assistance in tax matters now offers automatic exchange of information because of its modification, in 2010, the same year that the United States implemented the Foreign Account Tax Compliance Act (FATCA), catalyst for the automatic multilateralism and data exchange.

The FATCA law requires financial institutions domiciled abroad to report the bank details of American people and foreign entities with substantial participation of Americans to the Internal Revenue Service (IRS), under the penalty of a 30% withholding on income of U.S. source.

The profound innovation introduced by FATCA promoted the implementation of the new international tax rules within the OECD and the G20. Among other measures, the OECD published the Multilateral Competent Authority Agreement, which provides for the automatic and multilateral exchange of information between the signatories of the Convention. Since its launch on October 29, 2014, the agreement has been signed by 74 jurisdictions that have committed to exchanging the first automatic information in 2017 or 2018.[12]

In addition to this new international standard for cooperation, OECD has developed initiatives to combat aggressive tax planning used by multinational enterprises (MNEs). In general, MNEs take advantage of gaps in the tax systems of the jurisdictions to define connections to systems that serve to reduce the effects of the tax burden. As a result, the OECD and the G-20 developed the BEPS Action Plan (Base Erosion and Profit Shifting), comprising 15 initiatives for changes in tax laws and the adoption of the international standard of transparency, substance and coherence.

Brazil not only participate in the discussions related to BEPS, but also begins to reform the internal legislation in order to comply with the final recommendations of this Action Plan. An example is the program of reduction of tax litigation (PRORELIT), created by the provisional measure no. 685/2015[13], whose content is similar to the defendant by the action of the BEPS 12 - Mandatory Disclosure Rules. The PRORELIT creates an obligation to taxpayers to declare annually to the Receita Federal of Brazil (RFB), before September 30, acts or legal facts giving rise to the suspension, reduction or postponement of a tax. This is under the penalty of characterization of intentional fraudulent omission with the purpose of evasion or fraud, in addition to the collection of late fee and of the expected interests and fines[14].

12. Available at: www.ocde.org. Accessed: 12 Nov. 2015.
13. At the time of the closing of this work, the text had been approved by Congress and awaiting presidential approval for its conversion into law
14. BRAZIL. Provisional measure n ° 685, 21 July 2015. Creates the program of reduction of tax litigation (PRORELIT), °.7, caput and art.9 °, caput.

3. BANK SECRECY AND TAX SECRECY

Among the list of fundamental rights laid down in the Federal Constitution of Brazil, is the so-called right to privacy, expressed by the inviolability of privacy, private life, honor and image of persons (article 5 °, X) [15].

One aspect of privacy is the confidentiality of the data, which guarantees to individuals and institutions the confidentiality of the information transmitted to public or private organizations. Both the data handled by the administrative authority and the information held by financial institutions are, therefore, under the scope of this constitutional provision.

The Brazilian legal system offers tax authorities access to information from taxpayers and the respective duty to keep it under secret, according to provisions of the art.198 of the national tax code (CTN) that says:

(...) disclosure by the public Treasury or its agents, of information on the taxpayer or third parties economic or financial situation and on the nature and status of their business or activities is prohibited.

Although they derived from the right to privacy, tax secrecy and bank secrecy are different concepts. While the first refers to information obtained under the charge of the tax authorities, the second is the one that financial institutions are obliged to preserve in their active, passive and operations services (art. 1, LC 105/01). Even if access to the administrative authority to the bank details of taxpayers means the violation of bank secrecy, this does not mean, that the taxpayer is unprotected at all. There is another, more extensive protection area, which includes various types of information coming to the tax authorities, since the same data will be protected under the tax secrecy.

On the other hand, when the tax authority have access to taxpayers' data kept by financial institutions, the bank details remain, in accordance with the legislation in force, under a strict secret. In this case, the secrecy would be a kind of tax secrecy, under the information (bank details) managed by the tax authorities.

The complementary law 105/01, in its article 6, gives tax authorities the power of direct access to bank information, if a tax procedure or an administrative procedure has started and these examinations are deemed necessary by the administrative authority[16]. This competence has a constitutional basis because art.145, § 1, of the Federal Constitution allows the tax administration to identify assets, while respecting individual rights, in order to assess the economic capacity of the taxpayer.

However, in its decision of the Extraordinary Appeal (RE in Portuguese) 389808/PR, in 2010, the Federal Supreme Court ruled (in a 5-4 vote) in favor of the clause of judicial reserve, which imposes the need for prior judicial authorization to access the bank details.

The judges who voted in favor of the RE argued that the Brazilian State is based on the dignity of the human person, the sanctity of individual rights and legal certainty, so that access to

15. BRAZIL, 1988 Federal Constitution, article 5 °, X. Intimacy, privacy, honor and image of persons, guaranteeing the right to compensation for material or moral damage resulting from breach are inviolable.
16. Complementary Law No. 105 of 10 January 2001. It has about the secrecy of the operations of financial institutions and other measures, Art.6 °.

such data, without passing through the sieve of the judicial power, would affect the privacy of taxpayers.

Meanwhile, the judges who rejected the RE understood that there is no violation of privacy, given the provisions of the art.145, § one CF, above mentioned. According to this view, we must not talk about violation of bank secrecy, but the transfer of data since the Federal revenue has the duty to maintain data confidentiality.

The unconstitutionality of article 6, of the 105/01 LC was also subject to the direct action of unconstitutionality 2390 (Rel. Min. Dias Toffoli), with no decision announced yet. If the incidental understanding previously adopted by the STF prevails, the Treasury will depends on a judicial authorization to access bank data, since the effects now will apply to all (erga omnes).

In addition to the clash between transparency and privacy, the discussion involves the shape of Brazil's policy towards harmful tax competition and the inclusion of Brazil in the international scenario, with the goal of growing to achieve transparency, as described in the previous point.

The possible declaration of unconstitutionality of article 6, LC 105/01 gives rise to doubts about the timeliness of information exchange, since judicial decisions are characterized, in general, by being delayed. Without a need for judicial authorization, only 20% of requests made to Brazil were answered in 90 days[17], figures that need to be improved with the participation of Executive and judicial powers, if the country wants to meet the expectations of international transparency.

In addition, the adequacy of Brazil to the international tax standard also requires the renegotiation of some double taxation agreements in order to enter in the (5) art.26 of the OECD Model Convention. This clause is already included in the agreements signed with Chile, Peru, Turkey and Venezuela. In this case, Brazil may not invoke banking secrecy of the data requested. Other observations made by the Global Forum are also incompatible with judicial reserve of banking data, so this measure seems to contradict the pursuit of transparency and exchange of information that States have expected, and the measures in this sense taken by the Brazilian Government.

4. BRAZIL ON THE INTERNATIONAL TAX COOPERATION STAGE

The Global Forum published in 2012 and 2013, respectively, the reports of phases 1 and 2 (peer review), relating to the Brazil's compliance with international tax rules. In the initial phase, the OECD assessed the regulatory and legal framework for the exchange of information. In the second phase, the Organization analyzed the practical application of the rules of transparency under the aspects of the information availability, access to information and information exchange.

In General, Brazil was considered a cooperating jurisdiction; however, the reports identified some aspects to review, namely:

(i) Exchange of information in proper time:

sending timely data is emphasized by the OECD as fundamental for effective international cooperation, taking into account, to this end, a 90 days' timeframe, beyond which there will

17. OECD (2013), Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Brazil 2013. Phase 2: Implementation of the Standard in Practice, OECD Publishing p.112/114. Available at: http://www.eoi-tax.org/jurisdictions/BR#latest>. Accessed: 06 Nov. 2015.

possibly be damage and the eventual failure of the investigation carried out by the requesting jurisdiction.

Brazil would have not promptly answered the majority of requests for Exchange of information, pertaining to the RFB, through the General coordination of international relations (CORIN), which send this information. Upon receipt of the request for Exchange, the CORIN verifies if the information is included in the RFB database, sending it directly to the applicant if yes. Usually the RFB database stores information of simple nature, such as address, name and tax return.

The more complex information, which are not included in the database of the RFB, must be submitted to the unit of the RFB that hold jurisdiction over the domicile of the taxpayer (local unit).[18]

The Global Forum stressed that because of "the lack of clear internal controls within the deadlines, the inadequacy of resources for the units of information exchange, as well as the difficulty for the local units to forward the data in time"[19], the sending of information abroad in due time was hampered. Among the 89 requests for Exchange of information received by Brazil, in the period from 2009 to 2011, 12 were exchanged directly and 77 were directed to the local jurisdiction unit of the RFB[20]; 20% answered within 90 days; 46% up to 180 days; 68% up to 1 year; and 17% still not have been completed. For these reasons, the Brazil was rated as partially compatible in terms of the timely nature of data exchange.

The improvement of these figures, of course, requires investment in tax administration, providing it with the necessary logistics to develop a regular attention to foreign requests, as well as the development of Brazilian requests and the decoding of the data to be used before any indication of violation of the tax legislation.

(ii) Process of prior notification to the taxpayer in case of Bank data request:

The right to notify is a controversial issue. If on the one hand the lack of notification may result in a constraint to the defense of the taxpayer, on the other hand, notifying could frustrate the progress of abusive circumvention or evasion investigation.

In the field of the European Union, the Court of Justice of the European Union (CJD), in the case Sabou (case C-276/12), expressed for the first time the rights of taxpayers in the procedure of exchange of information, including the on right to prior notification. The Court ruled that in the investigation phase, the taxpayer is not entitled to a notification about the request for Exchange of information. On the other hand, the State has the duty to ensure the protection of the fundamental rights of taxpayers, such as the confidentiality of data exchanged[21].

In the Brazilian case, the RFB precludes the prior notification to the taxpayer under investigation for the exchange of tax information. As indicated in its database, the Agency can send the data directly as well as request them from a third party.[22]

18. OECD (2013), Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Brazil 2013. Phase 2: Implementation of the Standard in Practice, OECD Publishing p.72/73. Available at: http://www.eoi-tax.org/jurisdictions/BR#latest>. Accessed: 06 Nov. 2015.
19. In the original, "the lack of clear monitoring of internal timeframes and the insufficient level of resources within the EIO Unit, as well as difficulties in obtaining information from local units in a timely manner, have led to considerable delays in response times". OECD (2013), Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Brazil 2013. Phase 2: Implementation of the Standard in Practice, OECD Publishing p.88/89. Available at: http://www.eoi-tax.org/jurisdictions/BR#latest>. Accessed: 06 Nov. 2015
20. OECD (2013), Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Brazil 2013. Phase 2: Implementation of the Standard in Practice, OECD Publishing p.73. Available at: http://www.eoi-tax.org/jurisdictions/BR#latest>. Accessed: 06 May. 205
21. SEARA, Alberto Quintas; CARRERO, José Manuel Calderón. The taxpayer´s right of defense in cross-border exchange of information procedures. Bulletin for International Taxation. Amsterdam: IBDF, v.68, n°9, p. 501, 2014.
22. OCDE (2013), Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Brazil 2013. Phase 2: Implementation of the Standard in Practice, OCDE Publishing p.83. Available at: http://www.eoi-tax.org/jurisdictions/BR#latest>. Accessed: 06 may 2015.

In case of request for banking information, the Agency should consider the indispensable information to access it directly, being understood that the negative answer by the account holder implies responsibility or liability for the financial transactions. Such refusal or no manifestation of will open the Fiscal procedure (TDPF), and RFB would directly request the data to the financial institution (Dec. No. 3724/01 ° Art.3, X ° and art.4, §2 °).

In this sense, the Global Forum understood that the notice to the taxpayer must have exceptions like "the urgency of the request for exchange of information or situations in which it is foreseeable that notification will affect the chances of success of the research carried out by the requesting jurisdiction".[23]

This is not surprising. The suggestion of the OECD has been, for a long time, registered under Brazilian procedural law. Whenever there is a threat to any right, procedural rules are flexible to secure it to the detriment of the formalities usually necessary. It is the case, for example, in terms of the presentation of the power of Attorney posterior to the request in the event of loss of right; and precautionary measures granting.

The urgency of research needs information to confirm and verify a possible fraud, which, if it is not set, will never lead to the investigated on the passive side of the tax obligation relationship. However, it would not be reasonable to deny the existence of prescriptive terms and limits that run against the Treasury, in view of the urgent need of the information requested.

It is desirable to preserve all the rights of the investigated taxpayer. However, it also requires the preservation of the interests of all the contributing society, linked together by the ties of solidarity that turn citizens into taxpayers.

(iii) Professional secrecy within the lawyer-client relationship:

under the national tax code, professional secrecy is one of the exceptions to the obligation, by request in writing, to provide to the administrative authority all the information detained with respect to the goods, business or activities of third parties[24].

In the case of the attorney-client relationship, art. 7 of law Nº 8.906/94 is clear about the "inviolability of the office or workplace of the legal counsel, as well as their work tools, their written or electronic correspondence, telephone and telematics related to the exercise of the legal profession". Therefore, only the relationship that arises from the practice of law is under the protection of professional secrecy, understood as the legal representation before the judicial bodies such as advice, consultancy and legal address.

While the legislator defined the instruments covered by professional secrecy in the attorney-client relationship, there is a clear definition of the scope of these relationships. As a result, the attorney-client relationship could possibly be invoked as a basis for not presenting data to the tax authorities, although not without the actual practice of the legal profession.

As a result, it was recommended to Brazil review the provisions related to professional secrecy in the attorney-client relationship, more clearly explaining its limits.

(iv). Effective international information exchange:

Brazil, to exchange information, signed 39 agreements on tax matters (32 double taxation agreements and 7 TIEAs), of which 33 are in force (32 double taxation agreements and 1

23. OECD (2013), Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Brazil 2013. Phase 2: Implementation of the Standard in Practice, OECD Publishing p.84. Available at: http://www.eoi-tax.org/jurisdictions/BR#latest>. Access on: 06 may 2015.
24. BRAZIL. Law No. 5172 of October 25, 1966. Available on the national tax system and establishes general rules of tax law applicable to the Union, the States and municipalities, Art.19.

TIEA). This scenario could be more favorable to the Exchange if it were not for the delay in the procedure of ratification of the agreements already signed, as in the case of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters, signed in 2011, but not ratified.

A noteworthy point refers to the 2010 update to the art.26 of the Model Convention of the OECD, which earlier demanded "necessary" information exchange only and was made more flexible for "foreseeably relevant" information. In the case of Brazil, the agreements, except the agreement with Turkey, provide for the exchange of the necessary data.[25]

An update from 2012 to article 26 (2) of the OECD Model Convention brought the controversy of the use of fiscal information exchanged with purposes other than taxation as, for example, criminal offences, however this extension is not provided for in Brazilian agreements.

A provision of the art.26 (5) of the OECD Model Convention, under which the Contracting State may not refuse to provide the information requested to be in the custody of a financial institution, is expressed only in the double taxation agreements with Chile, Peru, Turkey and Venezuela, and the TIEAs with Bermuda, Cayman Islands, Guernsey, Jersey, United Kingdom and Uruguay.

The Global Forum also pointed out the fact that only the double taxation agreements with Turkey and Peru are adjusted to art.26 (4) of the OECD Model Convention. The regulation establishes that lack of national interest in the exchange of information is not a reason for the requested State to avoid sending it.

The effectiveness of the exchange of information progressed with the enactment of the Intergovernmental Agreement (IGA), through Decree No. 8506 24 August 2015. The agreement adapts the exchange of information provided for in the existing TIEA with the United States to FATCA, establishing the duty of the States to the automatic exchange of banking information. Therefore, annually and in reciprocal fashion, the Internal Revenue Service (IRS) and the Brazilian Federal Income (RFB) will send information on financial transactions of Brazilians/Americans taxpayers in financial institutions of USA/Brazil.

Joining FATCA was a boost for the new automatic information exchange standard, since so far only the Multilateral Convention on Mutual Administrative Assistance in Tax Matters, pending approval, provided for the automated exchange of data. However, the automatic exchange on a multilateral basis planned in the Multilateral Competent Authority Agreement must be implemented by Brazil in 2018, according to the commitment assumed by the country.[26]

However, the fundamental pillars of development and human dignity, authentic axiological vectors of the Brazilian legal system, require for its implementation more than measures to combat evasion practices. It recognizes the importance of international cooperation, but also focuses on coherence in the use of resources collected or waived. In summary, the budgetary revenue column must necessarily maintain close relationship with spending under the mantle of good governance and fiscal responsibility.

The waiver of income, expressed in the form of tax expenditures, has shown considerable growth in Brazil. Federal income data indicate, by the year 2015, tax expenditures of approximately

25. OECD (2013), Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Brazil 2013. Phase 2: Implementation of the Standard in Practice, OECD Publishing, and p.91. Available at: http://www.eoi-tax.org/jurisdictions/BR#latest>. Accessed on: 06 may 2015.
26. Available at:www.ocde.org>. Accessed: 05 sep. 2015.

R $ 282 billion, representing a growth of 13.04% compared to 2014 and 4.92% of the GDP.[27] Direct effect of this is the primary deficit of R$100 billion reals, presented in the budget bill for the year 2016. Therefore, it is normal that the budgetary pressure falls on the need for revenue that would justify the measures in the fight against international tax evasion.

Even if granting tax incentives to compete well on the international agenda is not condemned, this practice requires caution. There will be loss of income by the state, due to the allocation of foreign investment, and we will have to assess that there will be greater benefits than costs. From this point, the difficulty lies in the lack of transparency and absence of objective control of trade-off of these concessions.[28] Improvement of location factors reduces the need to offer tax incentives. In contrast, an unattractive internal environment tends to offer tax incentives in a disproportionate manner.[29]

In this scenario, therefore, of necessary reform in the tax system, Brazil has made efforts to be more competitive and cooperative, especially in the fight against the tax bases erosion and profit shifting. Therefore, the expatriation of resources has also affected the Brazilian tax base, since in the period from 1970 to 2010, ¼ of the $ 999 billion remitted by people from 33 countries of Latin America and the Caribbean came from Brazil[30].

In short, to be more competitive, it is necessary that the country develop a policy that seeks the attraction of capital, without neglecting domestic taxpayers, to avoid losing them or not discriminate against them in an arbitrarily or unfairly. Thus harmonizing the stage of multilateral cooperation seems inevitable, however, at the same time, it is necessary to enforce every part of the collection, given that the waiver or excessive expenditure of public revenue will inevitably reduce the well-being of taxpayers, breaching the pillars of the democratic rule of law.

5. CONCLUSION

Regardless of the progress of the Brazilian tax policy towards the exchange of information, an effective international cooperation requires adopting measures increasingly promoted by international forums. In fact, cooperation should be seen in the context of the exchange of information, as a two-ways roads, with greater risk when greater protection is offered by the domestic legislation of States on certain issues.

A topic of interest whose protection varies between the different internal systems is the banking secrecy. The recent measures recommended by the international order

27. Receita Federal do Brasil. Demonstrativo dos Gastos Governamentais Indiretos de Natureza Tributária (Gastos Tributários) – PLOA 2015. Disponível em: <http://idg.receita.fazenda.gov.br/dados/receitadata/gastos-tributarios/previsoes-ploa/arquivos-e-imagens/dgt-2015>. Accessed: 14 Nov. 2015.
28. BRAUNER, Yariv. The future of tax incentives for developing countries. In: BRAUNER, Yariv; STEWART, Miranda (Editors). Tax, Law and Development. Cheltenham: Edward Elgar, 2013, part. I, p.44.
29. ALMEIDA, Carlos. Sistemas Tributários Competitivos à luz da Interdisciplinaridade do Direito Tributário Internacional. Revista Novos Estudos Jurídicos – Eletrônica, v.20, n.1, p.234, 2015.
30. In the original: "in regard to Latin America and the Caribbean, the study indicates that the richest people in 33 countries sent twice an amount equivalent to $ 999 billion offshore between 1970 and 2010. More than a quarter of that amount comes from Brazil". VASCO, Carbajo Domingo; PORPORATTO, Paul. The latest advances in terms of transparency and exchange of tax information. In: Inter-American Center of tax administrations, 2013, p.8.

emphasize the need for a specific treatment of banking data. Thus, paragraph 5 of article 26 of the OECD Model Convention was modified to stimulate the exchange of banking information between the signatories of the agreement. Similarly, the issue occupied a prominent place in peer reviews carried out by the Global Forum, in addition to being the main objective of the significant changes introduced by FATCA, which concentrated precisely on access to banking data for the exchange of information. This, therefore, seems an irreversible picture.

Brazil gives priority to the protection of fundamental rights, among which stands out the privacy of citizens and taxpayers. The exchange of tax information, adapted to effective cooperation between States, whose objective is to progress, as required by article 4 of the Federal Constitution, does not mean, a priori, the violation of the protection of the taxpayer's trust by the State.

Conversely, fiscal actions seeking access to the banking data of taxpayers may never arise from the discretion of the tax authorities. The indispensability of the information, a necessary requirement for allowing the tax administration access to the banking data of taxpayers, is regulated specifically in the legislation regulating the action of the tax administration. Any breach carries penalties provided for in the specific standard.

In this case, access to the banking information by the tax authorities does not violate the fundamental right to secrecy, since bank details remain under another broader protection, i.e. the tax secrecy. A similar reasoning here leads to the conclusion that understanding the opposite means, a priori, assuming that the administrative authority shall commit an offence able to justify sanctions to the abusive collector.

On the other hand, the interest of the State in development, while ensuring the well-being of its taxpayers implies the supremacy of the public good over the private, so the ambivalence of exchanges of information must in the case of Brazil as a requisite, serve the interest of investigations limited to legal provisions. The possible understanding of the Federal Supreme Court to recognize the jurisdiction reserve above all and any access to the banking information goes in the opposite direction to the cooperation requested by the international order, increasingly in search of transparency. However, this understanding, if it prevails, does not imply for Brazil the impossibility of sending the information requested by other jurisdictions in a timely manner, if the Judicial and Executive powers reach an agreement for this purpose.

The conformation of BEPS reports, so that with the adoption of the IGA in the view of the FATCA aims to combat tax regimes privileged in order to preserve public revenue. In this sense, high tax expenses with tax waivers and the lack of effective legislation to repatriate omitted revenues from abroad are examples where the Brazilian international tax cooperation policy is not yet well defined. Consistency is needed, avoiding the loss of revenue, increasingly important on the international agenda. There is no justification for further actions to preserve the tax base and simultaneously affecting the budget because of tax expenditures, without guarantee of the greater benefits that would bring the collection.

The path of the States at this time is under strong external pressure. Among other things, they must adopt anti-avoidance measures, expand transparency, promote the exchange of information and combat the harmful competition from privileged regimes, and their internal legislations are challenged in their ability to respond coherently, in order to provide security not only to the international order but also, internally, to their taxpayers.

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LIMITATION OF THE DEDUCTIBILITY OF FINANCIAL EXPENSES IN CORPORATE TAXATION: THE SPANISH EXPERIENCE

Ignacio Granado Fernández de la Pradilla

SYNOPSIS

This article examines the aggressive tax planning strategies based on deducting financial expenses as well as the Spanish experience in fighting against this form of tax avoidance. A critical analysis is made of the rule currently in force, especially in the light of the criteria determined in the final report of Action 4 of the BEPS project, which was supported by the G20 meeting held in Turkey on November 15 and 16, 2015, wherein a common approach was proposed for ensuring that the deductible net financial expenses are directly linked to the economic activity carried out.

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Content

Can an entity grant itself a loan in order to deduct the interest earned and thus reduce its Corporate Tax (CT) base? No tax system would allow it, since it would be equivalent to letting taxpayers alter, at will, the amount of their contributions, thereby interfering with the coercive nature that is characteristic of every tax. However, certain aggressive tax planning strategies developed by multinational groups, have managed, by means of more sophisticated procedures to arrive at said result (if the group is considered as a sole entity) and reduce their overall taxation.

In its struggle against base erosion andprofit shifting, the OECD and G20 BEPS Project has devoted its Action 4 to the deductibility of financial expenses. It has also issued a final report, approved by the G20 at its meeting held in Turkey on November 15 and 16, 2015, wherein it urges the States to adopt a common approach for limiting the deductibility of financial expenses and facing this risk.

This article briefly examines the aggressive tax planning strategies that are based on the deductibility of financial expenses, as well as the Spanish experience in combatting this form of tax avoidance. It also involves a critical analysis of the rule currently in force, in the light of the international recommendations stated.

1. THE DEDUCTIBILITY OF FINANCIAL EXPENSES FROM CORPORATE INCOME TAXATION AS AN AGGRESSIVE TAX PLANNING TOOL

International aggressive tax planning in this sphere is based on two mainstays: i) the structure of the taxes on corporateincome, which allows for deducting financial expenses; and ii) the differences between the internal tax rules in the different tax jurisdictions.

1.2. The theoretical justification of the deductibility of financial expenses

The public finance theory fundamentally justifies the taxation of corporate income for equity reasons (Costa, Durán, Espasa, Esteller, and Mora, 2005, pages 247-252), since it allows for controlling corporate capital yields, in particular, the undistributed benefits (administrative theory).

The “ideal” tax base would be the economic benefit obtained by the corporations; that is, their gross income minus all the necessary expenses for obtaining it, calculated as opportunity costs. It should include all expenses incurred in paying for the cost of use of the productive factors and, with respect to capital, both the debt (interest) and the equity (the income that could have been obtained by the shareholders from another alternate investment). However, the “real” tax base or legal benefit does not generally allow

deducting the opportunity cost of use from equity (among other reasons, because it is difficult to calculate[1]), and therefore, only the interest is deductible.

The different tax treatment given to the remuneration of equity (nondeductible dividends) and debt (deductible interest) affects the cost of use of the capital, thereby eliminating the neutrality of the tax with respect to corporate investment decisions, by favoring indebtedness. In addition, such different tax treatment may be used by multinational corporations in their aggressive tax planning, for transferring, at their discretion, the tax benefits to tax jurisdictions with lower taxation.

1.2. Differences and asymmetries in internal tax rules

International tax planning based on financial expenses endeavors to achieve a transaction with an asymmetric tax treatment. It consists of generating, for one party, an expense that will not correspond to an income for the other. In other words, deductible interest in the tax jurisdiction of the debtor entity's residence (known as *Source state,* where the income originates), but exempt or subject to a sensibly lower tax in the creditor´s tax jurisdiction (known as *Residence state,* where collection takes place). Without intending to be exhaustive, one may mention some of the most frequently used means, either individually or in more complex transactions, in order that the creditor entity may enjoy reduced or null taxation on the interest received:

a. **Taxation in "privileged" tax jurisdictions or systems, which includes:** i) establishing in a tax haven or States with a lower tax rate; ii) being located in States of high or average taxation, although having available "preferential" tax systems with low taxation (some already abolished, such as the systems of the Belgian "coordination centers"; the Dutch and Belgian "international financial activities entities"; or the Irish "international financial service centers"). In this case, the interest received is not subject to tax or may be subject to a lower tax rate.
b. **Establishing in tax jurisdictions that may allow access to the advantages of certain bilateral conventions for avoiding double taxation (DTC).** This abusive use of DTCs is known as *treaty shopping*, since it involves locating the entities of the group (the creditor, the debtor or intermediaries between one and the other that limit themselves to receiving the funds and lending them to another), exclusively for tax reasons. Through this technique, the creditor entity may not have to pay tax on the interest charged or may do so at low rates.
c. **Use of asymmetries between the tax systems,** especially those dealing with: i) subjection (territorial or personal) to taxes criteria; and ii) tax classification of an entity (as taxpayer or transparent entity, that is, which attributes the income to its partners). Many times the instrument used is not a specific rule (internal or DTC) but rather the way it interrelates with those of other systems.
d. **Hybridagreements:** this is a concept covering several transactions that seek to obtain asymmetric tax treatments for the contracting parties, which may be used for generating deductible financial expenses for one party which, nevertheless are not taxed for the other. There are hybrid financial instruments (capital for one part and debt for the other), hybrid

1. By way of exception, some States such as Brazil, Belgium or Italy allow the deduction of a notional interest on capital..

entities ("transparent" in one country and CT taxpayer in the other); and hybrid transmissions ("double" transactions –e.g., purchase with repurchase clause- which for one part constitutes a loan and for the other, two purchases).

1.3. Aggressive tax planning strategies based on the deduction of financial expenses

Aggressive tax planning strategies based on the deduction of financial expenses begin with a financing transaction within a multinational group, which results in some interest used, together with the differences and asymmetries between the tax systems, toachieve base erosion and profit shifting.

Base erosion is achieved by reducing taxation to a minimum in the State where an operational subsidiary of the group carries out its activity, through the deduction of the interest resulting from the financing transaction. Profit shifting without tax cost to the parent company requires the fulfillment of some conditions (OCDE, 2013, pág. 53): i) the transfer of benefits (in general, interest) to the financing entity must be exempt from withholding at the source or subjected to reduced withholding; ii) the financing entity must be subject to reduced taxation or tax exempt; iii) payments made by the financing entity to the parent company must be exempt from withholding at the source or subjected to reduced withholding, and iv) the parent company must enjoy a tax exemption on benefits (scarcely taxed in the previous steps). The reduced or null withholding of the payments (those made from the operational subsidiary to the beneficiary as well as from the latter to the parent company) may be obtained under the protection of the DTCs or the European Union Directives which prevent taxing cross-border payments of interest and royalties[2] and of dividends between parent companies and subsidiaries[3]. On the other hand, low taxation of the financing entity and the parent company may be achieved through the means already mentioned.

Shown below are the basic characteristics of the two most used schemes (Sanz Gadea, 2012). For greater clarity of the presentation, the hypothesis to be used is that the corporation experiencing the tax base erosion is the one resident in Spain, since this is the situation faced by the Spanish tax Administration.

1.3.1. Acquisitions of intragroup participations financed with intragroup loans

The first of the strategies used is that of acquisitions of intragroup participations financed as well with intragroup loans; which is graphically represented in Strategy "A" of Graph 1 and corresponds to the following basic scheme:

a. **Initial situation:** This is the case of a multinational group consisting of a parent company which is not a resident in Spain, an "operational" subsidiary which is a resident in Spain, other "operational" subsidiaries that are not residents in Spain and a nonresident "financial" subsidiary established in a territory with "privileged" taxation.
b. **Restructuring of the group:** The group undertakes a restructuring so that all the operational subsidiaries will depend on a new *holding* entity resident in Spain. To this end, first of all, the Spanish *holding* entity is *ex professo* established, directly dependent on the nonresident parent entity. In some variations the Spanish *holding* entity is established prior to beginning operations.

2. Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States.
3. Council Directive 2003/123/EC of 22 December 2003 amending Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States.

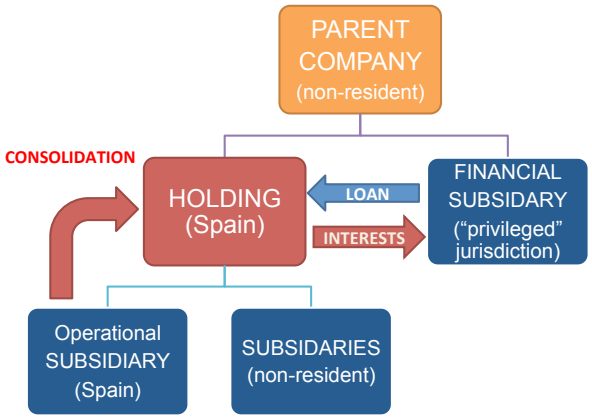
Even in some cases, there has been direct acquisition of the participations of nonresident subsidiaries by the operational subsidiary resident in Spain.

c. **Loan:** The financial subsidiary, located in a "privileged" jurisdiction makes a loan to the recently created *holding* company in order to provide it the required financing for acquiring the participations of all the subsidiaries. In some variations, the loan is granted by a nonresident subsidiary which, in turn, has obtained the funds from the financing subsidiary that is a resident in a "privileged" jurisdiction. On other occasions, a circular flow has been detected, since the entity transmitting the participations was the one lending to the purchasing *holding* company. In all cases, the loan granted to the Spanish holding formally complies with all tax regulations, in order that the interest may be deducted. Thus, according to the undercapitalization rule in force in Spain until 2012, the indebtedness of the holding entity was up to the maximum coefficient legally allowed (three times the amount of the fiscal capital).

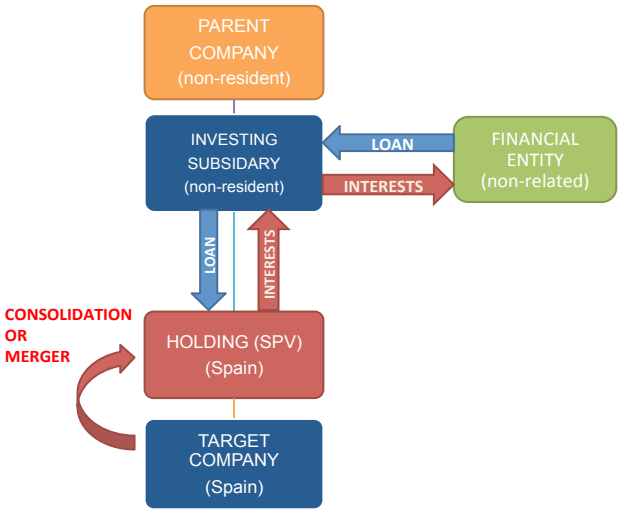
d. **Acquisition of participations:** With the funds received, the *holding* company acquires the participations of the nonresident operational subsidiaries and the Spanish operational subsidiary. In Spain, the *holding* Company and the operational subsidiary constitute a tax consolidation group.

Graph 1
Aggressive tax planning strategies based on the deduction of financial expenses

STRATEGY "A": Intragroup acquisitions financed with intragroup loans



STRATEGY "B": Acquisitions with financial leverage (*Leverage Buy Out*, LBO)



e. **Financial flows:** The *holding* company must pay interest (or, in general, financial expenses) to the financing subsidiary. In turn, the latter may pay dividends to the parent company.

f. **Tax consequences:** i) base erosion in Spain (the benefits of the operational subsidiary are compensated with the financial expenses of the *holding* company which, in addition, enjoys the

exemption of the dividends and surplus values originating from the nonresident subsidiaries[4]); and ii) profit shifting to the tax jurisdiction of the financing subsidiary (via interest) and subsequently, to the jurisdiction of the parent company (via dividends), in such a way that these benefits (interest and dividends) end up being subjected to much lower taxation than they would have been in Spain.

The compensation of revenues of the operational subsidiary with the financial expenses resulting from the interest on the loan can take place: i) at the operational subsidiary, if the latter acquired the participations of the nonresidents; ii) in the tax consolidation group if the acquisition was made by a pre-existing *holding* company or one created *ex professo* (when the *holding* company and the operational subsidiary are part of the same group); or iii) through a merger of the *holding* company and the operational subsidiary.

1.3.2. Acquisitions with leverage buy out (LBO).

A second aggressive tax strategy based on financial expenses is the one that uses the so-called acquisitions with leverage buy out or LBO. It is evidenced in Strategy "B" of Graph 1. In the basic scheme of these transactions a multinational group acquires a third unrelated party, an operational entity which is a resident in Spain and which generates benefits ("target company") using for such acquisition financing also granted by third parties. The tax savings originates from having the acquired company assume the cost of financing of the transaction through which it was acquired.

These transactions usually take place in these **stages** (OECD, 2013, pages. 94-95, Annex C): i) identification of the "target company"; ii) establishment of a special purpose vehicle (*holding* resident in Spain), which will acquire the "target company "; iii) obtaining financing from a third unrelated party; iv) acquisition of the "target company"; and v) tax optimization (so that the *holding* entity and the operational company may form a tax consolidation group or merge through the FEAC system), thereby ensuring that the acquired company will bear the financial costs of the debt.

This strategy allows for several **variations**: i) the special purpose vehicle (SPV) used (the *holding* company) may be established by the nonresident parent company itself or, more habitually, by another nonresident investing subsidiary; ii) the entity to whom the loan is granted may be the nonresident investor or the *holding* company with the investor's guarantee; iii) the structure of the financing chain may be the one described or an even more complex one with the introduction of intermediate subsidiaries[5]; or iv) the tax systems used for obtaining the tax savings may be either the consolidation or the restructuring transactions[6].

The key for achieving **tax savings** in any of its variants is the creation of a resident SPV (*holding* company) in Spain, because if the nonresident investor would directly make the acquisition, it could not create a consolidated group with the Spanish subsidiary or it would be

4. The holding company may opt for abiding by the special system of companies having foreign securities (ETVE), or for applying the general exemption provided in article 21 TRLIS. The outcome is the same: the exemption of this income, structured as a mechanism to avoid international double taxation, since this income is taxed in the State wherein it is obtained (Source state).
5. In this variant, the investing entity does so in an "intermediate" subsidiary established in a jurisdiction with "privileged" tax treatment for financial revenues, in order that this "intermediate" subsidiary will grant a loan to the holding company with the funds received. This then will allow for double deduction of interest: in the investing subsidiary as well as in the holding company.
6. The same tax results may be obtained in the consolidation system, wherein the revenues of the "target company" and the financial expenses of the holding company are compensated in the tax group; as well as in the merger wherein the debt is borne by the acquired entity (push-down debt transaction). Mergers should, in addition, abide by the financial assistance prohibition which prevents stock or limited-liability companies from granting financing to third parties for acquiring the company (arts. 143.2 and 150.1 of the Spanish Corporate EnterpriseAct (Texto Refundido de la Ley de Sociedades de Capital aprobado por Real Decreto Legislativo 1/2010, de 2 de julio); and 35, of the structural modifications of business partnerships Act (Ley 3/2009, de modificaciones estructurales de sociedades mercantiles), which transposes, in this respect, Directive 2006/68/CE).

more difficult to arrive at a merger in accordance with the FEAC system. The indirect acquisition (through a resident *holding* entity) allows it to solve these problems, although it calls for expanding the loans chain, since, in addition to the loan from the unrelated financing entity to the nonresident investing subsidiary, another one is necessary, which would be made by the nonresident subsidiary in favor of the resident *holding* company.

Avoidance originates from the fact that the parent company is the one that decides the company that will bear the financial expenses (the target company) and the tax jurisdiction wherein they may be deducted (Spain); thereby moving the deduction of the financial expenses from the jurisdiction of the investing subsidiary to that of the target company (Spain). As a result, the acquired company (which had no financing needs) ends up assuming the financial expenses of its investor, which were unnecessary for its activity.

This strategy differs from the one analyzed in the foregoing section in that neither the acquired company or the financing originate from related parties; but is similar in the end result: base erosion in Spain and profit shiftingto other more "favorable" jurisdictions. Nevertheless, the tax regularization of this second strategy is more complex since indebtedness responds to a real need for financing (the group lacks sufficient funds and must resort to outside financing) and there is an economic motivation (to acquire an unrelated company that generates benefits).

1.4. Harmful effects of these practices and difficulties for regularizing them

These aggressive tax strategies deserve extensive social reproach since they imply: i) for the companies not applying them, unfair competition; ii) for the Governments experiencing them, a significant loss of tax revenues; and iii) for society as a whole, a source of mistrust in the tax system, since they avoid the principle of tax justice which is the basis of every tax system. The increasing rejection of these practices has led the experts to include tax responsibility as a component of corporate social responsibility; and the States to find ways for combatting them, driven by two problems (OECD, 2013, page 54): i) the factors that favor the increase of aggressive tax planning strategies (such as globalization and the free movement of capitals); and ii) the fact that transactions carried out are valid if considered in isolation, thus rendering their regularization difficult.

2. ACTION 4 OF THE BEPS PROJECT: LIMITING BASE EROSION INVOLVING INTEREST DEDUCTIONS AND OTHER FINANCIAL PAYMENTS

2.1. The OECD and G20 BEPS project

Aggressive tax planning used by multinational companies to reduce their tax burden, eroding the tax bases in States with medium and high taxation and transferring their benefits to jurisdictions with low or null taxation was identified in 2012 by the OECD under the BEPS acronym (*Base Erosion and Profit Shifting*), which neutral denomination avoided the debate as to whether it was the case of evasion or avoidance practices or mere tax planning, while stressing the undesired consequences[7]. Within the framework of the international economic and

7. The success of this term allows for using it, even as an adjective (BEPS risk, BEPS strategies, etc.)

financial crisis, the OECD and G20 governments decided to undertake the ***BEPS Project*** to react against these practices. At its meeting held in Mexico in November 2012, the G20 requested the OECD to prepare a report on this subject matter for the next meeting of the Group held in Moscow in February 2013.

Based on this first descriptive document *(Addressing Base Erosion and Profit Shifting*), the OECD submitted in July 2013, an **Action Plan** (*Action Plan on Base Erosion and Profit Shifting*), which identified 15 points or actions that were considered a priority for combatting the BEPS problems, and which was supported by the G20 summit held in St. Petersburg in September 2013. The work of the BEPS Project which has been carried out for 2 years, has not been limited to the OECD countries, but has also involved the G20 countries, including as well the participation of developing countries. Especially noteworthy is the contribution of regional tax organizations such as the *Inter-American Center of Tax Administrations* (CIAT) and such international organizations as the International Monetary Fund (IMF), the World Bank and the United Nations (UN).

The purpose of these works was to propose specific measures for each of the actions in order to restore the trust in the effectiveness of the international tax system, based on these three objectives: i) coherence between the internal rules and the DTCs (to reduce the opportunities of applying BEPS practices); ii) economic substance of the tax rules (to ensure that the income is taxed in the State wherein the economic activity is carried out); and iii) transparency and juridical security of the tax systems (so that the Administrations may fight against new BEPS strategies and so that the economic activity may be carried out adequately).

To facilitate the agreement, a graduation of the proposed measures in the following categories was agreed: i) minimum standards (commitments to adopt new measures and criteria); ii) updating of standards (review of the regulations regarding transfer pricing and permanent establishments); iii) common approaches (tax policy guidelines to facilitate the medium term convergence of internal regulations that may become minimum standards further on); or iv) recommendations on best practices (optional measures).

Finally, the final reports of the 15 actions comprising the ***BEPS package*** were published in October 2015. The latter was presented to the Ministers of Finance of the G20 on October 8, as well as at to the G20 leaders at the Summit held in Antalya (Turkey) on November 15 and 16, 2015. They supported it and urged its "broad and consistent" implementation, as well as the monitoring of this process[8], regardless of the continuation of certain works in 2016, to specify certain aspects of some actions and negotiate a multilateral Treaty. Thus, following conclusion of the BEPS project, it should be implemented in accordance with modifications to the internal regulations of the States, the precautionary measures of the DTCs and the comment thereto (including the OECD guidelines as regards transfer pricing) and the signing of the multilateral Treaty announced, which combined measures may lead to the greatest transformation of the international tax system in this century.

2.2. Action 4 of the BEPS project

One of the actions of the *BEPS Action Plan* refers to the deductibility of the financial interest and is the so-called *Action 4: Limiting base erosion involving interest deductions and other financial payments*, whose objective was described in the following terms (OECD, 2013, page 17):

8. See paragraph 15 of the Communiqué of the G20 leaders of November 16, 2015, available at https://g20.org

"Develop recommendations regarding best practices in the design of rules to prevent base erosion through the use of interest expense, for example, through the use of related-party and third-party debt to achieve excessive interest deductions or to finance the production of exempt or deferred income, and other financial payments that are economically equivalent to interest payments. The work will evaluate the effectiveness of different types of limitations: In connection with and in support of the foregoing work, transfer pricing guidance will also be developed regarding the pricing of related party financial transactions, including financial and performance guarantees, derivatives (including internal derivatives used in intra-bank dealings), and captive and other insurance arrangements. The work will be coordinated with the work on hybrids and CFC rules."

According to the established calendar, the *Public discussion draft* was published on December 18, 2014. It proposed to the States a series of options to face the problem (Barreno, Ferreras, Mas, Musilek, and Ranz, 2015, page 40). After receiving the comments and carrying out the corresponding works, the final report was approved in September 2015 and published on October 5. Nevertheless, this Action will be completed in 2016, with specific measures for credit and ensuring entities and recommendations regarding the ratio applicable to the groups and in 2016-2017, with respect to its transfer pricing implications. Action 4 has been configured as a common approach with a tax policy orientation toward which the internal legislations of the States may converge within medium term and thus being capable of even becoming a minimum standard.

2.3. The selection of the common approach in the final report on Action 4

a. The final report (OCDE/G20, 2015) begins by admitting that the mobility of capital allows multinational groups to locate their debts in those jurisdictions that are most convenient to them, for which reason the use of related and third-party interest becomes the simplest simple BEPS technique. Specifically, the following BEPS risks are identified: i) locate a greater proportion of the debt with unrelated parties in jurisdictions with high taxation (to obtain higher deductions); ii) use intragroup loans for ensuring that interest deductions are greater than the interest actually paid to unrelated parties, (thereby achieving double interest deduction); and iii) using debt to generate tax exempt income, in practice, (by deducting from the income obtained, the interest paid, although the debt from which it originates may not be necessary to finance the activity which produced the income).

b. The **introductory Chapter** groups the general and specific rules approved by the States to face these risks into six categories: i) rules which, based on arm's length tests limit the disencumbered interest of an entity to that which it would have had if the debt would exclusively originate from unrelated third parties; ii) rules which impose tax withholdings on interest payments to tax them in the source State; iii) rules which disallow the deduction of a percentage of the financial expenses of an entity, regardless of the nature of the payment or the relationship with the creditor; iv) rules which limit the level of interest expense or debt in an entity with reference to a fixed ratio (such as debt/equity, interest/earnings or interest/assets); v) rules which limit the level of interest or debt of an entity with reference to the world group's situation; and vi) specific anti-avoidance rules which disallow interest deduction on specific transactions.

c. The report indicates that the first three ones may fulfill other objectives, but are not the most effective ones for fighting against the BEPS strategies. Therefore, it opts for proposing a common approach based on a

combination of the last three, whose details are summarized in **chapter 1.** The proposed common approach involves three main areas: i) a general rule which limits the net interest deductions based on a ratio of the operating benefit (EBITDA) between 10% and 30% (*fixed ratio rule*), modulated with the possibility of mitigating its unfavorable effects, in situations with low BEPS risk, by setting a threshold or minimum deductible amount (*de minimis threshold*), or the possibility of carry forward/backward of excess amounts to other periods; ii) an optional group ratio rule to afford specific treatment to sectors or groups showing more indebtedness for nontax reasons; and iii) the possibility of introducing or maintaining other specific anti-avoidance rules.

d. **Chapter 2** is devoted to delimiting the concept of "payments economically equivalent to interest", in the understanding that the proposed strategy must be applied to interest as such, as well as to those other economically equivalent payments –which on having a different legal configuration could avoid the tax limitations applicable to interest- as well items that may be included, such as: payments of participative loans, imputed interest on convertible bonds and zero coupon bonds, the financial expense of financial leasing, the amortization of "activated" financial expenses, the foreign exchange differences in relation to loans, or the guarantee or opening fees, among others. It also points out other items that should not be included, such as foreign exchange differences unrelated to financing, the operational leasing expenses or rates, among others.

e. **Chapters 3 through 5** are devoted to explaining the alternatives considered in developing a common approach, among others: i) the entities to which the strategy should be applied (the entities that are part of a multinational group; the entities that are part of a domestic group; and the *standalone* entities, that are not part of a group); ii) the amount that should be limited (gross or net interest or the debt); and iii) the amount to which the limit should refer (benefit or assets).

f. Following the analysis, the report recommends a **common approach** based on a limit to the deductibility of interest and other equivalent payments, in net terms[9], that may result from the application of a fixed ratio or percentage to the entity's Earnings Before Interest, Taxes, Depreciations and Amortizations, known as EBITDA. It is a concept widely used in making comparisons and carrying out studies, since it reflects the gross benefit derived from a company activity, without taking into account the expenses unrelated to the business: i) the interest which depends on the financial structure; ii) the taxes that are dependent on the tax rule; iii) depreciations that depend on external factors; and iv) amortizations, that depend on the assets renewal policy. The limit based on EBITDA guarantees that interest deductions are proportionately linked to benefit obtained from the activity. The report highlights two advantages of the option chosen:

- **Effectiveness in preventing BEPS risks:** The main objective sought under Action 4 is achieved through an anti-avoidance rule which ensures that interest deductions

9. The report allows countries to include an exclusion for interest paid to third party lenders on loans used to fund public-benefit projects, subject to conditions. These interest, so, would be enterely deductible. The reason is that, in these circumstances, an entity may be highly leveraged but, due to the nature of the projects and the close link to the public sector, the BEPS risk is reduced.

are directly related to the taxable income generated by the activity; that is, they correspond with the necessary indebtedness required for carrying out the activity (principle of economic substance). By relating the deductible financial expenses to EBITDA, it is possible: i) from the standpoint of the taxable income, to ensure that the benefit will not be eroded by financial expenses that are not directly proportional to the activity; and ii) from the standpoint of nondeductible expenses, to set a limit to the possibility that interest may be derived from a decision by the parent company to locate the debt in a specific jurisdiction merely for tax purposes. Its effectiveness as anti-avoidance rule lies in the fact that these BEPS risks are focused on companies with high net financial expenses in relation to their EBITDA. The proposed strategy ensures that a percentage of EBITDA is subjected to taxation, regardless of the level of financial expenses.

- **Neutrality in relation to the financing structure of the multinational groups:** Establishing the limit of financial expenses in net terms, does not affect those groups which, exclusively for nontax reasons –such as the credit rating of an entity, the currency used or the facility for accessing the capital markets- concentrate debt transactions with unrelated third parties in specific entities or jurisdictions. The financial intermediation function of these entities –whereby they request loans from third parties for obtaining the necessary funds to, in turn, lend them to the entity of the group requiring financing for carrying out its activity- allows them to compensate the interest paid to third parties with the financial income obtained from the intragroup loans.

2.4. The common approach of the Action 4 final report

The main elements of the *common approach* are the following:

2.4.1. Deductible minimum threshold (optional)

The establishment of a minimum threshold is allowed, below which all net financial expenses are considered deductible. The purpose is to reduce the impact of the limitation rule in entities which, because of their low financial expense level, pose less BEPS risks. To avoid possible undue uses of this threshold, it is recommended that, if established, it should be jointly applied to all entities that are part of a group in a jurisdiction, so as to set the threshold at the national group level, and not allowing the addition of each entity's threshold.

2.4.2. Limitation rule based on an EBITDA fixed ratio

The limit of deductible financial expenses will result from applying a fixed ratio to the entity's EBITDA. The ratio should be the same for all entities. It should be applied, as a minimum, to the entities that are part of a multinational group, although it may be extended to all the entities that are part of a national or multinational group (excluding the *standalone* entities), or be applied to all the entities.

Chapter 6 recommends that the fixed ratio be established within a 10% to 30% range of EBITDA, to guarantee that it will be sufficiently strict to face the BEPS phenomena. According to a study contributed by the OECD's Industrial and Entrepreneurial Consultative Committee, the range chosen allows the greater part of the groups to deduct an amount equivalent to the interest paid to the unrelated third parties, but not much more, in order to avoid the artificial increase of interest paid by means of intragroup loans. With a ratio of 10% of EBITDA, 62% of the multinational groups could deduct all the interest paid to unrelated third parties; while with a 30% ratio of EBITDA, the proportion increases to 87% of the multinational groups. A ratio above 30% of EBITDA would encourage many groups with a lower ratio to increase their indebtedness up to said limit.

The scope of the range is justified by each country's different situation, as well as the additional measures they may adopt in relation to this common approach, for which reason it is recommended that a higher ratio be applied, in case of the following assumptions: i) if the general fixed ratio is not combined with the additional group ratio; ii) if excess EBITDA cannot be carried forward to future periods, or excess financial expenses carried backward; iii) if additional specific rules are applied to face other BEPS risks; iv) if the interest rate is higher than that of other countries; v) if, for constitutional or legal reasons of the EU, certain types of entities with different level of BEPS risk, but juridically equivalent, should be treated equally; and vi) if, instead of a single ratio, various ratios are used according to the size of the group.

2.4.3. Additional limitation rule based on a group ratio (optional)

In order to reduce the impact of the limitation rule applied to specific groups or economic sectors with a high debt ratio that is not due to tax reasons, the report proposes that the entities whose financial expenses exceed the general ratio may deduct them up to the limit of the debt ratio of its world group.

The report recommends a *net interest with unrelated parties/EBITDA of the world group* ratio, which is similar to the general ratio, but admits that there are other equally valid approaches, in particular a group ratio based on the assets, as the *equity escape rule* applied in Germany and Finland which excludes the entities with a *capital/total assets* ratio equal or above that of its group from the limitation in the deductibility of interest. The report specifies that in comparison with the group ratio based on EBITDA, the equity escape rule may be stricter for highly indebted entities (which could not withdraw from the general ratio), but it is more slack for entities with losses (which, nevertheless, could not deduct any interest with the EBITDA based ratio).

In the same way, the report admits as valid strategy that a State not establish any additional group ratio rule and apply an EBITDA-based fixed single ratio (because, due to constitutional or other reasons it does not want to introduce any exception to the ratio according to the group's debt level). Nevertheless, in that case, it must apply the fixed ratio to all the entities that are part of a group, without discriminating between multinational and domestic groups. **Chapter 7** of the report expands on the details of the group ratio that recommends: *net unrelated third party interest / EBITDA of the world group*. It explains that the application of this rule involves two stages: i) calculating the group ratio (net interest of the group with unrelated third parties / EBITDA of the group); and ii) apply the group ratio to the specific entity (group ratio x the entity's EBITDA) to determine the maximum limit of deductible interest. In world groups subjected to different accounting, commercial and tax legislation, the ratio calls for deciding what is considered a group; which concepts may be considered net financial expense of the unrelated parties; how is the group EBITDA calculated; and whether or not the benefits of some entities of the group can be compensated with the losses of others in calculating the group's EBITDA. Given these calculation difficulties, a State can choose to allow an uplift of net unrelated third party interest expense of up to 10% to reduce the risk that the rule not take into account all the financial expenses of the group and double taxation may occur. In any case, all these difficulties have called for preparing a specific report on this group ratio, which is anticipated to be approved in 2016.

2.4.4. Excess temporary carry forward/back (optional)

One of the inconveniences posed by the EBITDA ratio is that it is based on a volatile concept, such as benefit, for which reason a negative evolution of benefits or not in step with the anticipated evolution of financial expenses (the interest of a debt, for example, may be lower during the first years and concentrated in the latter years, if it is thus agreed), may end up affecting the possibility of deducting them. Thus, if no temporary compensation rule is

introduced, it could affect those companies which, having the same global interest and benefits as others, throughout a period of years may have them more irregularly distributed.

An option to avoid this inconvenience would be to calculate EBITDA in average terms for a period of years (for example, the average EBITDA for the current period and the two preceding ones). Although accepted as a valid alternative, **chapter 8** points out that there may be problems in calculating the average group EBITDA (if, for example, there are changes in its composition), as well as in deciding the number of periods that would be taken into account.

Another simpler measure to mitigate EBITDA volatility is the possibility of carrying forward or back the excess financial expenses (if in a period net financial expenses exceed the limit resulting from the ratio applicable to EBITDA) or, in its case, EBITDA (if the net financial expenses do not exceed the EBITDA calculated limit), until exhausting the deductible limit established in each of the other periods (by adding financial expenses from other periods until arriving at the deductible limit for the period, or adding an EBITDA excess from other periods to increase the deductible limit of the period). It may likewise be applied to the group ratio. In the absence of this carry forward/carry back rules, the excess financial expense would not be deductible and, in its case, the EBITDA excess would imply a loss of the capacity for deducting financial expenses.

There is a bilateral advantage in these carry forward/carry back rules: i) in the case of companies, it avoids the risk of not being able to deduct the interest due to a mere lack of coordination in the temporary evolution of interest and benefits; ii) in the case of the States, it allows for ensuring that the level of deductible financial expenses be linked, over time, to the level of income, thereby adding to the limitation rule, the temporary allocation of financial expenses.

The report indicates that a State may allow the four types of *carry forward* and *carry back* of excess financial expenses and excess EBITDA- or it may limit it to any of these options: i) *carry forward* of excess financial expenses only; ii) *carry forward and carry back*, but only of excess financial expenses; and iii) *carry forward* of excess financial expenses and excess EBITDA. It is believed that the other options present greater BEPS risks.

There may be BEPS risks associated to these temporary carry forward and carry back rules if no limit is set. For example: i) the carry forward/carry back of EBITDA excesses may encourage the artificial increase of the debt or the reduction of benefits to take advantage of said increase in the deductible limit; ii) the carry forward/carry back of excess financial expenses may encourage a company to try to arrive at the maximum deductible amount each year, trusting that if it is exceeded, it may be deducted in subsequent periods. The rules with the greater BEPS risks are the *carry back* of the excess financial expenses and the *carry forward* of the excess EBITDA, since they allow for the most immediate increase of deductible expenses than the rest of the options and, therefore, they should be carefully established. To minimize these negative incentives, it is suggested that limits be established, especially with the *carry forward* of the EBITDA excess and the *carry back* of the excess financial expenses, as well as to determine a maximum number of years in which the excess may be carried forward/back, a percentage that may reduce every year the excess carried forward/back from other periods or a maximum limit of the excess carried forward/back which may be deducted every year (in absolute or relative terms).

2.4.5. Specific rules (optional)

The report recommends that the common approach be reinforced with specific rules to avoid that it may end up being replaced, for example, with fictitious mechanisms for reducing net financial expenses, or to face other more specific BEPS risks associated to specific transactions or agreements. What it does not

recommend is the opposite option of having a State struggle along against the BEPS risks with specific rules, but without a general rule, since it would require that said State would be continuously adapting its rules to the new BEPS strategies as they were discovered. However, it would deem it appropriate that a State which only has specific rules would introduce the general limitation rule and keep the specific ones (for example, thin capitalization rules).

Vis-a-vis the EBITDA ratio or the group ratio that would be applicable, in general, to all the entities and for all its financial expenses, the specific rules would be applied only in specific situations. **Chapter 9** refers to some of these possible rules:

a. Rules for preventing that the general limitation rule be replaced with: i) agreements for reducing net financial expenses (for example, by converting financial expenses into another type of deductible expense or nonfinancial revenues into financial revenues); ii) agreements for increasing, within a group, the level of financial expenses with unrelated parties and fictitiously increase the group ratio; or iii) restructuring to take advantage of the different limits applied to the groups or companies that are not part of a group.

b. Rules for preventing other BEPS risks, such as: i) interest of "fictitious loans" (generally intragroup), which are not an increase of the group's debt; ii) interest paid to related parties which are excessive or used to finance the generation of exempt revenues; iii) interest paid to related parties, which represent for the other party revenue not subject to taxation or to a lower rate; iv) interest paid within the framework of transactions wherein the group does not bear the total cost of the financial expense; and v) entities with net financial revenues, that reach an agreement with other entities of the group or related nonresidents to pay them interest and thus reduce the revenues subject to taxation.

2.4.6. Special systems for financial and insurance entities

The financial and insurance entities require a specific approach, since the fixed ratio and the group ratio would not be appropriate for these entities, due to their specific characteristics as regards financial revenues and expenses, which are the purpose of their activity. For this reason, **Chapter 10** refers to future works on this subject which are expected to be concluded in 2016.

3. THE SPANISH EXPERIENCE

Having briefly examined the theoretical and international framework, we will now consider the Spanish experience in the struggle against the abuse of interest deductibility in CT. Following the evolution of the main tax models, Spain has moved from a "traditional" thin capitalization rule, applicable only to debt with related parties, to a general limitation rule in the deductibility of financial expenses applicable to the debt with related parties and unrelated third parties.

3.1. The thin capitalization rule

The current CT originated from the 1977 tax reform, which was one of the measures that rendered possible the transition to democracy. The first Spanish Corporate Tax Act (Ley 61/1978, de 27 de diciembre, del Impuesto sobre Sociedades, LIS) implemented the new tax, although the first rule for fighting against the abusive use of interest deductibility in related

transactions was subsequently introduced[10], through the old Spanish Individual Income Tax Act (Ley18/1991, of June 6) which **added art. 16.9 LIS,**.

The wording of this new rule followed the technique of the so-called "thin capitalization rules" (or *thin-cap*), which had already been introduced in other States of our environment, particularly in Germany and France. The legislator reacts against an aggressive tax planning technique which consists of *disguising* as loan what is actually a capital investment, in order that the company may deduct as interest, the payments made to the investor. In this way the capital of the resident company will be lower than what it should actually be, for which reason it can be said that it is "thinly capitalized".

This type of rules consist of the following elements: i) sphere of application limited to debt between related parties; ii) establishment of an admissible maximum debt coefficient; iii) fiscal reclassification as dividends of interest exceeding the ratio. It is an anti-abuse rule that establishes a *iuris et de iure* presumption -without allowing any proof to the contrary- that beyond the debt coefficient, all funds delivered to the resident company are capital contributions and that, accordingly, the payments made by the resident company to the nonresident one, shall be considered as dividends which cannot be deducted from the resident company's CT.

This thin capitalization rule was maintained in article 20 of the following Corporate Tax Act (Ley 43/1995, de 27 de diciembre, del Impuesto sobre Sociedades), which established the debt coefficient allowed for purposes of this article, at 3 times the fiscal capital; that is, the equity without including the result of the period. However, it had to be modified in order to **adapt it to the requirements of the European Union's Justice Court (EUJC),** and to exclude from its sphere of application the companies that were not residents in Spain but residents in other Member States of the European Union (EU). In fact, the ruling of the EUJC of December 12, 2002, regarding the *Lankhorst-Hohorst* case C-324/00 stated that the German thin capitalization rule appearing in article 8 bis.1.2, of the German Corporate Tax Act (*Körperschaftsteuergesetz*) was contrary to the freedom of establishment provided in article 43 of the Treaty Establishing the European Community, currently article 49 of the Treaty on the Functioning of the European Union (Almudí Cid and Serrano Antón, 2003) because it provided for a different and more burdensome treatment to the companies established in other Member States (to whom the thin capitalization rule was applied) than to those that were residents in Germany (to whom this rule was not applied).

Given the similarities between the Spanish and German thin capitalization rules, in order to adapt the Spanish rule to the EUJC's jurisprudence, an act (Ley62/2003, de 30 de diciembre), introduced a new section 4 to article 20 of the Corporate Tax Act, according to which: *"That provided in this article shall not be applicable when the related entity not resident in Spanish territory is a resident of another member State of the European Union, unless it is a resident in a territory classified by the regulations as tax haven".* The wording of this article 20 was included in article 20 of the following Corporate Tax Act (Texto Refundido de la Ley del Impuesto sobre Sociedades, aprobado por Real Decreto Legislativo 4/2004, de 5 de marzo, TRLIS) and was maintained practically unchanged, until 2012.

This exception resulted in a significant reduction in the effectiveness of the rule, which called for an in-depth reform, in line with the international

10. A former background of the rules limiting the deductibility of financial expenses in transactions with related parties for taxing the benefits of companies in Spain may be found in the old Texto Refundido de la Ley Reguladora de la Contribución sobre las Utilidades de la Riqueza Mobiliaria, aprobado por Real Decreto de 22 de septiembre de 1922 which denied the deduction of interest as expense as well as other expenses paid to the parent Company abroad (Cordón Ezquerro, 2006).

recommendations, among which, one may mention, within the EU's sphere those approved by ECOFIN on June 8, 2010 which, among other things, proposed three ways for the tax treatment of thin capitalization: (Sanz Gadea, 2010, page 174): i) the traditional thin capitalization rule; ii) the general interest limitation rule which provides for the non-deductibility of net interest exceeding a limit calculated in relation to EBITDA; and iii) the rule limiting interest that exceeds the group's debt ratio.

3.2. Operations subject to actions by the Tax Inspection

During the enforcement of the thin capitalization rule, the Tax Inspection of the State Agency of Tax Administration of Spain (hereinafter, Tax Agency), regularized several restructuring operations carried out by the multinational companies, based on the two strategies discussed above. According to the Tax Agency's Report of 2012 (year in which the new deductibility limitation rules were introduced): "*Worth noting in 2012 (…) are the actions involving the regularization of undue deduction of financial expenses in intragroup transactions, which* ***have involved increases of the declared tax bases of over 1.700 million.*****"**[11] Shown below is a brief description of the main regularization processes used by the Tax Agency in the already discussed two aggressive tax planning strategies[12].

3.2.1. Regularization of intragroup acquisitions with intragroup financing: conflict in the application of the tax rule (article 15 LGT)

The Tax Inspection considered that the interest resulting from these loans should not be deductible from the CT, since the restructuring operations financed with the loans had no entrepreneurial motivation and the only objective pursued was to reduce the tax base of the Spanish fiscal group through the deduction of interest. The CT rules did not provide any limit to the deduction of the financial expenses beyond that of the thin capitalization rule and this rule proved its inefficacy for facing this type of operations, since it was formally respected. This inefficacy was due to the fact that it had not been designed to fight against "unnecessary" debts, that is, which did not respond to real financing needs, but rather to strategies for relocating the group's funds with a mere fiscal motivation.

Since the operations did not formally interfere with the TRLIS, the Inspection had to resort to general anti-avoidance rules which allow for declaring that an operation is valid but illegal (fraud and conflict in the application of the tax rule) or directly not valid (simulation), as provided in articles 15 and 16 of the LGT. If the evidence collected allowed for disputing the very reality of the operations, the Inspection could declare the existence of simulation, inasmuch as, in spite of the formal appearances, the operations had not existed and only corresponded to deliberate planning to the detriment of Public Finance. The simulation allowed, in accordance with the amount of the evasion, the application of sanctions or sending the file to the Attorney General's Office due to presumptions of offense against Public Finance.

The difficulty in proving the simulation resulted that, in general, the Inspection had to resort to conflict in the application of the tax rule (or, prior to the enforcement of the LGT of 2003, to fraud), even though requiring a procedure especially guaranteed in favor of the taxpayer, which calls for a favorable report from a Consultative Commission formed by two representatives from the General Directorate of Taxes and two others from the Tax Agency, whose reports, to

11. Cfr. Report of the Tax Agency. 2012, available at www.agenciatributaria.es
12. The descritpion of the operations and regularizations that are summarized in this section have been extracted from the TEAC resolutions and verdicts of the AN and TS which are quoted further on.

a great extent, may have dealt precisely with the regularization of this type of operations. To declare the existence of conflict in the application of the tax rule of article 15 LGT the following requirements must be met[13]:

a. **Artful or inadequate businesses for achieving the result obtained:** The main indications for classifying the businesses carried out (the acquisition or intragroup financing) as artful or inadequate were: i) the lack of entrepreneurial motivation (which was proven by showing, in its case, the existence of internal circular flows, or, in general by showing that there had been no significant changes at the group level, as a result of the operations, in the main entrepreneurial variables, such as management control –composition of the Administration Councils and the managerial staff- or the level of indebtedness of the group with third parties); and ii) the "privileged taxation" of the goodwill obtained by the transmitting entity and the interest received by the lending companies, which constituted an indication that the operations did not have an economic, but rather a fiscal motivation, since the Spanish tax Administration was obviously not competent for regulating them, inasmuch as they had been carried out in other jurisdictions.

   Another argument for proving that the operations were artful was to show that the logic of the restructuring had been inverted, since the intention was not to place some assets in Spain, but rather some liabilities generating deductible financial expenses, so the debt was not the necessary means for the acquisition of the assets, rather, against the economic logic, the assets were the means for justifying a debt which, otherwise, would be unnecessary.

b. **Result achieved at the group level, equivalent to the initial one.** As a consequence of the operation, the group continued to maintain the same participation percentages in the subsidiaries, although now ownership was indirect, through the interposition of the Spanish *holding* company. The only difference was the tax savings. To arrive at this result, the Inspection used the logic of the *sine qua non condition*: the fiscal advantage was an essential requisite for carrying out the operation, because, if the tax savings were eliminated, the operation would not have been carried out, since it did not respond to any entrepreneurial logic.

c. **Existence of conflict in the application of the tax rule (tax savings):** The third indication was the existence of a conflict (or fraud, under the previous LGT) which occurred, between, on the one hand, the apparently respected rules (the mercantile ones that allowed the restructurings; article 10.3 TRLIS, which allowed the deduction of the financial expenses; article 20 of the TRLIS, which provided for the formally respected thin capitalization rule; and the rules regulating the tax consolidation system) and, on the other, the actually evaded obligation to pay tax (article 4 TRLIS, which regulates the taxable event that consists of "obtaining income").

13. Article 15 of the General Tax Law reads as follows:
"1. It shall be understood that there is conflict in the application of the tax rule when the taxable event is totally or partially avoided, or the tax base or debt is reduced through acts or businesses wherein the following circumstances occur:
a) That, individually or jointly considered, they may be notoriously artful or inadequate for achieving the result obtained.
b) That through their use there would be no relevant juridical or economic results, other than tax savings and the effects that would have been obtained through the usual or appropriate acts or businesses.
2. In order for the Tax Administration to declare conflict in the application of the tax rule, the favorable report of the consultative Commission referred to in article 159 of thisact, shall be necessary.
3. In the assessments carried out as a result of that provided in this article the tax shall be applied through the rule that would have corresponded to the usual or appropriate acts or businesses or by eliminating the tax advantages obtained, and interest shall also be assessed".

The regularization of these operations were, in many cases, the subject of objection through economic-administrative and judicial means. The greater part of the resolutions and verdicts confirmed the assessments made by the Administration. Shown below are some of the significant (Calvo Vérgez, 2015): resolutions of the TEAC of 17/5/2007, of 1/6/2010 and of 12/2/2011 (the only ones unfavorable to the Tax Agency); verdict of the Central Penal Court of theAudiencia Nacional, of 23/12/2010; verdict of the Tribunal Supremo (High Court) of 18/7/2012; verdicts of the Audiencia Nacional of 7/2/2013; and of 21/2/2013.

3.2.2. Regularization of acquisitions with financial leverage

If the regularization of the previous transactions created significant evidentiary difficulties, these are much greater in the case of acquisitions with financial leverage. The following are some of the possible ways for regularizing these situations:

a. In operations using the tax consolidation system between the acquiring *holding* company and the acquired target company , the main option is to resort, again, to general anti-abusive rules (conflict in the application of the tax rule or simulation) to regularize operations that are illegal because they affect the following Tax Law principles and rules: i) the distribution of the tax power between States, that would be violated if the parent company may choose the tax system applicable to a subsidiary and the State to which its expenses would be applied (principle applied by the EUJC in the verdict on case C337-08, *X Holding BV*); and ii) the arm´s lehgth principle which would be affected if the acquisition and its financing has been imposed by the parent company to the entity that is the vehicle (SPV) or by the nonresident investing subsidiary (principle provided in articles 9 MC OECD and 18 of the LIS, and used in the verdict of the Supreme Court of July 18, 2012).

b. In the operations where the target company is absorbed by the *holding* company which is the vehicle, an option which can be used by the Administration is to deny the application of the FEAC system (which is essential for carrying out the operation, since it allows for the deferral of taxation which takes place in absorption cases) for lack of valid economic reasons, as provided in article 89.2 LIS[14] (which possibility has been applied, among others, by the verdicts of the Supreme Court of November 12, 2012 and June 28, 2013, although they have identified the tax advantage obtained with the possibility of deducting from the merger and not with the deduction of interest from the debt which financed the acquisition). Another option would be to resort, again, to the general anti-abusive rules for having affected the arm's length principle (on having imposed the acquisition).

14. "The system provided in this chapter will not be applied when the main objective of the operation carried out may be tax fraud or evasion. In particular, the system will not be applied when the operation is not carried out for valid economic reasons, such as the restructuring or rationalization of the activities of the entities participating in the operation, but rather for the mere objective of obtaining a tax advantage. The Tax administration's verification actions that determine the total or partial inapplicability of the special tax system due to the application of that provided in the previous paragraph, shall exclusively eliminate the effects of the tax advantage".

3.3. The general limitation rules regarding the deductibility of financial expenses and the prohibition to deduct specific intragroup financial expenses

Three factors encouraged in 2012, the legislator to decide on an in-depth reform of the tax treatment of financial expenses in CT: i) the context of the public debt crisis in Spain which made the increase of collection a priority; ii) the courts' support to the regularizations carried out by the Administration in the operations that have been pointed out; and iii) the limited efficacy of the thin capitalization rule in fighting against the already mentioned strategies. In this context, the Real Decreto-ley 12/2012, de 30 de marzo, (RDL 12/2012) whereby several tax and administrative measures were introduced for reducing the public deficit, abolished the thin capitalization rule and replaced it with two new rules: a limitation of the deductibility of all financial expenses (new article 20 TRLIS); and the prohibition for deducting specific intragroup financial expenses (new paragraph h) of article 14.1 TRLIS). The Explanatory Memorandum of RDL12/2012 highlights its main characteristics and objectives:

"(…) the reform described herein is similar to the legislative trend in States of our economic environment. Specifically, it provides the non-deductibility of those financial expenses generated within a mercantile group and intended to carry out certain operations between entities belonging to the same group, with respect to which the Tax Administration had been reacting when the concurrence of valid economic reasons was not evident. In accordance with the foregoing, this rule allows its inapplicability, to the extent the operations are reasonable from the economic perspective, such as assumptions of restructuring within the group, direct consequence of an acquisition from third parties, or else those assumptions where there is an authentic management of the acquired participating entities from the Spanish territory. In addition, a general limitation in the deduction of financial expenses is introduced, which in practice becomes a specific temporary application rule, thereby allowing the deduction in future periods in a manner similar to that of the compensation of negative tax bases. This measure indirectly favors entrepreneurial capitalization and responds, with figures analogous to our comparative law, to the current tax treatment of financial expenses in the international sphere."

A few months later, the Real Decreto-ley 20/2012, de 13 de julio (RDL 20/2012), regarding measures for guaranteeing budgetary stability and promoting competitiveness amended two specific aspects of the new article 20 TRLIS. Finally, Ley 27/2014, de 27 de noviembre, del Impuesto sobre Sociedades (LIS), the Corporate Tax Act (CT) currently in force has annulled the TRLIS (the former Corporate Tax Act), but has maintained, with scarce modifications, the two rules that regulate the treatment of CT financial expenses.

3.3.1. The non-deductibility of specific financial expenses (art. 15. h) and j) LIS).

This rule is included in paragraphs h) and j) of article 15 LIS, and reds as follows:

Article 15. Nondeductible expenses.

The following shall not be considered tax deductible expenses: (...)
h) Financial expenses incurred during the tax period, derived from debts with group entities according to the criteria established in article 42 of the Code of Commerce, regardless of the residence and the obligation to formulate consolidated annual accounts, intended for the acquisition, to other entities of the group, from participations in the capital or funds of any type belonging to the entities, or contributions to the capital or funds belonging to other entities of the

group, unless the taxpayer proves that there are valid economic reasons for carrying out said operations. (...)

j) The expenses corresponding to operations carried out with related persons or entities which, as a result of a different fiscal classification, does not generate income or generate income that is exempt or subjected to a type of nominal tax rate lower than 10 per cent.

a. The non-deductibility assumption of paragraph h) of article 15 LIS, originates from article 14.1.h) TRLIS (the LIS only replaces the term "obligor" with that of "taxpayer"). Its main characteristics are the following:

- It has an anti-avoidance purpose: reacts against the abusive practices indicated further on where there is an intragroup indebtedness to finance relocations of also intragroup participations. The rule assumes that there is no economically valid purpose and considers the interest of these debts as nondeductible. Therefore, it comes to fill in the lack of a specific anti-avoidance rule which had forced the Inspection to regularize these operations by resorting to fraud or conflict in the application of the tax rule and simulation. It follows the example of similar rules previously established in the Netherlands and Sweden.
- The scope of application of the deduction prohibition are the financial expenses derived from the following debts: i) those which originate from the group's entities, which concept is defined through reference to the requisites of article 42 of the Code of Commerce[15] and, in addition, in the form of world group: "regardless of the residence and the obligation to formulate annual consolidated accounts "; and ii) whose purpose has to be either the acquisition to other entities of the group, of participations in the capital or the equity of any type of entities (whether or not they belong to the group); or else contributions to the capital or the equity of other entities of the group.
- It contains a safeguard clause: the rule is structured as an *iuris tantum* presumption –it allows proof to the contrary -, because it is applied "*unless the taxpayer justifies that there are economically valid reasons for carrying out said operations*". The rule does not clarify the reasons that can be considered valid, but the Explanatory Memorandum of RDL 12/2012 provided two examples (which the Explanatory Memorandum of the LIS also includes): i) assumptions of restructuring within the group, that may be a direct consequence of an acquisition from third parties; and ii) assumptions where there is authentic management from the Spanish territory of the acquired participating entities.

It should be noted that with this safeguard clause, the legislator reverses the burden of proof in relation to the situation prior to the introduction of this non-deduction assumption. If previously the taxpayers deducted these financial expenses, unless the Inspection would show the absence of economically valid reasons, the new rule prevents the deduction unless the taxpayer shows the existence of economically valid reasons. It is, therefore, a specific anti-avoidance rule which may be directly applied by

15. The requisite provided by article 42 CCom is the control, direct or indirect, by one company, of another or other companies, which is presumed when the dominating company has the majority of rights of vote, has the power to appoint or dismiss the majority of the members of the administrative body, may dispose of, by virtue of agreements entered into with third parties, of the majority of rights to vote, or may have designated with its votes the majority of the members of the administrative body.

the Inspection, without the need to resort to such figures as fraud or simulation. It is possible not to apply it, but by transferring to the taxpayer the burden of proof of the existence of economically valid reasons.

The General Directorate of Taxes has issued several binding inquiries regarding the existence of economically valid reasons in relation to this prohibition, among which the following may be pointed out: V2234-12, V0398-13, V0833-13, V0878-13, V0880-13, V0882-13, V3257-13, V3644-13, V2762-14, V0161-15, V0775-15 and V1664-15. As economically valid reasons, these inquiries have considered, among others, organizational and managerial improvement; the simplification of governmental bodies of participating entities; the savings in operating costs or the measures for facilitating the entry of new partners.

b. The non-deductibility assumption of paragraph j) of article 15 LIS, introduced *ex novo* by the new LIS, is another anti-avoidance rule between related parties which may be applied to financial expenses. It considers the already mentioned ***hybrid operations*****,** that is, those having a different tax classification for the intervening parties. Its objective is to avoid, in those cases wherein these operations are carried out between related parties, the deductibility of those expenses which represent to the other party, income that is exempt or subject to nominal taxation rate of less than 10 per cent, as a result of said different tax classification.

In the absence of this anti-avoidance rule, payments derived from these instruments may be considered deductible financial expenses (interest) in Spain and, in the other party's jurisdiction, nontaxed dividends, whereby the group would have tax savings. The rule, therefore, prevents the deduction of financial expenses in these cases.

3.3.2. The limitation in the deductibility of financial expenses

The limitation in the deductibility of financial expenses is fundamentally regulated in article 16 LIS as follows:

Article 16. Limitation in the deductibility of financial expenses.

1. Net financial expenses shall be deductible to the limit of 30 per cent of the operating benefit of the period.

To this end, net financial expenses shall be understood to be excess financial expenses with respect to income obtained in the taxable period from assigning capital to third parties , excluding those expenses referred to in paragraphs g), h) and j) of article 15 of this Act.

The operating benefit shall be determined on the basis of the use of the profit and loss account of the period determined according to the Code of Commerce and other accounting rules regarding development, thereby eliminating the amortization of fixed assets, the application of subventions of nonfinancial fixed assets and others, deterioration and result due to transfer of fixed assets, and adding financial revenues from participations in net worth instruments, provided that they correspond to dividends or participations in benefits of entities wherein, either the percentage of participation, direct or indirect, is at least 5 per cent, or else the value of acquisition of participation is above 20 million Euros, unless said participations may have been acquired through debts whose financial expenses are not deductible in accordance with the application of paragraph h) of section 1 of article 15 of this Act.

In any case, net financial expenses of the taxation period in the amount of 1 million Euros shall be deductible.

Net financial expenses which have not been deducted, may be deducted in subsequent tax periods, jointly with those of the corresponding tax period and in accordance with the limit stipulated in this section.

2. In case the net financial expenses of the tax period would not reach the limit established in section 1 of this article, the difference between the aforementioned limit and the net financial expenses of the tax period shall be added to the limit provided in section 1 of this article, with respect to the deduction of net financial expenses of the tax periods ending in the 5 immediate and successive years, until said difference is deducted.

3. The net financial expenses applied to the partners of the entities which pay taxes as provided in article 43 of this Act, shall be taken into account by them, for purposes of application of the limit provided in this article.

4. If the tax period of the entity would have a less than 1 year duration, the amount provided in paragraph four of section 1 of this article shall be obtained by multiplying 1 million Euros by the proportion existing between the duration of the tax period with respect to that year.

5. For purposes of the provisions of this article, financial expenses resulting from debts devoted to the acquisition of participations in the capital or equity of any type of entities shall be deducted with the additional limit of 30 per cent of the operating benefit of the entity that carried out said acquisition, without including in said operating benefit, that corresponding to any entity that would merge with the latter in the 4 years following said acquisition, when the merger does not apply the special tax system provided in Chapter VII of Title VII of this Act. These financial expenses shall likewise be taken into account in the limit referred to in section 1 of this article.

Nondeductible financial expenses resulting from the application of that provided in this section shall be deductible in subsequent tax periods with the limit provided in this section and in section 1 of this article.

The limit anticipated in this section cannot be applied in the tax period in which participations in the entities' capital or equity are financed with debt, as a maximum, of 70 per cent of the acquisition price. Likewise, this limit shall not be applied in the subsequent tax periods, provided that the amount of said debt is reduced, as of the time of acquisition, at least in the proportional part that corresponds to each of the subsequent 8 years, until the debt amounts to 30 per cent of the acquisition price.

6. The limitation provided in this article shall not be applicable to:

a) Credit and insurance entities.

To this end, subject to the treatment of credit entities, will be those whose rights of vote correspond, directly or indirectly, integrally to the ones mentioned and whose sole activity consists of the issuance and placement of financial instruments in the market for reinforcing the regulatory capital and financing of said entities.

Likewise, the same treatment shall be given to mortgage-backed funds, regulated in Ley 19/1992, de 7 de julio, 7 regarding Corporate and Real Estate Investment Fund System and Mortgage-Backed Funds and the asset-backed funds referred to in the additional provision 5.12 of Ley 3/1994, de 14 de abril,, whereby the Spanish legislation regarding credit is adapted to the Second Directive of Banking Coordination and other modifications relative to the financial system are introduced.

b) In the tax period in which the entity's termination takes place, unless it is the consequence of a restructuring operation.

Shown below is a brief explanation of this rule, bearing in mind the administrative criteria indicated in this respect by the Resolution of July 16, 2012, of the General Directorate of Taxes (DGT).

A. Scope of application: Article 16 LIS is a general rule that is applicable to all entities and to all their financial expenses. Therefore, it is separate from the usual thin capitalization rules, whose natural scope of application was the debt with related parties of entities that were part of a multinational group. The limitation rule, following the example of the German rule, as will be discussed further on, seeks to overcome the limitations of the thin capitalization rule and become a

general rule that will be more difficult to be outwitted.

B. B. General limit: "*Net financial expenses shall be deductible with the 30 per cent limit of the operating benefit of the period*." Article 16 LIS and the DGT's Resolution have specified each of these concepts:

a. Net financial expenses: "*the excess financial expenses with respect to income obtained in the taxable period from assigning capital to third parties, excluding those expenses referred to in paragraphs g), h) and j) of article 15 of this Law.*" That is, financial expenses less financial revenues. According to the DGT, the two concepts must be homogeneous, for which reason both must be related to the entrepreneurial debt.
The DGT's Resolution specified that calculation of the net financial expenses is compatible with other specific anti-avoidance rules and with transfer pricing, which should be previously applied. That is: i) financial expenses, which in any case are "*nondeductible*", as provided in the specific anti-avoidance rules of article15 g), h) and j) LIS[16] are not included as net financial expenses; and ii) in the case of operations between related parties, financial revenues and financial expenses that must be calculated in this limit are the result of the previous necessary adjustments to determine their market value, according to article 18 LIS.

b. Financial expenses: are those resulting from debts of the entity with other entities of the group or with third parties. Specifically, those included in item 13 of the profit and loss account model of the General Accounting Plan, approved through Real Decreto 1514/2007, de 16 de noviembre (hereinafter, PCG): accounts 661 (interest from obligations and bonds), 662 (interest of debts), 664 (expenses from stock dividends or participations considered financial liabilities) and 66 (interest on discount of instruments and *factoring* operations).
In general, the DGT, develops the fiscal concept of financial expense on the basis of the accounting concept and follows the criterion of the PGC as regards taking into account the issuance or transaction costs, as well as to include within the financial expenses, the implicit interest or the commissions directly related to the debts. In the same manner, it does not include as financial expenses those that have been "*capitalised*", that is, that have been included in the value of the asset, since in those cases, its accounting application and fiscal deduction take place through amortization.
However, the accuracy introduced by the DGT in the sense that financial expenses included in the limitation must be related to entrepreneurial debt, calls for separating the fiscal concept in some aspects of the accounting one. Thus, some expenses which the PGC considers financial are not included in the limitation because they are not related to the entrepreneurial debt, as it occurs with expenses dealing with updating of provisions.
The application of this same criterion leads the DGT to understand that other expenses should be included in the limitation of article 16 LIS, although the PGC does not classify them as financial, such as: i) the losses due to deterioration of the value of credits, in the part that corresponds to interest earned and not collected (since interest earned is included as financial revenues); ii) the differences in exchange that are integrated in the profit and loss account and which may be directly linked to the debt; iii) the financial

16. Paragraphs h) and j) have already been discussed. Paragraph g) refers to financial expenses related to services carried out with residents in tax havens or paid through them. The original rule only referred to paragraph h), the other two were introduced by the current LIS.

coverage of the debts of the entity and which are integrated in the profit and loss account; and iv) the positive or negative results that correspond to the non-promoting participant in the joint venture contracts, since, in accounting terms, the investment of the non-promoting participant is not dealt with as a participation in the capital of the promoting participant, but rather as somebody else's financing.

c. **Financial revenues:** revenues that originate from the assignment to third parties of capital, covered in item 12 of the profit and loss account model: accounts 761 (revenues of values that represent debt) and 762 (credit revenues).
The DGT clarifies the situation of those entities which due to the characteristics of their activity (*holding companies* or concessionaires), generally include financial revenues within their operating benefit. In order to afford all entities a homogeneous treatment, the DGT considers that there should prevail the financial nature of these revenues, in such a way as to reduce the financial expenses of the period and that, for purposes of article 16 LIS, they should not be integrated in the operating benefit, although in accounting terms they are not part of the financial result, but rather of the net amount of the business figure.

d. **Operating benefit:** the concept of operating benefit originates from the sphere of entrepreneurial financing, wherein, as stated, it is better known by its English acronym: EBITDA. On establishing the limit on EBITDA, the legislator ensures that financial expenses maintain a not excessive proportion with the benefit derived from the activity, thus avoiding the risk of base erosion. Article 16 LIS indicates how this operating benefit is calculated for fiscal purposes. It begins with the result of the activity of the profit and loss account (which comprises the result of the period, together with the financial result and the CT expense) and the following adjustments are made:

- **Eliminations:** i) the amortization of the financial investment (item 8); ii) the application of subventions of nonfinancial investments and others (item 9); iii) the deterioration and result from the transfer of the financial investments (item 10).
- **Adds:** the financial revenues consisting of dividends or participations in benefits, provided that they originate from entities wherein the company has a significant participation, according to these criteria: percentage of participation, direct or indirect, equal or greater than 5%, or the acquisition value of the participation exceeds 20 million Euros (the current LIS has increased this amount which was previously 6 million). In addition, those participations acquired with debts whose financial expenses are not deductible, in accordance with the application of article 15.h) LIS, are excluded until said debt is fully amortized.
The remuneration originating from these participations must fulfill two cumulative requisites in order to be added to the operating benefit: i) it should be financial revenue (thus it excludes the dividends which in accounting term reduce the accounting value of the investment); and ii) it should consist of dividends or participations in benefit (it excludes financial revenues not fulfilling said requisite, such as those derived from the valuation at a reasonable value).
The DGT's Resolution clarifies that this addition – which is generally not made for calculating EBITDA- is aimed at putting on the same level the treatment of holding entities with the rest of the companies, since the holding entities include in their net amount of the business figure these dividends and participations in benefits.

C. Minimum deductible amount

In any case –that is, even though financial expenses exceed the 30% of the operating benefit[17]- the net financial expenses of the tax period are deductible if they do not exceed the amount of 1 million Euros. This threshold or minimum amount discloses the anti-avoidance purpose of the rule, since it allows that the limitation will not affect small and medium businesses. RDL 20/2012 introduced the precision, which is maintained in the current section 4 of article 16 LIS that, if the tax period of the company is less than a year, the 1 million limit should be reduced in the same proportion. That is, in this case, the limit will be the result of multiplying 1 million by the existing proportion between the duration of the tax period of said company and the calendar year.

D. Excess of financial expenses: carry forward possibility

The net financial expenses of the tax period that exceed the limit are not deductible in that period, but may be deducted in the following tax periods, jointly with those of the corresponding tax period, and provided they do not exceed the limit that results applicable (30% of the operating benefit of the period or 1 million Euros).

Initially, the RDL 12/2012 established a maximum period of 18 years wherein this excess could be deducted, but it has been eliminated by the LIS. Thus, a parallelism is observed in the treatment of the financial expenses and of the negative tax bases (BIN) since: i) the initial 18-year limit of the RDL 12/2012 had already been established by the RDL 9/2011 for the BIN; ii) the LIS has eliminated these two temporary limits and has established, in both cases, a percentage limit that ensures minimum taxation (30% of the operating benefit for financial expenses and 70% of the tax base prior to the application of the capitalization reserve for the BIN), with a minimum amount of 1 million Euros, and with the possibility of carrying forward the excess to subsequent periods, whereby in practice, they act as specific rules in the temporary application.

In case the financial expenses not deducted in previous years coincide with the financial expenses of the period, the DGT clarifies the order of deduction: 1º) the financial expenses of the period; and 2º) if they do not exceed 30% of the operating benefit or 1 million Euros, the financial expenses of previous periods, up to the limit that turns out to be applicable. Nevertheless, this rule had its raison d'être when there was an 18-year temporary limit, for which reason, by eliminating this limit, there would be no distinction in the order of deduction.

E. Unused deductibility limit: possibility of transferring it to the 5 subsequent periods (*carry forward*):

The rule also regulates the opposite situation; that in which the net financial expenses do not reach the limit of 30% of the operating benefit. In that case, the "unused" difference, that is, the difference between the 30% limit and the net financial expenses of the period shall be added to the 30% limit of the tax periods concluding on the 5 immediate and successive years, until it is used, that is, until it is deducted.

The DGT has clarified that this criterion is not applicable to the 1 million Euros limit; that is, that the unused difference between 1 million and the financial expenses of the period cannot be transferred to other subsequent periods. The DGT also clarifies the order of application of the limits, in case of addition of the difference from the previous periods: first of all, the limit of the tax period is applied (30% of the operating benefit); and, additionally and subsequent thereto, the net financial expenses are deducted, until achieving

17. We understand that the expression "in any case" establishes a safe port or safe harbour in relation to the application of the ratio to EBITDA, but not in relation to the Tax Administration's regularizing powers , which are not limited by this minimum threshold.

the difference originating from previous tax periods.

On the other hand, Note 1/2015, of the Deputy Directorate of Legal Organization and Juridical Assistance of the Tax Agency, establishes an administrative criterion for those cases in which the financial expenses of the period exceed the 30% of the operating benefit, but not the amount of 1 million Euros. It had been considered whether the difference would be added to the 30% of the operating benefit or to the greater figure between 30% of the operating benefit and the amount of 1 million Euros. The Note provides that this limit should be added, in any case, to the 30% of the operating benefit and should constitute a "*joint limit*" which will be applied prior to the minimum limit of 1 million Euros: "*Therefore, the minimum limit of 1 million Euros may be applied, only after the net financial expenses of the tax period have exceeded said joint limit*".

F. Additional limitation to financial expenses related to the acquisition of participations

Articles 16.5, 67.b) and 83 LIS anticipate an additional limitation to financial expenses resulting from debts devoted to the acquisition of participations in entities. That is, these expenses should exceed two limits: first of all, the additional limit; and, second, the general one provided in article 16.1 LIS, since the rest of financial expenses are accumulated to calculate the general limit.

The purpose behind this additional limit is to avoid that the acquired entity end up bearing the financial expense derived from its acquisition, through its incorporation to the fiscal consolidation group to which the purchaser belongs or by means of a restructuring operation. It is a specific anti-avoidance rule that had been requested to face one of the fiscal planning assumptions discussed that is the leveraged acquisitions, which by means of the consolidation system or by means of mergers, the financial expenses (even though they may originate from third parties) end up eroding the tax base of the acquired operational entity.

The additional limit is that these financial expenses can only be deducted up to the limit of 30% of the operating benefit of the fiscal entity or group that made the acquisition, and without including in that benefit, the benefits corresponding to any entity which, in the 4 subsequent years of said acquisition, merges with the acquiring entity or joins the fiscal consolidation group. Article 15.6 LIS establishes the limit of the mergers that do not abide by the FEAC system; article 83 LIS, refers to those that abide by said system; and article 67.b), deals with the acquired entities that join the purchaser's fiscal consolidation group.

The additional limit is not applicable in those cases in which the debt is not excessive or is reasonably reduced: i) it shall not be applied during the tax period in which the participations are acquired, if the debt involving the acquisition does not exceed 70% of the acquisition price; and ii) if these requisites are fulfilled, the additional limitation shall not be applied in subsequent periods if the debt is reduced, as a minimum, in the proportion required for achieving in an 8-year term, the level of 30% of the acquisition price. Inquiry V1664-15 clarifies the application of these two requisites:

"(…) initially, it is required that the debt financing the acquisition of the participations not exceed 70 per cent of the acquisition price. If this rule is fulfilled, the limit (…) shall not be applicable in the first annuity which shall be calculated as of the date of acquisition. On the other hand, said limit shall not be applicable in the subsequent annuities if the amount of the debt is reduced, at least, proportionally. This means that, at the end of each annuity, a comparison should be made between the existing debt at that time and the existing debt at the time of acquisition, provided it were equal or less than 70 per cent of the acquisition price. In this case, the limit shall not be applicable to an annuity if at the beginning thereof, the debt has been reduced with respect to the one existing on the acquisition date in the number of annuities that have elapsed divided by 8. (…)

That is, at the end of each annuity, it must be determined whether the existing debt, which initially was equal to or less than 70%, has been reduced at least (…) in the percentage resulting from:
{(Percentage of initial debt – 30%) x (number of annuities that have elapsed)} / 8
If the requisite for reducing the debt is not fulfilled, the limitation (…) [shall] be applied (…) until, as appropriate, the requisite is again fulfilled".

G. Non-application assumptions: The limitation is not applicable in the following assumptions:

a. Credit and insurance entities: these categories include the banks, savings funds, credit cooperative and Official Credit Institute (article 1 of Ley 10/2014, de 26 de junio, dealing with the organization, supervision and solvency of credit entities), as well as corporations, mutual associations, cooperatives and social security mutual associations carrying out the insurance activity (article 7.1 of the private insurance organization and supervision Act: Texto Refundido la Ley de ordenación y supervisión de los seguros privados, aprobado por Real Decreto Legislativo 6/2004, de 29 de octubre).

The purpose of this assumption is to exclude from the limitations the entities whose activity fundamentally involves financial revenues and expenses. For this reason, article 16.6 LIS expands this assumption to entities whose rights of vote fully correspond, directly or indirectly, to credit entities and whose sole activity consists of "*the issuance and placement in the market of financial instruments to reinforce the regulatory capital and financing of such entities*".

b. Termination of the entity: the limitation is not applied in the period wherein the termination of the entity takes place, to avoid that the entity's disappearance may actually tax a company with financial expenses that are pending deduction. Nevertheless, if the termination is the result of a restructuring operation, the limitation does not disappear, since the replacing entity that acquires the rights and obligations may apply the financial expenses that are pending deduction. It shall not be applicable either, if termination of the entity occurs within a fiscal group and, at the time of its integration thereto, the terminated entity had financial expenses pending deduction.

c. Elimination of the exception in the case of entities that are not part of a corporate group (*standalone* clause): The original wording of this rule, originating from RDL 12/2012, included the *standalone* clause, which excluded from the limitation those that were not part of any group. However, the RDL 20/2012 eliminated this exception, thus generalizing the limitation for every type of company.

H. Application of the limitation in specific special systems:

a. Spanish Economic Interest Groups (AIE) (article 43 LIS): "*Net financial expenses which according to article 16 of this Law have not been deducted by these entities in the taxation period shall be charged to their partners whether or not residents in Spanish territories with permanent establishment therein*". Accordingly, the tax treatment of these net financial expenses charged to the partners is as follows: i) they shall not be deductible by the entity; and ii) they shall be taken into account by the partners for purposes of application of the limit provided in article 16 LIS (art. 16.3 LIS).

b. Tax consolidation (articles 63, 67 and 74 LIS): In the case of tax consolidation groups,

article 63 LIS states that the deduction limit shall refer to the group, which to a certain extent, implies an exception to the habitual logic in the consolidation system, wherein the tax base of the group is calculated according to the addition of the individual bases (and, as such special rule is provided in article 63 LIS). In addition, in keeping with the non-application of the limitation to credit or insurance entities, article 63 LIS states that, in case they were part of a fiscal consolidation group with other entities not having such consideration, the limit shall be calculated by taking into account the operating benefit and net financial expenses of these latter entities, as well as the corresponding eliminations or incorporations in relation to the entire group.

The DGT's Resolution provides for a series of administrative specifications and criteria regarding this fiscal consolidation system. First of all, it states that the consolidated annual accounts of the fiscal group should be used to calculate the net financial expenses (which shall only be the expenses and revenues which the group may have with respect to third parties, since the others will be eliminated), as well as the operating benefit of the fiscal group. Those dividends that are part of the turnover originating from entities in the group should be eliminated from the operating benefit of the fiscal group, but those fulfilling the same requirements shown in article 16.1 LIS must be added.

Secondly, it must be determined whether the net financial expenses of the fiscal consolidation group exceed or not the deductibility limits to thus quantify the financial expenses that are deductible and then "*distribute them*" among the entities of the group so that the latter may determine their individual tax bases. Thus, the following assumptions are made: i) if the net financial expenses of the group do not exceed the limit, each entity of the group may deduct all its financial expenses; ii) if the net financial expenses of the group exceed the limit, the group must distribute the group's nondeductible "*excess*" among the entities. In this second case, it is charged to the companies whose individual financial expenses exceed the 30% limit of its individual operating benefit (companies with "*individual excess*"), in the proportion which said "*individual excess*" may represent in relation to the "*group's excess*" and up to the limit of said individual excess. If the sum of these "*individual excesses*" were not sufficient to cover the "*group's excess*", the remainder shall be distributed among all the entities (that this, those having as well as those not having individual excess) in proportion to other net financial expenses (by discounting, of course, the individual excesses that have already been considered as nondeductible).

Article **67.a) LIS** notes that if a company with financial expenses pending deduction joins a fiscal consolidation group, its pending expenses may be deducted in the group with the 30% limit of operating benefit of said entity. The DGT declares that there is a double limit: i) the *individual* (wherein pending financial expenses do not exceed 30% of the operating benefit); and ii) that of *the group* (wherein the pending financial expenses one endeavors to deduct, jointly with the financial expenses of the period of all of the companies in the group, do not exceed 30% of the operating benefit of the group or 1 million Euros). **Article 67.a) LIS** regulates the complementary assumption whereby: if an entity joins a fiscal consolidation group with an "*unused deductibility limit*" from previous periods, only said entity may use it, once the nondeductible excess has been distributed among all the entities of the group.

Finally, **Article 74 LIS** regulates the effects of the termination of the fiscal group or the loss of the consolidation system, or that some entity may abandon the group. If there are financial expenses pending deduction (or operating benefit pending use), they will be attributed to each entity to the extent they may have contributed to the groups' composition. Article 74.3 LIS adds an additional limit in the assumption that the dominating entity may

become a dependent, that is, be absorbed through a merger operation according to the FEAC system, in such a way that all entities included in the original fiscal group, join another fiscal group, following assumption of the pending financial expenses or operating benefits. In this case, the net financial expenses pending deduction, assumed by the entities that join the new fiscal group, shall be deducted with the 30 per cent limit of the operating benefit to which all of them are entitled. And in a coherent manner, the operating benefit pending use which, in its case, may have been assumed by the entities joining the new fiscal group shall be applicable with respect to the financial expenses jointly generated by said entities.

I. Lack of an escape clause

A distinctive element of article 16 LIS, as compared with other similar rules in Comparative Law, is that the Spanish one is totally objective; that is, it does not provide any *escape clause* that may allow for increasing the limit in those industrial sectors with a greater debt ratio or those companies that are part of especially indebted groups.

4. CRITICAL ANALYSIS OF THE SPANISH SYSTEM FOR LIMITING THE DEDUCTIBILITY OF FINANCIAL EXPENSES

Having examined the current treatment of financial expenses in Spain, we will make a brief critical analysis from different perspectives.

4.1. Abidance by the principles of the tax system

The main principles for considering a tax rule are: fiscal justice (equity), neutrality (efficiency) and adequacy. The rules that regulate specific operations (articles 15.h and 16.5 LIS and related), fundamentally respond, as is appropriate of any anti-avoidance rule, to the equity and financial sufficiency principles. However, the general rule on limitation of deductibility responds to more principles, as stated in the Explanatory Memorandum of the aforementioned RDL 12/2012:

A. **Equity or fiscal justice:** as anti-avoidance rule, it seeks tax justice, ensures the principles of payment capacity (avoiding that the benefit may be transferred to other jurisdictions) and benefit (avoiding that the tax base may be drained). It is the main principle that serve as basis of the rule; namely: to ensure the effective subjection to the tax (Fernández Antuña, 2013, page 9). Its general nature reinforces, in principle, its efficacy, although the critics say it affects its proportionality, as we shall examine further on.

B. **Neutrality:** the Explanatory Memorandumstates that it seeks to promote entrepreneurial capitalization. From its standpoint, it would increase efficiency by correcting CT bias in favor of indebtedness. Some authors (Armesto, 2013, page 1) argue, on the contrary, that it is an inefficient measure because it limits entrepreneurial decisions, although the greater part of criticisms defend that there are more neutral formulas for correcting thebias.

C. **Financial sufficiency:** the limitation in deductibility indirectly increases the CT tax base and, accordingly, deserves a positive evaluation. In addition, on ensuring that part of the operating benefit is subjected to taxation, it guarantees a more stable collection. The Explanatory Memorandum recognizes it when stating that "*it becomes in practice a specific temporary application rule* ".

4.2. Adjustment of the juridical tax system

A. Inspired in Comparative Law models: The Spanish rules on this subject have not been historically original. Thus, the first Spanish rule on thin capitalization, included in Ley 61/1978, was based on a French rule which provided for the same debt ratio of 1.5 over fiscal capital. In the same way, the general rule on limitation of deductibility has fundamentally followed the precedents of Germany, Italy and Denmark. Many of the elements of the Spanish rule (deductible percentage, definition of operating benefit, carry forward of pending financial expenses as well as of excess EBITDA, with a 5-year limit) were taken from the German rule (Niehus, Wilke, and Müller, 2013). However, the Spanish rule has been separated from the German one for the lack of an escape clause and the elimination of the standalone clause. With respect to the specific rules of article 15.h) LIS and article 16.5 LIS and related, the Spanish rule follows the example of two rules from the Netherlands and, partly, of other rules from Sweden and France (Sanz Gadea, 2012, page 2).

B. Compatibility with action 4 of the BEPS project: In Table 1 it may be seen that the Spanish rule fulfills all the minimum requisites and many of the optional ones appearing in the final report on Action 4 of the BEPS project.

Table 1
Comparison of the Spanish rule with the BEPS report

BEPS ACTION 4 REPORT	SPANISH RULE
General fixed ratio on EBITDA	**YES**
EBITDA Range 10% - 30%	**YES** (30%) Superior limit, on not having group ratio, but having other specific anti-avoidance rules
Minimum threshold (optional)	**YES** (1 million)
Scope of Application: as minimum, to entities of multinational groups	**YES:** All entities (*standalone*, of national and multinational group)
Group ratio (optional). Instead, the general ratio shall be applied to multinational as well as national groups	**NO** (optional). **YES**: General ratio applicable to all entities (multinational, national groups and stand-alone entities)
Temporary carry forward of excesses (optional)	**YES**: *Carry forward* of excess financial expenses (without limit) and EBITDA (5 years)
Specific anti-avoidance rules	**YES**: i) 15.h) LIS; and ii) 16.5, 67.b) and 83 LIS
Special system for credit and financial entities	**YES**: Excluded from general limitation rule

The Spanish rule comes out reinforced from this comparison, since the BEPS project: i) recommends, as anti-avoidance strategy to fight against BEPS practices, the rule based on a ratio of the operating benefit; ii) considers that the Spanish option, that does not include escape clauses or group ratios, is as valid as the contrary option of including them; iii) advises the combination of a general rule with other specific anti-avoidance rules as done by Spain.

C. **Respect for internal, international and EU limits:** As regards International Law, although the rule may imply double taxation, it is not contrary to the DTCs, since it does not affect the bilateral adjustments, but rather it is a unilateral measure for determining the CT base. In principle, it is neither contrary to the EU Law, because it does not affect the distribution of powers between Member States nor produced discrimination, on being equally applied to residents and nonresidents (Fernández Antuña, 2013, page 16). From the standpoint of internal Law, the Constitution grants the legislator a broad margin to structure the taxes and, in particular, the CT, which has not been assigned to the Autonomous Communities. Its only limits are the constitutional principles of the tax system, as well as non-confiscation and respect for the payment capacity, whose compliance may be presumed, as long as it is not contrary to the Constitutional Court, since it does not forbid the deduction, but rather only establishes limits in a proportionate manner, although some authors, as we shall see further on, argue about it.

D. **Proportionality of the anti-avoidance rule:** It has been criticized that, while the general rules with escape clause –such as the German one – allow the deduction of interest paid by the group to third parties, the Spanish rule, for lack of this clause, may end up preventing the total deduction of the interest which, in principle, would be legitimate. These authors consider (Sanz Gadea, 2012, page 9) that the German rule is sufficient for fighting against the willful distribution of the group's debt to the detriment of the German Finance (that is, to react against the parent company's decision to submit the German subsidiaries to thin capitalization) and to go beyond, as is done by the Spanish one, implies entering in the regulation of the taxable event (taxable income concept). This latter statement is debatable, inasmuch as the introduction in the LIS of the *carry forward* without time limit does not allow for talking about *nondeductible expenses*, as denounced by these authors. With the carry forward, excessive expenses become expenses *pending deduction*, for which reason the rule, rather than affecting the taxable event, behaves as a temporary application rule and cannot be classified as objectively disproportionate. This variation does not prevent continuation of the discussion regarding the convenience of introducing an escape clause or a group ratio, even though, in addition to the proportionality criterion one must value other factors, such as the avoidance risks it may entail.

4.3. Impact on collection

If the theoretical analysis is, in general, favorable, from the practical standpoint of its collection impact, its success is undeniable, in terms of the tax base (corrections to the accounting result by way of increases), as of the contribution (increase in CT collection as a consequence of the introduction of the rule). In terms of the tax base, as may be seen in Table 2, vis-a-vis the scarce (in number and amount) increases to the accounting result which called for applying the thin capitalization rule, in its first year of enforcement (2012), the general limitation implied increases of over 9.900 million Euros, to which one must include an additional 200,000 Euros from the intragroup anti-avoidance rule. In terms of the contribution its impact was quantified at 1.010 million additional Euros of CT collected in 2012, as a result of the introduction of the rules limiting the deductibility of financial expenses[18].

18. Cfr. Annual Report on Tax Collection. 2012, available in www.agenciatributaria.es

Table 2
Financial expense related increases in CT accounting result

	Period	Nº of filers	Amount of increase	Average
Thin capitalization rule	2004	75	32.841.494	437.887
	2005	71	16.805.854	236.702
	2006	69	39.571.881	573.506
	2007	68	37.637.130	553.487
	2008	101	54.259.568	537.223
	2009	100	36.729.677	367.297
	2010	105	29.450.111	280.477
	2011	103	50.442.519	489.733
Limitation in deductibility	**2012**	**5.700**	**9.910.360.405**	**1.738.660**
Nondedu tible intragroup expenses	**2012**	**610**	**212.287.471**	**348.012**
Limitation in deductibility	**2013**	**4.754**	**9.148.152.272**	**1.924.306**
Nondeductible intragroup expenses	**2013**	**441**	**283.395.247**	**642.620**

***Source*: State Agency of Tax Administration. Statistics of Corporate Tax Items**[19].

4.4. Usefulness as anti-avoidance rules

A. Anti-avoidance nature: The current treatment of financial expenses provides the tax Administration two rules whose anti-avoidance nature is evident (articles 15.h) and 16.5 LIS and related) and a limitation rule of which some authors (Fernández Antuña, 2013, page 32) have stated that it could have more of a collection rather than anti-avoidance purpose. However, we believe there is no doubt of its anti-avoidance nature, as we have stated in this article, and has been supported by the final report of Action 4 of the BEPS Project. Although it deviates from the traditional anti-avoidance rules, on being objective (does not include an escape clause) and not establishing any presumption (does not reclassify as dividends interest exceeding the limit and does not forbid its deduction, but rather postpones it for subsequent periods), effectively fights against tax avoidance on preventing the deduction of excessive financial expenses (susceptible of being used in BEPS practices) and ensuring that the deductions are reasonably proportional to EBITDA.

B. Compatibility with transfer pricing and other anti-avoidance rules: According to section 1 of the DGT Resolution, the general limitation rule is added to the rest of the rules that would allow for fighting against thin capitalization, without substituting them. The order in which these rules would be applied is the following: 1º) Assessment of financial expenses, with application, as appropriate, of the related operations assessment rules, transfer pricing or article 9 of the corresponding DTC; 2º) Application of specific anti-avoidance rules in relation to financial expenses (article 15.h) LIS); 3º) Application to the net financial expenses previously assessed and not declared as "*nondeductible*" by other rules, of the general rule on limitation of deductibility; 4º) Regularization, as appropriate, by

19. Available in www.agenciatributaria.es

the Tax Administration of the deducted financial expenses through application of the general anti-avoidance rules (conflict in the application of the tax rule and simulation).

4.5. Future perspectives

The Spanish rules that limit the deductibility of the financial expenses, on having followed the main international models, are fully adapted to the recommendations of the BEPS report. For this reason, there is no special need to modify these rules within short and medium term. The aspects that most certainly would be the subject of greater doctrinal debate and which could be changed in the future, are probably, the convenience or not of introducing a group ratio or escape clause, the possibility of again limiting the number of years of financial expense *carry forward,* or concrete aspects of the specific anti-avoidance rules of articles 15.h) and 16.5, 67.b) and 83 LIS.

5. CONCLUSIONS

1. The fiscal deductibility of interest, together with the differences and inconsistencies shown by internal tax rules and the DTCs, have been used by specific multinational groups to develop aggressive fiscal planning strategies. Two of the most used strategies are the acquisition of intragroup participations with intragroup financing and the leveraged acquisitions (LBO).

2. The result of these strategies is the base erosion in the State where the activity has been carried out, through the deduction of interest which is not necessary for carrying out the activity and the transfer, without fiscal cost, of the benefits obtained to other "privileged" fiscal jurisdictions (profit shifting), thus showing the failure of the tax rules for ensuring that income is taxed where it is produced.

3. The OECD and G20 BEPS project has devoted its Action 4 to the analysis of these risks. Its final report, supported by the G20 meeting held in Turkey on November 15 and 16, 2015, proposes a common approach for limiting the deductibility of interest and ensuring that it is related to the economic activity carried out by the entity deducting it, and which consists of: i) a maximum limit of deductible interest resulting from the application of a fixed ratio (between 10% and 30%) to EBITDA, applicable as a minimum to all the entities of the multinational groups and which can be regulated with a minimum deductible threshold and with *carry forward* or *carry back* clauses applied to excesses; ii) an optional group ratio that may allow for taking into account that specific company sectors or groups have greater debts for non-fiscal reasons, although the States may decide not to introduce this ratio if they apply the same conditions to the entities of the national and multinational groups; and iii) the recommendation to complement this general rules with specific anti-avoidance rules.

4. The Spanish rule on this matter has followed the international trends and in 2012 it went from a traditional thin capitalization rule –whose scope of application had been restricted by the EUJC jurisprudence – to a general rule for limiting the deductibility of financial expenses. The rule follows the German model (limit equivalent to 30% of EBITDA, minimum threshold of 1 million Euros and *carry forward*), but is distinguished due to the absence of an escape clause and the elimination of the standalone clause. In addition, two specific anti-avoidance rules have been introduced, one in 2012 for intragroup acquisitions and the other in 2014 for leveraged acquisitions.

5. From the tax Administration's standpoint, the thin capitalization rule did not allow for reacting against an "unnecessary" debt that was typical of

the operations indicated, for which reason it had to resort to general anti-avoidance rules (conflict in the application of the tax rule and simulation) which required significant evidentiary efforts on the part of the Administration. The current guidelines afford the tax Administration a general anti-avoidance rule (for all financial expenses) and two specific ones, that have proven to be effective in collection terms; theoretically adequate and adapted to the recommendations of the final report of Action 4 of the BEPS project. The debate has been focused on the convenience of introducing an escape clause or a group ratio.

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THE INFORMATIVE STATEMENT OF ASSETS, ITS FEASIBILITY IN CUBA

Rafael Agustín Meriño Betancourt

SYNOPSIS

The present work evaluates the reasons explaining why the Cuban tax administration does not know the financial circumstances of the segment of taxpayers called self-employed or independent workers. The present thesis proposes the use of statement of assets as an appropriate tool to know the variations of assets of these taxpayers. It outlines the doctrinal framework of what constitute the assets, their possible valuation according to their composition and the principles of legality, linked to the confidentiality and secrecy of information obtained from these assets statements. It considers how the non-use of this tool allows tax evasion, concealment of assets and the use of strategies such as insolvency and refusal to comply with debt deferrals under the pretense of an alleged absence of assets. The work provides a theoretical design of the contents of the statement of assets, considered adequate for self-employed workers the current state of Cuban society.

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Content

Tax collection is a complex and arduous activity. Tax systems are designed to work harmoniously; however, taxpayers tend to evade their taxes, resulting in partial or total failure of their tax obligations. These behaviors, when detected, are sanctioned with by the law, but they are not always detected. Occasionally they appear as insolvency situations, and the pending tax debt is not recovered. The existence of a paternalistic and inadequate legal system sometimes does not allow determining the real economic and contributory capacity of the taxpayers, in particular the individuals.

Our country, resolved to update its economic model, has initiated deep tax reforms, first in nineteen ninety-four, followed by a second reform in two thousand thirteen. These are significant steps if we take into account that tax issues began to be an important part of the agenda: economists, lawyers, entrepreneurs, investors and citizens in general. The self-employment is promoted vigorously as a solution to the lack of employment[1]; as alternative to cover the production of goods and services deficit for the population and the national economy; as a way of raising citizens' income; and embryo for the creation of more complex models of economic management[2]

The tax administration has been following the evolution of very specific sectors in which a significant number of taxpayers was concentrated. We implement the inspections of the self-employed (TCP[3] in Spanish) in selected sectors or activities such as catering (Food stands, Restaurants, Cafeterias) and transportation of passengers, among others. This process was completed and many of them were found as tax debtors with contributive capacity. However, facing the required payment, they argued of insolvency and lack of personal assets in accordance with the levels of revenues. In this situation it is necessary to implement tools allowing the tax administration to know the personal and business assets of the taxpayers, therein lies the fundamental importance of this research.

As a research field, this work is a novelty in our country. We have found materials that address the issue; but none touches the use of the tool that we propose[4]. It is true that this makes more difficult the task, which requires us to bring a doctrinal substrate, and provide a tool to tax officials to make decisions, and support their actions and legal constructions in the exercise of the taxation activity.

1. The independent work became an important source of self-employment that led to the absorption of most of the declared workers available in the restructuring of the State sector and the economic downturn product of the fall of the Socialist camp, the U.S. embargo and the global crisis.
2. Many of the partners of non-agricultural cooperatives - of first degree - were self-employed workers associated under this new management model. They have been characterized by their business success and economic solvency in sectors of the economy such as: the production of building materials; construction and repair works; gardening and applied decoration; the related recycling activities, transportation and the ornithological, just to mention some.
3. TCP (Trabajo por cuenta propia) acronym used to refer for independent workers.
4. The article discusses the legal perspective the feasibility of the use of the disclosure statement in Cuba, in the face of the taxpayer.

The experiences of other Latin American Nations are considered[5], where forms of informational statements of assets are applied. We are reviewing them, bearing in mind that any person or entity, physical or legal, public or private, shall have to provide the tax administration with relevant information for tax purposes, inferred from economic, financial, and professional relations with others.

As applied research, recommendations are provided to decision-makers of tax public policies, necessary to guide the legislator and the Executive on the technical and transcendent issues of the tax law.

Large-scale development of taxation with social significance has been manifested in Cuba since the implemented tax reforms. This process is kept alive and evolving today, requiring the intervention of tax administration officials and other social actors of Cuba, such as taxpayers, judges, lawyers, prosecutors, notaries, registrars, counselors and consultants; this process will not stop since its issue regulates both the economy and the market. These are sufficient reasons to facilitate the development of research topics that promote study programs and theoretical references on the subject, both for undergraduate and graduate students, law teachers and tax administration professionals.

The inclusion of our country in the international economy requires studying and standardizing our practices and tax regimes to the uses and customs of our environment. The research aims to demonstrate the need to assess the experience of other countries of the Latin American environment, without ignoring the peculiarities of the Cuban economic model, with the goal of expanding the compatibility of our tax system with the practices of the world economy, and create bases for future integrations. Law and accounting professionals, and the academic environment associated with them are called to play a special role towards this goal. Intelligence is not only in knowledge, but also in the skill of applying it in practice, principle that should guide our present work.

The professional order provides a benchmark of how to achieve a more efficient and pragmatic Justice, legality and fairness principle, which must exist and guide the tax system in Cuba in the implementation of tools such as the taxpayers' statement of assets. In particular, we consider technically suitable that all professionals contribute with their practical knowledge, in the creation of the theoretical basis that nurture educational programs and become a living source of knowledge.

It is the right time to undertake research to help the development of the Cuban economic model. This work will contribute to it, taking into account the significant incidence of tax policies on the economic field.

Develop a research on the feasibility of the assets statement of taxpayers in Cuba, their current legal regulation, strengths and weaknesses and the experiences of other countries to propose pragmatic criteria and points of view to adapt and improve the technical and legal guidelines governing the implementation of the aforementioned statement

The subject of the work is indirectly related to the point no. 6 and 66 of the ONAT Bank of problems, but with emphasis on processes of control, executive collection and tax debt settlement, among others. The existing situation is that borrowers argue that they are insolvents; therefore, a solution to this situation is needed. This underscores the scope and importance of the subject and its definition, a task that- partially - will be our goal.

5. Informative statements of the Kingdom of Spain; Costa Rica Republic informative statements.

1. THEORETICAL ELEMENTS RELATING TO THE INFORMATIVE STATEMENT OF ASSETS

1.1 Concepts of estate

For tax purposes, it is essential to know the contributory capacity of the taxpayers. The wealth of an individual tends to manifest itself in various ways such as consumption, savings and assets. Assets- in our judgment — is the most representative because it can be the bulk of taxpayers' income. However, in defining what is considered assets ("Patrimony") we find a variety of criteria.

When searching for the term in the online encyclopedia Wikipedia[6] considers it as estate. All properties and rights belonging to a person, or legal entity. Historically, the idea of estate was linked to assets. Thus, for example, the first meaning of the term "Hacienda" was something inherited from ancestors.

The term is also used to refer to the properties of an individual, regardless whatever he has purchased. From this point of view, the individual may be an individual or legal entity. Thus, we talk about business estate: The set of goods, rights and obligations, belonging to a company - as a legal entity - and that constitute the economic and financial means through which it can achieve its objectives. In reference to real people - and from a general point of view, in a less precise usage of the term - "the legacy" generally refers to goods and rights that individuals obtain as members of any community.

In the legal scope, it means something as well as "the set of legal bounds pertaining to a person, that have an economic utility and therefore are susceptible of financial estimation, and whose legal relationships are constituted by rights and duties (asset and liabilities)." "From this point of view the charges of the taxes on assets will be deduced from the value of a property".

According to the dictionary of Osorio,[7] the estate is etymologically speaking the set of properties that are inherited from the father or the mother. The Academy means as estate, in addition to what is said, the properties acquired by any title. In a legal definition, the estate represents a universality that is formed by the set of rights and obligations that correspond to a person and may be measurable in money.

To characterize sum, the Law Dictionary includes these notes on estate:

1. only people can have estate, but it is recognized to individuals and legal entities;
2. every person has an estate, thus their "assets" and debts are limited;
3. the greater or less quantity and value of the goods does not affect the fact that every person has only one estate although modern technique highlights the exceptional existence of separate estate;
4. We can only pass it entirely by cause of death;
5. It is the tacit and common pledge of all creditors of the owner or of the workers affected by it.

Almaguer López[8], in his dictionary refers to several meanings of the word "patrimony" (estate), so it states:

6. Wikipedia name official of the Wikimedia Foundation, constituted by a free software. His e-mail address is http://techblog.wikimedia.org/2011/01/update-on-offline-wikimedia-projects/
7. Osorio, Manuel. Dictionary of Science legal, political and social, Datascan S.A, Guatemala, 2012.
8. Almaguer Lopez, Rafael Antonio. Dictionary of accounting and auditing, Editorial Ciencias Sociales, La Habana, 2012.

a. For the Internal Control it is composed of the set of goods and rights acquired by any title.
b. In accounting of the private sector, it represents the value of the tangible fixed assets, the valuation of land, crops, buildings, machinery, equipment, agricultural implements, irrigation equipment, inventories and other means provided by cooperators to agricultural production cooperatives. A definition that is not entirely applicable to the basic units of agricultural production since they have other peculiarities.
c. In the accounting of the self-employment activity, the concept of equity is mentioned, being the residual value of the assets of the business once all its liabilities are deduced.

It is clear that from all these angles the taxpayer must prepare tax information of interest to us as administration, so the concept must be comprehensive and open and can include new economic forms of tax interest appearing in the future. This means that the models or forms should break down, for example, what constitutes the estate for the Treasury in connection with the information - with tax significance - that applies to the taxpayer. Reason why we, in our opinion, draft as concept of estate "the set of legal relations pertaining to a person, that have a utility economic and therefore susceptible of pecuniary estimation and tax interest, and whose legal relationships are constituted and involve: the acquisition, transfer or disposal of movable and immovable property;" duties, real and personal rights, including intangibles."

Although it is not simple understanding by people not associated with the world of accounting and taxes, it is appropriate for the implementation of assets statements because their complexity lies in their generality. Their weakness can be corrected with the use of models or forms that disaggregate the descriptions of the information with tax significance. They should not be omitted, depending on progress, in the consolidation of tax system and the taxpayers' culture associated with it.

1.2. General statement of assets

We must point out that although the research leads recursively to the estate, in this case of individuals, the analysis of the "taxation on the property or possession of certain goods', regulated in the law No. 113 "of the tax system", dated on July 23, two thousand and twelve is not object of our analysis. Our purpose is not to clarify such tax. However, although the terms – patrimony, estate and statement of assets - place us in that position, we will do it only to become acquainted with the theoretical and legal analysis of concepts, procedures and formulas that can help us to support the implementation of assets statements.

It is thus, and through the theory when García Vizcaino states[9] "…that the taxpayers must include, in their annual statement, also the kind and amount of income (perceived or accrued) deemed exempt or not reached by the IT[10]. They must also declare the payroll and the value of the property they own on December 31 of the year of the return, and the previous one, as well as amounts due to those dates. This is required with respect to property located, placed or used in the country[11] and abroad..."

… The GR[12] of the DGI[13] 2527/85 refers to appraisals of estates in this type of assets statement. It states that properties acquired from 1946 should be valued by their purchase price, adding expenditures actually made at the time of purchase (writings, commissions, etc.). The amounts paid to date of possession or deed

9. García Vizcaino, Catalina. Tax law, Ediciones Depalma, Buenos Aires, 1997.
10. Income tax.
11. The author refers to the Argentina.
12. General resolution.
13. Dirección General Impositiva. General Tax Directorate

by interests and update, and vehicles, ships, aircraft, yachts and the like, at purchase price, including the expenses up to the implementation of good conditions of use; Later updates are not computed. Non-commercial mortgage, collaterals and common credits are valued by their amount, excluding the interests and paid upgrades (nominal value at 31 December of each year). Checking and savings accounts in financial institutions integrate the return by the existing balance on December 31 of each year. To date fixed-term deposits must be entered, so that if their maturity take place later, they reflect the tax value, net of interest and updates. In summary: the mechanism of this original value or historical valuation of goods - without update - leads to determine that economic variations operated in the tax period respond to effective additions or depreciation of assets and debts, without computing later adjustments.

As a result, the value of an asset or debt is maintained as long as they remain in the estate... Depreciation of movable and immovable property shall not be subtracted from the values to report, although they have been deduced in the determination of the general tax. Confronting economic fluctuations with taxable incomes leads to that the declarant can achieve greater accuracy in his statements, to which is added the possibility of exercising a more efficient fiscal control...

The researcher makes an exhaustive analysis in his work outlining even comparisons with other Nations, such as the Kingdom of Spain, with a solid doctrinal foundation. Our purpose is simply to say that it makes two things clear: statement of assets are mandatory, reflecting economic aspects with tax transcendence, and serves as a means of checking the contributory capacity and return of the taxpayer.

Héctor B Villegas offers another interesting theory, with criteria about the need to know the assets of taxpayers[14]. He performs an analysis of the tax assets but with interesting criteria and illustrates how it represents a complement to the income tax return of individuals, also applicable to legal entities, and I quote:

… As the statement must hold definitively accountable the declarant in its consequences (except cases of proven error), the Administration detects a taxable transaction carried out and a taxable person identified. It will then determine the amount of an existing tax debt. According to the standard, it is presumed, unless contrary evidence, that there is a will to produce misleading statements or engaging in malicious concealment when any of the following circumstances occurs:

a. When a serious contradiction surge between the books, registrations, documents and other background with data arising out of the statements to produce at the time when the Tax Administration has to enforce the tax obligation.
b. When in the above documentation include inaccurate data with severe impact on the determination of the taxable income.
c. When the inaccuracy of the returns or the documentation comes from obvious disagreement with the legal and regulatory rules applicable to the case.
d. If accounting documents are not produced, with registrations and sufficient verification documents, when they lacks justification, given the nature or volume of operations or capital invested, or attentive to the nature of legal and economic relations usually established because of business or operation.
e. When inadequate tax forms or legal structures, or improper trade practices are disclosed, provided that they conceals or misrepresents the reality or economic purpose of acts, relationships or situations with direct impact on the determination of taxes...

14. Villegas, Hector B. Finance course, financial and tax law, Ediciones Depalma, Buenos Aires, 2001.

...The tax base Include all goods that may have value (real estate, machines, animals, raw materials, rights, patents, vehicles, jewelry, money, deposits, stocks, etc.). In practice, however, countries, for reasons of tax policy is tend to exempt some goods. There is also an exemption for "small assets", and deductions for dependents, including, in some jurisdictions, exemptions to disabled persons and elderly. This global trend of considering assets less liabilities has been abandoned by Argentina, which has abrogated taxes on assets and capital income, and replaced them with the tax on personal assets not incorporated into the economic process that consider assets without taking into account liabilities.

A. Arguments in favor.

1. The yield of the tax is quite stable because it does not react quickly to circumstantial changes. In the event of a crisis, this is advantageous because it avoids the drastic decrease of tax revenues when they are most needed.
2. It taxes unproductive assets (for example, yates, parks, gardens, precious metals, jewelry, art objects, investments in urban wasteland and uneducated rural land) that are not reached by the income tax (because they do not produce it), but be clear indices of contributory capacity. Then, it reaches not only the flows of wealth, but also their accumulation and tenure.
3. If it acts correctly complementing the income tax, it is effective instrument of convenient discrimination of tax treatment between incomes of labor and capital, logically favoring the first.
4. Unlike the income tax, it does not act against the increased productivity, new enterprises and risk-taking. On the contrary, has production efficiency by making more expensive the possession of unproductive wealth.
5. It can be an effective instrument of redistribution of wealth.
6. This tax "integrates" the tax system and gives it efficiency. Thus, for example, verification of income assistance, facilitates the valuation of inheritances and donations, and is useful to establish the accuracy with which determine other taxes, especially those levied on consumption as VAT.
7. It has statistical significance because statements about the assets facilitate the statistical compilation of key macroeconomic data, such as national estate and national income.
8. When he arrived at rather high rates in traditional taxes as those levied on income and consumption, adding a tax to the assets, produces fewer undesirable consequences as mentioned traditional taxes increased.
9. Conceived separately from the income tax and complementing it properly, achieved effective effect that both tributes will mutually corrected its flaws.

B. Arguments against

1. If the rate is high, it increases the evasive tactics that are manifested in the reduction of the value of the goods. However, we think that this can be avoided by proper implementation in complementary and separate form from the income tax. Indeed, the smaller the value of the goods, the income will be apparently higher. I.e. the tax on assets will be evaded but it will conversely increase the income tax. This also responds to the objections that some writers make with respect to the valuation of assets, which believe uncertain and difficult.
2. Conceived jointly with the income tax, it creates important gaps for evasion. This has been demonstrated by authors such as Lopez Aguado with respect to "the normal potential land rent tax", now repealed in Argentina and which was improperly inserted within the income tax.
3. It is a tax inefficient to discover real holders of the taxable assets - if left uncorrected – this tax will add new inequalities to the existing ones.
4. It has a regressive incidence because of the difficulty of capturing the high fortunes

invested in securities to bearer or emigrants abroad or invested in assets whose valuation can be handled by the taxpayer.

5. It has negative effects on savings and investment because it stimulates consumption at the expense of saving... end quote.

Seen out of context it would seem that it brings nothing to our research. However, Villegas - although talking about the tax on assets - gives us elements that prove that statements of assets allow us to know the wealth of the taxpayer, its variations, and even his presumptive behavior before tax. Not just the property tax, income or personal income tax- as it is known in Cuba – it is also possible to evaluate the information on the assets of the taxpayer. It attaches great value to the taxpayer's statement as information under consideration by the tax administration. In case of manipulated information, it allows greater freedom of action and is difficult to attack. It develops and registers a variety of goods that include real estate, machines, animals, raw materials, rights, patents, vehicles, jewelry, money, deposits, and stocks, among others, classified as assets. It explains that these rarely are unproductive in general their owners will exploit them and get income from them, confirming our hypothesis that they always will reflect the tax capacity; and it has value as a counterpart of income, inheritance, donations and consumption, allowing verification..

It is true that the assets can be masked and it also has weaknesses, but in a cost-benefit appraisal, it would be useful in our current conditions to have an assets statement that provides us with data on assets of taxpayers. They provide us elements of judgment such as in fiscal activities, debt management, deferrals, and executive or forced recovery.

Jarach,[15] in his analysis on the succession tax, outlines a complementary solution employing the assets statement attached to the income statement, and writes:"... These taxes are susceptible of improvement, if the progression is adjusted, taking into account the heir's own assets. This is practically more feasible if the tax system of the country under consideration includes a tax on the net worth of individuals or, if the tax returns of the income tax have annexed a detailed assets statement with reference to the situation at the end of the year and at the end of the previous year...

If we apply the above concept and enforce the informative statements of assets, with personal income tax statement, we can proceed to analyze elements such as detecting if the taxpayer invests in the development of the business; increase the personal property; consumption; if he saves part of the earned income is or consume it. It could also be used to correct the satisfied personal income tax, as an increase in the assets shows a higher value of income. In addition, a depleted assets statement will be a signal of alert if, according to the type of economic activity exercised and to referential economic indices (price, level of activity, competition, demand, geographical location, etc.) the tax administration suspects a higher level of income. This may indicate that there is a concealment of the assets, of the real income or a possible variant of tax elusion or money laundering.

This is consistent if we look at it through the prism of a concept expressed by Sacconet[16]: "Economic increases not justified with a 10% of income received or consumed in non-deductible expenses, are net profit that occur for the purposes of the income tax... The subjective element is fraud and specifically to obtain the improper equity, evading partial or total payment of the debt...

15. Jarach, Dino. Public finance and tax law, publishing Abeledo-Perrot, Buenos Aires, 1996.
16. Saccone, Mario Augusto. Manual of tax law, editions La law, S.A., Buenos Aires, 2002.

As a first conclusion, we can say that the information on assets can reveal the alleged economic and contributory capacity of each taxpayer, and even of his partners and relatives. It would be one more element to detect fraud, using these data in the intersection and checking the provided information: complying with a formal obligation of the taxpayer; of collaborating entities; of third parties and those obtained from audits carried out by the tax authorities in their work. It would provide a tool to legally appropriate and easy to implement to check other regular taxes, such as the personal income tax.

1.3. How do we evaluate assets?

Moving forward on this issue is important not only to know that goods or receivables make up the taxpayers' assets. They determine the value we will use to standardize the data that reflect economic informative statements of the taxpayers. As in life, interpretations in this field are varied and affiliations as dissimilar as there are schools of economic or legal thought. To solve this issue, we appreciate interesting criteria to describe the value of some assets of the taxpayer's estate, expressed by Catalina[17] when he analyzes the wealth tax. This academic says that the procedure for the calculation of the tax base[18] of these goods is under Argentina law, broadly speaking, the following and I quote:
… Firstly, the nominal value (source value) is computed and the month of purchase, acquisition, completion of construction - or investment in construction sites - (previously, the sums invested in construction are updated from the date of investment until the date of its completion or, where appropriate, to December 31 of each year) or admission to the assets...

… The tax valuation for property taxes or similar taxes shall also be "in cases in which it was not possible to determine the cost of acquisition or the value at the date of admission to the assets", and she will be, in this case, the "computable amount". When testing informing that square of real estate value, to 31 December of the period that is settled, is lower than the "computable amount", you can assign to those goods that value, "on the basis that emerges from the respective supporting documents", informing the Administration the procedure used for the valuation by presenting the respective affidavit. Refers to as "square" to the "price that could be obtained on the market in the event of a sale of the good that is valued, under normal conditions of sale". With regard to the rural properties, to the set value it is reduced in the amount resulting from applying the 25% over the fiscal value assigned to the free land of improvements for the purposes of payment of the provincial property tax. This is justified in the lower percentage profitability of those goods and the estate tax to which are subjected in the Argentina. It is noted that the value of the rural property in arid areas with irrigated water holes, "will be deducted the value of these perforations". Let us remember that improvement is not considered "public irrigation that benefits a particular venue"...

… For vehicles, the computable amount may not be lower that sets the tax administration to 31 December each year, "with the advice of the National Superintendence of insurance", taking into account the brand. The updated residual value is compared with the fiscal valuation of December 31 of the respective period or with the established... for the vehicles, the higher value is computed for each of the assets, obtaining the computable amount...

… Deposits, credits and currency holdings. If foreign, it is computed at the last value of quote - type buyer-from the Bank of the Argentina to December 31 of each year, including the interest accrued at that date. If the currency is Argentine, its value together with the accessories accrued as of 31 December is taken...

17. García Vizcaino, Catalina. Ibid., p. 115-121.
18. Remember that the context where the analysis of the researcher was taken is the implementation of the wealth tax; and the tax on personal assets, in the Argentina.

… Art objects, for collection, antiques and luxury objects, and other goods... not including the personal and household objects... The computation is carried out by the value of acquisition, construction, or admission to the assets, updated according to the concerned Administration table[19] for the month of December of each year. Depreciation is not expected...

… Personal and household objects. With the exceptions provided for in the law, they are computed at the cost of origin, not to mention any update...

… Government securities, shares of joint-stock companies and limited partnerships, and other securities. If they are traded in bags or markets, compute the last quotation value December 31 of each year, or last market value of that date in the case of quotas parts of mutual funds. If not quoted on the stock exchange, the assets are appraised by their cost – accrued if applicable with the interests, updates and exchange differences as of the date indicated, except in terms of actions that do not publicly traded, for which computes the proportional equity value arising from the last balance sheet closed on December 31 of the exercise. With regard to social cooperatives quotas, their nominal value is computed in accordance with the legal provisions... Shareholdings in capital (assets less liabilities) of any type of companies (with the exception of the already considered shares) and ownership of the capital of companies or one-person operations. The amount established for participation or ownership is computed pursuant to the capital of the Corporation, company or exploitation resulting from the last balance sheet closed on December 31 of the period. That value of participation is added or subtracted, respectively, the balance creditor or debtor special account at 31 December of the year by which the liquidation, without "the credits from the accreditation of utilities that had been taken into account in determining the contribution to the date of closure of the accounting year"...

… The legislation provides for standards of valuation of assets and calculation of the liability for cases of participation or ownership in the capital of companies, businesses or farms that do not make balance sheets in a commercial way. If application of these standards, the liability is greater than the asset, no amount is computed in respect of shares in the capital of any kind of partnerships or ownership of the capital of companies or one-person operations"...

This analysis and procedure corresponds to the application of the figures of the tax on assets and on the personal property, respectively; using legislation in force in Argentina, as we have stated, their systematics and approach of the phenomenon is very didactic to solve similar problems in the implementation of economic information statements in our country. Our context and reality is another, but solutions must necessarily starting from the experience and doctrine, albeit with the necessary adjustments. The theme here exposed - valuation of the assets and entitlements - leave us a conclusion indisputable, that assets must be recorded in economic information statements according to the type of asset. If their value could vary according to economic criteria such as depreciation, impairment or market changes, they should be recorded at their acquisition cost or their nominal value, or their certified appraised value. We recommend the elaboration of a regulation, proposed by the Ministry of finance and prices of the Republic of Cuba, which should undoubtedly be reflected in a legal provision that expresses the accounting criterion that legally will have the values that should be registered in formulating the statement, depending on the type of good or entitlement. So that this task requires the capacity and expertise of accountants and lawyers. However, referred earlier does not prevent the

19. Table issued by the tax administration in the Republic of Argentina, through the application of a coefficient - depending on the nature of the good - the updated residual value of the asset is estimated. For this are handled economic criteria such as amortization, improvements or investments that correct the value to the aims and purposes of the calculation of the wealth tax.

national Office of tax administration (ONAT) from being able to implement the statement and proposing, temporarily, the practical approaches in terms of the values with which taxpayers, the economy and the domestic market, subject to the property or right in question, will legally operate.

At present in our country, there are rules with rank of resolution for specific assets and goods, in the case of the tax on the transfer of property or inheritance, regulating which will be the minimum base value to take into account. These Criteria are taken into account by the Cuban tax administration in the referred tax control.

According to this criterion we have, that is handled as in terms of legal scope - in these cases-that of "value of the property or rights", being necessary to be recognized as such they must be entered or registered in documents and books, expert opinions, judicial documents reproductions or any other means of proof, legally recognized in our legal system.

In the case of real estate such as housing, which have a special treatment in our legislation, with a considerable number of regulations, it is important to start from the view that in our country, only the ownership of two properties is supported. One of them must be built in urban area and the second is granted if it is located in the beach or rural area. In the case of dwellings subject of transmission, their present value is considered, meaning their value as audited by the authority empowered to do so, usually performed by professionals of architecture, existing in each municipality in specialized offices subordinate to the local governments. For acts of sale or purchase by individuals, the selling price of housing which is transmitted will be the one stated by the parties in the Act, whenever it is equal or greater than the official value their; otherwise, it is made by the latter. In case of exchanges with compensations, the value of the property for the person who receives it for tax purposes is formed by the updated value of the housing and the value of the compensation received.

In the case of movable property such as vehicles, the so-called reference values that make the function of minimum legally set prices taking into account the type of auto and construction date exist also in Cuba. For tax purposes, sales acts and donation acts of motor vehicles will use as value of the asset the one stated by the parties in the public deed that formalize the transmission, provided that it is equal to or greater than the minimum reference value[20] established. The legislation in force in this regard is set out in the Decree No. 320, dated December 18, 2013, issued by the Council of Ministers. In this case, the property is not subject to a certain number of cars per taxpayer, but having more than one does have significance in the tax field of individual taxpayers.

Other goods which value is problematic to define in our country include:

1. In the case of real estate, the legal value of the land is complicated due to the category of soil ranging from first to fourth category according to their productivity, requiring the intervention of specialized experts, institutes and records of land tenure, subordinated to the Ministry of agriculture.
   Similar difficulties arise in the case of the urban surface, because although there are certain rules and the help of municipal urban planning directorates, it is not always easy to determine their value per square meter, but without reaching the complexity of the above-mentioned case of agricultural, livestock and forest soils.

20. Decree No. 320, dated December 18, 2013, issued by the Council of Ministers of the Republic of Cuba. In this legal standard is regulated, inter alia, the establishment of reference minimum values for acts of transmission of ownership of motor vehicles. There are rules of lower rank - resolutions - promulgated by other bodies (ministries: the transport, finance and prices, and justice) that in one way or another regulating the implementation of the provisions of this Decree.

2. In terms of goods such as animals and herds of any kind, it is difficult to find the appropriate pricing in municipalities in the country away from the provincial capital where there is a staff and institutions, trained and properly equipped to assume these functions. Since the taxation of these goods is not so diverse and occasionally exotic at provincial and municipal level, this is an issue that we must solve in the redesign and update of our economic model because of the importance that these goods have in commercial traffic and as financial or tax guarantees.
3. When it comes to works of art, jewelry, goods, property, rights or intangible, the appraisal is also complicated due to the deficit in the number of expert appraisers or entities that provide this service.

The scenario is complex mainly because of the shortage of expert appraisers for the diversity of goods and rights that can form the assets of a particular taxpayer. So far in the country, for the purposes of carrying out appraisals, the INTERMAR company is operating, and the Bank of credit and commerce in its provincial directorates, there may be other but with insufficient representativeness at national level or subject only to judicial activity when it is imperative. Another problem is the uneven development of public records, which need information technologies and telecommunications, as well as qualified personnel to maintain high levels of update of property and rights recordable by the taxpayers, and their updated values or market. However, even so the tax administration has achieved a modest but useful volume of exchange of information, vital in the necessary informative crossing for the verification of the data obtained in the assets statement of each taxpayer subject to this obligation.

In short, from reading the criteria of the researcher, the referred specialists and our criterion confirm that despite the limitations and vulnerabilities that such statements may have, they provide the administration with useful information for tax purposes, providing knowledge of each taxpayer, the evolution of his business and those that relate to it. We do not need not fear vices (false returns, incorrect or manipulated statements) because they could help us detect taxpayers of interest for the control, i.e. the undisciplined, and possible tax evaders.

1.4. Confidentiality and secrecy versus statement of assets

The request for reports, data, and any economic or patrimonial activity report is always a sensitive issue. Many associate such claims with violations of their rights and constitutional guarantees, and even taxpayers and lawyers scan the interposition of appeals before the courts. While it is true that almost all tax actions involve pressure and interference with the privacy of taxpayers, they rarely corresponds to illegal or unreasonable acts of the tax administration, which operates within the framework of a legal privilege due to the peculiarity of its mission. It is related to the need to handle sensitive information to comply with the law and to handle the natural predisposition of taxpayers to evade, in whole or in part, their tax obligations. This ability of the tax administration is limited also by the obligation to maintain the confidentiality of those data and information obtained from a taxpayer, and we could call it tax secrecy.

On this issue, Catalina[21] says:... It is noted that the powers of these agencies do not have to bring with them unreasonable damage to the taxpayers. The words of Adam Smith are valid today. He considered contrary to the principle of economy “subjecting people to frequent visits of tax collectors and their hateful records, because it can expose them to discomfort, humiliation and unnecessary tyranny”. There is no doubt

21. García Vizcaino, Catalina. Ibid., p. 20 to 48.

that meeting the demands and the formal requirements of the tax collectors includes private expenditures. Neither should the professional secrecy be breached regarding the professional advisors, who cannot be questioned by public agencies regarding their customers, even by their names...

… The banking secrecy (of the financial entities Act) and securities was significantly decreased with the law 23.271, stating that it should not apply to the DGI, in compliance with its legal functions, entities or subjects covered by the respective regimes. The information may be general or particular and include one or more subjects determined or not, even if they were not under examination. In stock market terms, the information may not refer to operations in progress or pending liquidation. Although 23.271 law only mentions the D.G.I., information is obtained can be exploited by the D.G.A.-A.F.I.P and other government tax divisions...

… Article 101 of the law 11.683 imposes the tax secret on returns and reports, presented by taxpayers or third parties before the A.F.I.P, and the judgments or contentious demand insofar as they record this information.

Specifically, officials and judicial employees or dependent of the A.F.I.P[22] are bond to preserve such secret, that they cannot communicate to any person that comes to its knowledge in the performance of their duties - or even at the request of the person concerned- "except to their superiors"...

In a similar context Calvo Ortega[23] writes..."the most important power[24] is not only to the request for information from the taxpayer (which is normal) but from third parties.... The limits of the application of information and duty to present it are the contents in the general tax law (postal, statistical, notarial secrecy in certain cases, professionals in terms of private non-property data, obtained in the exercise of professional advice or advocacy, services and professional secrecy in the exercise of the freedom of information"...

"From the procedural scope argues Diaz[25], ...the fact that the tax administration is endowed with powers to determine the fair measurement of each tax, of verifying information provided by taxpayers and third parties, this does not ignore or disrespect the rights of taxpayers in information with respect to privacy, confidentiality, etc.". They are fundamental rights of our constitutional system and make up the concept of a democratic society...

The tax legislation in Cuba includes specifically, the Decree No. 308 "regulation general rules and tax procedures", dated October 31, 2012, in its chapter III of the tax administration, second section, functions, in its article 13. It states: The functions of tax control that performs ONAT[26] are the following: subsection i) require the submission of data to individuals and legal entities, reports and background with tax significance, derived from their economic, financial or professional relationships with other people. In the third section, on duties, article 15 states that the tax administration must ensure the non-infringement of the principle of confidentiality of information. The confidential character of the statements that the tax administration get from taxpayers must be respected. Information from taxpayers and third parties may only be used for the purposes of the Administration and in the cases required by institutions of the Comptroller's Office and Prosecutor's Office both General of the Republic of Cuba, the corresponding people's Court and the competent bodies of the Ministry of the

22. A.F.I.P, in Argentina is thus called to the Federal Administration of public income.
23. Calvo Ortega, R. Tax law (General part), Editorial CIVITAS, Barcelona, p. 285-287.
24. It refers to officials and inspectors prosecutors from the State tax agency of Spain.
25. Diaz, Vicente Oscar. The legal security in tax proceedings, Editorial Depalma, Buenos Aires, p. 162.
26. In the Republic of Cuba, to the tax administration, it is called national Office of tax administration (ONAT).

Interior. The publication of general statistical data that do not allow the individualization of statements, information or people is allowed; and in addition, when there are issues that are of general interest to make them known by any means it deems appropriate.

From these considerations by each author and our own standard, we can agree depending on the social and economic reality. However, the legitimacy of the tax authorities to request any information associated with the assets, not only of the taxpayer but also of his partners, is clear. These powers should emanate from the law and be limited to the confidentiality of the information that tax entities handle and with the most absolute respect for constitutional guarantees and rights of taxpayers.

Therefore, there is no objection, in doctrine or by law in force, to implement the assets statements in our country. Because the law does not. 113 "of the tax system", date July 23, 2012, establishes in its article 393, that taxpayers are obliged to formal duties[27]: subsection h) submit statements, balance sheets, reports, certificates and other documents, in the form, terms and requirements established by law. More specific is the Decree No. 308 "regulation general rules and tax procedures", date October 31, 2012, in its article 29 states that registered taxpayers, at the request of the ONAT, must submit before ONAT estate before the corresponding to his/her legal residence registration of taxpayers, as set forth in the standard that is issued for the purpose.

Of the above and the analysis, the implementation of the asset statement for the taxpayers, in general, and for the self-employed, in particular, is viable and can legally be established by the head of the national Office of tax administration. This practice does not violate the rights of taxpayers, is within the prerogatives granted by law to ONAT and the limit of the confidentiality of the information thus obtained, subject to the exceptions legally regulated, providing adequate legal certainty to compel, with serenity and freedom, the taxpayers to provide the requested information.

2. USE OF STATEMENTS OF ASSETS OF TAX INTEREST FOR SELF-EMPLOYED WORKERS

2.1 Self-employment, a sector of tax interest

Independent work[28] as form of self-employment and as a source of salaried employment moves an important sector of the economy and services inside the nation. Being a sector with fluctuations (high and low), it records a slow but sustained growth.

The sector challenges the control ability of ONAT, which needs software development and other techniques to ensure tax compliance. This is reflected by the national press in an article titled "A modern tax management"[29], whose fragments refer the following:

… Approaching the new technologies of information and communication to the management of the Administration responsible for the collection of taxes in the country from the experiences in other Nations will be one of the objectives of the XIII tax international seminar

27. Formal duties: set of non-financial obligations related to taxation whose compliance are required from passive and responsible subjects.
28. Work by own account, as is known, in Cuba, economic activities and some professions that natural or natural persons carried out independently. Saving the necessary differences, would be what is known in Latin America as: micro-entrepreneurs, entrepreneurs, individual entrepreneurs, etc. It is important to say that their activities are legally regulated by the Ministry of labor and Social security of the Republic of Cuba in resolution. 42, dated August 22, 2013.
29. Morales Morales, Ivan. "Tax modern management", Radio Rebelde, 06/08/2014.

that began Wednesday at the Hotel Palco in Havana...

… The event - which brings together representatives of international organizations and institutions in 14 countries and officials and executives of the national Office of tax administration (ONAT) - will be held for three days and will lead to knowledge-sharing and dialogue on topics of mutual interest. During the opening remarks of the event, the Minister of finance and prices of Cuba, Lina Pedraza Rodríguez, recognized the importance of the issues; they will allow improving the effectiveness of fiscal control and - to the extent of the possibilities - ensuring adequate processes of modernization in the collection of financial resources...

… Contribute according to the capacity of each taxpayer will only be possible through an intense work on the increase of tax culture and an effective compliance system, states Pedraza Rodríguez...

… Wednesday morning was opened with the Conference by the Deputy Minister of finance and prices, Meisi Bolaños Weiss, on the main changes in the Cuban economy since the update of our economic model and its impact on the tax administration...

…the officer said that one of the main challenges of the ONAT is to educate people about the importance of having their tax contributions submitted, for the budget of the State and for local development...

… The conclave, which will take place until August 8, will also analyze the use of information technologies and telecommunications in the provision of services to taxpayers and tax control...

Various ideas are extracted from the lecture; the most obvious is the need for computerizing ONAT. That technical advantage is very much needed, because it allows a minimum of qualified personnel, control of a large universe of taxpayers, improve and streamline the processes inside the Office. However, today it has limitations due to the lack of financial resources to acquire these technical means and create the necessary technical conditions. The big obstacle is external; a society not much computerized and rarely interconnected socially and institutionally. The challenge is greater because the activity of the self-employed (TCP) and their economic relations and finance are not based on information technologies[30].

However, perhaps is this one of the reasons explaining the marked interest of ONAT Directors and the Ministry of finance and prices, associated with technology, to develop techniques to strengthen the audit and tax control, without neglecting the development of tax culture, elements that would favor a greater degree of compliance.

These technical and circumstantial difficulties underscore the importance of the implementation of economic assets information statements. They can use information technology or traditional printed forms. Their data can be entered and stored in databases, which would perform the analysis of the information supplied and stored in our computers for tax purposes with appropriate programs for this purpose.

30. Today there are small and medium-sized businesses using accounting systems, ads on Web pages, software, charts of orders or menu, among other techniques, supported - all - in technologies of information technology and telecommunications. However, they are not conceived with legality and transparency to be put in terms of auditability of face to the inspection and control of their business by the tax administration. As we said, their presence is growing but do not represent the entire national territory, they are concentrated in the capital, the main cities of some provinces and associated with urban areas directly related to tourist resorts in the country.

2.2. Tax evasion of self-employed workers

To understand this tax term, we must start from the definition of tax evasion[31], or tax fraud. It is a legal figure consisting in the nonpayment of taxes established by the law. It is an illegal activity and usually is referred to as crime or as administrative offences in most systems. The black money is any financial flow that has evaded payment of tax duties. They are profits earned in activities illegal or legal, but which avoided declaring them to evade taxes. They try to keep it in cash, avoid entering it in financial institutions, so it is not registered in banking movements and the State is not aware of its existence.

A complementary assessment is given by Saccone[32] when he states ..."the concept of evasion is broad and not limited to an unlawful activity; covering the set of manifestations of any kind that eliminate or reduce the tax burden, including tax fraud. That is why we talk of: legal or legitimate evasion and illegal evasion. The first concept is legal evasion. It consists of minimizing tax obligations, without violation of the law. It considers that the choice of the least taxed option is free. Conversely, illegal or unlawful evasion is tax law fraud...

Both definitions, although not completely adjusted to the concept that exists in our legal system, discover the circumstances favoring the qualification of these illicit activities among our taxpayers, but with marked emphasis on self-employed workers. Such circumstances are transactions in cash, non-use of bank accounts, non-use of banking payment instruments, of financial institutions in their economic and merchant services, and the reduction of the tax burden through the manipulation of revenues declared to the treasury. We cannot ignore either the ignorance by the tax administration of the operations of many taxpayers due to scarce information on their assets and economic activity.

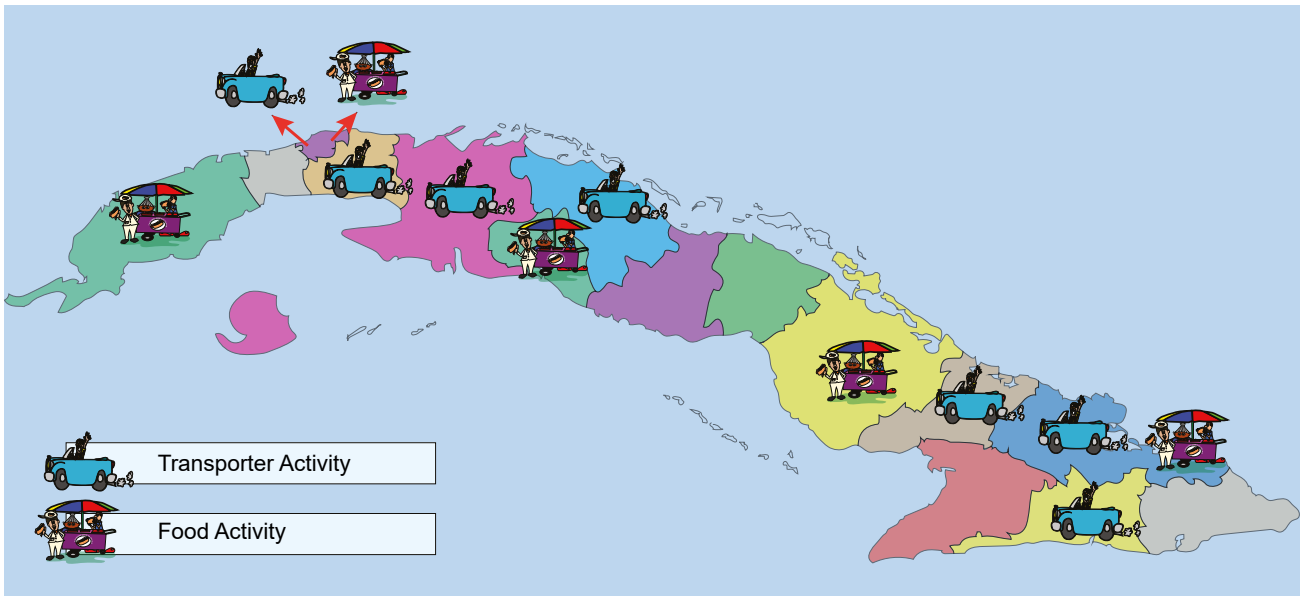
An illustrative case was obtained from the research carried out by the expert Yoani[33] in which he explains,... Self-employed workers (TCP in Spanish)[34] are taxpayers that by nature are particularly difficult to control and have almost no tax culture. They have different levels of schooling, it is impossible to have them complying with accounting practices, they tend to operate in the informal economy and exert diversity of activities...

Map of tax evasion levels among self-employed workers

.. .The following shows the levels in tax evasion for the activities of transportation and food processing at the end of the year 2013, considered as the most severe, using the map by regions of the country.

31. Wikipedia name official of the Wikimedia Foundation, constituted by a free software. His e-mail address is http://techblog.wikimedia.org/2011/01/update-on-offline-wikimedia-projects/
32. Saccone, Mario Augusto. Ibid., p. 139-142.
33. Albuerne Marin, YoaniYamell. "Action plan to reduce tax evasion on personal income tax", CECOFIS, La Habana, 2014.
34. In Cuba, TCP stands for "Trabajador por cuenta propia", meaning self-employed workers.

Figure No. 1
Map of income under-statement according to territories



Source: Author's elaboration.

… The major pockets of tax evasion at the national level for the transportation sector are found in Havana, Mayabeque, Matanzas, Villa Clara, Las Tunas, Holguin and Santiago de Cuba. In the activity of food processing, Pinar del Rio, Havana, Cienfuegos, Camaguey and Holguin...

Another problem described by Fernandez Ramirez, [35] stating about the assets of the self-employed:.. The unpaid tax debt leads to the start of the executive collection, and thus the debtor's assets should be embargoed, but the real situation is that when the tax administration official arrives at the legal domicile of the taxpayer, there is no property that may be susceptible of embargo...

… It is therefore required that the tax administration should be able to take guarantees on certain properties owned by the debtor taxpayer according to the business or related to it...

… This requires measures available to ONAT for taking action, every time those taxpayers are hiding their property or income beyond the reach of the tax administration. An absence of timely action can mean the loss of the goods and absence of guarantees that support the debt...

Both researchers detect the particular non-compliance of the self-employed workers, but this behavior- with specific differences - can be identified in other segments of taxpayers. They both agree on the cause of the problem, the lack of knowledge of the assets of these taxpayers and therefore the impossibility for the tax administration to meet the particular tax debt or guarantee it. Due to the lack of information, the compliance with tax obligations is evaded fully or partially. In both issues addressed by the research mentioned above, the use of economic information statements is a solution to part of the problem.

35. Alonso Enríquez, Edilia and Fernandez Ramirez, Sonia. "Proposed measures to improve the process of seizure of goods to natural persons", CECOFIS, La Habana, 2014.

We must progress in the knowledge and characterization of: business, taxpayers, their assets and modus operandi, to avoid tax evasion of taxable persons of the tax obligations. We have to consider the experiences of other tax administrations that have been successful in lowering the percentage rates of evasion to a reasonable level, achieving high taxation rates without violating the basic tax principles, the limits laid down by the law and the rights of taxpayers, in particular and citizens, in general. We consider that the establishment of assets information statements, as a formal duty for all contributing individuals will be a useful tool within reach of the Cuban tax administration; that logically they should be operating in designs suited to new information technologies[36] and telecommunications.

3. DESIGN AND SCOPE OF THE STATEMENT OF ASSETS IN OUR COUNTRY

3.1 Antecedents of statement of assets

Assets statements have a common tax purposes use in Latin America. Their value depends on their usefulness for tax related information about the taxpayers and third parties. Data or reports can be about estate, economic, financial, rights, intangible, personal, business affairs or profession, etc. In countries such as the Republic of Costa Rica and the Kingdom of Spain, just to mention two examples, their purpose and technical design is variable, but one of the most important is to keep updated the inventory of assets of taxpayers, control their operations and variations of their assets.

In Spain, the Tax Agency gives great importance to this type of information, and works in the digital implementation and accessibility of these forms using technical media such as the Internet, so forms such as the following models are available:

1. **Model 038.** List of operations carried out by entities registered in the public registry. Statement in euros.
2. **Model 156.** Dues paid by members and mutual insurance companies for purposes of the deduction for maternity leave. Annual statement of assets.
3. **Model 159.** Annual Statement of power consumption.
4. **Model 165.** Statement of individual certifications issued to members or participants in new or recent organizations.
5. **Model 170.** Annual statement of operations carried out by business people or professionals using credit or debit card to for their tax collection.
6. **Model 171.** Annual statement of taxes, funds disposals and payments of any document.
7. **Model 180.** Withholdings and payments on account. Income from the lease of urban properties. Annual summary.
8. **Model 181.** Statement of assets of mortgage loans for the purchase of housing.
9. **Model 182.** Statement of assets of donations, grants, and contributions received.
10. **Model 184.** Entities in income allocation regime. Annual statement of assets.
11. **Model 185.** Monthly statement of assets of managers of Social Security and mutuality bodies and entities.
12. **Model 186.** Provision of information relating to births and deaths.

36. ONAT progresses in the implementation of a software for tax purposes developed thanks to the research and development of its own specialists of information technologies, suitable to their needs and to the modernization of the Office. Informative statements must be appropriate and compatible with these systems, so that the information thus collected could enter so scanned in their databases, allowing processing, analysis and obtaining reports conclusive fiscal behavior both taxpayer and your business, and the variations of their assets for tax purposes.

13. **Model 187**. Statement information and annual summary of withholdings and payments for acquisition and disposal of shares and participations operations.
14. **Model 188.** Annual summary. Withholdings and payments. Income or yields from capital resulting from capitalization operations and life or disability insurance contracts.
15. **Model 189.** Annual statement of assets about securities, insurance and incomes.
16. **Model 190.** Annual summary of withholdings and payments on account. Performance of the work of certain economic activities, awards, and certain allegations of income.
17. **Model 192.** Annual Statement on magnetic support of operations with Treasury bills.
18. **Model 193.** Withholdings and payments on account on certain income from capital. Withholdings and payments on account on certain incomes. Annual summary.
19. **Model 193** simplified. Withholdings and payments on account on certain income from capital. Withholdings and payments on account on certain incomes. Simplified annual summary.
20. **Model 194.** Withholdings and payments because of income from capital and income derived from the transmission, repayment, refund, Exchange or conversion of any kind of representative of the uptake and utilization of non-capital assets. Annual summary.
21. **Model 195.** Quarterly statement of accounts or transactions whose holders have not facilitated the NIF to credit by the deadline.
22. **Model 196.** Annual summary of withholdings and payments on account in respect of sales or income from the capital obtained by the consideration of bills in all kinds of financial institutions.
23. **Model 198.** Annual statement of operations with financial assets and other securities.
24. **Model 199.** Identification of the operations of credit institutions. Annual statement.
25. **Model 270.** Annual summary of withholdings and payments on account. Special lien on certain lotteries and Gaming Awards.
26. **Model 290.** Annual statement of assets of financial accounts of U.S. persons
27. **Model 291.** Statement of assets of income of non-resident accounts.
28. **Model 294.** Individualized accounts of clients receiving benefits distributed by Spanish collective investment institutions, as well as those on behalf of whom the marketing entity performed refunds or transmissions of shares, in the event of cross-border marketing of shares of Spanish collective investment institutions.
29. **Model 295.** Annual report of individuals with the investment position in Spanish collective investment institutions, on 31 December of current exercise, in case of cross-border marketing or shares in Spanish collective investment institutions.
30. **Model 296**. Annual summary of withholdings and payments on account for non-residents.
31. **Model 299**. Annual statement of certain income obtained by individuals resident in other Member States of the European Union and other countries and territories with which an exchange of information has been established.
32. **Model 340**. Statement of assets of operations included in accounting registers.
33. **Model 345**. Plans, pension funds and alternative systems. Annual Statement participants and contributions.
34. **Model 346**. Annual summary of grants and compensation to farmers or ranchers.
35. **Model 347**. Annual operations with third parties.
36. **Model 349**. Recapitulative statement of intra-community transactions.
37. **Model 390**. Annual VAT summary statement.
38. **Model 611**. Property transfer and Legal documents duties. Statement annual review of payments in cash from the tax levied the documents negotiated by collaborating entities.
39. **Model 616**. Property transfer and Documented Legal Acts. Statement annual review of payments in cash from the tax levied the issuance of documents related to currency exchange or be endorsable to order.

40. Model 720. Statement of assets on goods and titles located abroad.

In the case of Costa Rica, the Ministry of finance relies on the General direction of taxation, which has within its powers to make permanent improvements to the Costa Rican tax system. It manages its weight and progressivity, in correspondence with the rights and guarantees of citizens, under the functions of control, management and general control of taxes, reform and perfect the tax control. Through the implementation of statement of assets, it has managed to develop an own approach in the design and requirements of these statements.

However, in the comparison and even designation of such instruments, those crafted by the Costa Rican institutions seem to be most appropriate and familiar to the immediate needs of the Cuban tax administration. Conclusion that we have come by the revision of the formal aspects of the referred informative statements that, as in the Spanish case, are shown in digital format on websites.

Our study has been limited to the mere observation, as lacking documents or contacts with specialists of this administration, we have missed the doctrinal base used and the assessment of the results obtained from their use. This circumstance that does not prevent us, in any way, from believing that that this instrument is compatible - and necessary - and would be a great solution to the degree of development attained by our tax system, an effective means of control (control or audit) of taxpayers and economic variations of these. By way of example, we show assets statements that have been implemented in the Republic of Costa Rica;

1. Annual statement of withholding summary (model D-150)
2. Annual overview of customers, suppliers and specific expenses (model D-151)
3. Summary annual statement of withholding – unique and final taxes (model D-152)
4. Monthly summary on withholding payments for (model D-153) sales tax
5. Quarterly statement overview of departure tax (model D-157) from the territory
6. Annual statement, agricultural purchases and sales auctions (model D-158)
7. Quarterly statement overview of printing of invoices and other documents (model D-160)
8. Quarterly summary statement of cash flow (model D-161)

In the compilation and analysis of information, for this work, we confirm that our tax administration has antecedents in the collection of information for tax purposes of taxpayers. However, to avoid unnecessary lengths, we will focus on the aftermath of the tax reform of 1994 until 2015, after enactment of law No. 73 “of the tax system”, dated August 4, 1994.

In this context, we analyze the resolution No. 54 of 1995, from the head of ONAT; the resolution No. 23 “Regulation of the registration of taxpayers”, of March 24, 2006, issued by the aforementioned Authority, legal instrument, include statements such as the following:

- RC-07 registration or update registration of taxpayers of the tax ownership or possession of ships.
- RC-08 affidavit of support, co-owners or dependents.
- RC - 09 affidavit for cases of loss or loss and deterioration of documents.
- Census Statement.

From the improvement of the regulations for the self-employment, it became necessary to update the procedures relating to the registration of taxpayers, according to the new conditions for the automation and redesign functions of tax administration, carried out by repealing the above provision and its complement. The process was implemented with the entry into force of resolution N°113 “regulation of the registration of taxpayers”, dated October 26, 2010. This provision keeps mentioning statements such as:

- Statement of hired workers and co-owners.
- Statement of dependents.
- Statement of assets.

With some experience and a modest software development, we arrive at the dawn of the last and current tax reform. Law No 113. "On the tax system", promulgated on July 23, 2012, establish also the obligation to report or testify upon request of the tax administration[37], obligation[38] that again entered in the Decree No. 308 "regulation general rules and tax procedures", dated October 31, 2012. In all these legal norms the obligation is established with a general scope which does not delimit which information must be submitted, leaving it open to the requirement or regulation made by the tax administration. We need to clarify that it is only specified in of two types of statements when, exceptionally, which covers:

- Census Statement.
- Statement of assets.

It is curious that, both are framed in the scope of the taxpayers registry, but the scope of such statements is not legally defined, and it refer to a complementary standard which has still not been developed. It is perhaps one of the reasons why the control direction of the ONAT has elaborated provisional work instructions[39] transitional that not only support the procedures, but they include - in addition - requirements, requests and mandates for taxpayers' information on their economic, financial, property and personal relations. They also performed an act similar with third parties in the daily description of their functions, since all the necessary details the operation of business and taxpayers are lacking internally, to illustrate this we could quote some annexes, such as:

- Annex No. 10 Information request (model FIS-10 - 10)
- Annex No. 15 Third parties information request (model FIS-10-15)
- Annex No. 16 Control Report (model FIS-10-16)

Obviously, each country according to their experience and level of development establishes the form and timeliness of the presentation of mandatory statements, always in search of information of tax interest. They usually express data and rely on forms of assets, which can be to goods and rights within the national territory, as well as those assets owned by nationals abroad, as in the case of Spain. Their effectiveness is such that often they are the subject of articles in press or angry protests by specialized law firms that represent taxpayers, concerned to be

37. Law No. 113 "of the tax system", of July 23, 2012 date; (article 393, taxable persons are obliged to the following formal duties: subparagraph (b) keep updated personal and economic data that are entered in the register of taxpayers and present those required by the tax administration. Subsection h) submit returns, balance sheets, reports, certificates and other documents, in the form, terms and requirements established by law; and paragraph j) attend before the corresponding tax administration within the term that will cite them, and must provide the required information.

38. Decree 308 "regulation general rules and tax procedures", dated October 31, 2012. Its article 13, the tax control that performs ONAT are as follows. Subsection i) natural and legal persons require the delivery of data, reports and background with tax significance, derived from their economic, financial or professional relationships with other people. Article 19, taxpayers are required to submit, when so determined by the ONAT, a census Declaration which confirmed the collected main attributes in the register of taxpayers and other items of interest provision for tax administration. Article 26, natural persons carrying out economic activities, in the Act of registration State employees and the owners of their assets that are of interest to tax. Article 29, registered taxpayers filing at the request of the ONAT estate to the corresponding to his/her legal residence registry of taxpayers, as set forth in the standard that the purpose be issued. And article 30 regulates legal entities carrying out their activities in more than one place, subsidiaries and affiliates, are considered, for the purposes of registration, as major taxpayers, and are obliged to declare dependencies which are subordinate, that does not exempt to carry out the procedure of registration in the register of taxpayers of the legal domicile.
IT-26 "Control intensive for individuals", date of December 20, 2013. Methods and techniques proposed are not invasive, avoiding, as far as possible, the physical displacement of controllers to audit the business of the taxpayer and applying combinations of techniques such as crosses of information and analysis of databases; without definitively renounce physical control in certain sectors of taxpayers, according to their behavior or characteristics of the activity.

39. The obligation to provide information is essential in this new model of control. This can consist of: the data which the taxpayer should provide, including the presentation of accounting books and primary documents; and also the obligation that can impose on third parties who maintain or possess information with tax significance, linked to the topic that is processing Office.

detected by the tax administrations because of inconsistencies between the taxed income and the stated assets. This shows that the experience has been valid for other Nations, likely to be applied in our context as a tool of control and control, always ensuring the use and role of the computer in access, filling and processing of the information obtained.

3.2. The Statement of Assets in Cuba, elements of format.

It is an indisputable truth that the information is a useful value in any daily activity, in our case, in the collection of taxes is vital. It would be inappropriate to establish a system so complex and diverse statements information like the examples mentioned above, since our country lacks experiences in the implementation of such statements facing taxpayers and society, in general. The non-existence of a computing infrastructure accessible to everyone from anywhere in the country for tax purposes is a real limitation; In addition, the tax culture is currently in training. This does not mean not implementing it, progressively, on certain segments of taxpayers, until generalizing it. In our view, because of its high informality, diversity and level of non-compliance, at first, it should be implemented on all modalities of self-employment.

But, if it has been difficult to introduce into public policy-makers and citizens the awareness of the need to pay tax and their relationship with the principle of solidarity and justice, we must insist on the need to go implementing tools that strengthen other principles, no less important. The economic and tax capacity, which is no easy task but must begin with a step, the establishment of the statement of assets among the formal duties of taxpayers in our country.

Now, what elements would interested us as tax administration? A form containing all necessary data with tax significance for our activity could be elaborated, it is necessarily a teamwork, difficult but urgent. Therefore, I consider here some elements, which, in general, should be included in these assets information statements, and legal regulations to implement them, as follows:

a. The citizens compelled to submit this information would be individuals who develop self-employment, in any of its approved forms. It is important to define the subjects and their scope, as this provides transparency and legal certainty. Attainable by using standards and regulations, which implement and regulate the obligation to file information statements at the end of the fiscal year. It is also important that those provisions instruct the taxpayer and society of the progressive and general character of this formal obligation.

b. Indicate: Tax identification number, name and surname, tax domicile, home of residence, phone number and email, this last two data if available. These general data are fundamental to the location, communication, characterization and notification of the taxpayer.

c. Must indicate: Composition of the household, names and surnames, permanent identity or the tax ID number if already a taxpayer. Indicate the passport numbers, kinship, and if there is some source of income (salary, pension, or other). Separately but in the same section, if there are dependents, who do not live at home, which are economically dependent upon him, related: names and surname, identity number, passport number, address, relationship monthly amount of support, and way in which it reach them (money order, Bank, transfer or other). These data allow us to judge and verify the economic capacity of the taxpayer, those of others - taxpayers- that are part of the household, detect possible tax avoiders or evaders, have elements of judgment to grant agreement on deferral of tax debts, among other tax actions.

d. Must enter: passport number, amount paid in the fiscal year for tax customs or duties. This data would be crossed it with immigration authorities could offer the possibility of detecting potential taxpayers who have

contracts of employment abroad or those who exercise any activity (economic or professional) that receive undeclared income outside borders. In addition, tourism travel or imports[40] of products can demonstrate an income or consumed income indicator of economic and tax capacity.

e. Bank account number, Bank name, National branch number, or in any other country. Balance at the beginning of the tax year, for each quarter and the fiscal year-end (December 31). This fact has great relevance in the tax order; their control is easy and provides elements about the variation of income and income of the taxpayer. To achieve this it is imperative to raise awareness to public decision-makers and society, the feasibility and relevance of technical, operational and legal measures in the progressive penetration of monetary relations in the country and the society.

f. Gross amount from sales or services and the purchase of the tax year.

g. List of suppliers and amounts paid. These data allow us to get an idea of the evolution of the taxpayer, the activity and to control in both directions.

h. Listing of clients and amounts received, except for sale or services to detail with public, in which case shall indicate the gross amount of the sales or services. These data, as well as the previous paragraph, allow us to get an idea of the evolution of the taxpayer, the activity and to control in both directions.

i. Amount paid for power consumption (the Kw consumed should be recorded); water (regardless if obtained from network of aqueducts, pipes or other forms of sale); gas; coal (number of sacks or unit of measure); other fuel (with the unit of measurement). These data, as well as the previous paragraph, allow us to have an idea of the evolution of the taxpayer, the activity and are they are easy to control.

j. Transport vehicles number, registration, acquisition cost, document property, ownership (here also should be recorded the names and addresses of the owners, if they exist). If rented (indicate the monthly amount paid, name and surname, identity number or number of tax registration and the owner's address) or if it is contracted worker, brand, year of manufacture, capacity (passengers and/or cargo), type and amount of fuel consumed.

k. Number of boats, acquisition cost for each as ownership document, ownership (here also should be recorded the names and addresses of the owners, if they exist). If leased, monthly amount paid, name and surname, identity number or number of tax registration and address of the owner, or contract worker, folio and list of the boat, engine horsepower type and quantity of fuel consumed and their amount; capacity of cargo and/or passengers, year of manufacture, where it is registered and the place where it is based.

l. In restaurants, address, name (name or company name), number of chairs, used in the activity, work weekdays and opening time, square meters used in the activity.

m. Cafeterias, address, name (name or company name), amount of seats, linear meters of bar or counter (including tables for clients that consumes standing up, square meters used in the activity, weekdays and opening hours.

40. Government authorization is needed in Cuba to import, in the case of natural persons, is a cumbersome process that makes it almost impossible. However, certain modus operandi have been achieved by entering the national territory certain goods and parts which then have been detected in the operation of certain business services in the case of natural persons. Some activities such as the repair of internal combustion equipment and the dressmakers tailors, in the acquisition of supplies, parts and goods outside borders to flout laws and customs regulations. The so-called mules leave the country with currency and buy their luggage capacity of luggage in these objects that then resell in the country or are employed by solvents holders of some activities that pay for these trips to provide their business and resale. Also some artists - painters - benefit from this smuggling but in the opposite direction to position and sell their works in galleries and auctions of art abroad and repatriate the money, with this proceed they mock the withholdings that national enterprises should make to commercialize the works of artists and creators, obtaining substantial income without paying taxes. So it should be worked on regulations that prevent circumventng customs regulations and tax revenues or income obtained by different types of taxpayers.

n. Other businesses or activities, address, name (name or company name), brief characterization of the activity (type of offer or service and for which type of clients or media), square meters used in the activity, work weekdays and opening hours.

o. Movable property belonging to the business, breakdown by type, brand, year of manufacture, acquisition cost, State, if owned or leased (monthly amount paid, name and surname, identity number or number of tax registration and address of the owner).

p. Real estate property of the business, address, ownership (here also should be recorded the names and addresses of the owners, if they exist), value, and year of acquisition, or leased (monthly amount paid, name and surname, identity number or number of tax registration and address of the owner).

q. Number of employees, total amount in payroll (excluding the owner or owners of the activity).

r. Personal property (address of residence buildings, summer or country house (Beach area). Always entered in these cases: if it is owned (here also should be recorded the names and addresses of the co-owners, if they exist), value, shape and year of acquisition; If there are other durable goods, works of art, jewelry, or others. Always provide value, form and year of acquisition. This information is important, so it is must instruct the taxpayer to describe everything that legally is part of his assets, to which you a minimum amount must be stated. We estimate that you for this segment of taxpayers (TCP) and the regulations for payment in cash in our country[41], a reference value - appropriate - could be declaring the property from a value acquisition than the five hundred Cuban pesos.(25 USD)

s. Rights over intangible indicate the registration number and of any kind of copyright, active intellectual property, brand, and business sign, commercial or similar. In the register of Cuban individuals, of this kind of assets in the national Office of intellectual property tends to grow and the copyright of closely linked to the exercise of economic, professional and creation activities (including artists). The existence in the country of these types of official records, organized and adequately computerized allows crosses of information between them and the tax administration, easy verification of the statement and control of the taxpayers.

t. Must register: accounting services, advice or management, if the taxpayer covers them himself or use hired professionals. If hired, enter: name and surname if it is an individual; denomination or company name if it is a legal entity; tax ID, number of identity card or passport; home legal and habitual residence; (e) monthly or any amount paid for the service.

u. Must register: legal services, legal advice or representation[42], if the taxpayer covers them, or if he hires a professional. In this case enter: name and surname if it is an individual; name, denomination or company name if it is a legal entity; tax ID, number of identity card or passport; home legal and habitual residence; (e) monthly or any amount paid for the service.

41. Resolution No. 101 "rules Bank for the collections and payments", dated 18 December 2011, issued by the Minister President of the Central Bank of Cuba. In chapter V, standards for the payment of the Cuban legal entities to individuals, in its article 24, first paragraph, has: the payments from the Cuban legal entities to individuals authorized to exercise self-employed activities, small farmers who legally prove ownership of the land and individuals authorized to exercise other forms of private economic activities are paid in Cuban pesos. They use the instruments of payment and securities defined in chapter II, and applying the ranges of values specified in article 16, both of the present resolution. In article 16, it regulates, Cuban legal entities in their contractual relations used instruments and securities defined in article 2 of the present, according to the ranges of values specified in the following tables: Cash (expressed in Cuban pesos) up to 500 pesos... The second resolution provides that this resolution is applicable to payment obligations resulting from non-contractual relations between the subjects of this standard.

42. In this case refers to the representation before courts or Attorney in the filing of appeals at the tax admiration.

Broadly, these are the general minimum attributes that should be part of an initial prototype of statement of assets of the taxpayers in our country. It may seem complex, but actually, their value lies in adherence to the truth by the declarant, who will only fill the squares that are suited to their economic and legal reality in each fiscal year running.

The implementation of returns, in design, must be in form type, with spaces well identified with numbers, grouped into sections by related data and accompanied by an instruction that facilitate their completion by taxpayers. They must include the characteristic warning than what is stated is conform to the truth and makes aware of the legal and economic effects of a sworn statement if it is not truthful. It must conclude with the full name and the signature of the taxpayer or his legal representative to the tax administration.

Parallel to this, a computer application service that allows storing and creating a database to obtain reports and analysis of taxpayers must be created.

The successful use of this information depends on crossing it with different registries, banks, databases, third parties and other institutions existing in the country, so it is necessary to sign agreements for the supply and information crossing. We must try find applications integrated in information technologies and compatible with the systems used in the country; in the future remote access to those databases from all our offices to the length and breadth of the entire territory must be possible and that taxpayers must be able to prepare and digitally send their assets statements.

4. CONCLUSIONS

We could verify that the tax administration ignores the assets situation of self-employed workers. The segment self-employed taxpayers have successfully hidden their assets, part of their real earnings and therefore their real taxpayer capacity, to the detriment of their obligation to contribute in proportion to the income obtained and the increase of their assets. These evasion practices are a product of the large informal sector, the large number that integrate it, poor scanning and penetration of the monetary business operations in the society and without an administration with appropriate tools to obtain the important tax information using as a source the taxpayers themselves or third parties, despite that such possibility is legally established.

The conception, design and implementation of a tool as the statement of assets of the self-employed, can reverse or mitigate this lack of information. To provide the tax administration with information enabling it to assess the variations of the assets of this segment of taxpayers. It would be difficult to challenge this information against the actions of the TA since it is provided by the taxpayer himself, checked and authenticated with the information of third parties; with as added value, the creation and updating of database of taxpayers and their economic activities or business.

As a tool, its application is likely to be extended to all taxpayers, according to their characteristics. The statement of assets would be the document that certifies the personal information provided by each taxpayer to the tax administration. This statement would respond to the needs and interests of different areas and functions of the Cuban tax administration (ONAT), such as Registration of taxpayers, Collection (debt management and fiscal control), and the Legal Department.

5. RECOMMENDATIONS

To the Main Office of ONAT:

- Intensify negotiations with collaborating entities, registries, banks, offices of the industrial property and copyright, national Office of statistics and information, Chamber of Commerce, agencies of the Central Administration of the State, and others useful entities to sign the necessary collaboration agreements and establish the crosses of information of tax significance.
- Introduce the statement of assets as a formal obligation of self-employed workers, with the prospect of extending it to the universe of taxpayers registered in an approved timeframe, and later the periodic evaluation of the effectiveness of this tool.
- Adopt a strategy that enables the scanning of exchange and crossing of asset information and all type of tax interest data from self-employed workers.
- Integrate within the tax control strategies, the request for the statement of assets with the aim of fighting and reducing tax evasion in segments from taxpayers linked to the informal economy, prosecuting non-compliance with tax obligations.
- Develop software tools that detect economic variations of taxpayers from the data provided in the statement of assets.
- To systematically evaluate the results and improve the content of the statement.
- Develop computer tools enabling the taxpayer to fill and send their assets statements of assets electronically to the offices of the tax administration from their tax domicile.

Operational recommendations are as follows:

- Evaluate the proposal in the Technical Advisory Council Office, correction and immediate implementation. Perform the relevant consultations with the Ministry of finance and prices of the Republic of Cuba.
- Extend the investigation to all offices in the country from its presentation and validation in the TAX FORUM, registering and evaluating objections about this tool.
- Eliminate the deficiencies identified in the conception of the asset statement.
- Develop the regulatory provision that approve and put into force the statement of assets, by publishing it in the Official Gazette of the Republic of Cuba for its general and public knowledge.
- Include and regulate in the Manual of standards and procedures of the Office for application in all country offices.

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43. Las leyes, Decretos-Leyes y Decretos, fueron organizados atendiendo al orden jerárquico de la norma.
44. Resolutions of same normative ranking were sorted in chronological order.

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COMBINING DATA AND TECHNOLOGY WITH ANALYSIS, STRATEGY, OPERATIONAL PLANNING, EDUCATION AND IMPROVED ENFORCEMENT ACTIVITIES TO IMPROVE TAX COMPLIANCE

Paul Panariello and Tom Heinz

SYPNOSIS

This article presents best practices and proven, effective activities used for improving tax compliance. It provides information on how data and technology can be used to create a foundation to support enforcement as well as other essential elements used to improve tax compliance The other essential elements include development of an agency compliance strategy; implementation of operational plans; and understanding and addressing the outreach and educational needs of taxpayers.

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Content

The Large Complex Issue of Noncompliance

Reasonable estimates indicate that the overall scope of noncompliance is as much as 10% to 20%, or more, of the voluntarily reported tax base. Unfortunately for tax administrators, the problem is not only large, but complex. There will always be a portion of this revenue that is not collected; however experience has proven that with data analysis and the implementation of an agency plan to improve compliance enforcement activities, including education, significant positive results can be achieved.

In January, 2012 the United States Internal Revenue Service (IRS) released a new set of personal income, withholding and corporate income tax gap estimates for tax year 2006. (IRS, 2012) The tax gap is defined as the amount of tax liability not paid on time. The voluntary compliance rate — the percentage of total tax revenues paid on a timely basis —for tax year 2006 is estimated to be 83.1 percent; statistically unchanged from the most recent prior estimate of 83.7 percent calculated for tax year 2001.

To further support the depth of the noncompliance problem, in April, 2012 the United States Government Accountability Office (GAO) issued a report "Tax Gap: Sources of Noncompliance and Strategies to Reduce It." (GAO, 2012) Some of the findings and conclusions included in the report are summarized below.

Noncompliance does not have a single source, but occurs across different types of taxpayers and taxes. For example, individual income tax accounts for the largest portion of the tax gap, but corporate income tax and employment tax are also significant contributors. [Note - at the federal level, the United States does not have a value-added or sales tax which is administered at the state level]. Individuals misreport business income, non-business income, deductions and credits. The extent of misreporting depends on the extent to which income tax is withheld or reported by third parties to the IRS. Nearly 40 percent, or $179 billion, of the 2006 gross tax gap is due to misreporting of non-corporate business income and related self-employment taxes. This includes sole proprietors under-reporting receipts or over-reporting expenses.

Although not part of the GAO report, there is general agreement from tax administrators that other noncompliance can be categorized in the following areas:

- For corporate income tax, a high percentage of adjustments come from technical issues including abusive tax schemes and avoidance transactions; claiming inappropriate and excessive credits; compensation vs. corporate distribution; as well as under-reporting of income and receipts through various schemes.
- For employment taxes the largest issues are non-reporting of employees ("off the books" cash payments to employees) and misclassification of employees as independent contractors.

The voluntary nature of tax compliance also requires businesses selling goods and services not only to collect applicable taxes, such as US state sales and use taxes (SUT) and national value-added tax (VAT) from their customers, but to accurately report taxable sales and remit those collections to tax agencies. Some common examples of noncompliance by businesses include:

- Conducting business without proper registration and tax licensing and not collecting or remitting any taxes on taxable sales.
- Collecting taxes from customers, but reporting to the agency less than actually collected.
- "Skimming" some sales (particularly cash) and not reporting them, and, similarly, also excluding them from gross income for income tax purposes.
- Avoiding paying tax on the items purchased by incorrectly reporting them as exempt.
- Unintentionally reporting and remitting lower tax than due because of lack of understanding of often complicated tax laws and rules.
- Omitting or reducing the appropriate payment of income-based taxes by carrying the non-reporting and under-reporting described above through to the income tax return.

Customers responsible for paying SUT and VAT are sometimes also part of the problem, intentionally frequenting businesses that operate without collecting or paying taxes. Individuals also knowingly or unknowingly avoid their obligations by purchasing from Internet-based or out of country/state sellers who do not collect taxes.

Government agencies are being asked, even required, to do more, to be more effective, and to function more comparably to a successful business. Tax and Revenue agencies have not only heard these calls, but have sought to implement solutions, that have as their end point an increase in voluntary compliance and increased collections of unreported and unpaid taxes.

Essential Elements to Address Noncompliance

To reduce the large percentage of noncompliance, and collect a larger portion of the unreported and unpaid lost revenue, one should look at the best practices that are working in other Tax and Revenue agencies. These practices can be categorized into four essential elements as follows:

1. **Data and technology foundation:** Data and technology, working together, provide the necessary infrastructure for reporting, analysis and data-driven decision making throughout the agency and are necessary to support and enhance the remaining elements of the solution.
   - Data-driven decision-making is essential to resolving noncompliance and must become commonplace in all areas of taxation.
   - The technology required begins with a full-function data warehouse.
   - Building on a data warehouse with business intelligence reporting tools will also positively impact all aspects of good tax administration including tax policy analysis, economic and revenue forecasting, understanding filing trends and error rates, and identifying education needs as well as improving audit and collection activities.

2. **Analysis, strategy and operational planning:** In order to identify opportunities to improve compliance, agencies need to make a detailed analysis of the data, develop an agency compliance strategy and use operational plans to focus limited resources on those areas of noncompliance at the cross-section of where the agency has the best data/analysis (e.g., certainty of noncompliance) and at the noncompliant taxpayers who are most in need of attention (e.g., most egregious).

3. **Outreach and education:** Agencies should not expect compliance to improve without providing taxpayers the information needed to properly comply. Outreach and education are the least costly ways to improve compliance. Securing compliance after the fact is significantly more costly than addressing the problem before it occurs.
   - Data and technology helps identify who will benefit most from education and outreach assistance.

- Analysis identifies effective ways to educate and influence those who may not know they need help and assists in preparing a sound operational Education Plan to focus on key, low-cost compliance improvements (e.g., new forms/instructions, outreach letters to new businesses, etc.).

4. **Improved enforcement activities:** There will always be a need for enforcement activities. Audit, collection and other enforcement activities do contain elements of taxpayer assistance but they also use incentives (additional tax assessments as well as penalty and interest) to encourage future compliance. Based on the high percentage of resources and agency budget devoted to enforcement activities, and the high amount of additional revenue that can be collected through enforcement, agencies must be effective in these activities.
- Data-Driven Compliance - Data must become commonplace in all compliance related activities.
- Technology Enhancements - Available technology must be used to streamline the audit and collection process from selection to automated actions (e.g., letters) to case management; to increase and improve automated decision making (e.g., risk scoring to determine the next best case/action); and to provide the supporting technology tools to improve compliance management (e.g., case tracking).
- Data Matching and Queries, Segmentation, and Decision Analytics - Advanced selection, identifying the right audits and identifying effective treatment of collection cases needs to be improved.
- Agency Strategy and Operational Plans - "Plan the work and work the plan." Planning will help to iteratively identify opportunities to improve and help set goals to monitor the progress toward improvement.

Purpose and Content of Article

This article provides best practices and proven, effective activities used to increase compliance. It provides information on how data and technology are critical to improving enforcement and preventing or stopping negative trends. What is different today is the amount of data available to an agency, the tools to aggregate the data, the techniques to query (or "mine") that data, and the case management tools to automate the follow-up and recovery of revenue. Combined, the data, the selection and case tools enable agencies to maximize their reach with fewer resources. Data and technology not only provide the foundation for improvement but significantly impact and support the remaining elements including: formulating an agency-wide strategy to address noncompliance; development of targeted education initiatives; identifying compliance activities that can be improved; and, results and performance reporting across the agency.

The "soft" activities used to improve compliance, including development of an agency compliance strategy, implementation of operational plans for all units involved in compliance related activities, and, understanding and addressing the outreach and educational needs of taxpayers to better comply, must all be respected.

Enforcement actions are much more costly compared to education and outreach, however stepped-up and improved enforcement activity is required to improve compliance. All tax agencies are not at the same level of tax administration, but by embracing the four essential elements and best practices discussed, tax agencies can achieve higher enforced compliance revenues and increased compliance.

Data and Technology is used by savvy marketers to segment and target their customers to increase sales. Tax and Revenue agencies must do the same to improve tax compliance.

Tax and Revenue agencies need to have the same quick, unconstrained access to the right information. This includes access to data identifying new businesses and individuals first entering the workforce, so agencies can educate them about their tax obligations. It also includes assisting those businesses and individuals who want to do the right thing while aggressively enforcing tax laws for those that commit tax fraud or are tax evaders.

To be successful, data and technology must work together to take full advantage of automated decision making and to provide relevant data to auditors and collectors to ensure timely and correct decisions.

1. DATA AND TECHNOLOGY FOUNDATION

Tax agencies need to go beyond using only what the taxpayer tells them through the registration and filing process since noncompliant taxpayers provide little or no information. Therefore, agencies must secure and aggregate data from a variety of sources to assemble a "portfolio" about the taxpayer to determine their tax obligation and payment capacity.

Industry Leads Effort - Tax Agencies Need to Move in Similar Direction

As it often happens, industry is leading the effort in using data and technology to improve operations and business. Progressive tax administrators know they need to follow this lead. This includes:

- Use of Data and Information - The amount of data in our world has been exploding, and analyzing large data sets is becoming a key basis of competition, underpinning new waves of productivity growth, innovation, and consumer surplus, according to research by MGI and McKinsey's Business Technology Office. Current uses include healthcare and retail in the United States, the public sector in Europe, and manufacturing and personal-location data globally. Tax agencies must increase their use of available data.
- Embrace and Benefit from Technology - What has happened to the newspaper and periodical industries, and the record industry? How many of us still use travel agents? Technology will continue to change the world as we know it along with our ability to acquire and use more data. We have much more data and we acquire it in a much more efficient way but we can be overwhelmed by the data and the "noise" that goes with it. Available technologies must be used by agencies to maximize the benefits of having the data. Tax agencies must use data warehouses, business intelligence tools, advanced and improved workflow and automation, and robust case management systems.

Savvy marketers already use data and technology to identify new populations of customers and potential customers, and successfully market

to them. Tax and Revenue agencies are not effectively finding new businesses at startup or new workers entering the workforce. Yet identifying and educating them is critical – on the new taxes they must collect and pay, and how to correctly report.

Data and Technology – Ten or more years ago, if you asked an auditor or collector what they most needed to improve results they would probably have said, "I need more data and information about taxpayers." Today if you ask the auditors and collectors the same question they will probably say, "I have too much data to look at."

Technology, including a full-function data warehouse and business intelligence tools, must provide timely, unfettered access to necessary information. Technology must be used to ensure staff has the pertinent data, aggregated in a way that is easy for auditors and collectors to use and quickly discern for prompt, appropriate decision making. Successful compliance management must provide the ability to apply the right compliance action, to the right taxpayer, at the right time, through the intelligent use of information.

Data Driven Decision Making

The key to effectively managing and improving compliance programs and performing other revenue data analysis is to first understand the individuals and businesses in an agency's jurisdiction. This requires the use of more data and storing the data in a structured and accessible manner. The well-organized, efficient aggregation of data in a data warehouse will enable an agency to reshape its enforcement operations to successfully address non-registrants, non-filers and under-reporters.

To improve compliance, agencies should emulate businesses use of data to drive decision making, including use of multiple, specialized sources of data. Identifying individual income tax non-filers has traditionally meant looking at past year/period filings and sending soft letters to those that did not file for the current year/period. Agencies should now be adding to prior year filing information using multiple, relevant data sources including data from other government agencies, i.e., data from the government's labor department (wages and unemployment tax information) and motor vehicle and licensing agencies (residency and assets) as well as the private sector and commercial data (the information that taxpayers do not provide to the agency). For business taxes, there are many commercial data files focused on specific industries including construction, retail and manufacturing. When there is a need to target a particular industry group the agency should first understand the data available that will provide agencies the best opportunity to identify non-filers and under-reporters. The more relevant the data is the more reliable the resulting decisions and enforcement actions will be.

Agencies already have access to significant data including agency demographic and tax return data, and possibly to other government agency data (motor vehicle licensing and registration, quarterly wage reports, government and professional licenses). In the United States, state tax agencies make extensive use of pertinent and useful IRS data through the federal-state exchange program. The more data the agency has aggregated about a business or individual, the stronger the agency's position will be in making decisions. By using multiple data sources, non-filer and other enforcement efforts

will be vastly improved over traditional "single data source" approaches.

During the last 10 years, the cost of acquiring and storing data has been drastically reduced. This is a result of electronic filing of return data, the lower cost of storage servers, and abundance of low cost commercial data bases. Programming costs are also significantly reduced as there are tools to cleanse, match, load and analyze the data – far better than in the past. Modern computer architecture has made it much easier to share data across agencies also making the data exchanges more timely and less time consuming. One example of how CIAT members, including Brazil, Spain and Mexico, are using additional data to improve compliance is their requirements to have businesses electronically submit their sales invoices to the agency. Once the data is aggregated the information can be used to identify non-registrants, non-filers and under-reporters for the Value Added Tax as well as other business taxes.

With this greater volume and access to data, security and confidentiality of data must be maintained. Agencies need to aggressively protect the data to ensure taxpayer trust. Not only must the data be protected from hacking and outside intrusion, it must also be protected internally to ensure that only those who need access to perform their duties are given such access. This security and confidentiality protection can be accomplished using the data warehouse and security controls that are part of the full-function data warehouse structure.

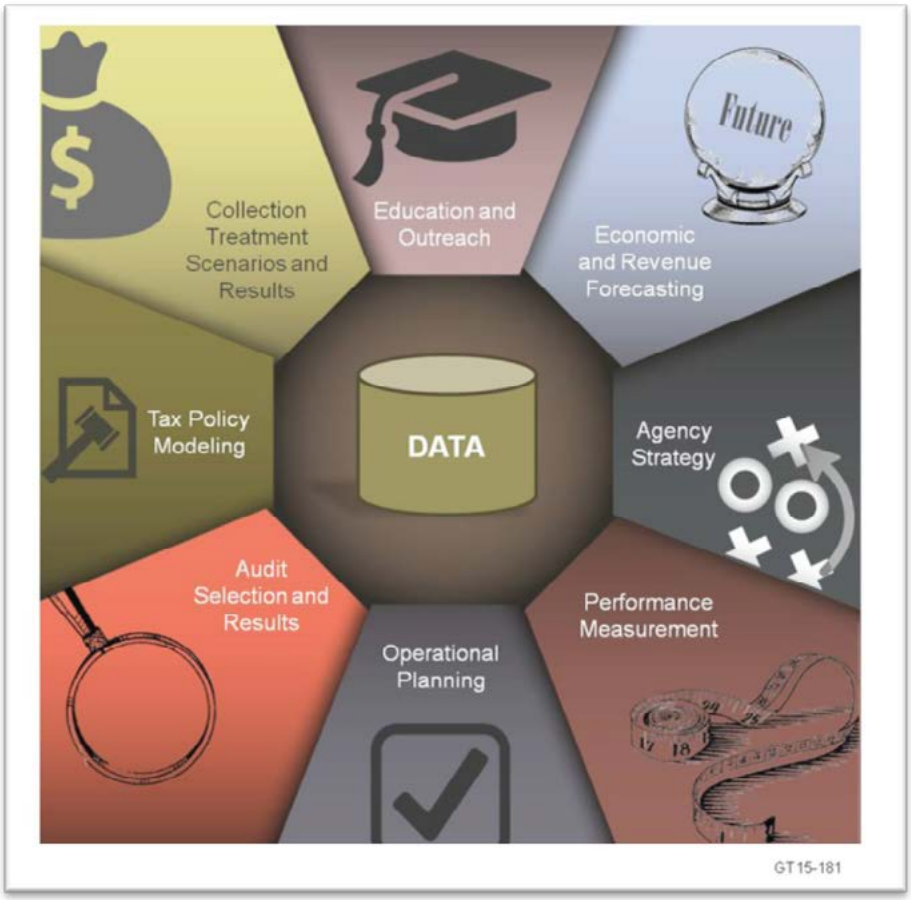
Key Technology - Full-function Data Warehouse and Supporting Processes

Agencies must leverage advances in technology to assemble and use more data. This starts with a full-function data warehouse to facilitate the cleansing, matching and loading of data and the use of business intelligence tools to maximize the analysis of the data. Access to the appropriate relevant data must be timely, easy and secure. Automated access must be used where possible to provide instant decision making.

Data, by itself, has no value unless it assists in automated or quick decision making. This requires that the data be properly aggregated and categorized for efficient access. A full-function data warehouse will provide the proven data foundation for analysis by structuring agency data, shared government data and third-party data sources in a flexible data model organized around taxpayer "portfolios" of data. This approach is used to store historical and ongoing data from tax return processing and collections systems, as well as non-tax data, so the data is well structured and fully accessible to support the data-dependent processes of the solution – from analytical modeling to reporting to ad hoc analysis. This data aggregation is possible using advanced data warehouse technology.

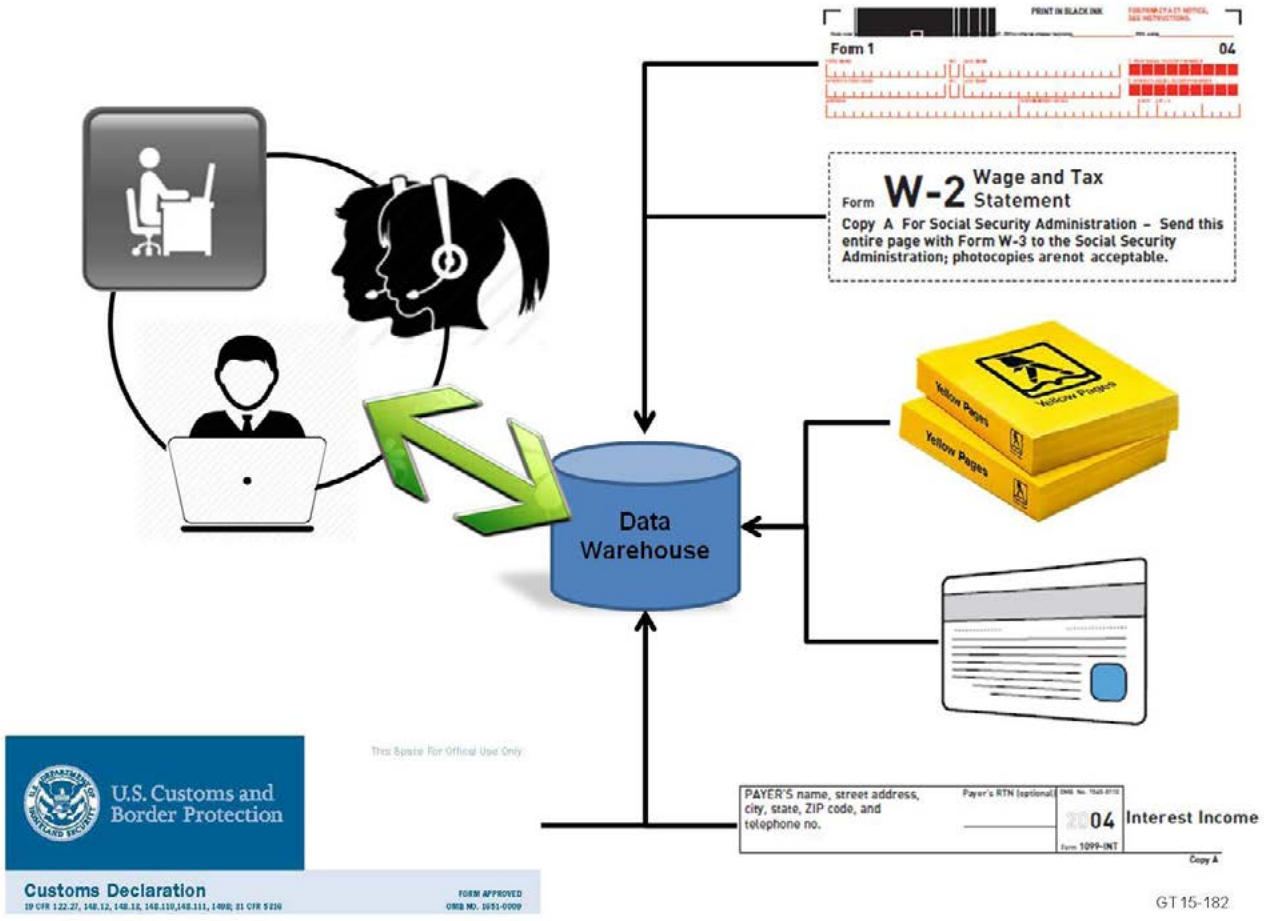
Using this technology can simplify the data loading process as well as provide standardization and synthesis of multiple sources of data to create a more complete picture of the businesses and individuals. It enables end-users to efficiently inquire and interrogate the information for analysis, planning and working all compliance programs. A full set of inquiry screens allows users to view all entity data, down to the tax return line item. It is used to present "views" of the taxpayer portfolio data to auditors and collectors as they research cases. The warehouse is used to include additional external data to enrich the predictive behavior analysis. Conducting peer analysis and examining how a particular business may deviate from standards and norms from similar businesses operating in the same industry can identify outliers where a business may have obtained a competitive advantage through tax avoidance. A full-function data warehouse will also provide a tax calculation function, i.e., computing what the taxpayer should have paid in tax, to aid in the selection of the best non-registrant, non-filer and audit candidates.

Figure 1
Data and Technology Working Together to Support Agency Operations



Building a solid data and technology foundation via a full-function data warehouse will positively impact all aspects of good tax administration including tax policy modeling and impact analysis, economic and revenue forecasting, facilitating a better understanding of trends and changes while they are happening, developing a strategy and operational plans to address noncompliance, identifying education and outreach needs, and improving compliance related activities (Figure 1). With data mining tools, a warehouse can identify a gap in taxpayer awareness among segments such as specific individuals or communities of interest (e.g., using same preparer, abuse of credits, geographic location) to assist the agency in strategy development and planning. Full-function data warehouses provide a case and correspondence component that provides case workers with a full view of a taxpayer's demographic and financial data aggregated from multiple sources, thus giving them the ability to more carefully and accurately serve the taxpayer (Figure 2).

Figure 2
Agency-wide Access to Aggregated Data in Warehouse



By following successful private sector mass marketing techniques, revenue agencies can build customer "portfolios" with data from a variety of public and private sources. Agencies can analyze these portfolios to find non-registrants, non-filers, under-reporters and fraud. For example, if a business has multiple commercial vehicles but reports few employees, should this be a concern? With a full portfolio, this analysis becomes easier.

For past due accounts, it is critical to continue to improve collectors ability to locate delinquent taxpayers, identify assets and improve overall compliance and collections management. For collection operations, taxpayer research, skip-tracing, income determination and asset location are mission critical components to ensure successful account resolution. For the collection of business taxes, the ability to identify and manage taxpayer relationships (i.e. responsible individuals) is an essential part of effectively resolving that tax liability. Consolidation of internal and external agency data is the foundation of an effective collections system. Technology supports improved collection by building comprehensive taxpayer "portfolios" containing key data used by collectors and allowing both the users and

system to leverage the data to drive collections management.

The agency can examine taxpayer portfolios to determine if the taxpayer is in full compliance. Agencies can use expanded data to automatically bill the taxpayer if there is clear non-filing or a discrepancy is undisputable. Alternatively, the taxpayer can be selected for a desk audit conducted through correspondence and telephone calls, or could be selected for an onsite, in-depth field audit. Through analysis and planning the agency should look to prioritize activities and cases based on the most effective method to address the problem, i.e., achieve compliance. It is much more cost effective to send an automated letter than to conduct a field audit, but when will letters achieve compliance vs. when is a complete field audit necessary. System support for workflow and billing using the data for effective correspondence audits can greatly increase the reach of the agency and educate and collect past due taxes. The portfolios in the full-function data warehouse also provide the foundation for using data mining and business intelligence tools that enable the performance of complex queries for purposes of revenue estimation, econometric forecasting, fulfill information requests and identify taxpayer education needs in areas of noncompliance or in response to changes in tax laws.

Effective data mining can be accomplished in three ways – Data Matching and Queries, Segmentation, and Decision Analytics. All of these methods are used in advancing audit selection and determining treatment scenarios for collection cases.

- **Data matching and queries.** Once the data has been assembled, an auditor can write a query or use standard stored queries to match certain data and detect abnormalities. As part of this process derived data elements (computation of differences, key relationships and ratios or percentages) can be used to add value and help pinpoint good cases. These queries can be developed without programming to create lists of taxpayers who meet certain criteria. For example, provide a list of all business taxpayers who filed an SUT or VAT return for the previous year, have payment of wages but did not file their latest SUT or VAT return.
- **Segmentation**. Segmentation is a practice long used in the private sector to better understand, track and interact with customers and should be applied in taxation. Rather than looking at all businesses or individuals the same, they should be grouped and managed in segments of like attributes. Segmentation enables peer group analysis and assists a tax agency in providing better services and programs to a segment and to increase and monitor overall compliance within a segment. For example, did this educational mailing have an impact on a particular audit program? By segmenting, agencies will better understand and create strategies to attack the tax gap.
- **Decision analytics.** Decision analytics techniques develop risk scores similar to "credit scores." By analyzing vast amounts of historic data, one can develop an understanding of the "attributes" or "patterns" which are predictive of a future behavior. For example, collection risk scores can be developed by using advanced statistical modeling to understand which taxpayers, who have not fully paid their tax return, will eventually pay without needed enforcement actions (low risk) versus a taxpayer who needs coaxing (medium risk) or a taxpayer who is not likely to respond to enforcement actions (high risk). By separating taxpayers into different risk categories, collections resources can be better assigned resulting in increased collections. A first-time delinquent may respond to a letter, whereas a habitual delinquent taxpayer should be handled more aggressively, immediately. By not calling low risk taxpayers who will self-cure within a reasonable period and applying those resources to medium risk cases, an agency will collect more of what is due. For high-risk cases, after immediate, aggressive collection

efforts and no results, mailings continue but alerts (notifications to specific units) are issued when a new address or levy source is identified. The alerts trigger immediate enforcement actions using the new data. This collection risk scoring technique has been used for decades in the private sector. Collection results from using analytics have resulted in increases of over 20% and as high as 40%. The same technique can be used to focus audit selection to better pinpoint taxpayers who likely under-report and not select taxpayers who likely paid in full and should not bear the burden of an audit. For audit, use of scoring has led to an increase of 20% or more in audit productivity while at the same time reducing "no change" audits.

The data warehouse must be equipped with or interfaced to a case management and correspondence system. Secure inquiry into the system should also be available so examiners and support staff can respond to taxpayer inquiries. For example, consider the taxpayer who disputes a use tax or VAT bill based on an overseas purchase. The examiner looks into the data warehouse and details the purchases and originating places of export from the customs data (Figure 2).

Together, a full-function data warehouse, data analysis and supporting tools, e.g., case management, will enable the streamlining of processes, improving workflows to reduce resource commitment, automate decision making, provide case management assistance and in general reduce the staff resource commitment to improve compliance.

Streamlining compliance-related processes includes case management and workflow capabilities that administer the process of creating and tracking cases, such as noncompliant leads. Today's technology can prompt or automatically take actions to accelerate the progress of cases from identification through final resolution and billing. For example, case management systems are being used for automated correspondence programs. Using the data warehouse and selection techniques detailed above, a taxpayer's non-filing or under-reporting can be more precisely determined and a bill created and mailed. In addition, some agencies are leveraging virtual office concepts and developing case management systems that securely "check-out/check-in" cases for a field auditor so they have all the information needed to complete the audit while at the taxpayer's location. Through these systems, significant productivity gains are realized because auditors have all necessary information without taking the time to make calls or do printouts and can create a bill and share their audit workpapers and findings with a supervisor. The supervisor can see the case information from the central office, without faxing or phone calls. Field collectors too are able to have full access to all the information they need to work a case in the field.

Cases should be automatically created or created manually upon user request from the lead selection process. Offline processes should manage the configurable case workflow based on triggered events or case attributes, such as elapsed time, case status and dollar amount. Each case file includes a complete history of user assignments, case status, case actions, contacts and case notes. Case management and workflow technology provides agencies a robust case management system and integrated tracking tool for case processing for all case types and sub-types (e.g., discovery,[1] refund reviews, audits, collections, outreach, etc.) with specialized functionality that extends the common service to meet the specific needs of a particular case type (e.g., managing Statute of Limitations on an audit case, managing Payment Plans on a collections case, managing automated assessment calculations on a discovery case, etc.).

1. Term used in the US to describe a type of case reflective of a business that is not registered for a tax type that they should be registered for and filling returns.

To conduct more low cost audits using the available data, agencies need to expand automated decision making and implement more automated workflows. The days of "automatically approving refunds less than $1,000 because they are not worth working and/or requiring manual review of all refunds greater than $25,000" are over. Such judgmental rules following agency practices and embedded in business processes should be re-evaluated and replaced with statistically based decisions. Treating taxpayers "uniquely" based on their specific facts enables improved decision making. Using all available data in predictive models allows decisions to be made based on the unique attributes of the taxpayer.

Using collection of outstanding debt as an example, technology needs to use available data to accurately identify taxpayers' current addresses, taxpayers' assets and, for businesses, the identification of responsible individuals. The collection case should consist of a single electronic case folder that contains all the needed information including taxpayer history, financial information, assets and taxpayer submitted records that are relevant to locating the taxpayer and collecting the outstanding debt. Technology links the data to the case folder to seamlessly allow skip-tracing, asset identification, responsible-person management and management reporting. Using the aggregated data of the taxpayer, the technology will help drive enforcement activity through searches, both automated and manual, the generation of automated or manual property liens and bank levies and when required the release of such liens and levies. Robust case management will help manage the work across the agency including case assignment, defining effective workflow, automating actions, providing messaging and alerts and following approval and case-closing rules. The engagement of data and technology will significantly reduce manual resources required to complete cases.

It is hard to go anywhere these days without interacting with someone in business using a mobile device including returning a rental car; ordering food while at your seat at a sporting event; or having retail employees check warehouse stock without being bound to use a register/computer in a certain area of the store. Mobile devices are being used because industry has learned that the power and benefits of using a computer should not be available to only their employees that are tethered to a workstation.

Although some agencies are now using mobile devices, all agencies should be following the industry and using a robust mobile tool containing as many time saving functions and features as needed to support auditors and collectors. For audit, this means having a portable device with functionality to:

- Define templates for audit letters, adjustment schedules, worksheets and forms yet allow auditors to customize templates based on audit situations while still providing standard audit results reporting.
- Support various data import channels for electronic records and time saving features for keying data when electronic records are not available.
- Connect to various supporting resources such as policy and legislative repositories, external web sites or audit operating procedures.
- Attach external files obtained during the course of an audit, including database files, PDF files and any other file types.
- Support multiple block-sampling methods and projections. Also support statistical sampling providing a step-wise wizard approach to the sampling process including ability to connect to a variety of data sources for defining the sampling frame; establishing administrator control of all parameters of the sampling methodology; a detailed log of each and every step of the sampling process and sampling parameters utilized to generate the sample; seamless integration with audit workpapers; and, automatic generation of projection schedules.

Benefits of Combining Reliable Data and Current Technology

Progressive tax agencies worldwide are evolving to data analytics to improve compliance, revenue analysis and customer service. For the past two decades, revenue agencies spent their limited resources on information technology projects to centralize and expedite processing. Decreasing the volumes of paper, accelerating refunds and improving tax accounting were the mandated priorities. Through imaging and optical character recognition technology, integrated tax systems, electronic filing, e-commerce and customer self-service over the Internet, these goals have been realized. Progressive agencies have changed their focus to use enormous amounts of electronic data to locate noncompliant taxpayers, explain changes in anticipated collections, analyze tax policy and predict taxpayer behavior.

The value and power of successfully aggregating and using data has been seen in numerous examples including individual income tax non-filer and "Lifestyle" programs.

- For individual income tax non-filers, agencies that use multiple data sources have sent fewer letters resulting in fewer false positives and higher revenues because they have focused their efforts on the true non-filers and provided taxpayers with specific information on why they must file a return.
- For programs based on predicting taxpayer lifestyle, the warehouse is used to compile and analyze the data to determine non-filers and under-reporters based on multiple criteria. For example, how can an individual have high year to year mortgage payments, own high-priced vehicles and yet regularly report minimal income from a business as their only source of income?

Using the data and technology available, agencies can implement very innovative programs. Agencies are currently analyzing online classifieds, e-commerce and social media sites to identify buyers and sellers of items without appropriate payment of SUT or VAT. Utilizing Open Source Data similar to eBay, Craigslist, etc. not only identifies cases for correspondence and field audit but also identifies fraud and criminal activity, e.g., thriving, long-term businesses that have been operating without any previous knowledge by tax agencies.

A full-function data warehouse populated with multiple data sources provides support for:

- Business intelligence and data mining applications providing ability to support complex queries and analysis.
- Automation and expansion of multiple efforts across the agency including tax compliance audit programs and collection activities.
- Improved and automated procedures used to detect fraudulent or erroneous refund requests under the individual income tax program.
- Data mining and business intelligence tools to enable the performance of complex queries for purposes of revenue estimation, and econometric forecasting, fulfill information requests such as the effect of changes in tax law, and to identify taxpayer education needs.
- Establish an extensible and scalable platform that will support additional business intelligence functionality as new objectives are identified.

Rightfully receiving more attention today is the use of data across borders. Technology supports aggregating multi-agency (country and states) data to address specific compliance issues to address cross-border sales and transfer pricing issues.

Historically, agencies only shared data with a few of their bordering states or countries. This traditional solution is inadequate due to the following.

- Due to a lack of data exchange standards, the work effort for each agency is a time consuming process. Considerable effort is

required for an agency to develop programs to extract the data to be exchanged and to handle and match data received. Each agency needs to develop and perform verification, cleansing and validation services. The more agencies involved in the one-to-one data exchanges, the more cumbersome and time-consuming the process.

- The process is sequential in nature, resulting in only a few states or countries receiving attention. Each tax and revenue agency needs to share data with an increasing number of agencies because the workforce and economy continues to become more virtual, mobile and borderless. More agencies need to be involved in these exchanges, outside of just those bordering one another.
- Most agencies are not sharing this data in a routine, comprehensive way. This results in missed opportunities to address compliance issues including unintentional errors and purposeful evasion.

The current Multistate Clearinghouse in the United States is a good example of using technology to support the collaboration to share, aggregate and analyze information stored in a secure data warehouse environment (hosted at a secure state data center). The purpose of the clearinghouse is to identify inter-state noncompliance on individual income taxes and includes the matching of individual income tax returns from participating states using a data warehouse. Participating states collectively exchange data and identify noncompliance cases with greater efficiency than attempting to coordinate multiple state-to-state exchange programs.

The Clearinghouse provides single input and output data exchange standards (i.e., common file layouts) enabling efficient participation and faster sharing of data with all other states that wish to participate. Over time, the project's scope could expand into other compliance areas where there are similar advantages to sharing information through a centralized, standardized "hub." The output provided to participating states currently covers identification of taxpayers who claim incorrect Other Jurisdiction Credits on their resident state return as well as non-resident non-filers for participating states based on returns received from other participating states.

The Multistate Clearinghouse addresses the three issues with traditional exchanges described above as well as provides a foundation for expanding into other areas to improve taxpayer compliance. It is a more effective and improved process compared to each state incurring significant costs (both in resources and funds) handling, matching and storing data. For CIAT member countries, this model could be implemented to share data in a more comprehensive way to address noncompliance related to VAT or Transfer Pricing.

2. ANALYSIS, STRATEGY AND OPERATIONAL PLANNING

Without a regular in-depth analysis, agencies will not know how well they are performing in key areas and will not know where improvement is needed and possible. On a regular basis, agencies should conduct a complete strategy review and planning exercise using available data to determine how well they are doing and make decisions on how to improve the overall agency compliance strategy. Once the strategy is set, operating units, particularly those involved with enforcement, need to establish operational plans in line with the agency strategy.

Analysis, Strategy and Operational Planning – Agencies should follow a compliance improvement cycle including analysis of large areas of non-compliance and development of strategies to address those areas, including outreach and education, improved use of data and technology and assignment of associated goals to enforcement units.

Improving compliance is an iterative process involving the repetition of a sequence of operations yielding results successively closer to a desired end. Without "planning the work and working the plan" agencies will not have a plan or roadmap to get to the end result.

Data and Technology Provides Necessary Information

The starting point to improve compliance is knowing the largest areas of noncompliance and determining how they can be addressed. To accomplish this, agencies must know what they have been doing and the results of those activities. Agencies cannot effectively plan resource allocation until they define and identify priority work, match that work with the most effective types of resources and then assign the resources.

A full-function data warehouse and business intelligence tools can provide the necessary analysis reports including results from prior years' compliance activities to help answer the questions that are asked during the strategy and planning analysis.

- What are the largest segments (in counts and amounts) of noncompliance?
- What key business and individual segments (by tax, by industry, by area, by issue) need to be addressed and what is the best method to address them – outreach, education, correspondence audit, field audit?
- What are the current returns on investment (ROI) for compliance programs and do the programs need to be improved or should they be dropped?
- Is it more appropriate to have different resources work the program?
- What new data or new or enhanced technology could help streamline operations and result in more efficient compliance activities?

It is necessary to be able to look at prior results and effectiveness of past efforts – and to "slice and dice" the results from all compliance activities, to quickly go deeper into the data to see what drives "good" programs or cases and what drives bad (unproductive) programs or cases. Too often agencies have very high-level data that does not provide the details needed to perform a comprehensive, in-depth analysis. Only after capturing the data and having the ability to thoroughly analyze and use the data will agencies be able to make the right decisions on the alignment of resources. Without the technology to provide necessary reports and having the ability to quickly reformat the results to better understand what is happening or what could happen in the future agencies will not be able to decide the activities necessary to maximize return from current resources.

Development and Importance of Agency Compliance Strategy

Agencies need to have an agency compliance strategy that operating units follow to improve compliance. The agency strategy is developed at a high level to ensure large segments of noncompliance are addressed and determine which operational unit (Taxpayer Outreach,

Correspondence Audit, Field Audit) is best suited to effectively address the problem. Operational plans follow the agency strategy and are more about specific cases and actions, including a plan for how the unit's resources are used, the types of cases to be done and the expected results.

The overall purpose of the agency strategy is to prioritize what needs to be done to achieve the agency's mission (improve compliance). In determining the work to be done, the cost of enforcement needs to be considered. Cases that can be worked effectively via automated bills (changes that have a very high degree of accuracy and can be identified and computed using available data) will have the lowest cost and provide the highest ROI. Cases that can be effectively done using correspondence audits have the next highest cost. Field audit cases have the highest cost and for that reason, cases should only be assigned to field audit if they cannot be effectively worked by other less costly methods. Agencies that focus on getting the most value and benefits from their data and technology will implement a strategy that seeks to work as many cases as possible through automated bills or correspondence. This strategy is one of the lowest cost, highest ROI enforcement efforts that an agency can have. Similar analysis and strategies are required to assign collection cases to automated workflows, telephone agents, field collections, legal or out-source. There are always enough productive audit and collection cases to be worked so the effort should be to determine which units can most efficiently work the case to achieve the desired results. The mix of types of cases being done by each unit may change based on information learned from new data, access to improved technology, or learning about other types of cases that may be available because units doing that work in the past do not have available resources. Education or outreach programs should also be included in the planning.

Figure 3
Development of Agency Strategy and Operational Plans

The Agency compliance strategy is developed by understanding the universe of noncompliance and establishing a high-level approach to work those areas or segments where the noncompliance is most significant.

The forming of the compliance strategy could include an annual workshop with all operating units. Most Tax and Revenue agencies separate enforcement staff (Discovery, Audit and Collections) from taxpayer outreach and education services staff as well as customer service, who can present the common issues they support. It is important for people who have firsthand knowledge of recurring problems and issues (auditors and collectors) to provide their input into formulation of outreach and education related matters. Developing an agency strategy can provide the setting and opportunity for units to share best practices, review current efforts and results, and discuss current work to better coordinate and reassign work based on what is best for meeting agency goals.

Agencies sometimes conduct compliance activities more based on the historical work done in the unit rather than based on a review of current resource skill levels, data availability, technology advances, trending issues and relative productivity. Agencies will find taxpayer segments and compliance issues may be better suited to different compliance treatments/ activities within the agency rather than the historically assigned unit or treatment. Regular analysis is needed to ensure agency priorities, selection approaches and that identified issues are effectively and comprehensively addressed by taking advantage of new data or more effective case treatments.

As discussed earlier, there are many dimensions to the complex problem of noncompliance. Results of previous years' operations, analysis of the taxpayer universe, understanding noncompliance trends and many other factors must be taken into account when developing the strategy. This requires data and use of the data warehouse and business intelligence tools to ensure agency resources are focused on areas and issues most in need of attention.

An example of a CIAT member action that could result from a compliance strategy discussion is the extended examination function and related activities which the Internal Revenue Service of Chile has been carrying out since mid-2014 to maximize the levels of tax compliance in the Digital Economy segment.

Operational Planning - Plan the Work, Work the Plan

Following the agency compliance strategy, each of the key operating units should develop and implement a yearly operational plan. This includes Taxpayer Outreach and Education (Education Plan), Correspondence Audit, Field Audit and Billing and Collections (Collection Plan).

Compliance units should share their selection criteria, use of data, results and plans with other units to identify if multiple units are performing similar or related compliance activities. Taxpayers should not receive multiple inquiries on the same issue.

Development of operational plans is an iterative process and needs to change as compliance changes and new tax avoidance schemes surface. Improvement in compliance will result based on decisions and agreements reached by the units on how to make the best use of agency resources. There are three key components to operational plans:

- **Planning Component** – Units will review past results to understand the level of effectiveness (or not) of their efforts. This includes the evaluation of past results and other data, identifying opportunities for improvement, setting improvement goals, and planning and scheduling the most productive, available work for the coming year.
- **Operational Document** – Documentation of the decisions made, the goals established and the projected actions and results

established during the planning component. It summarizes the planning results and sets a baseline of projected results.

- **Managing Component** – Managing to achieve and exceed the goals established in the planning component is the most important aspect of the plan. Units must commit to following through on the Managing component which is the most difficult component to implement. It requires the most "buy-in" and change by managers, supervisors and staff. If properly implemented it will result in the most meaningful and productive changes. Staff will become more results-oriented, more active, more involved and more effective in improving end results. For example, to achieve change in audit, the unit may limit case selection to only those leads identified as high risk in certain programs.

Operational plans and goals must be realistic, reasonable, attainable, in line with agency strategy and reflect continuous improvement from prior years' results. If staffing resources are only capable of completing 200 of a certain type of case, the operational plan should not show it will work 1,000 cases. Realistically, there will be times when the plan and goals will require adjustment (e.g., loss of staff, influx of a much higher number of refund requests).

Having a plan in and of itself will not produce the desired improvement. Managers and supervisors must be actively involved to make sure the actions required to achieve goals are carried out. Supervisors need to challenge staff in a positive way to identify ways to improve operations and be more productive. This includes regular communication, positive reinforcement, evaluating strengths and weaknesses of units or individuals, providing support, staff development and training, etc.

Below is a more in-depth look at establishing and using a Field Audit operational plan. Although it discusses field audit, the concepts discussed apply to other operational plans. As with all operational plans, it relies on the data and technology foundation (results of completed audits, the data warehouse and business intelligence tools). It provides a structure to help plan and use field audit resources with the overall goal of increasing audit revenues, reducing no change audits which burden taxpayers unnecessarily and reducing noncompliance.

Data used in the planning component includes closed audit results and available data from the business and individual universe of taxpayers in the data warehouse. The planning component determines opportunities for improvement (in selection across industry/segments/taxpayer types, assignment, audit practices, and resource allocation) and uses that information to set five to seven goals that will result in an overall improvement in audit productivity. Goals could focus on reducing the average number of hours for certain types of audits, improving selection resulting in fewer no-change audits, or reducing cycle time (average time from assignment to closing) for certain audit types. Each year the plan focuses on new or repetitive areas where a concerted effort will be made to improve. All goals will be monitored and reported on throughout the plan.

Auditors and collectors have first-hand knowledge of compliance issues and noncompliant segments. They should not only provide input into the strategy and planning process but should be performing research and development (R&D) on finding more accurate, less costly methods to attack noncompliance. For example, audit units should be devoting time to enhance existing programs or develop new ones with the data and technology available. Figure 4 provides a picture of a typical audit program development cycle that could be followed.

Figure 4
Audit Program Development Cycle

During the managing component, each office analyzes actual results compared to projections, evaluates progress towards goals and identifies areas where new strategies or revised strategies are needed for improvement to be realized. Key metrics used in the analysis should include comparing projected to actual for number of completed audits, findings/billings, collections, hours, findings/billings per hour, hours per case, etc. At the office level, managers meet with supervisors and auditors to discuss deviations between projections and actual results. On a monthly basis the office/unit manager provides comment on the progress being made as well as what is being done to further improve operations.

Below are some brief comments concerning other specific operational plans.

- **Education Plan** - Education Plans are different from other operational plans as they are focused more on activities to educate rather than bill and collect past due taxes. The plan is a combination of identifying the targeted groups likely to improve compliance with education (tax type, industry-based, issue based) as well as the best remedy to address the problem (form / form instruction modifications, development of information brochure, early intervention, general mailing to a particular group, class or speaking

engagement, etc.). More information on an Education Plan is discussed in Section 3.

- **Collection Plan** - The operational plan is focused on having collection staff apply the right action to the right taxpayer at the right time through intelligent use of information. Statistical analysis, using results of past collection cases, will determine which cases should be worked via a letter or directing the taxpayer to the website to set up a payment agreement, require presence in the office or a field visit, or other legal remedies (lien, levy, etc.). The goals should be based on case prioritization and to maximize resource utilization to increase revenues. Agents should focus more on "medium risk" cases (cases that are collectable but which require personal contact) and thereby maximize the return on their efforts because low-risk cases will self-cure and high-risk cases generally require harsher, legal actions. Any case inventory in an agency (collections, penalty abatements) can use decision analytics to determine the optimal action(s) for each case.

3. OUTREACH AND EDUCATION

Voluntary Compliance vs. Noncompliance

A typical breakdown of resources at Tax and Revenue agencies and the total revenues those resources account for are shown below in Table

Table 1
Revenues (as a %) Collected by Agency Resources

Resources	Percentage of Agency Resources	Percentage of Direct Total Revenues
Processing - returns processing, exception processing, accounting	20% - 30%	90% to 97%
Enforcement - auditors, collectors, enforcement support	50% - 60%	3% - 10%
Other - taxpayer outreach and education, budget, legal, technology	20% - 25%	0%

Agencies must use education and outreach as a tool to encourage and improve voluntary compliance. This reflects the generally acknowledge principles of "prevention first" and "voluntary compliance is less costly than correcting noncompliance." The complexities and unremitted large dollar amounts associated with noncompliance as well as the cost of pursuing noncompliance should strongly encourage agencies to make improving voluntary compliance their first priority.

Identifying Opportunities to Improve Voluntary Compliance

A telling example of good tax administration, exemplifying some of the best practices discussed, is requiring Social Security Numbers

(SSNs) for claimed dependents on individual income tax returns. Starting in 1987, the Internal Revenue Service (IRS) required reporting the SSN of all dependents over the age of five. That year seven million American children disappeared from the nation's tax returns, representing a nine-percent drop in the 77 million dependents claimed the previous year and $2.9 billion more in yearly tax revenue.

Those who began paying federal income tax only in the last twenty-five years are probably surprised to learn that not until 1987 did the IRS begin requiring the SSN of dependent children claimed on returns. Listing phony dependents in order to claim illegitimate extra deductions was historically one of the more common forms of tax fraud, so it makes sense the IRS would want to track such information as closely as possible.

Evidence that nonexistent children were claimed was clear in the IRS's 1988 TCMP [Taxpayer Compliance Measurement Program]. On tax returns where the TCMP auditor disallowed an EITC [Earned Income Tax Credit] claim, 39 percent of the disallowed dependent child claims were dependents for whom the taxpayer checked the box stating the child was under five and was not required to provide a social security number.

This simple reporting requirement on tax returns resulted in a significant increase in voluntary compliance and reporting and is a good example of effective tax administration including:

- Developing Agency Compliance Strategy - Required new reporting based on analysis of noncompliance and identifying large segment of taxpayers requiring attention.
- Education and Outreach - The change in reporting also served as an education effort and significantly improved voluntary compliance at negligible cost.
- Data and Compliance Activities - Availability of new data to be used to identify and correct noncompliance.

Agencies must consider the results of audits, contained in data warehouse, and other input when identifying segments and issues in need of attention: either education and outreach or enforcement and developing their strategy. Collection results can also be used in identifying needed education and outreach or enforcement including identifying the major segments that are chronically late in filing or paying, industries or taxpayer groups that are making a high use of payment plans and identifying the groups of high-risk taxpayers that cannot be located or have no resources or assets to levy or lien. Solutions to such issues may involve the need for legislative action, new procedures or a fast-tracked collection process for that segment.

One new education and outreach tool is the agency Internet site and web portal. The Internet site and web portal (taxpayer service portal) are now mission critical components that provide individuals and businesses a 24-hour self-service mechanism and ready access to information materials, modern online self-services, including business registration and licensing, return and payment filing, account balance/history, email, and other services that will help educate, provide valuable outreach and reduce taxpayer burdens. Education Plans should use the Internet site and web portal to identify and implement unique ways to help those who may not know they need help. For example, if agencies have on-line business tax registration, technology can drive the self-education process by using NAICS/SIC codes of newly registering businesses to mail or pop-up available education brochures and general information material for the tax types for which businesses are responsible.

Outreach and Education – In 1987, the first year in which the IRS required taxpayers to list social security numbers of dependents on tax returns, seven million fewer dependent children were claimed than in the previous year. Tax agencies must use education and outreach, and increased use of effective reporting requirements to improve voluntary compliance and address the more common cheating and under-reporting schemes.

Operational Education Plan

Agencies need an operational education and outreach plan that prioritizes the activities or actions that will provide the most benefit in line with the agency strategy. Audit data could be used to identify noncompliant segments that need attention including issues, industry groups or other known segments that have high audit change rates.

The plan would focus on a number of goals such as developing education and outreach activities to increase the filing of individual income tax returns for first-time filers (those who have a new obligation to file their first income tax return) and could include February mailings to recent high-school and college graduates and other unique ways of outreach to potential first-time filers.

Similar effort can be applied to SUT or VAT first-time filers. Once a business is registered, a "reminder to timely file" could be sent along with industry specific information directing them to the agency Internet site and web portal to learn about the taxation of their business and encouraging them to electronically file.

In certain cases, agencies may decide to use informational mailings rather than "got you" letters. If the goal is to improve compliance and the agency identifies a group or issue needing correction, the first choice of action may be education and outreach rather than audit adjustments.

Another goal could be improving the language of publications and informational letters enabling them to be more clearly understood by businesses and individuals not having a tax background. By simplifying the notice in non-legal terms and by including specific data to encourage compliance (e.g., 99.8% of the people pay their taxes in your jurisdiction) can be very effective. A 2012 article talked about how behaviorists persuade people to pay delinquent taxes. (Byrnes, 2012) The article mentioned that from the simple re-wording of late notices to changing the structure of back-tax payment plans, tax collectors are getting results by tapping into basic human tendencies. Whether it is the desire to do what peers do or to stick with a voluntary commitment, persistent patterns of human conduct revealed by behavioral economics are gradually being targeted to boost tax revenues at very low cost. The article went on to say that tax administrators traditionally have focused on penalties to compel compliance. That remains important, but audits and legal enforcement action are expensive. Behavioral strategies can help do the job at far lower cost, experts said.

4. BEST PRACTICES - IMPROVING COMPLIANCE

Compliance activities, particularly audit and collection, consume a large percentage of agency resources. These compliance activities account for the collection of millions of dollars that would otherwise not be collected. Improvements in the four essential elements discussed will result in improved compliance and produce significant additional revenue.

Years ago, there was no commercial use of drones. Today, drones have endless commercial applications, due to their relatively small size and ability to fly without an on-board pilot. Industry's current and planned uses include delivery of tangible goods, commercial photography, monitoring crop growth, improved search and rescue missions and the list is continually growing. Tax administrators must be open to new methods of enforcement. Imagine a future where agencies use drones to identify new businesses just opening or delivering bills to remote areas that do not have conventional address identification.

Below is a listing of some proven best practices and activities that agencies have used to improve compliance and collect additional revenue.

Improved Enforcement Activities – Successful Compliance Management requires applying the right action, to the right taxpayer, at the right time, through the intelligent use of information. Using more data and implementing improved technology, in and of itself, is not a solution. Tax and Revenue agencies must identify what their major hindrances are (i.e., lack of relevant reliable data, untimely and cumbersome access to the data necessary for good decision making, inability to streamline, automate or otherwise eliminate manual tasks). Once these are identified, agencies must determine what data, technology and improved compliance activities will help implement or support compliance improvement.

Data Driven Compliance

For too long, Tax and Revenue agencies have relied primarily on the taxpayer alone for information regarding their compliance. To gain an advantage, tax agencies must build more complete data portfolios on all existing and potential taxpayers (individuals and businesses); using data sources other than the data provided by taxpayers themselves. Noncompliant taxpayers are unlikely to provide significant insight into their own noncompliance.

Effective best practices to improve compliance using data, a full-function data warehouse and business intelligence tools include:

- Expand use of data including agency, governmental, third-party and targeted commercial data sources.
- Provide data access to all who need it with accompanying layers of access security.
- Implement sound data security and confidentiality processes and procedures.

- Use a full-function data warehouse to develop a combined, more complete, picture of the taxpayer using taxpayer portfolios.
- Employ search and business intelligent tools as part of daily life for management reporting, trend analysis, performance management, etc.
- Utilize data-driven decision making through regular use of data matching and queries, segmentation and decision analytics.
- Make decision analytics commonplace for refund fraud detection, audit selection, determining collection treatment and virtually all enforcement activities that have a large resource commitment.
- Where appropriate, expand and share data to develop a common, comprehensive data repository that knows no borders.
- Make full use of the value and power of data by using supporting technology to automate workflows and decision making.
- Develop staff with the necessary analytical, SQL and statistical skills to maximize use of the data.
- Develop management and productivity reports including extensive reporting of audit and collection results, advanced analysis of the compliance gap using taxpayer portfolios, generation of geographical and statistical representations of data and other beneficial performance reports.
- Develop revenue analysis and forecasting models with the ability to drill down to the taxpayer level to provide forecasts, analysis of revenue phenomena (e.g., increase or decrease in collections for a given period), and respond to legislative and executive inquiries to support tax policy.

Tax and Revenue agencies must capture, secure, manage and turn data from more sources into useable information. One recent United States example is the use of 1099K reporting data.[2] This data was the result of federal legislation requiring the reporting of the information to the IRS. Using their data warehouses or similar repository, the IRS and states compiled this new information and began to pilot/test the use of the information in audit selection and collection enforcement. This data has proven to be invaluable and is now used as part of annual programs to identify non-registrants, non-filers and under-reporters.

Agencies need to use their aggregated data to enhance virtually all compliance related activities. Agencies need to expand data sharing to address cross-border compliance and find more efficient ways to share data. Clearinghouses and structured data exchanges should become more commonplace.

The ultimate use for data warehousing in compliance is in decision analytics. For audit data analytics is used to examine the characteristics of taxpayers who have been audited in the past and use the results of those audits to determine patterns of successful audits. By applying those patterns, sometimes called scorecards, to all current taxpayers, those most likely to have a tax change on audit can be determined. Decision analytics can be applied to collection cases, refund fraud, non-filers, etc., to enable agencies to target their resources to most effectively handle the collection of unpaid tax, investigate fraud or pinpoint the right non-filers to pursue.

Using decision analytics eliminates the natural tendencies of individuals making selection and treatment decisions. Experience has shown that using analytics is more productive because it eliminates the individual biases that exist in manual processes.

2. Internal Revenue Code Section 6050W - The Housing and Economic Recovery Act of 2008 requires the IRS to begin collecting 1099K (Payment Card and third-party Network Transactions) from third-party payment entities, such as credit card companies, and for merchant card transactions, such as credit and debit card payments, for all sales that occur on or after January 1, 2011.

Technology Enhancements

Although most of the discussion on technology has focused on the use of a full-function data warehouse and business intelligence tools, other technology capabilities need to be part of an agency's compliance improvement strategy. Tax and Revenue agencies need to utilize technology to free-up resources, improve the management and supervision of enforcement cases and implement new ways of doing business. Best technology practices include the following:

- Extensive use of a full-function data warehouse and business intelligence tools must be an essential feature to improve compliance.
- Use data mining and business intelligence tools that enable performance of complex queries for purposes of revenue estimation, econometric forecasting, to fulfill information requests and to identify taxpayer education needs in areas of noncompliance or in response to changes in the tax laws.
- Maximize benefits of available data and current technology to automate, streamline and improve workflows.
- Use a single, electronic case folder concept for all enforcement-related cases to help improve assignment and tracking, to create effective workflows and automate decision making.
- Implement robust case management tools for all compliance-related cases.
- Deploy mobile devices with the necessary functions and features required by auditors and collectors to effectively complete their work outside the office.
- Utilize technology to help provide the necessary security and confidentiality requirements to prevent outside access and to enforce internal access rules and monitoring.
- If needed, consider options for technology outsourcing to ensure the agency has state-of-the-art technology to assist in addressing the large complex issue of noncompliance.

A full-function data warehouse provides high-performance access to information (data of all types) and business intelligence tools, and supports data analysis and better informed decision-making. Audit selection is accomplished by using data matching and queries, segmentation of taxpayer populations and decision analytics. Large sets of taxpayers can be targeted via automated mailings using data stored in the warehouse.

Technology needs to provide automated and workflow support for all repetitive activities including assignment, tracking, messaging, alerts and notifications, configurable approval and case closing rules. This streamlining, automating the process of creating leads and other repetitive activities, along with automating decision making, can significantly extend the reach of an agency's limited resources. Working automated billing and correspondence cases is a low-cost way to improve compliance and generate additional revenue.

One newly adopted best practice in US state tax administration is to forgo sending "non-filer letters" or "requests for amended returns," which generate little response. Some agencies find it much more effective to issue notices of proposed assessments, based on assembled information from a variety of data sources. The mass mailing of specific, defendable proposed billings will free auditors to work more complex cases and expand the reach of the compliance function.

Payment agreement monitoring is a time-consuming activity if it is not automated. Monitoring payments to recognize defaults (taxpayer pays less than what was agreed to, skips payments or establishes new debt by not remaining current on tax liabilities) and applying updated case treatment in an automated process will free up significant time and ensure prompt, corrective action is taken.

Agencies require a robust case management system that effectively tracks cases and case activities, and can generate the reports and

alerts providing supervisors and managers with the information they need to properly manage cases. Managers and supervisors will be better able to actively manage their staff and address shortcomings from knowing the cases they need to be involved in, and working with auditors and collectors to make decisions and move cases to completion. This will reduce average time spent on cases resulting in improved compliance and additional compliance revenue.

Deployment of mobile devices needs to be used to provide field staff with access to needed data and time saving functions and features to enable them to complete their work, while outside the office, in less time with fewer errors. For audit, a laptop application should produce consistent workpapers and include time saving analysis and data-handling functions, reducing errors through standardization and facilitating supervisory and taxpayer review by way of consistent audit result reports.

Technology enhancement must include addressing the staff's willingness to change. Staff must be ready to take on new work and accept that some cases can be done more effectively by another unit. Agencies must work with staff to facilitate taking advantage of new data and the investment the agency is making in technology, otherwise they will not maximize the results that could be produced.

Strategy, Planning and Education

When one thinks of improving compliance it is usually focused on strong enforcement activities performed by auditors and collectors. There are other activities performed by differently classified staff that play a major role in improving compliance. These are the forward thinkers involved in developing an agency strategy, the executives involved in developing operational plans for enforcement units and the education and outreach staff of the agency. These "soft" activities necessary to increase voluntary compliance as well as help focus resources on noncompliant taxpayers should utilize the following best practices.

- Utilize the data warehouse and business intelligence tools to analyze past results and identify large taxpayer segments that contribute to the tax gap
- Analyze the tax gap and the large areas of noncompliance and develop an agency-wide strategy to improve voluntary compliance including improvement in reporting, education and outreach and improving compliance activities.
- Use taxpayer portfolios in the warehouse to determine patterns of noncompliance and identify the most effective ways to educate and service those taxpayer segments.
- Use warehouse portfolios to provide customer service staff with a single repository of information to answer taxpayer questions and assist them with their compliance issues.
- Agency compliance strategies should focus on implementing as many low cost, high ROI programs as possible (starting with automated billings).
- All units involved in enforcement activities should develop an operational plan that allocates resources to noncompliant segments, sets goals for those resources based on ROI and uses the plan to monitor programs to meet or exceed goals.
- Utilize current technology to improve general and specific education and outreach efforts including the agency Internet site, web portal and innovative marketing techniques used by successful businesses.
- The Internet site and web portal (taxpayer service portal) need to provide individuals and businesses a 24-hour self-service mechanism and ready access to information materials, modern online self-services, including business registration and licensing, return and payment filing, account balance/ history, email, online chat and other services that will help educate, provide valuable outreach and reduce taxpayer burdens associated with their tax obligations.

Agencies should not underestimate the benefits that will be gained by properly implementing these "soft" enforcement activities, including

recommendation of legislative changes to require additional third-party reporting. It is easier and less costly to encourage general populations to comply and file returns or to have a third party involved in the tax transaction report the information than it is identify, track down and enforce filling on an individual basis for those who do not file.

Plan the Work, Work the Plan - If agencies do not have a current compliance strategy and operational plans for enforcement units, how will you know where you are, where you are going and how far you have to go? Success will come from planning the work and working the plan. Successful compliance management requires applying the right action, to the right taxpayer, at the right time, through the intelligent use of information.

5. SUMMARY AND CLOSING

Agencies will increase the overall effectiveness of compliance initiatives by using relevant and comprehensive data in a full-function data warehouse that aggregates the data to form a single useful portfolio, along with supporting and other technology. An agency's limited resources will be targeted to work those taxpayers having the highest probability of noncompliance, resulting in more accurate and revenue-maximizing detection of and revenue recovery from non-registrants, non-filers, under-reporters and fraudulent taxpayers. Collection activities will significantly benefit from using available data to automate effective workflows and determine effective treatment strategies on outstanding bills, resulting in better allocation and use of collection resources. As new data sources become available new compliance programs can be developed or historically productive programs can be further improved.

Using the right data and data mining tools, and analysis of taxpayer portfolios, the results will be beyond what most agencies predict. Not only will the agency realize direct, measurable collections, but once the broader taxpayer community realizes that the agency is using new tactics (i.e., "the word gets out,") voluntary compliance, the true end goal, will increase as well.

Agencies need to continue advancing and improving and be as open to new ideas just as much as industry and the private sector seeks to improve on a daily basis. Performance measurement applies to everything agencies do and must be used to evaluate and improve. Use of the data is paramount, not only for data-driven compliance but for making an honest evaluation of where the agency is and what it must do to improve. Continuous improvement should be a constant goal – for the agency and for improving compliance. Agencies need to ask themselves: are we getting the results we expected and if not, why? What can be changed to make this better? The answer to these and other questions on effectiveness lies in the data.

Stimulating innovation

As has been mentioned, all Countries/Tax Agencies are not operating at the same level of efficiency and are not achieving the same level of voluntary compliance. Following the agency strategy to increase compliance, agencies will need to call on the knowledge and experience

of staff from all units to identify opportunities to improve, as well how the agency can find solutions to address noncompliance.

Similar to industry practice, agencies need to have a mindset focused on getting better each day. If you do not focus on R&D and continuous improvement you will be left behind. If agencies cultivate the continuous improvement aspect of compliance their staffs will provide valued input.

Once the data aggregation is completed and the analytics begin there will be no limits on the ideas and creativity by staff to improve compliance. Through tools such as SQL, SQL Builders and Online Analytical Processing, your agency's end-users can perform their own analysis. Staff will be excited and far more productive with access to data at their fingertips.

Some of the summary best practices are:

- In order to continually improve, agencies need to perform research and development efforts to identify and utilize new data and technology, to improve current programs and develop new programs to address noncompliant taxpayer segments.
- With ever growing workloads and limited resources agencies need to find ways to reduce required resource commitment yet maintain or increase vigilance and coverage of non-registrants, non-filers, under-reporters and deadbeats
- Agencies need to value auditor and collector input and transform traditional development of improvement plans and actual programs to a more collaborative and iterative process that includes front-line business staff from all operational units as well as technical personnel

In addition to the detection and recovery of previously unpaid taxes, the best practices discussed in this article will have a direct and positive impact on improving voluntary compliance. As new taxpayers are registered, letters, based on risk scores, could be automatically sent welcoming and educating them about their filling and reporting requirements. The transformation to Data-Driven Compliance using data matching and queries, segmentation and data analytics is occurring. Join the evolution and begin making more informed decisions. Target noncompliant taxpayers before they target your agency.

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