International procedures to resolve dispute in tax law

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Abstract

This study is about dispute resolution procedures in international tax relations. It is an issue of international tax law with enormous relevance at a time of globalization. Objectives: analyse the cooperative relationship programmes and mechanisms to guarantee the correct interpretation of tax legislation between administrations, in the field of international commercial transactions and investments. Methodology: study of APA programmes; comparative study of solutions adopted by some administrations in EU; some internal mechanisms to resolve dispute in tax law. Some case studies will be analysed. Results: we concluded that when a company initiates a new investment, it should consider the possibility that controversy could arise down the line about the consequences of the investment on tax to pay. So, the APA programmes are very important and if they can't be applicable there are other mechanisms to assure the equity in e tax law interpretation and application. The administrative collaboration, the modernisation of methods and change of information's are definitely important to the international commerce in a globalization era.

Keywords*: international tax; administrative cooperation; dispute resolution procedures; tax law.*

JEL Classification: K33, K34

1. Introduction

The internationalization of economies characteristic of the last decades of the 20th century and the globalization movement in the 21st century have placed the themes of international fiscal law on the agenda of academic and political discussion.

There are two separate but complementary analysis plans in international tax law, particularly relevant to States and companies:

1st) problems of direct and indirect taxation, tax benefits granted, abusive tax planning, anti-abuse rules, harmonization of laws, double taxation and tax evasion conventions and base erosion problem;

2nd) resolution of disputes between tax administrations of different countries and possible conflict of applicable law.

These problems are specially connected with the foreign investment necessities. Investing outside has become the general rule in most economic sectors as markets and opportunities are in many different States. As multinationals are

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usually involved in a diversity of legal systems, they also need to cope with the different tax systems and interpretations of tax authorities to dispute resolutions.

The present study focuses on the second problem referred to, i.e., the dispute resolution procedures in international tax relations. This is an international tax law issue with enormous relevance at a time of globalization.

In the last years the first topic (erosion of the tax base) have received particular attention from international organizations such as the OECD, EU, IMF, World Bank and, in the professional discussion plan, the International Tax Association, between others institutions.

The second theme has been seconded and less debated, however, is of fundamental importance for the correct application of the rules of international tax law[3]. We can say that the solutions found for the resolution of the first problem (through contracts or international treaties) will only be effective if correctly interpreted and applied in the specific cases of dispute that arise.

The great difficulty is to achieve a transparent, independent and competent route with to know and resolve disputes that arise between tax administrations of different countries, sovereign and international partners, but which, in a specific case concerned, consider both competent to deal with this issue[4].

The international commercial arbitration mechanism has given a complete response in the field of international contractual relations, whether between companies or countries and multinational companies.

Foreign investment contracts, as well as bilateral trade treaties between States, have specific rules for determining the applicable law and the judicial system competent to resolve disputes. The interpretation of these contracts or bilateral treaties will be decisive to the resolution of disputes arising. In turn, the interpretation of the rules contained in the Contracts or Treaties will be done according to the principles and rules of international tax law.

2. Interpretation and application of international tax law rules

The question is how ensure a correct interpretation of the rules of international tax law in countries with different legal traditions and how to ensure that the correct interpretation is as uniform as possible between the jurisdictions of the countries concerned[5].

This question is very important in an era of globalization and intensification of international transactions. So, we need some mechanisms to guarantee the correct interpretation of international tax law rules. That is why international institutions,

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[3] Abreu, J. C., *Fiscalidade Internacional – abordagem prática no âmbito dos impostos sobre o rendimento*, Almedina, Coimbra, 2020, p. 12.

[4] Neto, A., *Soberania fiscal e suas limitações na perspectiva internacional: o impacto quanto ao princípio da residência na forma de tributação das pessoas singulars*, Coimbra Businness School. ISCAC, Coimbra, 2015, p. 27.

[5] Abreu, J. C., *op. cit.*, 2020, p. 15.

coo the OECD, devote a remarkable investigation and intervention in international tax matters, especially to avoid double taxation of investment companies[6].

3. Mechanisms to guarantee the correct interpretation of tax legislation between different tax administrations

First of all, the tax authorities or administrations must stablish some cooperation between each other. In this way, they can standardise common interpretative criteria to be followed by the different tax administrations. For example, the concept of "*stable establishment"* is fundamental to tax the income of companies. It is important that this concept be identical in the different countries involved in the contract or the treaty. Only in this way can we ensure the effectiveness of the International Conventions against double income taxation.

The purpose of this working document is therefore to examine cooperation programmes and cooperation mechanisms to ensure the correct interpretation of tax legislation between administrations in the field of international trade transactions and investments.

Tax authorities' decisions, the Early Pricing Agreement (APA) and alternative mechanisms for resolving the dispute in international tax law (mediation and arbitration) are very important tools to ensure greater certainty and confidence in the interpretation and application of tax legislation. Let's analyze each of these mechanisms, how they work and the contribution to a better interpretation and application of tax law.

3.1. Tax authorities' rulings

There are many different types of these kind of engagement with tax authorities. In general terms, they are intended to express the opinion of a tax authority regarding a certain transaction. Those decisions are effectively enforced by the same authorities if an internal litigation arises between an undertaking and the Tax Authorities. That is why we believe that those decisions should not take effect before being reassessed by a judicial court. We mean that any decision of an internal tax authority on the application of rules contained in international conventions or treaties must be provisional. And, if the subject concerned in the decision appeals to the competent Court, the administrative decision of the tax authority should not have any effect. The appeal should have suspensive effect. In such cases, the internal tax authority acts as a judge in its own case, at least in the first decision it delivers and that decision may call into question or destroy the underlying interests enshrined in an International Convention or BIT.

[6] OECD (2014) BEPS action 14, Making Dispute Resolution Mechanismes more effective; OECD, Model Tax Convention, version 2014, commentaires to article 25; OECD (2014) Manual of Effective Mutual Agreement Procedures (MEMAP); OECD, Mutual Agreement Procedures and Advance Pricing Arrangements (APA's) Retrieved November 17, 2013.

This tool or power of the internal tax authorities must be under scrutiny of the international community because of main reasons, mainly transparency and confidence.

But, on the other hand, usually it is claimed that making them public might affect the confidentiality of the main data included. We don't agree with this position, because it is against the guarantees of investors, in means, this is a fake argument. The most important is to guarantee the international contractual good faith, transparency and trust of foreign investors and the States involved.

On the other hand, the decisions of the internal tax authorities of any state undergoing an international convention or treaty must be publicised, while the interest of transparency, legal certainty and trust is based on the protection of secrecy and data. The questions that companies usually raise about the decisions of national tax authorities always refer to problems with the correct interpretation of international tax law. The common argument is that the internal tax administration cannot guarantee the correct interpretation and application of international tax law and, above all, cannot have the ultimate fiscal decision-making power over the amount that the company will pay.

In a word, it is a question of independence and equity. It is not acceptable that national tax authorities can act in this area as judges in their own interests.

However, as Carolina Del Campo points out, these "*decisions can be a very useful tool for companies, since they should generally give rise to a high degree of certainty and reliability of the expected results*"[7]. We agree with this point of view. Carolina Del Campo points out, these "*decisions can be a very useful tool for companies, since they should generally give rise to a high degree of certainty and reliability of the expected results*"[8]. We agree with this point of view, but we believe it is necessary, in case of doubt, to put the question to the local tax authorities and ask for written information. These requirements to initiate a ruling do not imply the payment of any fee or cost.

The administrative practice is very different in each country, so for a foreign company that settles in another country it is necessary to have all prudence in these matters.

3.2 APA Programmes

Advance Pricing Agreement (APA) is a kind of agreement between a taxpayer and a tax authority intended to achieve a resolution between a tax administration and companies before transactions take place and in most cases regarding their valuation. This is an advance agreement between the taxable person and the tax administration on an appropriate transfer pricing methodology for a set of transactions concerned for a specified period of time. With this kind of agreement,

[7] Del Campo, Carolina, *Dispute Resolution Procedures in International Tax Matters. General Report Madrid Congress*, „Cahiers de droit fiscal international", vol 101, 2016, International Fiscal Association (IFA). Netherlands, p. 75.

[8] Ibid.

companies seek some tax certainty and certainty. They try to avoid future audits and inspections with unexpected consequences for the company.

APA programmes can be bilateral or multilateral and also include agreements between the taxpayer and one or more foreign tax administrations under the authority of the mutual agreement procedure specified in income tax treaties. The taxpayer benefits from such agreements since they are assured that income associated with covered transactions is not subject to double taxation by income.

The main objective of the EPA programmes is to set transfer prices for a period of future years, but sometimes partners agree with a roll-back effect of an APA as a solution for open years.

In general terms, this is an instrument that companies really welcome in the foreign investment scene[9]. These programmes are an effective way to eliminate disputes over transaction prices, profits and double taxation. Of course, the success of APAP programmes depends on the level of knowledge and expertise that each country has in its tax administration, to conduct all procedures efficiently.

3.3 Alternative mechanisms to resolve dispute in international tax law

The next problem to be faced is to find an alternative to resolve international tax law disputes. The truth is that sometimes the APA programme fails and, in this case, we must look for other alternatives to resolve disputes in international tax law.

The risk of misunderstanding about the interpretation and application of the law is always present. It is becoming common to promote some tax adjustments in the internal law to introduce some mechanisms to resolve the dispute. This is the case of mediation and arbitration.

In addition, it becomes common the interaction with other tax administration authorities, in order to exchange of information.

Tax auditing is another administrative way of resolving disputes. However, tax auditing has some limits and problems. Firstly, some countries do not allow negotiation as to the value of tax tax on tax arrangements. On the other hand, the procedure is usually slow and somewhat inhibiting for taxpayers, as they are in an unequal position, lower than that of the tax authority. Some transparency and trust are essential in tax audit procedures and some countries are not prepared to ensure a fair and exempt procedure.

3.3.1 Mediation

This is a different and innovative option that aims to be a negotiating and friendly way to reach the resolution of the dispute on some issue of domestic or international tax law. Mediation may be optional or mandatory and may avoid judicial proceedings.

[9] Ibid.

A tax authority may agree to involve an independent person in the process in order to have recourse to objective views that will be taken into account in resolving a dispute. Here what is considered is not an arbitration but an independent opinion that may be useful to highlight the important aspects of the case and help with conclusions. Sometimes there is a domestic process of judicial conciliation, that has the same effect as mediation even though it is not mediation as such.

3.3.2 Tax arbitration: the Portuguese case

Some countries, such as Portugal, has the possibility of recourse to arbitration as an alternative solution to the judicial courts. Thus, tax arbitral tribunals may exist alongside the judicial courts. It ensures a faster decision in the dispute, a high degree of expertise of the arbitrators and the possibility for each party to be able to choose one of the arbitrators.

Tax arbitration is a novelty introduced in some EU countries and the rest of the world, recently and still in the process of being affirmed in some countries. It is a way of resolving disputes which is particularly appropriate for issues arising from international tax law[10]. Tax arbitration is an intricate area of law. It is therefore vital for us to understand what tax arbitration entails, its consequences for taxpayer rights, and the effects it has on the legal sector.

In 2015, the Organization for Economic Cooperation and Development[11] released their Final Report on Action 14 – Making Dispute Resolution Mechanisms More Effective – as part of the G20 Base Erosion and Profit Shifting (BEPS) Project. This Final Report highlights the following: *"eliminating opportunities for cross-border tax avoidance and evasion and the effective and efficient prevention of double taxation are critical to building an international tax system that supports economic growth and a resilient global economy"*[12].

Nevertheless, these measures should not result in punishing compliant taxpayers with further uncertainty and unintended double taxation. Therefore, supporting taxpayer rights by ensuring that profits are taxed where value is created – prescribed as BEPS Project's fundamental initiative – similarly requires improving dispute resolution mechanisms between the competent authorities.

Article 25 of the OECD Model Tax Convention on Income and on Capital[13] grants taxpayers the opportunity to entrust the corresponding competent authorities with resolving tax disputes which have arisen from the interpretation and application of the convention by means of the MAP, irrespective of the remedies available under domestic law[14]. However, if the authorities do not reach an agreement within two years, the unresolved issue may be submitted to arbitration at the request of the taxpayer.

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[10] Abreu, J. C., *op. cit.*, 2020, p. 17.
[11] OECD (2015) BEPS action 14, Making Dispute Resolution Mechanismes more effective.
[12] Ibid.
[13] OECD (2014) Model Tax Convention, version 2014, commentaires to article 25.
[14] Helminen, M., *The notion of tax and elimination of double non-taxation: General report of Finland. Madrid Congress of International Tax Association*, „Cahiers de Droit Fiscal International", 2016, Netherlands.

One the most interesting solutions was introduced in Portugal in 2011. A new model of dispute tax resolution was introduced in Portuguese tax law. Since January of 2011 Portugal have a new model of tax dispute resolution based in arbitration regime introduced by Decrete-law nº 10/2011 of 20 January.

According to R. Fernandes Ferreira, *„this new regime was designed as an alternative dispute resolution method for disputes between taxpayers and tax administration, with the specific goals of reducing the number of tax cases pending in the Portuguese Courts and promoting faster resolution of tax disputes"*[15].

This new model has since been essential for the effectiveness of the tax system and enhancing investment opportunities in Portugal, benefiting all operators involved. We can say that the most important disputes can now be decided by the arbitral tribunal, which has a very broad jurisdiction in tax matters[16].

The Portuguese tax administration is subject to and bound by the decisions issued by qualified arbitration courts as regards disputes with a value equal to or less than €10.000.000,00 (ten million euros)[17]. It means that disputes within this threshold can be subject to arbitration and if superior will be mandatorily subject to the traditional jurisdictions.

4. Judicial courts

Access to the courts is a constitutional guarantee in majority of countries. Otherwise, they are completely excluded from the intentions of foreign investors.

Once a taxpayer has completed a tax audit without an agreement, he has access to the courts. There are usually special courts to decide tax matters, taking into account the expertise of the issues. The most common solution is to send the case to administrative courts with sections specializing in tax. As we have seen, in some countries, the taxpayer may choose that his case be decided by an arbitral tribunal.

In some countries (i.e. Brazil, Argentina and Japan) there are an administrative court that belong to the tax authority as an independent body. Not every tax administration offers this possibility, but if it exists, it is normally a mandatory step before having recourse to a judicial court.

The judicial courts are completely independent of the tax administration and in most States, they are available for decide tax issues with an expertizing experience. The big problem usually pointed out to the judicial courts is its slowness and a tendency to value formal issues as a way of not knowing the bottom of the legal question. It means that the case is sometimes regarded as unfounded only for formal reasons as a way of facilitating the decision and avoiding the background of the matter, which normally involves very complex questions of law.

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[15] Ferreira, Rogério F.; Guerra, J.C.; Pires, J.M., *Tax Arbitration in Portugal: a new Tax Dispute Resolution Model* in Dennis Campbel (ed.), *Comparative Law Yearbook of International Business – Center for International Legal Studies*, Vol. 35, Wolters Kluwer, Salzburg, 2013, p. 287.

[16] Anjos, Maria do Rosário, *Justiça Administrativa e Tributária* in „O Estado da Justiça", Ed. Universitárias Lusófonas, ULP, Lisboa, 2016, pp. 121-143.

[17] Ferreira, Rogério F.; Guerra, J.C.; Pires, J.M., *op. cit.*, 2013, p. 287.

Finally, there is another major problem that we find in some countries of the world, with serious problems of failures in the democratic decision-making process, in which the lack of independence of the judicial courts, including the higher courts and the Constitutional Court, is evident. Of course, in these cases the investors have an enormous reserve and fear to risked their investments[18].

Tax policy is essential for foreign investors as well as procedural guarantees.

5. Findings

We concluded that are some important mechanisms to ensure a correct interpretation of the rules of international tax law. Considering the business relations between countries with different legal traditions the agreement about procedures to disputes resolution and ensure the correct interpretation of the international tax rules are quite important. The procedures must be as uniform as possible avoiding conflicts between the jurisdictions of the countries concerned in order to keep the confidence and transparency of procedures.

This question is very important in an era of globalization and intensification of international transactions. So, international institutions as OECD play an important role for that.

It is necessary to define some mechanisms to ensure the correct interpretation of the rules of international tax law. In this study we present some of the most important procedures can be used for that, such as:

1) tax authorities rulings;

2) APA programmes;

3) Alternative disputes resolution, in special mediation and tax arbitration;

4) Judicial Courts.

We can say that when a company initiates a new investment, it should consider the possibility that controversy could arise down the line about the consequences of the investment on tax to pay. Appropriate dispute resolution mechanisms are the key to maintaining trust in the transparency of cases. Without this, investors may decide to stay out of investment in the country. You are aware that the granting of tax benefits is not the only important fact to be taken into account. Similarly, or more importantly, it is to ensure an effective way of resolving tax disputes, such as double taxation problems or the definition of the amounts of taxes payable.

In this context the international conventions, bilateral o Treaties and APA programmes are very important and if they can't be applicable there are other mechanisms to assure the equity in tax law interpretation and application. As we saw the internal processual tax law is quite important to keep investors confidents therefor is important to preview some important and modern mechanisms to dispute resolution as tax mediation and arbitration.

[18] Pereira, P.R., *Princípios de Direito Fiscal Internacional – do Paradigma Clássico ao Direito Fiscal*, Col. Teses. Almedina, 2012, p. 59.

The example of Portugal is a particularly interesting and positive case. After ten years of tax arbitration courts in operation we can say that the country did recover the confidence of foreign investors in the proper functioning of the arbitral tax justice and also recovered the image of the country, which suffered for decades with the ineffectiveness of the tax judicial courts.

Another important mechanism to consider is the administrative collaboration, the modernisation of methods and change of information's between countries involved. This is definitely important to the international commerce in a globalization era.

In legal systems enabling tax audits and the possibility of reaching an agreement with the tax authority, this route should be used, as it allows the resolution of the dispute in a short period of time, with respect for the rights and interests of the parties and the Treaties or investment contracts concerned. International experience in settlement agreements has shown how useful is this mechanism is when used early in the process to avoid double taxation or, at least, to simplify future international disputes. If agreement is not possible then the next step would be to have recourse to the administrative ways of appeal, and after that to the arbitral or judicial internal courts if the previous decision is not favourable.

If the court agrees with the company, there will be no adjustment and presumably no double taxation, but if the court disagrees it may be necessary to explore additional alternatives.

In fact, several important issues have not yet been resolved. Like everything we know, countries do not give up their fiscal sovereignty in the decision to resolve disputes by internal courts. At the present stage, an international tax court has not yet been created to ensure greater exemption in tax disputes involving companies and countries with different jurisdictions. Would it not be considered the establishment of an international court, exempt, arbitral or similar in nature to the CJEU, under direction of the OECD, to settle tax disputes of an international nature?

This issue remains open, but we find it very interesting to think of such a solution to accelerate and strengthen investor confidence in tax justice in international affairs.

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