Application of international double taxation conventions in Romania[1]

Professor **Florin DUMITER**[2]
Master student **Ștefania JIMON**[3]

Abstract

In this article we sought to address the international double taxation phenomenon from two different standpoints. To begin with, in the first part we analysed the framework of international double taxation, and how this topic was tackled in both Romanian and international literature. International double taxation has been analyzed, mutatis mutandis, *from an economic perspective, more precisely in terms of the implications that it generates on economies, on added value, on capital flows, on the internationalisation of business. Second, I believed it was important to analyse international double taxation from a legal perspective, through the jurisdictional effects of obtaining income or holding property at the European or international level. Romania's case is carefully approached in this paper, aiming to highlight the issues Romania is facing concerning cooperation in tax matters with authorities from other countries, how the more than 80 double taxation conventions are applied and interpreted, but also other aspects that should be considered by the Romanian tax authorities, based on the provisions of the Fiscal Code and the Fiscal Procedure Code. The article ends by presenting, commenting on and analysing two test cases in international double taxation, of remarkable importance and actuality for Romanian jurisprudence to observe how complex double taxation mechanisms operate in practice. The conclusion of this article emphasises the importance of significant "steps" achieved by Romania on the path to creating a true "fiscal area" in the European Union, as well as the "corridors" that should be inserted to correct economic – legal and economic deficiencies and gaps, in order to strengthen the fiscal area.*

Keywords: *economic double taxation, legal double taxation, double taxation conventions, fiscal area, treaty shopping, taxpayer, income tax, capital tax.*

JEL Classification: H24, H30, K34, K40

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[1] This article was submitted to 6th International Conference "Perspectives of Business Law in the Third Millennium", 25 -26 November 2016, the Bucharest University of Economic Studies, Bucharest, Romania.

[2] Florin Dumiter – "Vasile Goldiș" Western University of Arad, Romania, fdumiter@yahoo.com.

[3] Ștefania Jimon – "Vasile Goldiș" Western University of Arad, Romania, jimonstefania@yahoo.com.

1. Introduction

Looking at the literature, we can see that different views on the provisions of double taxation conventions can lead to conflicts[4]. If one state considers an entity as having a permanent residence, that entity will be subject to the income attributed to this facility with regard to tax regulations. As a result, the other state will interpret the clause of permanent residence in a different way, and will not consider the fact that the requirements for the establishment of permanent residence are met, having the right of *veto* with regard to granting an exemption from tax income, in this case the income being subject to double taxation.

Fiscal sovereignty entails that each state is free to determine the tax system it enforces, define the taxes that make up that system, specify the subjects of taxation, set tax amounts, establish payment terms, grant tax incentives, set tax penalties, establish remedies and tax dispute settlement procedures etc.[5]

The international context and globalisation, the increase in international mobility, the free movement of goods, services, capital and people have quickly led to international investment, the expansion and relocation of economic activities and the development of multinational entities.

In this context, the tax system and fiscal policies of a state must be adapted to both the national and the international environment to ensure competition in taxes. Thus, the increasing mobility of capital and labour can positively influenced, each taxpayer being interested in owning the most profitable opportunities to get the highest return on income before or after taxes[6], and states can ensure their economic and social development based on foreign investment.

There were immediate tax jurisdiction controversies related to revenues obtained and capital held by non-residents of a country, the most common conflict in international tax law being international double taxation[7].

Double taxation is a complex phenomenon that is based on the action of two or more fiscal sovereignties or competition arising between two or more fiscal competences[8] and it is a topic often discussed in the literature because of the negative effects that it generates. International double taxation poses a number of problems due to the fact that its existence prevents inter-state transactions and affairs[9].

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[4] Reimer, E., Rust, A., *Klaus Vogel on Double Taxation Conventions – Fourth Edition,* Wolters Kluwer Law & Business, 2015, Vol. II, pp. 171.

[5] Ioan Condor, *Evitarea dublei impuneri internaţionale*, Regia Autonomă „Monitorul Oficial" Publisher, Bucharest, 1999, p.31.

[6] Dănuț Chilarez, George Sebastian Ene, *Harmonisation and fiscal competition in the European Union*, „Management Strategies Journal", 2014, Vol. 23, No. 1, pp. 83-93.

[7] Éva Erdős, *Conflicts in the international tax law and answers of the European tax law*, „Curentul Juridic", Târgu Mureș, 2011, Vol.47, pp. 159-174.

[8] Ioan Rus, Eleonora-Laura Avram, Paula Monica Bocicor, Mirela Ruxandra Moldovan, *Evitarea dublei impuneri între România și statele: Ungaria și Bulgaria*, „Academica Science Journal Studia Series", Tîrgu Mureș, 2013, No.(3)-2, p.50.

[9] Florin Dumiter, Anca Laura Opreț, Florin Marius Turcaș, *Theoretical underpinnings vis -à- vis of double taxation problem*, „Journal of Legal Studies", 2014, Vol 15, No. 28, pp. 83-99.

However, in order to eliminate or at least mitigate the problem of double taxation, many states have signed bilateral agreements to avoid international double taxation, based on either the OECD model or the UN model[10].

After joining the EU, Romania has adopted a series of legislative changes regarding tax and international double taxation. Thus, Romania has concluded conventions and protocols that ensure good economic and trade cooperation internationally.

The purpose of this article is to highlight how Romania has adapted to the globalisation and liberalisation of markets, how it has adopted and enforced treaties to avoid international double taxation and how it has harmonised the national tax system to the international legal framework.

The article describes international double taxation from a Romanian perspective and makes a synthesis of the literature and law. The structure consists of multiple sections which deal with international double taxation, both economically and legally, the legislative peculiarities encountered in Romania and the actual implementation of conventions, treaties and national tax legislation on international double taxation. Finally, there are some conclusions about how Romania has managed to adapt its tax system to the international context.

2. The economic and legal substantiation of international double taxation

Owing to the intensification of national and international trade relations, legal and natural persons obtain income or own property under different tax authorities, within the same state or in different states. Therefore, it became necessary to define the competences of taxation authorities within the same state or different states, since these taxable items are likely to be disputed simultaneously by multiple such entities[11].

The phenomenon of international double taxation entails a fiscal relation with foreign elements[12], being most often linked to the transfer of capital internationally and tax jurisdiction over it. This may occur if one state claims tax authority based on the taxpayer's residence or citizenship, while another state posits tax authority based on income origin[13].

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[10] Limor Riza, *Taxpayers' Lack of Standing in International Tax Dispute Resolutions: An Analysis Based on the Hybrid Norms of International Taxation*, „Pace Law Review", Vol. 34:3, 2014, pp. 1064-1092, available online at: http://digitalcommons. pace.edu/ plr/vol34/iss3/3 (accessed on 1 October 2016).

[11] Florin Dumiter, Daniel Berlingher, Anca Opreț, Silvia Todor, *Double taxation conventions, structure and evolution of the american tax system*, „Journal of Legal Studies", 2016, Vol. 17, No. 31, pp. 1 – 14.

[12] Cornelia Lefter, Simona Chirică, *Evitarea dublei impuneri internaționale (Reglementări legale interne și convenții fiscale încheiate de România),* „Economie teoretică și aplicată", Vol. XVII, 2010, No. 9(550), pp. 38-51.

[13] Fabian Barthel, Matthias Busse, Eric Neumayer, *The impact of double taxation treaties on foreign direct investment: evidence from large dyadic panel data*, „Contemporary Economic Policy", 2010, Vol. 28, no. 3, pp. 366–377.

Thus, there are two different concepts, namely the concept of source and the concept of residence. Both concepts arise from national legislation, which distinguishes between two types of taxpayers: non-residents and residents[14], each having different connections with the state in which it is located. The concept of source defines the concept of territory, geography revenues are generated, and the concept of residence is based on the home or business of the taxpayer's administrative and ignores the place where the actual revenue. Double taxation is generated by the different application of taxation criteria, based on these concepts.

Double taxation occurs in different forms and in different cases, but the literature classifies it into two broad categories, namely: economic double taxation and legal double taxation. Double taxation is legal when the same person is taxed twice on the same income by more than one state. Double taxation is economic if more than one person is taxed for the same item[15]. In other words, economic double taxation involves taxation on the same taxable item, belonging to different taxpayers for the same period of time, whereas legal double taxation, as defined by George D. Bistriceanu, is where income or property is taxed in two states with the same type of tax in the same financial year[16]. Whatever form it takes, international double taxation has the same result: difficulty in achieving free trade.

To prevent and reduce these negative effects, each state has adjusted its tax legislation, either by unilateral legislative measures, or through bilateral or multilateral agreements. In this regard, the Organisation for Economic Co-operation and Development (OECD) and the United Nations (UN) have each proposed a model of convention to avoid international double taxation.

An international double taxation convention constitutes a common arrangement between the two countries to prevent a taxpayer from one state, or in some cases both states, to be taxed on the same income or capital in both states[17].

Tax treaties fulfil two key functions: firstly, eliminating double taxation, and secondly, assisting information exchange between governments[18] to avoid tax evasion and fraud.

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[14] Committee of Experts on International Cooperation in Tax Matters Seventh session, *Revision of the Manual for the Negotiation of Bilateral Tax Treaties,* Item 5 (h) of the provisional agenda, Geneva, 2011, available online at: http://www.un.org/esa/ffd/tax/ seventhsession/CRP11_ Introduction_2011.pdf (accessed on 1 October 2016) .

[15] OECD-Glossary of Tax Terms, available online at: http://www.oecd.org/ctp/ glossaryoftaxterms.htm#D (accessed on 1 October 2016).

[16] Nicoleta Barbuta-Misu, Florin Tudor, *The International Double Taxation – causes and avoidance,* Acta Universitatis Danubius. Œconomica, Vol. 5, No. 1, 2009, pp. 147-160, available online at: http://journals.univ-danubius.ro/index.php/oeconomica/article/ view/84/81 (accessed on 1 October 2016).

[17] Florin Dumiter, Florin Turcaș, Anca Opreț, *German tax system: double taxation avoidance conventions, structure and developments*, „Journal of Legal Studies", 2015, Vol. 16, No. 30, pp. 1 – 17.

[18] Michelle Bertolini, Pamela Weaver, *Mandatory Arbitration within Tax Treaties: A Need for a Coherent International Standard*, „The ATA Journal of Legal Tax Research", American Accounting Association, Vol. 11, Issue 2, 2013, pp. 1–20.

Under these circumstances, fiscal agreements have an irreversible role in all groups of favouring factors that guarantee and stimulate economic and trade relations between states. The need to conclude a tax agreement becomes even more important if we consider the growing number of international companies that are conducting business in several states simultaneously[19].

Double taxation conventions are part of national law of the Contracting States. They are also part of international law, as international tax treaties. Different experts from the academia have been trying to determine how the denial of the benefits of double taxation conventions in "abusive cases" can be supported by the principles of international law. Vogel argued that international law contains a prohibition against the abuse of the law[20].

The issue of economic double taxation arises frequently in cases where affiliated or associated corporations, with legal offices in different countries, conduct different transactions among them[21]. Each state of residence determines the taxable amount in respect of corporation tax, under the auspices of national legislation. If the two companies engage in reciprocal transactions, the tax authorities of the two countries can assign different values to these transactions.

Analysing legal literature, we have seen that there is great controversy among experts in the field of taxation, regarding how tax authorities may prevent misuse of double taxation conventions. On the one hand, this discussion focuses on the significance of the term of abuse, and hence, its undesirability, and on the other hand, on the rules than encumber tax authorities, to confer benefits from double taxation conventions[22].

3. Particularities of double taxation in Romania

3.1 Double taxation conventions concluded by Romania with world states

The late 20th century meant the beginning of new reforms for Romania, which involved all areas and sectors of the state. Removing the totalitarian Communist system meant reorganising the economy and led to a series of legislative changes in taxation, and the accession and integration into the European Union imposed the adaptation of national tax law to European community provisions.

In its international economic relations, Romania complies with EU regulations on international double taxation and has concluded agreements for

[19] Genta Tafa (Bungo), *Analysing double taxation: the Albanian case*, „International Journal of Management Cases", 2013, Vol. 15, No. 3, pp. 109-121.

[20] Reimer & Rust, *Double Taxation Convention – Fourth Edition – Volume 1,* Wolters Kluwer Law & Business, 2015, p. 376.

[21] Holmes, K., *International Tax Policy and Double Tax Treaties – An Introduction to Principles and Application – Second Revised Edition,* International Bureau of Fiscal Documentation, 2014, p. 40.

[22] Lang, M., *Introduction to the Law of Double Taxation Conventions – Second Edition,* Linde Verlag & International Bureau of Fiscal Documentation, 2013, p. 64.

avoidance of double taxation with countries across the world. Thus, the taxation of income earned in Romania is stipulated in conjunction of the provisions of the Fiscal Code with articles in international tax conventions[23].

International double taxation conventions concluded by Romania use the OECD model and set the taxes and the taxing competence assigned to each state, establish how to eliminate double taxation, how to handle possible conflicts, how to exchange information, determine the date of entry into force and how the agreement can be terminated. Also, the signatory states of such agreements pledge to respect the right to non-discrimination, i.e. to grant the same rights and impose the same obligations on both residents and non-residents.

Romania has concluded conventions and protocols with 86 countries[24] to ensure smooth economic cooperation, presented in Annex 1.

Romania's first agreements to avoid double taxation were signed while the state was a socialist republic. In 1973, the first agreement was signed with the Federal Republic of Germany to avoid international double taxation of income and capital, which was expected to be applied by the end of 2003; eventually, the new convention signed in 2002 was applied, which redefines taxes and how to avoid international double taxation.

In 1974 agreements were signed with France for the avoidance of double taxation of income and capital, and with the US to avoid double taxation of income, then in 1976 with Japan for the avoidance of double taxation of income and the UK for avoiding the double taxation of income and capital, still applied today.

By 1980, Romania had concluded agreements to avoid international double taxation of income and capital with Italy, Denmark, Belgium, Austria, Sweden, Finland, Spain and Canada, and with Pakistan for the avoidance of double taxation of income. The agreements with Italy, Denmark, Sweden and Spain are still are applied today, the other ones having been amended.

From 1980 to 1988 agreements were also concluded on income tax with Egypt, Malaysia, Morocco, India, Bangladesh, and on income and capital tax with the Netherlands, Norway, Cyprus, Zambia Jordan, Sri Lanka, Turkey, Socialist Federal Republic of Yugoslavia, with actual implementation in Bosnia and Herzegovina, Tunisia and Syria. Changes and additions were made to the agreements with Morocco, the Netherlands, Syria and Norway.

From 1992 until 2000, Romania concluded a series of treaties with 18 countries from Europe, 14 from Asia, 4 from Africa and Ecuador, which were mainly focused on income and capital taxes. During this period, the agreements with Belgium and Finland were updated.

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[23] Georgiana Covrig, *Conventions for the avoidance of double-taxation. Romania case*, „Contemporary Readings in Law and Social Justice", Volume 4(1), 2012, pp. 426–430.

[24] Romanian National Tax Administration – Directorate-General for Administration of Large Taxpayers, available online at: https://static.anaf.ro/static/10/Anaf/AsistentaContribuabili_r/Conventii/Conventii.htm (accessed on 1 October 2016).

During 2000 – 2010, further steps were taken in the same direction, and 26 new international double taxation agreements were concluded with 10 countries from Europe, 10 from Asia, 3 from Africa, with Australia, Canada, and Mexico.

The number of agreements concluded by Romania after 2010 is small, with states such as Saudi Arabia, India and Uruguay. In this period, protocols on the avoidance of double taxation were signed with Switzerland, San Marino, Luxembourg and Austria.

This year, Romania has amended the agreements it has with Bulgaria and Norway. These agreements refer to the double taxation of income earned by residents of the Contracting States; in the case of Romania, this refers to income tax and corporate tax. Double taxation is accomplished through deduction, and the effective implementation of the provisions of these agreements will be made with effect from 1 January 2017.

Compliance with these treaties is guaranteed by the Constitution of Romania, which stipulates that the Romanian State pledges to fulfil as such and in good faith its obligations as deriving from the treaties to which it is a party[25].

International double taxation can be eliminated either by exemption method, whereby the State of residence does not tax income that is taxed by the source state, or by crediting, which entails the country of residence deducting all or part of tax paid in the source country. The most common method used in agreements for elimination of double taxation concluded by Romania is ordinary lending.

As regards the exchange of information between Contracting States, by signing these treaties each state commits to notifying the partner state on the amendment of national tax legislation, as well as other information required to implement the agreement and to avoid tax evasion and fraud.

3.2 Provisions of the new Romanian Fiscal Code and Fiscal Procedure Code

To avoid international double taxation, Romanian tax legislation has unilateral regulations and is completed by EU legislation rules and regulations of bilateral tax agreements, which prevail in case of conflict[26]. In Romania, the fundamental regulations on tax are represented by Law no. 227/2015 regarding the Fiscal Code[27] and Law no. 207/2015 regarding the Fiscal Procedure Code[28], as amended and supplemented.

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[25] Constitution of Romania, Title I General Principles, Article 11 – International law and domestic law, available online at: http://www.cdep.ro/pls/dic/site.page?id=339 (accessed on 1 October 2016).

[26] Law 277/2015 on the Fiscal Code, Title I – General Provisions, Chapter I – Purpose and scope of the Fiscal Code, art. 1, para. (3) "Should any provision of this code contravene a provision of a treaty to which Romania is a party, the provision of that treaty shall apply."

[27] Official Gazette of Romania, Part I, no. 688 of 10 September 2015.

[28] Official Gazette of Romania, Part I, no. 547 of 23 July 2015.

Agreements concluded by Romania to avoid double taxation of the income or income and capital of non-residents, as well as the protection of own taxpayers conducting business abroad.

In this sense, the concept of residence is defined by the existence of domicile, citizenship and vital interests in Romania, and the presence in Romania for more than 183 days within 12 consecutive months, whereas legal residence is the establishment and operation under Romanian law, namely the existence of headquarters in Romania.

Regarding income or profits earned by non-residents in Romania, the Fiscal Code provides for the imposition of all taxable income, the calculation, withholding, reporting and payment to the state budget. The tax rate applied will be the most favourable between domestic law and provisions of existing agreements[29].

In case of existence of a convention for the avoidance of international double taxation, and in the presence of a valid tax residence certificate, paid tax can be adjusted by granting an exemption or a tax credit in the country of residence, according to the agreement concluded under a certificate attesting tax paid to the state budget.

Income earned or profit obtained, including from abroad, by residents of Romania, are subject to tax. In the event of an agreement to avoid international double taxation and on the basis of documentary evidence proving the actual payment of tax, Romania shall grant deduction in the form of exemption or tax credit for tax paid in the partner State, within the limit of the tax amount due under the law internal.

In order to implement these regulations most effectively, the Fiscal Procedure Code regulates the realisation of international administrative tax cooperation. Thus, information on legislative fiscal changes on income and capital taxation affecting residents of Partner States and the application of international double taxation conventions, must be communicated to the competent authorities.

In the event of a conflict on the implementation of domestic regulations and agreements concluded for avoidance of international double taxation, the mutual agreement procedure shall be initiated to achieve resolution[30].

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[29] Law 277/2015 regarding the Fiscal Code, Title VI – Tax on income earned in Romania by non-residents and tax on representative office of foreign companies established in Romania, Chapter I – Tax on income earned in Romania by non-residents, Section 7 – Corroboration of provisions of the Fiscal Code with those of conventions to avoid double taxation and European Union legislation, art. 18. "In application of art. 230 para. (1) of the Fiscal Code: (1) Provisions of para. 2 of art. Dividends, Interests, Fees, Dues from double taxation conventions concluded by Romania with other states, which regulate taxation in the source of such income, shall apply with priority. If the domestic legislation should expressly provide a more favourable tax rate, the provision of domestic legislation shall apply."

[30] Law 207/2015 regarding the Fiscal Procedure Code, Title IX Mutual agreement procedure for avoidance/elimination of double taxation, art. 282 Mutual agreement procedure, para. (1) "based on the provisions of the convention or agreement to avoid double taxation, the taxpayer residing in Romania, who believes that taxation in the other contracting state does not comply with the provisions of that convention or agreement, may request A.N.A.F. to initiate mutual agreement procedure" and para.(2) "A.N.A.F. shall also conduct the mutual agreement procedure when the

4. The application of the provisions of Conventions for avoidance of double taxation concluded by Romania with other states. Case study: Tax on gains arising from the transfer of ownership of securities[31]

In this section, we consider it important to present a decision of the Supreme Court of Justice of Romania *(HCCJ)*, namely 646 of 8 March 2016. This case concerns a Romanian company which was ordered to repay tax accounting for gains arising from the transfer of ownership of securities, according to the Convention for the avoidance of double taxation concluded between Romania and Italy[32].

Circumstances of the case

In the claim lodged at the Court of Arad, on 03.09.2012, claimant DF requested that the defendant, Directorate General of Public Finance of Arad County – Public Finance Administration for Medium Taxpayers, was ordered to refund the amount of 1,927,653 lei representing tax on gains from the transfer of ownership of securities and delay increases amounting to 938,767 lei, established by Decision no. 587/06.07.2010 issued by the Tax Audit Section of the Directorate General of Public Finance of Arad County; 113,557 lei representing tax on the gains from transfer of ownership of securities and delay increases in the amount of 55,246 lei, established by Decision no. 579 / 05.07.2010 issued by the Tax Audit Section of the Directorate General of Public Finance of Arad County; with trial costs.

The court's solution

By sentence no. 131 of 20 May 2015 of the Timisoara Court of Appeals – Administrative and Fiscal Contentious Section VIII, the plea of lack of interest and the plea of lack of *locus standi* were dismissed, both invoked by the defendant DGRFP Timisoara – AJFP ARAD (formerly DGFP ARAD for Public Finance Administration for Medium Taxpayers Arad), the action brought by the plaintiff DF, against the defendant DGRFP Timisoara – Arad AJFP (formerly DGFP ARAD for Public Finance Administration for Medium Taxpayers Arad), concerning tax refund and related accessories, was dismissed.

The domestic law governing tax on income earned in Romania by non-residents under Title V of the Fiscal Code Chapter I, which in article 115 distinguishes between a first category of income earned in Romania, which is taxed

competent authority of the state with which Romania has concluded a convention or an agreement to avoid double taxation requests it."

[31] The High Court of Cassation and Justice of Romania, Administrative and Fiscal Contentious Section, Decision no. 646 of the Public Meeting of 8 March 2016, File no. 5726/108/2012.

[32] *Convention between the Socialist Republic of Romania and Italy regarding the avoidance of double taxation and the prevention of tax evasion with reference to taxes on income and capital, adopted by Decree no. 82/15.04.1977 and published in the Official Gazette no. 34 – 35/1977, which entered into force on 06.02.1977 and became effective on 01.01.1985.*

according to the rules established under Title V, and a second category of income that is taxed according to the applicable general rules applicable to the majority of income.

Income earned by the applicant falls into the category envisaged by art. 115 para. 2 let. d: the income of non-resident individuals, obtained from the transfer of equity interests, as defined in Art. 7 para. (1) pt. 31 (equity interest – any share or other membership in a general partnership, limited partnership, limited company, partnership limited by shares, limited liability company or another legal entity or an open investment fund), held in a Romanian legal entity. Paragraph 2 of Article 115 expressly stipulates that the income it lists is not taxed under this chapter, but under Title II, III or IV^1, as applicable (in the present case, pursuant to Title III).

Thus, with regard to the type of income earned by the plaintiff, national law refers to the rules contained in Title III, entitled "Income Tax", which in art. 39 let. d grants taxpayer status to non-resident individuals who receive income referred to in Art. 89, and which, under Art. 66, para. 3, shows the actual method of calculating the payable tax.

Therefore, according to the provisions of the Fiscal Code, the income earned by the plaintiff by disposition of shares are taxable in Romania, national law excluding from this tax only income earned on foreign capital markets (paragraph 5 article 115 of the Fiscal Code), which is not applicable in the present case.

The Court also found that the provisions of art. 14, para. 3 of the Convention for the avoidance of double taxation between Romania and Italy (ratified by Decree no. 82/04.15.1977) are not applicable, as they regulate the situation of other income than those mentioned in the first 2 paragraphs, whereas the income earned by the plaintiff is contained in paragraph 2 of article 14 ("Capital gains") of the Convention for the avoidance of double taxation, the paragraph stating expressly that the income derived *from the alienation of movable assets of a permanent office that an enterprise of a Contracting State has in the other Contracting State, or movable assets pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for the performance of professional services, including gains from the total alienation of this permanent office (alone or with the entire enterprise) or of this fixed base may be taxed in that other State*. Therefore, the very Convention invoked by the defendant regulates the place of taxation as Romania.

The defendant also argued that the tax paid in Italy was partly paid by his father, to whom he gave a proportion of 67% of income received, and partly by himself, corresponding to a percentage of 33%.

The judge held that such support, even if it were true, is irrelevant, given that the budgetary payment obligation to the Romanian state existed under both Romanian legislation and the Convention for the avoidance of double taxation. Thus, any voluntary payment, made to another budget, does not negate the legally made payment to by the Romanian state budget.

As for the amount of tax borne by the plaintiff, the Court found that this is not covered by the application for summons, the plaintiff only contesting the payment obligation and not the calculation of tax receivables, which is why the court shall not consider the method of calculation or the extent of the claim.

The appeal

The plaintiff, DF, appealed against that judgment, criticising it for illegality and groundlessness.

As grounds for the appeal, the plaintiff essentially stated that the Court of Appeal delivered an unlawful judgment in which the Convention on double taxation was misapplied.

In the first part of the recitals, Timisoara Court of Appeal found that the reference period – the fiscal year 2009 – the plaintiff was a tax resident of the Italian state and found that the income he obtained through the transfer of shares is taxable income in Romania, as Romanian law excludes from tax only income earned on foreign capital markets (art. 115 para. (5) of the Fiscal Code), which is not the case.

It is shown that, in accordance with art. 31 of the Law of Treaties, the Fiscal Code provides in art. 1 para. (4) the following: "Should any provision of this Code contravene a provision of a treaty to which Romania is a party, the provisions of that treaty shall apply."

Timisoara Court of Appeal found that the rule applicable in this case is not the one invoked by the plaintiff – art. 14 para. (3) of the Convention – but the rule under art. 14 para. (2) of the Convention. Timisoara Court of Appeal thus infringed art. 14 para. (6) of the new Code of Civil Procedure.

The rule invoked by the court, para. (2) of art. 14 was misapplied in this case.

The rule invoked by the court deals with the taxation of gains obtained from the alienation of two categories of movable assets:

a) movable assets pertaining to a permanent office which an enterprise of a Contracting State (Romania or Italy) has in the other Contracting State (Italy or Romania), including gains from the total alienation of that permanent office (alone or with the entire enterprise);

b) movable assets pertaining to a fixed base available to a resident of a Contracting State for the performance of professional services, or from the alienation that fixed base. The applicability of the rule in this hypothesis is obviously out of the question, as art. 15 para. (2) defines the professional services as comprising "in particular, independent scientific, literary, artistic, educational and pedagogical activities, as well as independent activities of physicians, lawyers, engineers, architects, dentists and accountants."

When he citing the rule of art. 14 para. (2), the trial court pointed out two pieces of text:

"income from the alienation of movable assets (...) including gains from the total alienation of a permanent office (alone or with the entire enterprise)".

The emphasis of the court shows, without a doubt, that it considered that the shares that the plaintiff owned at the company SCTCSRL Pecica and which they alienated to the company TIG Germany are movable assets pertaining to the permanent office of the enterprise in Romania. It is evident that the shares which the plaintiff held in SC TCSRL Pecica were not part of the assets of that company, but of the plaintiff's property.

The plaintiff considers that the terms "be part of" and "pertain to" that the Convention on double taxation between Romania and Italy uses are synonymous and indicate unequivocally that they refer to movable assets belonging to the legal entity.

The applicable rule in the litigation is art. 14 para. (3) of the Convention.

Recitals and the Court of Appeal's solution

In essence, the plaintiff considers that the amounts paid by debtors of SC TIG Germany and TF SRL, established on their behalf by Tax Decision no. 587/2010 and 579/2010, and not contested by the two companies, must be returned.

- *As regards the misapplication of art. 14 para. 2 of the Convention on the application of double taxation between Romania and Italy*.
- The plaintiff shows that the trial court wrongly considered that the shares that he alienated from the company TIG Germany are movable assets that he held in the company SC TC SRL Pecica, which were part of the permanent office of the enterprise.

The plaintiff argues that the text refers to company earnings, and not to an individual investor like the plaintiff or the performance of professional services that have a fixed base.

The High Court finds that the shares alienated by the plaintiff were held by him as an associate to SC TC SRL, therefore the shares are part of collective property, and not the plaintiff's property.

SC TC Cel SRL Pecica is a limited liability company whose principal activity is "growing non-perennial plants".

In EU law, the concept of enterprise is not defined in the TFEU. The ECJ stated that an enterprise is any entity that has a unitary organisation of personal, material and intangible items, and which sustainably pursues a specific economic aim.

In Romanian law the legal definition of an enterprise is formulated in several laws. Thus, according to art. 2 para. 2) of Law no. 21/1986, an enterprise is any economic operator engaged in an activity consisting of providing goods and services on a given market, independently of its legal status and method of financing, as defined in EU case law.

Art. 2 of Law no. 346/2004 on stimulation of the establishment and development of small and medium enterprises defines "An enterprise as being any form of organisation of economic activity, with autonomous property and

authorised under the laws in force to perform acts and deeds of commerce for profit under competition...".

It is beyond doubt that SC TC SRL is a company established under Law no. 31/1990, which has the elements of an enterprise according to the definitions given above, meaning that the company has the meaning provided by the art. 14 para. 2 of the Convention for the avoidance of double taxation invoked.

Note that the income earned by the plaintiff as non-resident from the transfer of shares held at SC TC SRL Pecica to SC TIG Germany falls within the provisions of art. 115 para. 2 let. d) of the Fiscal Code, according to which: "income of a non-resident individual earned from the transfer of shares, as defined in Art. 7 para. 1 pt. 31, para. 2 of art. 115 clearly states that it is not taxed under this chapter, but under Title II, III or IV, as appropriate.

Also note that applicable to this case are the provisions of art. 67 para. 3) of the Fiscal Code, "Calculation, withholding and payment of tax on investment income, other than those provided in para. 1) and 2) are performed as follows: b) in case of earnings generated by the transfer of securities, other than shares, in the case of private limited companies, and the transfer of shares, the obligation to calculate, withhold and pay the tax lies with the acquirer."

In this case, the acquirers of shares are SCTF SRL Romania and TIG Germany, which also paid the debit without appealing tax decisions.

Therefore, the debit/tax liability was established by the correct application of applicable legal provisions.

It is true that the international treaties to which Romania is a party are applied directly and with priority when the provisions of the Fiscal Code contravene its contents, but in this case, para. 3 of art. 14 of the Agreement between the Romanian Government and the Government of Italy shall apply to any assets *alienated other than those referred to* in paragraphs 1 and 2; in this case one cannot proceed to para. (2) referring specifically to the alienation of movable property pertaining to a fixed establishment which an enterprise of a fixed base available to a resident of the other Contracting State to exercise certain professions (position of the plaintiff).

The plaintiff is applied this particular variant and one cannot proceed to art. 14 para. 3 of the Convention, aimed at "alienated goods - other than those in paragraphs (1) and (2).

- Nor can one retain the argument of tax payment from gains arising from the alienation of equity interests in the Italian State, as there is no proof of any payment of that tax from March 2009 to July 2010 – the date the tax obligations were established by tax authorities, or thereafter.

Documents invoked by the plaintiff to prove tax on income from investments amounting to €1,927,653.141 lei are irrelevant, these proving the transfer of money to his father and the company RESECO (€900,000 in 2009 and €1.394 million in 2010).

Judgements cited as the practice in this matter by the plaintiff are irrelevant, as they were reported in different case situations, and it does not appear that the tax had been paid to the Italian State for the operation of transfer of shares.

Legal basis for the solution adopted in the appeal

In accordance with Art. 312 para. 1 of the Code of Civil Procedure, providing that the trial court pronounced a legal and thorough decision, the High Court rejected as unfounded the appeal filed by DF against Sentence no. 131 of 20 May 2015 of Timisoara Court of Appeals – Administrative and Fiscal Contentious Section.

5. Conclusions

The provisions of double taxation conventions apply only if a tax residence certificate is produced, showing the following: "... the taxpayer is a resident of the State (...) and the provisions of double taxation conventions are applicable to him." If the certificate issued by the tax authorities of the country of residence is not produced, domestic tax law will be applied. To rectify the situation, a term of 5 years is stipulated, in which the tax residence certificate can be produced.

To solve the problem of double taxation, the so-called *classic tripartite* was established, representing a set of criteria for avoidance of double taxation: the criterion of origin or territoriality, which argues that the taxation is made by the country in whose territory the income or property was obtained, disregarding the nationality of the income beneficiary; the domicile or residence criterion, which states that taxation on income and property is carried out by the authority to which the resident pertains, without taking into account the place where the income and property was obtained; the nationality criterion, according to which the State shall tax all its residents, regardless of whether or not they live within that state.

Although each country pursues with application of these criteria quite rigorously, we frequently see taxation on the same taxable matter by two separate authorities, which gives rise to double taxation. Depending on the area of manifestation, it may be domestic and international. Double taxation often lies with the will of the legislator and responds to financial or economic policy purposes.

The conclusion of this article is that some countries tax citizens or residents based on their global income. Other countries only tax income earned in the state of whose jurisdiction they are responsible. Most countries adopt a combination of the above approaches. As a result, it can be seen as a common practice that taxpayers involved in international transactions are taxed more than once (usually twice) on the same level of income achieved. This phenomenon is called international double taxation. Double taxation can take various forms; however, it inhibits economic affairs. Therefore, international tax policy makers have designed multiple ways to ensure that income earned by a taxpayer is, *ceteris paribus*, taxed only once.

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Appendix 1. Double Taxation Conventions concluded by Romania with other states

No.	Country	No & Data of the Decree / The Law Ritifying Convention	Bulletin/Gazette in which is published the Convention	Effective Date/ Date to which it is applied
1.	Africa de Sud	59/13.07.1994	199/1994	29.10.1995/01.01.1996
2.	Albania	86/18.10.1994	302/1994	20.10.1995/01.01.1996
3.	Algeria	25/12.04.1995	69/1995	11.07.1996/01.01.1997
4.	Arabia Saudită	259/07.12.2011	917/2011	01.07.2012/01.01.2013
5.	Armenia	121/09.07.1997	156/1997	24.08.1997/01.01.1998
6.	Australia	85/20.03.2001	150/2001	11.04.2001/01.01.2002
7.	Austria	333/15.11.2005	1034/2005	01.02.2006/01.01.2007
	Austria (Protocol)	245/17.07.2013	448/2013	01.11.2013/01.01.2014
8.	Azerbaidjan	366/19.09.2003	687/2003	29.01.2004/01.01.2005
9.	Bangladesh	221/04.09.1987	37/1987	21.08.1988/01.01.1989
10.	Belarus	102/26.05.1998	200/1998	15.07.1998/01.01.1999
11.	Belgia	126/16.10.1996	262/1996	17.10.1998/01.01.1999
12.	Bulgaria (until 31.12.2016)	5/10.01.1995	7/1995	12.09.1995/01.01.1996
	Bulgaria (from 01.01.2017)	29/17.03.2016	220/2016	29.03.2016/01.01.2017
13.	Canada	450/01.11.2004	1043/2004	31.12.2004/01.01.2005
14.	Cehia	37/16.06.1994	157/1994	10.08.1994/01.01.1995
15.	China	5/24.01.1992	10/1992	05.03.1992/01.01.1993
16.	Cipru	261/09.07.1982	66/1982	08.11.1982/01.01.1983
17.	Coreea de Sud	18/08.04.1994	96/1994	06.10.1994/01.01.1995
18.	Coreea de Nord	104/19.06.2000	301/2000	25.08.2000/01.01.2001
19.	Croaţia	127/16.10.1996	271/1996	28.11.1996/01.01.1997
20.	Danemarca	389/27.10.1977	118/1977	28.12.1977/01.01.1974
21.	Ecuador	111/09.11.1992	294/1992	22.01.1996/01.01.1997
22.	Egipt	316/14.10.1980	84/1980	05.01.1981/01.01.1982
23.	Elvetia	60/13.07.1994	200/1994	27.12.1994/01.01.1994
	Elveţia (Protocol)	261/07.12.2011	934/2011	06.07.2012/01.01.2013
24.	Emiratele Arabe Unite	74/03.11.1993	262/1993	23.01.1996/01.01.1997
25.	Estonia	449/01.11.2004	1126/2004	29.11.2005/01.01.2006

No.	Country	No & Data of the Decree / The Law Ritifying Convention	Bulletin/Gazette in which is published the Convention	Effective Date/ Date to which it is applied
26.	Etiopia	448/01.11.2004	1057/2004	09.05.2009/01.06.2009
27.	Federaţia Rusă	38/16.06.1994	158/1994	11.08.1995/01.01.1996
28.	Filipine	23/04.04.1995	64/1995	27.11.1997/01.01.1998
29.	Finlanda	201/24.12.1999	642/1999	04.02.2000/01.01.2001
30.	Franţa	240/23.12.1974	171/1974	27.09.1975/01.01.1975
31.	Georgia	45/26.03.1999	132/1999	15.05.1999/01.01.2000
32.	Grecia	25/12.03.1992	46/1992	07.04.1995/01.01.1996
33.	India	329/05.12.2013	769/2013	16.12.2013/01.01.2014
34.	Indonezia	50/02.03.1998	104/1998	13.01.1999/01.01.2000
35.	Iran	279/15.05.2002	401/2002	30.10.2007/01.01.2008
36.	Irlanda	208/28.11.2000	626/2000	29.12.2000/01.01.2001
37.	Islanda	139/04.07.2008	589/2008	21.09.2008/01.01.2009
38.	Israel	39/14.02.1998	86/1998	21.06.1998/01.01.1999
39.	Iordania	215/26.06.1984	51/1984	02.08.1984/01.01.1985
40.	Italia	82/15.04.1977	34-35/1977	06.02.1979/01.01.1979
41.	Letonia	606/06.11.2002	841/2002	28.11.2002/01.01.2003
42.	Liban	10/21.03.1996	62/1996	06.04.1997/01.01.1998
43.	Lituania	278/15.05.2002	393/2002	15.07.2002/01.01.2003
44.	Luxemburg	85/18.10.1994	299/1994	08.12.1995/01.01.1996
	Luxemburg (Protocol)	181/18.10.2012	715/2012	11.07.2013/01.01.2014
45.	Japonia	213/05.07.1976	69/1976	09.04.1978/01.01.1978
46.	Kazahstan	11/06.03.2000	109/2000	21.04.2000/01.01.2001
47.	Kuwait	5/08.03.1993	57/1993	05.10.1994/01.01.1992
48.	Malayezia	482/26.12.1983	106/1983	07.04.1984/01.01.1985
49.	Malta	61/03.07.1996	144/1996	16.08.1996/01.01.1997
50.	Macedonia	306/17.05.2002	473/2002	16.08.2002/01.01.2003
51.	Marea Britanie	26/03.02.1976	13/1976	22.11.1976/01.04.1976
52.	Maroc	5/18.02.2004	161/2004	17.08.2006/01.01.2007
53.	Mexic	331/28.06.2001	372/2001	15.08.2001/01.01.2002
54.	Moldova	60/17.06.1995	127/1995	10.04.1996/01.01.1997
55.	Namibia	61/15.04.1999	188/1999	05.08.1999/01.01.2000

No.	Country	No & Data of the Decree / The Law Ritifying Convention	Bulletin/Gazette in which is published the Convention	Effective Date/ Date to which it is applied
56.	Nigeria	10/08.03.1993	58/1993	18.04.1993/01.01.1994
57.	Norvegia (until 31.12.2016)	67/25.03.1981	19/1981	27.09.1981/01.01.1982
	Norvegia (from 01.01.2017)	27/17.03.2016	218/2016	01.04.2016/01.01.2017
58.	Olanda	85/25.05.1999	251/1999	29.07.1999/01.01.2000
59.	Pakistan	212/28.11.2000	632/2000	13.01.2001/01.01.2002
60.	Polonia	6/10.01.1995	7/1995	15.09.1995/01.01.1996
61.	Portugalia	63/15.04.1999	194/1999	14.07.1999/01.01.2000
62.	Qatar	84/20.03.2001	150/2001	06.07.2003/01.01.2004
63.	R.F.Germania	29/16.01.2002	73/2002	17.12.2003/01.01.2004
64.	R.F.Iugoslavia[33]	122/09.07.1997	155/1997	01.01.1998/01.01.1998
65.	R.S.F.Iugoslavia[34]	331/14.10.1986	61/1986	21.10.1988/01.01.1989
66.	San Marino	384/31.12.2007	13/2008	11.02.2008/01.01.2009
	San Marino (Protocol)	85/06.06.2011	408/2011	16.06.2011/01.01.2012
67.	S.U.A.	238/23.12.1974	168/1974	26.02.1976/01.01.1974
68.	Singapore	475/09.07.2002	580/2002	28.11.2002/01.01.2003
69.	Siria	106/14.04.2009	279/2009	04.06.2009/01.01.2010
70.	Slovacia	96/10.11.1994	315/1994	29.12.1995/01.01.1996
71.	Slovenia	55/24.01.2003	105/2003	28.03.2003/01.01.2004
72.	Spania	418/05.12.1979	97/1979	26.06.1980/01.01.1980
73.	Sri Lanka	149/22.05.1985	27/1985	28.02.1986/01.01.1986
74.	Sudan	386/31.12.2007	13/2008	14.11.2009/01.01.2010
75.	Suedia	432/31.10.1978	104/1978	08.12.1978/01.01.1978
76.	Tadjikistan	16/17.02.2009	110/2009	02.03.2009/01.01.2010
77.	Thailanda	3/03.02.1997	18/1997	03.04.1997/01.01.1998
78.	Tunisia	326/23.12.1987	60/1987	19.01.1989/01.01.1990
79.	Turcia	331/14.10.1986	61/1986	15.09.1988/01.01.1989
80.	Turkmenistan	107/14.04.2009	321/2009	21.08.2009/01.01.2010
81.	Ucraina	128/16.10.1996	272/1996	17.11.1997/01.01.1998; 15.01.1998

[33] Apply in Serbia and Montenegro..
[34] Apply in Bosnia-Herţegovina.

No.	Country	No & Data of the Decree / The Law Ritifying Convention	Bulletin/Gazette in which is published the Convention	Effective Date/ Date to which it is applied
82.	Ungaria	91/26.10.1994	306/1994	14.12.1995/01.01.1996
83.	Uruguay	276/24.10.2013	665/2013	22.10.2014/01.01.2015
84.	Uzbekistan	26/12.03.1997	46/1997	17.10.1997/01.01.1998
85.	Vietnam	6/13.03.1996	56/1996	24.04.1996/01.01.1997
86.	Zambia	215/26.06.1984	51/1984	29.10.1992/01.01.1993

Source: Information taken from the National Agency for Fiscal Administration – Directorate General Administration of Large Taxpayers database.