

TAX AVOIDANCE IN EMERGING COUNTRIES: IS A GAAR A SUITABLE MEASURE?

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Summary: Introduction. 1. Differences between OECD and emerging countries' tax systems. 2. The challenges and constraints to promote effective reforms and to counter noncompliance in emerging countries. 3. Is tax avoidance a problem that calls for a GAAR in emerging countries? 4. Conclusions. Bibliography.

I. INTRODUCTION

Tax avoidance is a common feature of tax systems, despite the differences in terms of taxpayers' aggressiveness and the responses from the governments. Up to the present time, no jurisdiction has built a complete solution to this matter.¹

There is no universal legal or academic definition of avoidance. It is either defined negatively or combined with terms such as 'impermissible' or 'unacceptable'.² In order to circumvent this conceptual dilemma but, at the same time, to prevent misinterpretations, my approach will proceed on the definitions based on the legal consequences of the taxpayer's conduct.³ Hence, I will, where appropriate, use the term 'evasion' for criminal tax conduct, 'avoidance' for unsuccessful tax avoidance and 'minimisation' for successful tax planning.

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1 Malcolm Gammie, "Tax avoidance and the rule of law: A perspective from the United Kingdom" in G. S. Cooper (ed), *Tax avoidance and the rule of law* (Amsterdam: IBFD, 1997), 210-4. Michael A. Livingston, "Law, Culture, and Anthropology: On the Hopes and Limits of Comparative Tax" (2005) XVIII CJLJ 1, 129-31. Phyllis Lai Lan Mo, *Tax avoidance and Anti-avoidance Measures in Major Developing Economies*, (London, 2003), 1-2. James Alm and Jorge Martinez-Vazquez, "Tax morale and tax evasion in Latin America" (GSU, 2007), 16-8. Hermes Marcelo Huck, *Evasão e Elisão: Rotas Nacionais e Internacionais do Planejamento Tributário*, (São Paulo, 1997), 3.

2 Philip Baker, "Tax avoidance, tax evasion & tax mitigation" (2000) GITC, available at <http://www.taxbar.com/documents/Tax_Avoidance_Tax_MitigationPhilip_Baker.pdf> [Accessed March 8, 2011], 12. Victor Thuronyi, *Comparative tax law*, (London: Kluwer, 2003), 152-3. Tracey Bowler, "Countering Tax Avoidance in the UK: Which Way Forward?" (2009) 7 IFS, available at <<http://www.ifs.org.uk/comms/dp7.pdf>> [Accessed February 21, 2011], 13.

3 Douglas Yamashita, "Limites à economia de tributos: da teoria legal à prática jurisprudencial" in D. Yamashita (ed), *Planejamento tributário à luz da jurisprudência* (São Paulo: Lex, 2007), 73.

Most countries have anti-avoidance measures. They differ between systems (common or civil law) and type of states (unitary or federal).⁴ Even so, there is a high degree of coincidence among these measures because they address similar issues and share common elements.⁵ The most popular techniques are targeted anti-avoidance rules– which are specific, detailed and reactive– and general anti-avoidance rules (hereafter GAARs)– broad, uncertain and both prospective and retrospective.⁶

GAARs are controversial since they confer discretion on tax officials.⁷ One cannot verify the necessity of GAARs in any place given its uncertainty and the unforeseeability of the judicial outcomes. It has not eliminated tax avoidance, despite its long history in some countries; still, early rules have been amended or replaced to overcome pitfalls, the idea has spread in many places, and no country gave up on it.⁸

Prior studies suggest tax avoidance is not exclusive to OECD countries and seriously harms developing economies.⁹ Several of these countries allegedly have some sort of GAAR.¹⁰ Some inherited it from their colonisers. In others, 'tax transplants' from OECD countries are signs of progress.¹¹ And International Financial Institutions put pressure on these countries to remove trade barriers and to follow their recommended tax policy,¹² which recently contain the adoption of GAAR:

An effective set of tools to address tax avoidance and evasion is critical in defending the revenue bases of both G-20 and developing countries and much work has already been done both by international organisations and countries alike. Building on this work, G-20 countries, working through the Forum on Tax Administration and others could develop a menu or tool kit of measures to counter avoidance and evasion. This should include an appreciation of countries' experience with counter measures so that developing countries can make an informed choice about the best way forward. For instance, experience in countries that have a strong general anti-avoidance rule in their tax law indicates that this approach can be a very effective deterrent and enforcement instrument.¹³

4 Thuronyi (2003), above fn.4, 152-3.

5 Nabil Orow, General anti-avoidance rules: a comparative international analysis, (Bristol: Jordans, 2000), 64-74. Judith Freedman, Beyond boundaries: developing approaches to tax avoidance and tax risk management, (Oxford: CBT, 2008), 1-6.

6 Thuronyi (2003), above fn.2, 152-3. Bowler (2009), above fn.,2.

7 João Dácio Rolim, Normas antielisivas tributárias, (São Paulo: Dialética, 2001), 60.

8 Graeme S. Cooper, Tax avoidance and the rule of law, (Amsterdam: IBFD, 1997), 25-6. Bowler (2009), above fn.2, 48. Freedman (2008), above fn.5, 1-6. Thuronyi (2003), above fn.2, 152-3.

9 Livingston (2005), above fn.1, 129-31. John Christensen, et al., "Tax Avoidance, Tax Competition and Globalisation: making tax justice a focus for global activism", available at <<http://visar.csustan.edu/aaba/christensen2004.pdf>> [Accessed January 19, 2011], 5.

10 International Bureau of Fiscal Documentation - IBFD, "Countries Surveys", available at <<http://o-online.ibfd.org.catalogue.uu.nl>> [Accessed 01/05/2012].

11 'Borrowing other people's law is seen as just a method of speeding up the process of finding legal solutions to similar problems – a process being encouraged all the more by pressures towards convergence brought about by globalisation.' David Nelken, Towards a Sociology of Legal Adaptation, (Oxford: Hart, 2011), 11-21. See also, Carlo Garbarino, "Comparative Taxation and Legal Theory: The Tax Design Case of the Transplant of General Anti-Avoidance Rules" (2010) *Theo Inq L* 11, 765-90.

12 'Countries may seek to imitate militarily or economically more successful powers; law is often imposed by an occupying or colonial power, and legal reforms may be made a condition of financial aid.' David Nelken and Johannes Feest, *Adapting legal cultures*, (Oxford, 2001), 5.

13 IMF, et al., *Supporting the Development of More Effective Tax Systems* (2011) 25, 25.

Nonetheless, the idea of a GAAR 'menu or tool kit' must be cautiously discussed. Inevitably, legal transplants raise problems.¹⁴ Numerous differences between OECD and emerging countries¹⁵ suggest they should have dissimilar approaches to tax avoidance.¹⁶ There are few studies addressing this matter. Often where a GAAR is considered, it is seen as inadequate for these countries based on common sense assumptions or without providing alternative measures.

II. DIFFERENCES BETWEEN OECD AND EMERGING COUNTRIES' TAX SYSTEMS

There is not a single tax system in the world equal to another one. Overall differences comprehend levels of taxation, and structural variation of taxes on consumption, property, income, capital gains and social security contributions.¹⁷ Yet, OECD tax jurisdictions share many common features, whilst they differ greatly from developing states in several aspects and for many reasons.¹⁸

Generally, OECD countries have broad-based direct and indirect taxes, where tax liability covers the majority of individuals and corporations.¹⁹ Direct taxes, particularly on personal income and social contributions— and less on corporations— are responsible for most revenue. Indirect taxes represent a smaller share of the tax collection, especially consumption taxes on domestic sales (VAT or goods and sales taxes, and excises) rather than on international trade.²⁰

In contrast, indirect taxes prevail over direct taxes in emerging countries. They are 'easy-to-collect', have fewer administrative costs and are less sophisticated. Personal income tax is a minor source of revenue given its narrow tax base, high collection costs and ease of evasion by the self-employed.²¹ These taxes target taxpayers who are most likely unable to resist tax liability via withholding taxes on wages— mainly of the public sector— or on large businesses that depend on the finance sector and have to comply with accounting requirements. Indirect taxes on domestic consumption are their most important source of revenue. Import tariffs, trade taxes, and excises— particularly resource taxes—²² still play an important role in these states. These sources of revenue have distorting effect on the economy as opposed to modern taxes; they undermine the distributiveness and progressivity of the tax system.²³

14 Thuronyi (2003), above fn.2, 152-3. Garbarino (2010), above fn.11, 765-90. Richard Bird, "The BBLR Approach to Tax Reform in Emerging Countries" (2008) available at <<http://ssrn.com/abstract=1273818>> [Accessed April 11, 2013], 2.

15 The term 'emerging country' is controversial. In this paper, it refers to fast growing economies, more advanced than other developing countries but not yet having reached the status of developed world, such as those within the G-20 (Argentina, Brazil, China, India, Indonesia, Mexico and South Africa).

16 Reuven Avi-Yonah and Yoram Margalioth, "Taxation in developing countries: some recent support and challenges to the conventional view" (2007) V.T.R., 4. Margaret McKerchar and Chris Evans, "Sustaining Growth in Developing Economies through Improved Taxpayer Compliance: Challenges for Policy Makers and Revenue Authorities" (2009) 7 eJ.T.R. 2, 171-2.

17 Cedric T. Sandford, *Why tax systems differ: a comparative study of the political economy of taxation*, (Bath, 2000), 7-19.

18 Christopher Heady, *Tax Policy in Developing Countries: What Can Be Learned from OECD Experience?* (IDS, 2002), 1. Sandford (2000), above fn.17, 7-19.

19 Elke Siehl, *Addressing Tax Evasion and Tax Avoidance in Developing Countries* (Federal Ministry for Economic Cooperation and Development, Germany, 2010), 6.

20 Roger Gordon and Wei Li, "Tax structures in developing countries: Many puzzles and possible explanation" (2009) J.P.E. 93, 857. Avi-Yonah and Margalioth (2007), above fn.16, 2-5. Sandford (2000), above fn.17, 7-19.

21 Gordon and Li (2009), above fn.20, 856-7. Avi-Yonah and Margalioth (2007), above fn.16, 2-3. Sandford (2000), above fn.17, 7-19.

22 Resource taxes are easy to tax on source but are subject to severe ongoing fluctuation of market prices. Clemens Fuest and George Zodrow, "Introduction" in C. Fuest and G. Zodrow (eds), *Critical Issues in Taxation and Development* (London: MIT Press, 2013), 3, 7.

23 Avi-Yonah and Margalioth (2007), above fn.16, 18-9. Bird (2008), 2. Sandford (2000), above fn.17, 7-19. Alm and Martinez-Vazquez (2007), above fn.1, 3.

Globalisation has forced developing countries to gradually replace trade taxes and excises with domestic consumption taxes, particularly VAT,²⁴ and introducing or expanding income tax. These ‘hard-to-collect taxes’ require efficient tax administration, infrastructure, monitoring and enforcement. Still, these taxes are not free from economic distortions where there is a narrow tax base.²⁵

Such differences are justified by a number of factors. In developing countries, agriculture has a more significant weight than industry in contrast to OECD countries. Illiteracy, unqualified labour and poverty usually reduce the tax base for it is difficult or cost-ineffective to bring low-income taxpayers under the tax net.²⁶ Administrative inefficiencies, the lack of adequate database, high compliance costs, severe noncompliance, a significant informal sector, poor public transparency and accountability, and corruption are barriers for enhancing the revenue-raising capacity.

All these differences are fundamental issues to take on board before any tax transplant is considered. They mean that ‘taxes that work well in OECD countries will not necessarily work well in any particular developing country.’²⁷ Similar consideration applies to GAARs in emerging economies.

24 Avi-Yonah and Margalioth (2007), above fn.16, 6, 14-5.

25 Avi-Yonah and Margalioth (2007), above fn.16, 18-9. 15. Marta Ruiz, et al., IFI tax policy in developing countries (Actionaid, 2011), above fn.5, 25.

26 Avi-Yonah and Margalioth (2007), above fn.12, 4-5. Sandford (2000), above fn.17, 7-19.

27 Heady (2002), above fn.18, 1.

III. THE CHALLENGES AND CONSTRAINTS TO PROMOTE EFFECTIVE REFORMS AND TO COUNTER NONCOMPLIANCE IN EMERGING COUNTRIES

IFIs' recommended tax reforms to developing countries had relatively limited success. This was partly due to errors in design as a result of the unawareness of their particular circumstances, the inappropriate import of foreign tax models and the unsuitable time frames to implement these reforms in a competitive international environment. And partly as a result of a number of constraints faced by developing countries such as fragile economic structures, administrative weaknesses, political instability, widespread noncompliance and complex, incoherent legal frameworks.²⁸ These ambitious programs have been gradually downgraded and now advice is building on simpler basis: 'in developing countries, tax policy is often the art of the possible rather than the pursuit of the optimal.'²⁹

The first task for developing countries results from their socio-economic structure: an informal sector involved in cash transactions, a large agricultural base and a poor, uneducated population. VAT and income tax are incompatible with informality for they require a high threshold of registration, filing, reporting (including third-party), withholding and operate mainly on a self-assessment basis.³⁰ The number of formal taxpayers is limited: the 'shadow economy' does not pay income taxes or does not collect consumption taxes on sales and services.³¹

Revenue may come with growth but higher rates might discourage it. Improving tax capacity and introducing proper taxation policies may change this cycle, although 'there is no simple road to better (or bigger) taxation in developing countries.'³² Many jurisdictions are still struggling to adopt such tax reforms and to adjust to a fast changing international commerce.³³

This dilemma is amplified by the competition between countries or even between regions within a single country. This occurs when incentives, exemptions and tax holidays³⁴ are given to seduce FDI, reducing more the revenue. 'Competition between developing countries for investment can trigger a race to the bottom.'³⁵ It may encourage domestic noncompliance since foreign investors have an advantageous treatment. 'Most developing countries are reluctant to apply stringent tax audit policies to foreign enterprises for fear of driving them off the country. This situation encourages tax avoidance behaviour.'³⁶

28 Michael Keen, "Taxation and Development—Again" in C. Fuest and G. Zodrow (eds), *Critical Issues in Taxation and Development* (London: MIT Press, 2013), 19-20. IMF, et al. (2011), above fn.13, 10-11.

29 Vito Tanzi and Howell Zee, "Tax policy for emerging markets: Developing countries" (2000) *LIJ Nat'l Tax J.* 2, 300. Keen (2013), above fn.28, 19-20. IMF, et al. (2011), above fn.13, 10-11.

30 Tanzi and Zee (2000), above fn.29, 299. Siehl (2010), above fn.19, 18. Keen (2013), above fn.28, 19-20. Clements Fuest, et al., "International profit shifting and multinational firms in developing countries" in C. Fuest and G. Zodrow (eds), *Critical Issues in Taxation and Development* (London: IMF Press, 2013), 145. IMF, et al. (2011), above fn.13, 11. McKerchar and Evans (2009), above fn.16, 171-4.

31 Alm and Martinez-Vazquez (2007), above fn.1, 16-8.

32 Richard Bird, "Taxation and Development" (2010) 34 *Econ Premise*, 2-3.

33 Natalia Quinones Cruz, "Anti-avoidance measures: portrait of a thorny struggle" (2009) 36 *T.P.I.R.* 1, 10.

34 Tanzi and Zee (2000), above fn.29, 316. See also, Mo (2003), above fn.1, 12-3. Yariv Brauner, "The future of tax incentives for developing countries" in Y. Brauner and M. Stewart (eds), *Tax, Law and Development* (Cheltenham, UK: EEP, 2013), 25-6.

35 IMF, et al. (2011), above fn.13, 10.

36 Mo (2003), above fn.1, 12-3.

Institutional weaknesses of tax administration are difficult constraints to tax policy-making in developing countries and include: limited administrative resources, inadequate structures, out-dated systems and scarce information technology, low levels of skills and training of staff, poor databases and third party information, and insufficient and underpaid officials. The result is the inability to collect and control taxes reasonably, and the incapacity to properly assess taxpayer's returns and perform full-field audits and investigations.³⁷

There are many socio-political constraints to adjust developing countries tax systems to international standards: poor governance, weak rule of law, constant and incoherent changes of tax statutes, lack of independent courts and safeguards against arbitrariness and discrimination. Besides, wealthy groups or 'cartel elites' who capture the institutions and power structure oppose distributional tax reforms.³⁸

Corruption is an endemic barrier to tax reform, as it may: discourage investment; unlawfully enrich officials or politicians; confer contracts, concessions or public appointments to people who are not necessarily the most committed or capable of serving public interest; transfer public assets abroad; grant tax advantages, exemptions,³⁹ incentives⁴⁰ or deferral of liabilities to individuals or companies; and erode public confidence in the institutions (legitimacy).

There is a close relation between corruption, institutional weaknesses and distrust, noncompliance and low tax morale.⁴¹ 'Corruption indicators are strongly associated with low revenue (indeed corruption functions like a tax itself, and is likely to be a particularly regressive and inefficient form of taxation).'⁴² While compliance is high in OECD countries, in many emerging countries evading taxes is seen as a talent, carries no social stigma⁴³ and authorities are reluctant to sanction evaders.⁴⁴

[...] civil servants in developing countries are poorly paid. As a result, tax officials have enormous opportunities and incentives to accept bribes to help individuals or enterprises avoid paying taxes. To prevent or deter such bribery, some governments have imposed limitations and restrictions on tax administrative activities. For example, individual tax officials are not allowed to make field visits to the enterprises alone, and tax inspectors may be required to conduct their field audits in teams. These actions unnecessarily increase the cost of tax auditing and tax collection.⁴⁵

37 Alm and Martinez-Vazquez (2007), above fn.1, 9-10. IMF, Revenue Mobilization in Developing Countries (2011), 8. McKerchar and Evans (2009), above fn.16, 171-4. Siehl (2010), above fn.19, 18. Tanzi and Zee (2000), above fn.29, 299.

38 Alm and Martinez-Vazquez (2007), above fn.1, 39. Kevin Davis, "The prospects for anti-corruption law: optimists versus skeptics" (2012) 4 H.J.R.L. 2, 322. Keen (2013), above fn.28, 19-20. Tanzi and Zee (2000), above fn.29, 299.

39 'Not all tax exemptions are implemented for some legitimate societal goal. Under certain circumstances- nepotism, corruption, and low transparency- they may just appear to be "tax evasion with an official stamp on it."' Siehl (2010), above fn.19, 24.

40 'The most acute disadvantage of discretionary tax incentives, especially in developing countries, is that they are susceptible to corruption.' Avi-Yonah and Margalioth (2007), above fn.12, 23.

41 Alm and Martinez-Vazquez (2007), above fn.1, 39.

42 IMF, et al. (2011), above fn.13, 11.

43 Sandford (2000), above fn.17, 7-19. Alm and Martinez-Vazquez (2007), above fn.1, 16-8.

44 Bird (2010), above fn.32, 2-3. McKerchar and Evans (2009), above fn.16, 171. IMF, et al. (2011), above fn.13, 11. Siehl (2010), above fn.19, 7, 14-5. Mo (2003), above fn.1, 12-3. Alm and Martinez-Vazquez (2007), above fn.1, 2.

45 Mo (2003), above fn.1, 12-3.

The critical point is where corruption is institutionalised and seen as a common feature by society.⁴⁶ The so-called 'corruption as a grease' hypothesis argues that it 'may facilitate economic activity by allowing entrepreneurs and other economic agents to circumvent inefficient regulations and taxes,' although recent research suggests a negative effect of corruption in direct investment⁴⁷

Taxing more compliant taxpayers or increasing penalties alone are not the right strategy to improve revenue mobilisation. Increasing tax rates and penalties without broadening the tax base can contribute to more corruption.⁴⁸

Developing countries' efforts should be towards strengthening tax administration and enforcement; improving voluntary compliance, self-assessment and third-party information; expanding the tax base as possible; eliminating incentives to noncompliance; introducing procedures to address corruption and to identify and punish officials' misbehaviour; and to ensure taxpayer's protection.

IV. IS TAX AVOIDANCE A PROBLEM THAT CALLS FOR A GAAR IN EMERGING COUNTRIES?

Tax avoidance is a type of noncompliance along with evasion and simple non-payment. It is not part of the shadow economy; it is more sophisticated and requires tax planning, which involves expertise to manipulate the law. Since there is no uniform concept of avoidance, it is not known the size of the 'tax gap', which is the difference between the expected revenue and what was effectively collected. Also its factors driving are not yet well understood and the methods to measure it are disputed.

Why do we know so little about the dimensions of the evasion-avoidance problem? One reason is conceptual problems in measuring erosion of the tax abuse. [...] Another reason is the problem of comparability across countries. The many legal and illegal channels by which individuals can reduce their taxes depend upon the institutions of a country. The comparability problem is further compounded by the importance of cultural factors in defining the line between compliance and non-compliance. Finally, and most important, little of the relevant data to estimate the full tax base are available.⁴⁹

46 Richard Bird, et al., "Tax Effort in Developing Countries and High Income Countries: The Impact of Corruption, Voice and Accountability" (2008) 38 EAP 1, 60. Mukul G. Asher, Design of Tax Systems and Corruption (K. A. Stiftung, 2001), 1-17.

47 Fuest, et al. (2013), above fn.30, 65, 79.

48 Sandford (2000), above fn.17, 142-55. IMF (2011), above fn.13, 4.

49 James Alm, et al., "Tax base erosion in developing countries" (1991) 39 EDCC 4, 849.

The damage to development caused by tax avoidance is also contested. No one contends that it reduces revenues. But the question is whether the available funds result in more productive investment from the private sector— particularly where there is poor governance and corruption— or if the tax base erosion causes unfair competition, nullifies progressivity effects, or even moves the tax burden to labour and consumption to the detriment of horizontal and vertical equity.⁵⁰

There is a perception that tax avoidance is increasing with the globalisation process and technological progress. New forms of avoidance have emerged such as profit shifting by intercompany loans, transfer-pricing manipulation, and changes to the location of central administration and business assets.⁵¹ Yet, this perception can be a result of the financial crisis and governments' efforts to recover revenue by strengthening tax enforcement, including new anti-avoidance measures.

In emerging countries, tax evasion has always received more attention.⁵² It does not mean that avoidance is not a problem. Despite the small empirical data, some studies suggest they experience avoidance even in a larger scale than OECD countries.⁵³ Multinationals, large business and wealthy individuals typically promote tax avoidance schemes in emerging countries. Hence, many of the complex issues related to tax avoidance there are similar to those found in OECD countries.⁵⁴

*Yet, anti-tax abuse provisions in the tax laws as well as the technical training of tax auditors in many developing countries are generally inadequate to deter and detect such practices. A concerted effort to upgrade these deficiencies is, therefore, of the utmost urgency.*⁵⁵

A first condition for introducing any anti-avoidance measure in developing country is to understand if and how tax avoidance might affect them, as discussed above. A second one is to examine developed countries' experience in challenging tax avoidance schemes in courts and in designing anti-avoidance rules. It is not a matter of simple tax transplant but to learn from their successes and mistakes.⁵⁶

As an example of having successfully followed this line of reasoning, South Africa has undergone an in-depth study of the experiences in other countries to formulate a discussion paper to substitute its former, ineffective GAAR.⁵⁷ Although largely inspired by the South African experience, it seems that the Indian GAAR failed to obtain similar goals.⁵⁸ And Brazil has introduced a GAAR in 2001, following an international trend, an unclear provision that lacks regulation to date.⁵⁹

50 Alm, et al. (1991), above fn.49, 849. Mo (2003), above fn.1, 11-2. Christensen, et al. (2004), above fn.9, 1-3.

51 Siehl (2010), above fn.19, 7, 19. Mo (2003), above fn.1, 6-7.

52 Alm and Martinez-Vazquez (2007), above fn.1, 16-8.

53 Alm, et al. (1991), above fn.49, 849. Christensen, et al. (2004), above fn.12, 1-3. Mo (2003), above fn.1, 1-2, 6-7. Siehl (2010), above fn.19, 6. Tanzi and Zee (2000), above fn.29, 319.

54 Alm, et al. (1991), above fn.49, 849.

55 Tanzi and Zee (2000), above fn.29, 319.

56 Siehl (2010), above fn.19, 25.

57 South African Revenue Service - SARS, Discussion Paper on Tax Avoidance and Section 103 of the Income Tax Act, 1962 (Act No. 58 of 1962) (2005).

58 Philip Baker, "The UK GAAR and the Indian GAAR" (2012) 6 JIT 5, 590.

59 João Dácio Rolim and Paulo Rosenblatt, "Dez Anos da Norma Geral Antielisiva no Brasil" (2012) RDDT 197, 86-9. Ricardo Lodi Ribeiro, "Planejamento fiscal: panorama sete anos depois da LC n° 104/01" (2008) RDDT 159, 90-1.

The key issue in the introduction of any anti-avoidance measure—GAARs in particular—is whether the legal system and the institutional framework provide the necessary safeguards to limit eventual abuse by tax officials in the exercise of the discretion conferred by such rules.⁶⁰

Countries around the world, developed or developing, need to balance the benefits of providing taxing authorities with additional tools and resources, against the costs of invasion of privacy and potential for abuse by government officials and others. [...] it is perhaps also likely that the potential for abuse and the associated costs are also likely to be greater in developing countries.⁶¹

A statutory GAAR is not able to deter tax avoidance by itself, since 'law does not have a significant impact on behaviour in comparison to other forms of social control.' However, it can play a relevant role by providing a source of moral instruction. It introduces the idea that avoidance is unlawful, drawing some sort of line between acceptable and unacceptable behaviour, and points out the degree of condemnation.⁶² Moreover, it should be part of a major strategy to improve tax compliance. Some of the IFIs policies for development, which focus on promoting effective tax administration, voluntary compliance, strengthening audits and enforcement,⁶³ are relevant when considering a GAAR.

Organisational reforms are fundamental for these purposes. Quasi-independent or semi-autonomous revenue authorities have been one of these suggestions and it is an important initiative to reduce corruption. It should come along with management strengthening, appointing senior officials to relevant positions on the basis of knowledge and experience. Therefore, in the case of a GAAR, senior officials should be involved in the operation of the rule.

A relevant recommendation is the introduction of large taxpayer units (LTUs) for ensuring stable and continuous revenue, early detection, improving audits and reducing opportunities for evasion and corruption.⁶⁴ The concept of a LTU can serve as a model for the introduction of a GAAR in developing countries, provided resources are allocated and skilled auditors appointed for properly applying the rule.

A GAAR also needs to be developed within the strategies of building staff integrity, introducing internal and external controls, and penalties for reducing corruption opportunities. Otherwise, there will be a risk that some groups would capture the statutory GAAR for their own political and economic interests – for persecuting opponents who may not be engaged in tax avoidance or favour real avoiders from being punished.⁶⁵

60 'In short, the key common elements of corruption in the tax system are the considerable discretion provided to officials.' Asher (2001), above fn.46, 1-17. See also, Mo (2003), above fn.1, 12-3.

61 Richard Bird and Eric Zolt, "Technology and taxation in developing countries: From hand to mouse" (2008) LXI NTJ 4 (Pt. 2), 810-1.

62 Davis (2012), above fn.38, 320-6.

63 McKerchar and Evans (2009), above fn.16, 181-200. OECD, Compliance risk management: Managing and improving tax compliance (2004), 7-15.

64 Ruiz, et al. (2011), above fn.38, 16. Keen (2013), above fn.28, 21-3.

65 McKerchar and Evans (2009), above fn.16, 181-200. Davis (2012), above fn.38, 330.

The greatest challenge, however, is how to combine a GAAR with the recommendation to strengthen administration and enhance officials' integrity by increasing transparency, removing discretion and simplifying the law.⁶⁶ By definition, a GAAR is based on indefinite concepts, confers discretion upon tax authorities and makes the law more complex. However, if emerging countries decide to introduce a GAAR, they should try to find an acceptable balance of these basic principles by a careful design of the provisions and the introduction of taxpayers' safeguards. More revenue powers require more checks and balances.

V. CONCLUSIONS

A 'one-size-fits-all' approach to GAARs is unworkable for emerging countries. Tax reforms should address the problems faced generally by these countries but also be able to adapt to their circumstances. The recommendations from the IFIs are not to be discharged. Several suggestions are important for enhancing any tax system, especially those relating to strengthening tax administration and enforcement. A universal model is inconceivable and policy recommendations should be flexible to the intricacies of each different reality.

Emerging countries face several problems, which are obstacles to an effective and fair tax system, and to building trust between state and citizens. The tax systems of OECD and emerging countries differ. Therefore, any tax policy should be tailored to fit to each country, and simple tax transplants rejected. Compliance programmes need to address the country's cultural environment and choose strategies that will work within that framework.

Tax avoidance is now perceived as a significant problem in emerging countries and not only evasion and simple non-payment. That might be an even worse problem than in developed countries, in the light of the globalisation process. For this reason, a GAAR is becoming a trend in some of these jurisdictions. Every country places a great concern in trying to protect its tax base and, to a greater or lesser extent, counter avoidance, having or not specific or general statutory anti-avoidance rule.

Avoidance requires tax planning and advice, and it is something that mostly large companies and wealthy taxpayers can afford. For this reason, avoidance tends to be more harmful to developing countries, since it probably affects the distributional and progressive features of the tax system.

A GAAR could be a useful tool for emerging countries, in this context, and it would operate similarly as those from advanced economies. However, all the challenges to effective tax reforms faced by developing countries suggest a more careful design of the rule and the introduction of safeguards for taxpayers.

⁶⁶ McKerchar and Evans (2009), above fn.16, 181-200.

Nonetheless, a GAAR depends on political will. If a workable GAAR is a priority, since resources are finite, then the government needs to allocate enough resources and human capital to operate that rule. In this respect, it should be included in a major programme for fostering compliance and enhancing tax administration and enforcement. Any reform should be based on building trust between taxpayers and the revenue or government, and therefore, creating sound legitimate institutions.

Despite recent trends to enact GAARs in many jurisdictions, one should neither be optimistic nor sceptical about the extent this rule can tackle tax avoidance, particularly in emerging countries. It is a powerful instrument and, for this reason, measures should be taken to avoid its misuse by tax officials. A universal model of GAAR is currently unconceivable, and a better solution should be to design it in a tailor-made fashion, facing the particularities of each country.

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