TAXPAYERS' PROTECTION AND INTERNATIONAL FISCAL COOPERATION. NOTES

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I. INTRODUCTION

In the last five years we have witnessed an exponential growth in information exchange Agreements.[1] On the one hand, Conventions signed to avoid double taxation on capital and income (hereinafter DTC), which in their traditional conception envisaged such interchange on a reduced scale (art. 26), have widened considerably the scope of information exchange, incorporating additional regulations aimed at conveying relevant information among tax authorities in an effective and orderly manner. The result is that the autonomous exercise of tax powers has given way to what Udina[2] described as "international fiscal cooperation", which ranges from exchange of tax relevant information to assistance in tax collection on behalf of the tax authorities involved.

However, as De Capitani argues, "such collaboration can only be achieved in full through common standards that allow States to require assistance from other States in determining and collecting taxes beyond their borders, guaranteeing – in turn – effective reciprocal fiscal cooperation".[3]

In this context we should consider the taxpayer´s rights in the process of information gathering and its subsequent interchange and use by the tax authorities involved.

1 As reported by IBDF at present there are 4,683 DTCs in force in connection with income and asset taxes and another 694 information exchange agreements, and they are on the increase.

2 "Attività coordinata, ma distinta, di organi interni di due o più Stati, mirante di volta in volta ad adattare i fini di uno di essi indifferentemente, fini trovanti rispondenza negli analoghi degli altri, aventi egualmente diritto alla loro attuazione". Udina, Il diritto internazionale tributario, Padova, 1949, pág. 428.

3 De Capitani Di Vimercate, Paolo "La cooperazione internazionale in materia di accertamento e riscossione" in La concentrazione della riscossione nell'accertamento (Dir. Uckmar, V – Glendi, C) Cedam, 2011.

As we can see, the question goes beyond the individual rights of taxpayers as it involves not only the protection of their legal rights, but also the actions followed by the tax authorities. In fact, the absence of rules regarding how tax authorities gather, handle and use such data - acquired by themselves or from other tax authorities – means that the whole process may become ineffective by being subsequently ruled unconstitutional by courts.

The approach of this paper is practical, that is, to highlight aspects that in our opinion should be analysed in greater depth in the future.

II. INTERNATIONAL EXCHANGE OF INFORMATION AND LEGAL PROCEDURES IN MERCOSUR.

The complex relationship between integration processes and coexistence with DTCs or Information Exchange Agreements, generally of a bilateral nature, is reflected in the development of legal doctrine of the European Court in the well known cases of Shumacker and Case D, among others.[4]

Specialised doctrine (Pistone) has pointed out this evident tension and at the same time suggested solutions, such as the adoption of a multilateral DTC common to all European Union member Countries, or in the meantime, the adoption of a common tax policy as a soft-law instrument.

Even though the development of Mercosur has not progressed substantially since its creation (imperfect customs union), the relationship between community policies and DTCs has already created similar problems such as, for example, the application of the "most favoured nation" clause included in Article 48 of the ALADI Treaty, with the usual benefits awarded by a State to a third non-member State as part of a DTC.

Contradictory positions are found in Argentine jurisprudence as a result of the sporadic application of these Articles, as they clash with the traditional benefits granted by DTCs, which envisaged sole income tax liability in the Country of residence in respect of equity participtions which said non-residents hold in local companies. [5]

Regarding exchange of information, we must remember that this involves the area of tax assessment, as well as possible administrative penalties or criminal prosecution arising from taxpayers' actions or failings.

4 Rulings of the European Court on cases: D-CASE (C-376/03 5 July 2005), Schumaker, Gottardo, Saint Gobain, among others.
5 Rulings of Tax Court in cases Losa Ladrillos SA. Trib. Fiscal Nac. SALA: A . 08/08/2011 and Techint Compañía Técnica Internacional SACI without appeal –personal asset tax – shares and equity participations. Trib. Fiscal Nac. SALA D. 15/06/2012.

It must be borne in mind that the American Convention on Human Rights (PSJCR), unlike its European equivalent (HUDOC), expressly covers tax matters under the principle of effective legal protection (Article 8.1), which means that certain rights and guarantees included in such principle must be applied to the process of international exchange of information.

Regarding exchange of information and criminal related issues, it should be remembered that the MUTUAL ASSISTANCE PROTOCOL ON CRIMINAL LAW ISSUES dated 26 June 1996 (henceforth the San Luis Protocol) is in force and establishes in Article 5 that *"...the requested State shall be able to refuse assistance when:c) requests refer to tax crimes".*

In the orbit of community rules, legal doctrine has generated diametrically opposed views. Thus, for example, during the recent IX River Plate Tax Conference (IX Jornadas Rioplatenses de Tributación) speakers Pablo S. Varela (Argentina) and José C. Bordolli (Uruguay) supported the option of refusing to exchange information on the grounds that the San Luis Protocol must prevail as an international agreement of a higher order.

Another speaker, Agustín Amonte put forward the opposite view, arguing that the Information Exchange Agreement must be enforced over and above community regulation by applying the principles of specialisation and competence.

I respectfully suggest a compromise position for future consideration which attempts to reconcile both sets of guidelines. Where community guidelines establish powers (*shall be able to refuse)*, these could be expressly waived by an opposite Agreement signed for that purpose. Under this agreement, the requirement to Exchange Information related to criminal tax offences – made as a result of international obligations taken on under the Information Exchange Agreement – could not be denied by invoking community guidelines.

This solution would appear to be satisfactory for those cases where Information Exchange Agreements have been signed in accordance with procedures established by Treaty Law (1969 Vienna Convention) after the San Luis Protocol (e.g. the recent Agreement signed between Argentina and Uruguay); but it could hardly be justified with respect to DTCs signed before the existence of community guidelines (e.g. the DTC currently in force between Brazil and Argentina, signed on 17 November 1982)

Summing up, pursuing this kind of differential application could lead to a conflict of possible tax discrimination within Mercosur, which is expressly forbidden by Article 7 of the Treaty of Asuncion, which is intrinsic to the process of integration.

III. INTERNATIONAL TAX LAW AND PROCEDURAL AUTONOMY OF STATES.

There are various conventional instruments that establish the exchange of information, such provisions can be found in Treaties based on the principles included in the Vienna Convention on Law of Treaties, as well as agreement protocols or memorandums of understanding signed by the Countries concerned. These instruments do not envisage procedural rules to regulate how information should be obtained nor the degree of participation that must be given to taxpayers regarding the origin and progress of these types of procedures that involve them.

In fact, while such agreements belong to the area of international tax law, where signatory States are the only subjects of international law, the tax authority-taxpayer relationship is established and unfolds within the limits set by the juridical fiscal relationship under the rules of the internal laws of each State.

These comments lead to a first conclusion, which, though obvious, should be remembered: international tax law regulations which share tax powers among tax authorities or agree ways and means of exchanging information may not generate tax obligations other than those established by the internal tax law. This assertion, corollary of the principle of legal rights, is true as much with regards to the material as the formal obligations established by tax law.

Certain legal doctrines have suggested that there is a need to adapt internal regulation in order to carry out the exchange of information required by both States. Even though the objective is not misguided, we must bear in mind that the establishment of fiscal obligations must adhere not only to existing constitutional rights (legality, non-retroactivity, etc.) but also remain within limits that go beyond the tax framework and which are derived from other areas of the law, such as the treatment of personal data, bank secrecy, foreign exchange regulations, anti money laundering, etc. As clearly stated by Professor Casás "in such circumstances the rights and guarantees given to inhabitants of the Nation by the Constitution, specifically called "civil liberties", in terms of taxation represent the limits that may not be breached, ... given that constitutional rights are fully in force and are guaranteed by the courts, which, at the request of an interested party, must declare the unconstitutionality of any measure that ignores them or empties them of meaning".[6]

6 Casás, José Osvaldo, Derechos y garantías constitucionales del contribuyente, Buenos Aires, Ad-Hoc, 2002, pages. 71 a 74.

Moreover, it is clear that the degree of protection afforded to the taxpayer by Countries may be quite varied, especially at different stages of legal and administrative procedures. These differences in protection have led certain legal doctrines to argue for the need to establish a common standard, as demanded by De Capitani, or, instead, recognise "the rights of taxpayers" across many states, as is the case, for example, in the European Union.[7].

IV. RIGHTS OF TAX AUTHORITIES AND TAXPAYERS.

It is clear that in order for tax authorities to be able to fulfil their responsibilities for tax collection they must be able to access information about their taxpayers who operate beyond the territorial limits of the State. For this purpose it is essential to count on the cooperation of other tax authorities, which are also hamstrung by the actions of "global" taxpayers.

The necessary balance between effective interchange of information and respect for the taxpayers´ rights, as we previously argued, should not be viewed in terms of opposition and mutual obstruction, but rather, we must reaffirm that effective protection of taxpayers will lead to efficient and successful procedures to accomplish the assessment and collection processes carried on by tax authorities.

In this context, it would seem relevant to ask about taxpayers' right to be informed, to participate and to defend themselves when confronting issues related to exchange of information.

Specialised legal doctrine has pointed out that this is one of the weaker areas of the topic under discussion, not only because of the absence of regulation, but also principally because actions by the protagonists are mutually perceived as "obstruction" by the other party.

For example, Pietro Adonnino indicated, "the question of protection of taxpayers is very important with regards to information exchange, and it is perhaps the aspect that generates most confusion; different regulations regarding information exchange lack standards on this point and the protection afforded by different national schemes is often inadequate". The author adds in connection with agreements: "... the rules regarding limits to the assistance offered and the secrecy of the information are established not with consideration for the taxpayers involved in the exchange of information, but rather in favour of States". Adonnino concludes that, in general, under current information exchange regulations there is no instrument protecting taxpayers' interests, "so much so that often they are not even notified of information exchange activity that takes place involving them"[8].

7 Fernández Marín, F. La Tutela de la Unión Europea al contribuyente en el intercambio de información tributaria; Atelier, Barcelona, 2007; page. 23.

8 Adonnino, Pietro, "El intercambio de informaciones entre administraciones tributarias", en Curso de Derecho Tributario Internacional, Tomo II, Bogotá, Temis, 2003, pp. 595 y ss. Sachetto agrees when he states "in all probability taxpayer protection constitutes the weakest facet in information exchange" Sacchetto, Claudio; "La colaboración internacional en materia tributaria", in Boletín de Fiscalidad Internacional, N° 15, 1998.

The view of the Italian professor appears to be confirmed in practice as, for example in the framework of the OECD Model, where there are no regulations regarding the rights of taxpayers during the process of information exchange and reciprocal assistance between the Authorities involved.

Despite this absence, legal doctrine has supported the fact that taxpayers subject to verification can enforce their rights and defend their interests not only with regards to requirements and acquisition of data by one of the States, but also in connection with its subsequent use by the requiring authority.[9].

4.1 Rights and guarantees in constitutional tax law.

An initial set of answers arises from the constitutional guarantees which are reflected in constitutional tax law. In fact, as Rosembuj rightly indicated, necessary information exchange on request does not extinguish or exclude respect for the personal rights of taxpayers, which are pre-existent and of a higher order.[10].

First of all, it is necessary to assert the proper balance between the powers of tax authorities and taxpayers' right of defence. As legal doctrine wisely indicates, these are correlative procedural obligations and rights which keep the balance in relations between active and passive parties and even third parties to fiscal obligations, in the process of assessment, collection and administrative discussion of taxes.[11]

As Rodríguez Cardona recalls, we must take into account that this equality assumes: "in addition to equality of fiscal treatment, which is equality among taxpayers before tax law, there is also equality between the tax authority and the taxpayer before the same law and in the processes of determination and due care which establish correlative procedural rights and obligations".

As Claudino Pita[12] has correctly pointed out, "with relation to investigation and control functions, this is where taxpayers' constitutional principles and general rights are usually reaffirmed in relation to procedural matters, some of which are related to the principle that German legal doctrine has called "the principle of interdiction of excess", which would be the corollary to the constitutional guarantee of reasonableness of public acts and which operates as a limit to discretionary acts by the tax Authorities.

9 On this question refer to Schenk, International Exchange of Information and the Protection of Taxpayers, Alphen aan del Rijn, 2009.
10 Conf. Rosembuj, Tulio; Intercambio Internacional de Información Tributaria, Colección Universidad de Barcelona N° 79, Edicions Universitat de Barcelona, Barcelona, 2004, page. 34.
11 Ramírez Cardona, Alejandro, Derecho Tributario, Bogotá, Temis, 1985, page. 83.
12 Pita, Claudino "Cooperación internacional en materia fiscal. - Los Acuerdos sobre Intercambio de Información", punto VI, en Tratado de Derecho Internacional Tributario (Dir. Asorey – Gracía). La Ley, Buenos Aires, 2013.

Among the rights of taxpayers the author highlights the following:

To be informed, about the scope of control and investigative proceedings when they are started, and of their rights and obligations in connection with said procedures.

To know the identity of the officials taking part in the proceedings.

To know the progress made in those proceedings.

To privacy of the data and information given to and obtained by the tax Authority.

For the tax authority to minimise the burden of actions for which the taxpayer is responsible.

Strict adherence to obligations arising from due process in the development of the proceedings.

But as Pita recognises, the assertion of these rights, which appear as "background" to be taken into account when establishing mechanisms for the exchange of tax relevant information, are often relegated to declarations of principles and guarantees which are non-binding for States, or which are ineffective in practice.

For example, the Joint Council of Europe/Organization for Economic Cooperation and Development Convention on Mutual Administrative Assistance on Tax Matters (OECD), contains some declarations of principles and measures designed to strengthen taxpayers' legal guarantees and rights, although - as Pita admits – these are best efforts obligations and are, in principle, non-binding.

In the preamble it states the intention "...to protect the legitimate interests of taxpayers" and declares "...that fundamental principles entitling every person to have his rights and obligations determined in accordance with proper legal procedure should be recognised as applying to tax matters in all States and that States should endeavour to protect the legitimate interests of taxpayers..." and that "... States should carry out measures or supply information having regard to the necessity of protecting the confidentiality of information, and taking account of international instruments for the protection of privacy and flows of personal data".

Moreover, in the Introduction to the text of the revised report of the Convention amended by the Protocol which became effective on 1 June 2011, notes 6 and 8 express respectively:

"6. "The Convention attempts to reconcile the respective legitimate interests of those involved: in particular, the requirements of mutual international assistance in tax assessment and enforcement, respect for special features of national legal systems, the confidential nature of information exchanged between national authorities and the fundamental rights of taxpayers", and

"8. In applying the Convention, tax authorities will be bound to operate within the framework of national laws. The Convention specifically ensures that taxpayers' rights under national laws are fully safeguarded. However, national laws should not be applied in a manner that undermines the object and purpose of the Convention. In other words, the Parties are expected not to unduly prevent or delay effective administrative assistance."

Finally, article 21 of the Convention on the Protection of people and limits to the obligation to give assistance establishes that: "1. None of the provisions of this Convention shall affect the rights and guarantees of people, in accordance with legislation or administrative practice of the requested State."

4.2 Implementation of rights

Victor Uckmar has already identified "Common principles of constitutional tax law" and we have seen how these are declared by Constitutions, statutes and international agreements on the matter. But a different question is how these rights are enforced, that is, how these rights are protected in practice from request, transmission and use of data obtained through information exchange.

In this framework, prohibition against discrimination would prevent the existence of different degrees of protection given against local and international requests. As Pita clearly expressed it, "if this were not so, we could incur in the absurdity of protecting the rights and guarantees of taxpayers who are facing investigation and control by our administration, but not when taxpayers under our jurisdiction face similar actions carried out by a foreign administration with the cooperation of the administration of our own country".

Diego Fraga[13] indicates that some countries (Germany, The Netherlands, Portugal, Switzerland, Uruguay and, in some cases, the USA) include in their legislation so called "rights of participation", which range from mere rights of notification or consultation, to true rights of administrative and judicial review of the procedures followed by the State that wishes to convey information[14].

Thus for example, in Italian law, a recent Circular 21/E in 2012 deals - albeit in a limited fashion – with the role of the taxpayer in the context of MAPs (mutual agreement procedure based on the CDI – article 26 OECD Model) and the Arbitration Convention based in Europe.

First of all, after recalling the exclusive role that pertains to States as legal entities in international law (art. 4.2.9), it recognises that there is no impediment against "inviting" the taxpayer to take an active role, "specially in connection with the need to describe the facts specifically and accurately, and to add precise information leading to thorough treatment of the issues."

13 Fraga, Diego N. "El Intercambio Internacional De Información Tributaria en el Derecho Argentino", Punto V-c; en Tratado de Derecho Internacional Tributario (Dir. Asorey – Gracía) Ed. La Ley, Bs.As. 2013.

14 Calderón Carrero, José Manuel, "El intercambio de información entre Administraciones Tributarias en un contexto de globalización económica y competencia fiscal perniciosa", in Las medidas anti-abuso en la normativa interna española y en los convenios para evitar la doble imposición internacional y su compatibilidad con el Derecho Comunitario, Soler Roch, María T. y Serrano Antón, Fernando (Dir.), Instituto de Estudios Fiscales, Madrid; page. 17.

On the other hand, the right of taxpayers to information is recognised. MEMAP (Manual on Effective Mutual Agreement Procedures) in Article 3.3.3 and its best practice 14 specifically recommends "...for tax administration, timely and frequent communication with the taxpayer regarding the status or issues of a case will increase transparency in the process...". Even though the taxpayer is not part of the negotiation process "competent authorities are encouraged to consider obtaining input from the taxpayer on factual and legal issues that may arise in the course of the MEMAP".

In case of mutual procedures dealing with rectifications pursuant to transfer pricing – which account for the largest number – the Comment to Article 25 of the OECD model also includes a recommendation (paragraph 40 C) which states that, depending on the matter, the rights of taxpayers to put forward their arguments on the case before the competent authorities must be respected.

The above mentioned Circular argues that as a rule "both the above described practices are observed by the Italian tax authorities. The facts and arguments put forward may be subject to joint evaluation by the Department of Finance and the tax Authority."

In the case of the Arbitration Convention, the references to the role of the taxpayer are as shown above, adding also that "the taxpayer must be kept informed of all significant developments during the course of the procedure." (Paragraph 6.3 b of the Code of Conduct).

It should be noted that, from a perspective which takes into account the differing rights of tax authorities and taxpayers, there is a reaction against the introduction of these kinds of specific protection mechanisms. It is thought that they are obstacles that delay and even prevent international exchange of tax information.

The question is more troublesome when it involves cases of fraud against the tax authorities, or tax crimes, where timely communication to taxpayers regarding the request for information involving them can lead to concealment of evidence or interference with due process, resulting in an impediment to the very fight against tax fraud.

In response to this situation, Pita argues that in these cases, "if they wish to avoid notification the competent authorities must indicate in the requests that there is suspicious of fraud." The decision to frame it as such would make the request valid, and would ensure subsequent jurisdictional control by the relevant authorities.

4.3. The situation in Argentina:

As Barzola points out, in the absence of international legislation we should examine the means given to taxpayers by internal legislation in each State to control the correct use of data and make sure that it is used for the purpose for which it was supplied. He adds that DTCs and information exchange agreements expressly contemplate that the information supplied will be kept secret and will be used exclusively for the purpose for which it was requested. However, without minimum mechanisms to guarantee effective protection of the individuals involved, it may be difficult to retain subsequent control over the use given to the information.[15]

Unlike systems that establish specific mechanisms aimed at guaranteeing taxpayers' right to be informed and participate in the process of information exchange, Argentina does not contemplate at present explicit rules in this regard. Indeed, as Fraga argues, tax law does not contemplate any mechanism to take "participation rights" into account, thus it is not necessary for the tax Authority to notify taxpayers of requests for exchange of information that involve them. However, it must be pointed out that, as widely expressed in legal doctrine and jurisprudence set by the Supreme Court, Personal Data Law number 25,326 is applicable to information in the hands of the tax Authority. This means that taxpayers should have the right to access and verify the accuracy of the data the tax Authority holds and is intending to exchange. This is so despite the fact that in practice the tax Authority opposes such access.

Fraga concludes that "as long as there is no legal modification stipulating at least the obligation to notify taxpayers of a request for exchange of information from a foreign Tax Authority, it is most likely that these procedures will continue to be executed without any participation by the individuals affected."[16]

Professor Tulio Rosembuj has argued that in these cases it should be possible to apply the doctrine of habeas data. This author states that although it can be argued that spontaneous or automatic communication may cause interference with tax collection, this is not a convincing argument, as the knowledge of relevant facts that may give rise to preparatory or preliminary procedures at the applicant State "does not have as objective reference point a particular person nor does it produce, in itself, the full result of correct payment of tax." Its objective, he adds, is none other than the conveyance of data in possession of the requested State [17]. He argues, moreover, that the request for information is aimed at full administrative, equivalent or rectifying extinction of the act of non-compliance incurred by taxpayers or tax liable entities; it is an administrative act central to the exchange of necessary information. In Rosembuj's opinion, this would not occur with relevant information which, in his view, stimulates administrative activity by the tax authority at the applicant state without prejudice to a final judicial ruling.

15 Barzola, Juan P.; "Intercambio internacional de información tributaria – la experiencia argentina"; Compilado del 2° Encuentro Tributario Regional Latinoamericano IFA 2010, Buenos Aires, 7 to 9 April 2010. Idem Fraga, Diego - Verstraeten, Axel in "Tax secrecy and tax transparency - the relevance of confindentiality in tax law – Argentina" (Dir. Lang, M – Pistone, P) (in progess).
16 Cfr. Barzola, Juan P.; op. cit.
17 Cfr. Rosembuj, Tulio; op. cit., pág. 34.

Regarding the role of taxpayers in the context of Mutual Agreement Procedures (MAP) established in a DTC signed by the Argentina, in Fraga's opinion "it is not an instrument that gives the necessary participation to owners of the data, because they can only intervene after the transfers have been carried out, as they will only become aware of them when applicant tax authorities make their demands, which could well be based on the data obtained in the interchange."

4.4 Use of the information

If the collection and conveyance of the information generates the problems that we have summarised above, these do not appear to become lesser at the final stages of the procedures. They involve the use given to the data by the other authorities and the value that it has as evidence in processes of determination and subsequent application of administrative penalties or criminal prosecution.

In this regard the OECD has argued that such information can be used in jurisdictional processes, even when it is clear that its value as evidence is a matter of judgement in the light of the legislation of the applicant State.

One such example can be found in the position taken by the Italian Supreme Court of Cassation, which has argued that "the determination notice in respect of undeclared foreign income is legitimate, it is based on a document originated by the US Department of the Treasury issued on the basis of article 26 of the US-Italy Convention... Even though it has not been properly signed, as it is not possible to argue that documents originating overseas should comply with the same formal requirements as those produced in Italy."[18].

In the absence of specific regulation, a reasonable precaution would be not to discriminate on the basis of the origin of the information. In fact, tax administrations that according to their internal systems are unable to use certain evidence obtained in breach of their legal conventions, could hardly use it solely on the basis that it was obtained thanks to the collaboration of the tax administration of another Country.

18 Cass., 3 March 2000, n. 2390, en Giur. imp., 2000, 844 (translated by the author).

V. PRELIMINARY CONCLUSIONS:

Even though protection is demanded from many standpoints for taxpayers subject to information exchange procedures, there is no international consensus with relation to the level of legal protection that has to be afforded to the persons involved.

On the whole, legal doctrine agrees with the need to ensure the right to be informed of a request for information and its content, the right to participate in the process and to appeal against the legitimacy of the requirement and its eventual use in processes of tax determination or penalties.

The lack of common regulatory frameworks or taxpayers' charters covering the States involved transfers the issue to the internal laws of the States, whose standard of protection may not coincide with the systems in force the other Countries involved.

Unlike other countries, Argentina does not have specific regulations guiding these procedures.

It is clear that the validity of the principle of effective jurisdictional protection and other principles of constitutional tax law may be enforced before the jurisdictional bodies of the Countries in which citizens are taxpayers. This would be the case when taxpayers feel that their constitutional rights have been or are being breached by the administration.

However, it is not clear how taxpayers can enforce those rights in a timely manner at the administrative and initial stages of information gathering by the requested tax authorities involved.

The same problems that were identified at the collection stage are found when the information is used as evidence. In fact, it has been argued that the evidential value of the documentation and information must be governed by the relevant legislation of the State that applies it. However, taxpayers appear to be unprotected of possible breaches committed by requested tax authorities at the time of collecting the information. This is the case even when the information has been gathered lawfully in the requested countries by means, or following procedures, that are not acceptable in the applicant Countries.

Finally, regarding Mercosur, the possibility established by the San Luis Protocol to refuse assistance in connection with criminal tax cases in the face of international commitments taken on through Information Exchange Agreements, is an issue that requires further research.