UNILATERAL LEGISLATIVE MEASURES AND METHODS FOR AVOIDING THE INTERNATIONAL DOUBLE TAXATION

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Abstract: *International double or multiple taxation occur only when the fiscal authorities from two or more states collect concomitantly taxes having the same incidence, so that a person bears a fiscal obligation heavier than in case it would have been subject to a sole fiscal authority. Because the double taxation may constitute a real barrier in the way ofteconomic technical-scientific cooperation, of setting-up of subsidiaries or branches abroad, of foreign investments of capital and of external loans, of development of economic and financial affairs, it is important to identify measures and methods for avoiding it.*

Key words: *double taxation, fiscal authorities, fiscal methods,legislative measures*

JEL classification: *H21*

The taxation of incomes obtained from production, commercial, mediating financial activities, from dividends due for participating in the capital of companies, from interests to the credits offered, from dues for using or granting the use of invention patterns, of processes of production, know-how, trade marks and other intellectual rights, from royalties for scientific, literary and artistic creations, as well as of other categories of income, which takes place both in their country of origin and in the country where the beneficiary of the income resides, according to the fiscal legislation of each country, can lead to hampering economic exchanges and other income-producing activities, if one does not create the legal instruments necessary for avoiding double taxation of incomes and property.

As states exist as political entities and so do national economies, as taxes are used as tools stimulating or limiting certain economic, commercial, financial activities, double taxation is functional for a foreign partner. This phenomenon plays a restrictive role, being an impediment to international exchanges, since the fiscal obligation is higher as compared to the situation when the income or the property is taxed only once, in a one country only.

Brândaş (2010) appreciates in this respect that politics and fiscal legislation being strictly a manifestation of the sovereignty of each state, the phenomenon of international double taxation occurs very frequently, being an obstacle mainly in the way of investments abroad, of technological transfers or of extending outside the country subsidiaries of commercial societies. Hence, eliminating international double taxation appear as something necessary in order to further develop economic relationships among states. It would be recommendable to clarify, to correlate and to guarantee the fiscal situation of the tax payers, both natural and legal persons, who are engaged in commercial, industrial, financial activities in other countries, by applying mutual solutions in identical cases of international double taxation.

Taking into consideration the numerous negative effects of double taxation on international relations, different solutions for diminishing or eliminating this phenomenon have been suggested and applied at national levels.

Two ways of eliminating double taxation are used in the international practice of income and property taxation: national elimination, obeying the domestic k legislation about taxation of incomes and property, and international elimination, within the limits and by conventions about avoiding double taxation

The first of these ways and methods of preventing and eliminating international legal double taxation, which imposed itself because of its results, is *introducing into the national fiscal legislation or into other domestic regulations , of stipulations aimed at preventing repeated taxation, operated by two or more fiscal s authorities.* The countries take that kind of steps mainly when a certain solution is general in international practice and breaking this regulation could prejudice both the state under discussion, and other states among its economic partners.

As taxes are an instrument of economic policies, the fiscal systems of the states keep adopting new measures aimed at preventing international legal double taxation. Among the solutions used individually by different states that introduced them into their fiscal legislation, we can mention *exoneration from customs duties or VAT* of goods exported, deduction of the tax paid abroad from the tax payable in the state of residence.

The unilateral methods of avoiding double taxation have some shortcomings, as well, due to the fact that the not always have a correspondent, reciprocity, in the legislation of other states, as legal regulations differ from country to country. Thus, there arises a danger of one country's legislation stipulating unilateral measures for avoiding double taxation, while the legislation of partner states does not have similar stipulations. Or, the stipulations in one country find no equivalent in other countries.

At the same time, some countries, in their wish to stimulate economic relationships with certain states, try to offer these countries broader fiscal facilities, which lead to an intentional and discriminatory transfer of fiscality.

According to Condor (1999), although progress towards eliminating double taxation has been made by implementing unilateral legislative measures, the existence of numerous and different national fiscal systems and regulations, has proved that unilateral measures are not enough for solving the multiple complex problems that appear in this area.

The result is that avoiding double taxation by unilateral legislative measures does not solve the multitude of aspects that appear in international fiscal practice.

The second category of measures, the conventional ones, aimed at avoiding international double taxation are generally regulated by means of two categories of instruments: *fiscal conventions proper a, international agreements* (containing fiscal stipulations, although these are not their main objective).

a. Fiscal conventions regulate their measures for avoiding double income ad property taxation. These conventions are adopted distinctly in order to eliminate double taxation and they contain criteria, solutions, methods established to this end by the partner states.

a.1 General fiscal conventions stipulate complex measures for avoiding income and property double taxation and they have in view all the taxes and duties in force in the partner states, or to an important number of financial duties and income and property taxes.

a.2 Special fiscal conventions have in view limited aspects of the financial relations between states and they approach either a certain y type of tax, or certain procedural measures in fiscality. Such conventions are concluded, for examples, for regulating the taxation of international air or sea transport companies, or for establishing the financial statute of frontier workers.

General and specific conventions usually refer to international agreements with an exclusively or essentially fiscal object.

b. International agreements, that have to fiscal as their main object, include economic, commercial, financial transport agreements, which, contain both specific regulations connected t their main object and certain fiscal measures. Taking into account the n umber of contracting parties, the fiscal conventions can be bilateral conventions ad multilateral conventions,

Bilateral fiscal conventions have the advantage of regulating all the details of those solutions that are adequate for the specificity of the national systems under discussion and they ensure a high degree of flexibility in application, or when changed or amended. More over, bilateral conventions do not require establishing special institutions to ensure their uniform interpretation in the contracting countries, as it is the case with multilateral conventions. It is clear that the option for a bilateral or a multilateral convention belongs to the states interested in eliminating international legislative double taxation from their relations.

On the other hand, the idea of using *multilateral fiscal conventions* used to dominate before World War II, the argument for this orientation being a higher opportunity of bringing harmony to the legislative measures of internationally taxing incomes and the superiority of the results of this harmonization.

In certain cases, neither national regulations nor international conventions offer solutions for the fiscal problems that appear in the relations between the contracting countries. That is why one tries to cover the legislative gaps by resorting to *common law, case law or jurisprudence.*

Generally, the characteristics of the unilateral measures are determined by the conceptions on which taxation is placed within each national fiscal system .The practice of *the principle of reciprocity in the relations between* states plays an important part in creating fiscal measure for avoiding international double taxation, as in the case of incomes obtained from activities in international traffic, by naval and air transport societies.

In most cases, the unilateral measures for eliminating international double taxation are prompted by the states with societies that have subsidiary branches abroad or that obtain income from foreign sources.

At the same time, the international fiscal practice demonstrates that the fact that the states where the income comes from offer taxation deductions or unilateral exonerations in order to eliminate international double taxation, is not a frequent phenomenon, since each of these states is interested to attract fiscal profits as high as possible. They consider that the priority in taxation belongs to the states where the income is obtained, and that the diminution ion of fiscal obligations aimed at eliminating double taxation has to be operated by the state where the tax payer resides.

Alexandru (2003) shows that, the regulations adopted by this category of states under the for of tax exoneration and deduction can be considered rather as aimed at attaining certain objectives of economic policy (stimulation of capital and technology import) than at eliminating double taxation at an international level.

The first attempts at solving problems caused by international double taxation date back only to the latter half of the XIXth century and can be divided into 3 periods:

- the stage of eliminating double taxation from the relations between federal states of the same union (e.g. the German federal laws in 1870 and the Swiss constitution in 1874)
- the stage of eliminating double taxation in the relations between quasi-independent states of the same empire (the stated in the British Empire)
- The stage of measures taken for eliminating double taxation between sovereign independent states (e.g. the Dutch law in 1819, that accepted exceptions from the payment of naval taxes on condition of reciprocity for Dutch vessels)

The highest point of these stages in the development of the measures taken for eliminating double taxation in the relations between the crates, is represented by the first bilateral treaties for eliminating double income taxation, appeared in 1837 (Conventions between France and Belgium) mad in 1899, with Prussia an the Austrian-Hungarian Empire. In modern and contemporary times, the development and harmonization of the bilateral treaties for eliminating double taxation have been and still are highly influenced by the activity of international organizations.

We have found during our research work that in 1921, this issue was for the first time brought to the attention of the Nations League by the resolution of the International Financial Conference, which took place in 1920 in Brussels. As a consequence, The National League hired 4 internationally-known specialists: Bruns (Holland), Einaudi (Italy), Seligman (USA) and Sir Stamp (The United Kingdom of Great Britain), asking them to conduct a detailed study of the issue of double taxation.

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Romania is among the states that stipulate exonerations and tax deductions. The aim of its first measures in the fiscal reform was attracting foreign investments and capital.

One of the unilateral measures most often applied for eliminating double taxation is offering, in the country of residence of a *fiscal credit*,(registering the taxes in the account) for any tax paid abroad (for example, for the income of a subsidiary , which have already been taxed in the state of the source). The practice of the states that permit registering in the account the taxes paid abroad demonstrate s that the highest amount of the fiscal credit cannot go beyond the level of the fiscal obligations generated by the fiscal legislation of the respective state.

The registration in the account of the taxes paid abroad is limited in the following way:

a. limitation according to the country: when the amount of the national tax is calculated from the total sum obtained in a certain country, and equivalent to the taxes paid in that country, registration in the account is offered;
b. general limitation: e when the registration in the account of the tax paid abroad is offered as equivalent to an average sum (calculated from all the taxes paid abroad) of the tax
c. detailed limitation: when the sum of the tax for which registration in the account of the taxes paid abroad is offered, is calculated separately, for each kind of income;
d. category limitation: a system applied in the USA in which the taxes applied to incomes obtained from sources abroad, is classified into 9 different categories. This system excludes the possibility to get the credit ahead of the amount of the taxes due.

The method of fiscal credits can also have as an effect eliminating economic double taxation at an international level.

From a practical point of view, the measures for avoiding eliminating international double taxation adopted by a state are very different, containing many

similarities but also numerous dissimilarities caused by the specific characteristics of each national fiscal system. Because of territorial limitations in the application of domestic fiscal legislations, two categories of tax payers are to be found in all countries:
-*residents,* who are natural and legal persons residing within the country who are taxed either without limitations, according to the principle or world incomes, or only for the incomes obtained from internal sources, according to the principle of territoriality;
-*nonresidents,* who include foreign natural and legal persons, taxed only for the incomes obtained from sources situated on the territory of the respective state.

Since the principle of universality of taxes or of world incomes has been adopted by most states, the residence of a person is very important as far as fiscal treatment is is concerned, meaning that, according to this element, the tax payer, natural or legal person, is subject to fiscal obligations without limitation for all the income it makes, both from internal and foreign sources.

For a proper elimination of double taxation, the international practice applies several methods or technical procedures, according to the criteria adopted by the states participating in the convention: methods of exoneration and methods of crediting (deduction).

A. The methods of exoneration consider that in the state of residence of the beneficiary of a certain income one does not tax those incomes which, according to the stipulations of fiscal conventions, are being taxed in the other state (the state of the source or the state where the taxable property, a permanent headquarters or a fixed basis is located).

According to Harris (1996), among the unilateral measures of eliminating international double taxation, the method of tax exoneration is also meant at achieving fiscal neutrality abroad (neutrality as far as capital imports are concerned).

The unilateral elimination of double taxation can be obtained by using two forms of exoneration: *total* or *progressive exoneration.*

a. The method of total exoneration implies that the taxation of the incomes obtained by the resident of a country is made separately, that is the country of residence taxes the incomes obtained there, and the foreign country taxes the incomes obtained on its territory.

This method is used both in the countries that apply the principle of territoriality of taxes, like Argentina and Brazil, and in some of the countries that apply the principle of world/global taxation, like Austria, Australia, Switzerland, Holland. The use of the method of total exoneration, by separating the taxable incomes of the same taxpayer between two or more states, can have as a consequence a limitation of the effects of progressivity of taxation.

The Model Conventions of the Cooperation and Economic Development Organisation (OCDE) and of the United Nations Organisation (UNO) have agreed upon the following text for the application of the total exoneration method: "when a resident of a contracting state obtains income or possesses property which, according to the stipulations of the convention, is taxable in the other contracting state, the state of residence exonerates from taxation these incomes or that property."

b. The method of progressive exoneration implies that the incomes obtained in the country of residence are taxed with a taxation quota corresponding to the total income obtained, irrespective of origin, and that the foreign country taxes only the incomes obtained on the territory of the respective country.

To apply this procedure one must follow the following steps:

-the taxable matter obtained by the same subject in the country of residence and abroad is cumulated. When the total taxable matter is established, it must be placed in the category of tax and one identifies the amount of tax that has to be paid;

-the tax amount thus identified is applied only to the taxable matter obtained in the country of residence.

The Model Conventions of the Cooperation and Economic Development Organisation and of the United Nations Organisation have agreed upon the following texts for the application of this method: "when, according to a stipulation or convention, the incomes obtained by the resident of a contracting state or the property he possesses are exonerated from taxation in that state, the state can, however, take into account the exonerated income (property) when calculating the tax for the rest of the income (property) of that resident.

B. Methods of crediting. The defining feature of the method of crediting is the fact that the beneficiary's country of residence deals with foreign taxes within certain statutory limits. When the amount of the foreign tax is lower than the internal amount, only the excedent of the domestic tax is paid to the beneficiary's country of residence.

The countries that apply this method lower their normal fiscal requirements as far as foreign profits are concerned, with the amount of tax that the beneficiary has already paid to the source country. The source country can thus increase its tax amount up to the level of the tax in the country of residence, but without charging an additional load to the beneficiary.

According to the method of crediting, the state f residence calculates the tax due by one of its residents starting from the total volume of the income of this tax payer. That is, the state of residence will include in the taxable income the income taxable in the country where the headquarters or the fixed location is. It will not deal with the income or property which are only taxable in the other contracting state, but, in the end, the state of residence will deduce the tax paid by the respective tax payer in the other contracting state, from the total tax, calculated for the total taxable income or property.

The method of crediting appears under two forms in fiscal conventions: *the method of total (integral) crediting and the method of common crediting (limited).*

a. The method of total crediting. According to this variant of the method of crediting, the state of residence deduces from the tax referring to the total taxable income (property)

The Model Conventions of the Cooperation and Economic Development Organisation (OECD) and of the United Nations Organisation (UNO) have developed the following texts for the application of this method:

"a deduction from the tax that it collects from this resident, amounting to a sum equal to the income tax paid in the other country",

"when a resident of a contracting state obtains elements of income that are taxable in the other contracting state, the state of residence allows, from the tax on the income of this resident that it collects, a deduction equal to the tax paid in the other contracting state". This latter deduction, cannot, however be higher that the part of the tax, calculated before the deduction, according to the elements of income communicated by the other contracting state"

b. The method of common crediting. In this case the state of residence deduces, as a tax paid in the other contracting state, an amount that can be equal or lower than the sum actually paid to the state of source.

As a consequence, in cases when the quotas applied in the state of residence are higher than those applied in the state of source, the fiscal credit offered by the latter is equal to the tax paid in the state of origin of the incomes. In the situation in which the quotas applied in the state of residence are lower than those in practice in the state of origin of the incomes, certain differences appear, that is the state of residence deduces from the tax due by the taxpayer under discussion, as a fiscal credit, a sum that is lower than tax actually paid in the state of source.

Since the fiscal credit offered by the state of residence to its taxpayer is lower than the tax paid by that person in the other contracting sate, one can draw the conclusion that the method of common crediting leads to a limited avoidance of double taxation.

REFERENCES

1. Alexandru M., *Dubla Impunere Internaţională, Modalităţi de evitare*, Ed. Economica, 2003.
2. Allemès F., *The Problem of Double Taxation*, Economica, No. 17, 1926.
3. Bărbuţă-Mişu N., Tudor F., *The International Double Taxation - causes and avoidance*, Acta Universitatis Danubius, Ed.Economica, Nr.1, 2009.
4. Brândaş I., *Managementul investigării infracţiunilor săvârşite prin intermediul companiilor offshore*,Teză de doctorat - rezumat, Academia de Poliţie „A. I. Cuza, Facultatea de Drept, 2010. Cătinianu F., *Finanţe publice,* Ed. Marineasa, Timişoara, 2005.
5. Condor I., *Evitarea duble impuneri pe venit şi pe avere: drept fiscal*, Ed. Tribuna Economica, 1999.
6. Davis D.R., *Principles of International Double Taxation Relief*, Londra: Sweet & Maxwell, 1985.
7. Hillman A., *Public Finance and Public Policy*, Cambridge University Press, 2003.
8. Mayda A.M., *International Migration: A Panel Data Analysis of the Determinants of Bilateral Flows,* Department of Economics and School of Foreign Service, Georgetown University, CReAM Discussion Paper No. 07, 2007.
9. Mutaşcu M., *Elemente de teorie fiscală*, Ed. Mirton, Timişoara, 2008.

"This article is a result of the project ***"Creşterea calităţii şi a competitivităţii cercetării doctorale prin acordarea de burse"****. This project is co-funded by the European Social Fund through The Sectorial Operational Programme for Human Resources Development 2007-2013, coordinated by theWest University of Timisoara in partnership with the University of Craiova and Fraunhofer Institute for Integrated Systems and Device Technology - Fraunhofer IISB."*