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SECOND EDITION

TAXATION AND SUSTAINABILITY

NOVA TAX RESEARCH LAB

NOVA TAX RESEARCH SERIES

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Preface

Welcome to the second edition of the NOVA Tax Research Series. This edition, theme-based *Taxation and Sustainability*, reflects our continuous commitment to bringing the spotlight on the necessity to think, create, interpret, and apply a humanistic lens to taxation.

Integrating principles of sustainable development within our taxation research agenda and work demonstrates a path towards that humanization and reflects that our efforts are rooted in the profound belief that taxation is not merely a financial tool but a fundamental piece on the possibility to create global sustainable development.

In 2015, the United Nations Member States adopted the 2030 Agenda for Sustainable Development, setting ambitious targets across seventeen sustainable development goals (SDGs). These goals range from eradicating poverty and achieving gender equality to fostering sustainable cities and ensuring peace and justice worldwide. The centrality of taxation in achieving these goals cannot be overstated; it is a cornerstone for implementing these global ambitions.

The NOVA Tax Research Lab, in collaboration with the NOVA School of Law, supported by the Foundation for Science and Technology (Fundação para a Ciência e Tecnologia) and CEDIS (Centro de I&D sobre Direito e Sociedade), hosted the *Taxation and Sustainability Conference*. This event, held on 31 May and 1 June 2023 at NOVA School of Law, served as a vibrant forum to discuss the intersection of taxation and sustainable development. The event featured eight international guest speakers and allowed for

the presentation and discussion of thirty-two research projects, previously and rigorously evaluated by our esteemed Editorial Board[1].

With 16 chapters written by researchers of different nationalities in English or Portuguese (the conference's official languages), this book summarises the diversity of topics discussed, reflecting the interdisciplinary approach that characterises our Knowledge Centre. From analysing policies in areas such as healthcare, education, and housing to exploring the role of tax systems in economic stability and social equity, this edition offers a comprehensive overview of contemporary challenges and innovative solutions at the nexus of taxation and sustainability.

As a special contribution, this issue includes an insightful article by researchers from the NOVA Tax Research Lab on *Tax Policies in Housing - from the tax reforms of the late 20th century to the 'Mais Habitação Programme' and the State Budget Law for 2024*. This piece highlights the critical role of tax policies in shaping housing markets and emphasises the continued need for thoughtful tax reform to meet contemporary housing challenges.

We hope that the contents of this book will inspire and inform your work, whether you are a policymaker, an academic, or a practitioner, and that it will spark more excellent dialogue about the essential role of taxation in achieving a sustainable future. We wish to create, engage, and be part of it!

Enjoy the read![2]

Rita Calçada Pires, Diogo Feio and Mariana Passos Beraldo
Coordinators, NOVA Tax Research Series - Second Edition

1. The conference proceedings have been published and are available to access at the following link: https://www.bubok.pt/livros/267838/taxation-and-sustainability-2nd-annual-conference-of-nova-tax-research-lab

2. If you need to contact us, please do. We are eager to dialogue: taxlab@novalaw.unl.pt

Taxation as a Driver of Sustainable Behaviour: Corporate Social Responsibility and Good Green Tax Governance

Pedro Ferreirinha, Catarina Martins de Souza

Abstract: This paper argues that taxes can drive sustainable behaviour, in conjunction with good governance and corporate social responsibility. Sustainable tax policies can incentivize corporations to engage in sustainable practices, while good governance ensures that corporations are held accountable for their actions. On the other hand, corporate social responsibility (CSR) provides a framework for corporations to adopt those sustainable practices voluntarily. In this paper, we examine the role of taxation in promoting sustainable corporate behaviour, focusing on the interplay between taxes, good governance, and CSR. Sustainable taxation policies must be designed by collaboration between government, enterprises, and civil society to project and implement effective policies that encourage sustainable actions. We argue that tax policies can be a powerful tool to promote sustainable corporate behaviour but must be complemented by good governance and CSR to achieve their full potential.

Keywords: taxation; sustainable corporate behaviour; good governance; corporate social responsibility.

1. Introduction

Humanity is both a creature and a moulder of its environment, giving us physical sustenance and allowing us the opportunity for intellectual, moral, social, and spiritual growth. In the long and tortuous evolution of the human race on this planet, a stage has been reached when, through the rapid acceleration of science and technology, mankind has acquired the power to transform its environment in countless ways and on an unprecedented scale. Both aspects of man's environment, the natural and the man-made, are essential to his well-being and the enjoyment of basic human rights - even the right to life itself (Stockholm Declaration on Human Environment, 1972, pp. 1-3).

Therefore, humanity inherently possesses the fundamental entitlement to freedom, equality, and adequate living conditions within an environment of such quality that enables a life of dignity and prosperity. Simultaneously, individuals bear a profound responsibility. The earth's natural resources, including the air, water, land, flora and fauna, and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate. We bear a unique obligation to protect and thoughtfully manage the rich heritage of wildlife and its habitats, which now face grave peril due to an amalgamation of adverse factors. Consequently, the conservation of nature, including wildlife, must hold paramount importance in the strategic planning for economic development.

As such, it is relevant to the study, the design, and the effectiveness of the instruments aiming to protect the environment. The primary goal of this paper is to delve into the spectrum of taxation tools as mechanisms for safeguarding the environment, with a particular emphasis on fostering good governance and corporate social responsibility (CSR). It's pivotal to recognize that while the term "environment" might appear redundant, it encapsulates the ecological system that sustains life on Earth, operating through intricate

biochemical cycles and energy fluxes (Soares, 2001, p. 15). The environment functions cyclically, serving as a source of natural resources and a waste recipient.

Its distinctive characteristics, monumental significance, and subjective nature delineate it as an independent legal entity, clearly demarcated from values such as life, public health, and physical integrity. It's imperative not to conflate the environment with the material support that underpins its physical existence. The essence that translates the environment into a legally indeterminate and perpetually evolving concept is currently enshrined in Article 66.º of the Constitution of the Portuguese Republic, which, when interpreted, should encompass solely natural elements.

Now, in a constantly evolving world, it is important to reflect on the theme of sustainability to guarantee the necessary resources for future generations. But when discussing sustainability, are we just talking about environmental sustainability? As we will see, sustainability is not only an environmental issue but also a financial and human matter; these three dimensions are interrelated.

At this intersection of the various dimensions of sustainability, taxation is summoned as a driver of sustainable behaviour. It is, therefore, very important to understand how taxation can influence behaviour, especially of companies, when adopting sustainable practices. Nonetheless, does taxation, by itself, make it possible to ensure the desired sustainability? What other concepts need to be summoned at the same time? As we will explain, this is where it becomes necessary to invoke concepts such as good governance, corporate social responsibility, and moral standards and ethics. Nowadays, it is essential to take a holistic approach to this matter, even if it may be complex.

2. Taxation as a driver of sustainability

2.1. Brief considerations

States, as sovereign entities, have a duty to protect their populations (Rocha, 2020, p. 181).

Therefore, there is a connection between the function of States and sustainability, which is seen as a power duty of States (Rocha, 2020, p. 181).

From a global perspective, sustainability is the ability of human beings to relate to the surrounding environment, ensuring the necessary resources for future generations. It is a complex concept with numerous other dimensions, such as i) social; ii) energetic; iii) economic; and iv) environmental.

Moreover, three primary classifications in sustainability demand meticulous consideration: i) financial sustainability, ii) environmental sustainability; and iii) human sustainability. On financial sustainability, the economy spins around energy, and the population collapses if they do not have energy or economy. In this dimension, we talk about equity and social cohesion. On environmental sustainability, the more degraded the environment is, the shorter the life span the human beings can expect because there is a decrease in resources and an increase in waste. Hence, the law has an important role in assisting in the function of power-duty of the State. Human sustainability focuses on human beings because they are the central element in protecting other resources. The main goal is to create a fair and inclusive society by increasing social cohesion. These tripartite facets are entangled, and at their center is the realm of taxation. Additionally, at the heart of this interception lies the subject of sustainable taxation.

In fact, taxation does not have the collecting revenue for the State as the only goal. In Article 103.º of the Constitution of the Portuguese Republic, for example, the tax system indeed has to cover the financial needs of a State. Still, there is scope for other purposes like human sustainability and environmental sustainability.

In the end, achieving a calibrated fusion of fiscal incentives and penalties becomes imperative for effecting enduring behavioural shifts concerning the aforementioned tiers of sustainability.

2.2. Environmental sustainability

On environmental sustainability, we call for the so-called environmental taxes as "means" that environmental protection policies have been using as measures of indirect or mediate guidance of the behaviours or conducts of individuals, either in the sense of containment or restriction of environmental actions. This is achieved through greater taxation, materialized in ecological taxes, or through the stimulation or incentive of "philoenvironmental" actions through tax eco-benefits (Barbosa, 2022, p. 235).

Despite the frequent difficulty of defining the causal link between the damage and the corresponding tax, there is no doubt that taxation and the constant worry about preserving the environment are a strong trend because of the multiple studies that consecrate the idea that environment taxes are an efficient mechanism of environmental protection (Ribeiro, 2022, p. 3). Presently, an upsurge in legislative fervor spans, encompassing environmental framework laws, from statutes governing access to environmental information, norms delineating environmental impact assessments, legislations addressing climate change, water quality, waste management, air quality, nature conservation, biodiversity, protected areas, environmental liability, and the establishment of an "environmental simplification" paradigm, among other legislative mandates.

Particularly within fiscal policy, Portugal has implemented several seminal environmental fiscal measures. Firstly, we highlight Taxation on Petroleum and Energy Products (ISP). This levy targets fossil fuels like gasoline, diesel, and natural gas, featuring a variable rate contingent upon the fuel type. It is a disincentive for excessive consumption, catalyzing the transition toward cleaner energy alternatives. Secondly, we talked about the Single Vehicle Tax (IUC). An annual levy

imposed on vehicle ownership in Portugal, contingent upon vehicular specifications, including carbon dioxide emissions. Vehicles with diminished pollution emissions tend to incur reduced IUC rates. In addition, 100% electric vehicles are currently exempt from this tax under Article 5.º, n.º 1, e) of the Single Vehicle Tax Code.

Thirdly, we highlight Taxation on Plastic Bags. Portugal has taxed disposable plastic bags furnished by commercial establishments since 2015. The primary objective is to curtail plastic bag utilization while incentivizing the adoption of more sustainable alternatives, such as reusable bags. Fourthly, we refer to the Urban Waste Tax. The UW tax targets the disposal of solid urban waste in landfills. It seeks to incentivize waste minimization, reuse, and recycling, advocating for more sustainable waste management practices. However, an attendant issue of this tax is the potential induction of undesirable behaviours, including unlawful waste dumping in unsuitable locations. Fifthly, we mention fiscal incentives for Renewable Energies. The governmental initiatives encompass tax incentives to encourage investments in renewable energy domains such as solar, wind, and hydroelectric power. These measures include tax exemptions and deductions for corporate entities engaging in such ventures.

Notwithstanding these measures, challenges persist within the construction of tax benefits or incentives: i) economic burdens - with incentives often incur substantial costs and encounter hurdles in effecting behavioural changes; ii) irreversibility - since once granted, these incentives typically lack revocability, save instances of legal violations; iii) lack of transparency - as often, these incentives lack transparent guidelines concerning the favoritism toward specific sectors or activities. Despite concerted endeavors, persisting hurdles prevail, spanning climate alterations, air and water contamination, soil degradation, waste management complexities, and species depletion, among other challenges.

Hence, one could assert that taxation is pivotal in addressing socially undesirable activities. The nexus between taxation and the environment garners escalating substantiation, emerging as a

predominant trend underpinned by myriad studies propounding environmental taxation's efficacy in environmental conservation, often surpassing conventional regulatory frameworks. However, warranting scrutiny, exemplified by Ireland's diverse environmental tax portfolio - e.g. 15 distinct levies spanning energy, transportation, pollution, and resources — reveals a disproportionate revenue yield compared to the broader tax repertoire, with a scant allocation earmarked for sustainability initiatives. Consequently, evidence substantiating the efficacy of environmental taxation in fostering a more sustainable environment remains scarce.

In fact, for example, it is not relevant to increase the Single Vehicle Tax to reduce carbon emissions if people do not have the purchasing power to buy a 100% electric vehicle because it is very expensive. As such, people prefer to pay more taxes.

Thus, for a more sustainable environment, using the taxation mechanism, States should invest in tax policies that define incentives that reward people's conduct rather than penalizing the non-adoption of environmentally sustainable acts. Obviously, the prospect of adopting tax policies that involve the definition of incentives also has cons. However, in the long term, behavioural change will come more easily, and the effects on environmental protection will be seen on a larger scale.

2.3. Human and financial sustainability

Human sustainability is an essential dimension and, at the same time, a big challenge when it comes to sustainable taxation. In this dimension of sustainability, contemplation emerges concerning the prospective taxation of artificial intelligence. Could a novel tax framework be conceived for entities deploying robotics and artificial intelligence, potentially engendering labor market repercussions? This is what has been questioned and hypothesized by several authors.

On the other hand, some envisage artificial intelligence as a mechanism to be allocated to the service of the tax authorities to reduce tax

evasion and tax avoidance, ensuring the application and compliance with the tax law. Firstly, it is true that the introduction of artificial intelligence may translate into a reduction of jobs. Reducing jobs implies increasing public spending since more people will have recourse to social and unemployment compensations. In addition, the States still lose revenue because, with the increase in unemployment, the revenue from social contributions decreases. However, it is also true that our tax system allows the costs of acquiring software and technological equipment to be deducted from corporate income tax, thus contributing to the aggravation of the effects listed above.

Moreover, Tanzi and Davoodi, in the twentieth century, argued that the tax administrations were inefficient (Guímaro, 2017, p. 83). And in this context, artificial intelligence could be an important element in combating this inefficiency. In fact, artificial intelligence and technology play a significant role, as it allows the rapid cross-referencing of information, the detection of divergences, and the automation of notifications, among other options that will reduce tax evasion and tax avoidance. At the same time, by summoning artificial intelligence to this topic, there are indeed procedural improvements, speed and de-bureaucratization, and almost real-time contact between people and tax administration services (Sousa, 2022, p. 4 and Guímaro, 2017, p. 82). So, artificial intelligence contributes to financial sustainability at this point, although, as we have seen, it can jeopardize social sustainability.

Thus, in this dimension of human sustainability, it is essential that there is a balance between what is the workforce and artificial intelligence.

2.4. Closing remarks on green taxation

Finally, the inquisitive quest unfolds: Are these legal mechanisms efficacious? What lacunae persist? What redressal pathways should be traversed? Can tax policy be the propelling force and catalyst for holistic sustainability?

Undoubtedly, making the world more sustainable is an imperative that must be seen in all areas, that is to say, social, economic, and environmental (Hogan, 2021, EY "How taxation can help make the world a more sustainable place"). Environmental sustainability is the most important dimension of sustainability because, without it, it may not be possible to achieve the financial and human sustainability mentioned above (Hogan, 2021, EY "How taxation can help make the world a more sustainable place").

When talking about taxation, we include the perspective of creating incentives, as well as that of deterrence, by setting new taxes or increasing the burden of existing ones. Of course, the definition of taxes to achieve sustainability can become unfair to certain social classes or even certain companies. Thus, it will be up to the government to protect those who, in certain circumstances, will be considered more vulnerable.

In fact, the path to sustainability is rather complex, sometimes becoming tortuous at an economic and social level. To be implemented, "green policies" must have an underlying security aspect concerning people's incomes and the viability of maintaining investments on the side of companies while guaranteeing a path to a sustainable world. Such a path does not only pass through taxation, quite to the contrary. Allied to taxation, there are the concepts of good governance and corporate social responsibility - which we will explore below - concepts that are essential to aim for a more sustainable world.

3. Good governance and corporate social responsibility

3.1. Opening remarks on governance

Governance diverges from the conventional top-down governmental and bureaucratic approach to driving society. This shift in the role and status of government is encapsulated in the transition from government to governance (Morison, 2003, p. 104). The term "governance"

or "new governance" reflects an evolved paradigm that seeks to grapple more effectively with prevailing realities and underlying dynamics (Rhodes, 2012, p. 33). It encompasses multiple facets and interpretations, not confined to national boundaries but also prevalent within international and transnational organizations.

In the domain of public administration, governance broadly refers to the exercise of political authority and the utilization of institutional resources to address social issues (World Bank, 1991, pp. 1-2). The transformation in the State's public management since 1990, known as "new public management", emerged in response to the deficiencies of classical bureaucracies. With their large, centralized structures and standardized services, these conventional bureaucracies faltered in meeting the challenges posed by the information society and the knowledge-based economy (Osborne and Gaebler, 1992, p- 15). The response involved making the government more agile, responsive, and cost-effective, giving rise to market-oriented perspectives within public administration. However, this shift sometimes overemphasized the entrepreneurial aspect of government, overlooking the distinctive nature of public duties.

Therefore, new governance advocates are moving away from vertical "command and control" styles of government toward more horizontal and adaptable regulatory mechanisms. The focus should be on achieving substantial public outcomes (Denhardt and Grubbs, 2003, p. 333) while considering the needs of the public rather than bureaucratic structures. Good governance, a normative concept, implies effective policies implemented by political, legal, and administrative institutions concerning public goods (Rothstein, 2012, pp. 143-144). It goes beyond quantitative efficiency in business processes, emphasizing qualitative criteria and outcomes instead.

Lastly, the evolution of information technology has also played a key role in introducing new and less bureaucratic forms of governance. As we will further develop in section 2.5 of the present article, this transformation has significantly impacted tax administration.

3.2. On a path to good (tax) governance

Tax affects every business. Choices regarding investment locations, the quantum of investments, funding methods, and profit allocation are all significantly shaped by prevailing tax rates and systems encountered by corporations. Without understanding how tax can and does influence corporate behaviour, our understanding of the motivations, actions, and strategies employed by these entities is rather incomplete.

Over the past two decades, extensive discussions and literature have emerged regarding the tax conduct of multinational corporations (Cooper and Nguyen, 2020). Numerous international articles have concerned the central query concerning whether these entities demonstrate “acceptable fiscal behaviours” (Enden and Klein, 2020, pp. 1-16). However, arriving at a definitive answer to this question poses significant challenges. The complexity arises from the divergence of perspectives among various stakeholders regarding the definition of “acceptable fiscal behaviour” and/or “tax governance”, which lack of consensus, impeding the establishment of a universally agreed-upon standard for such behaviour (Boerrild, Kohonen, and Sarin, 2015, p 36).

Strategic objectives and principles form the angular stone of good governance, which means an entire spectrum of business operations comprising all corporate functions’ vision, mission, and operational strategies - including taxation. Within this framework, the necessity for a distinct set of principles and conduct rules specifically targeting fiscal behaviour might appear incongruous (Bossert, 2002, pp. 224-248). Good tax governance is essentially a derivative element of corporate governance, wherein the tax strategy seamlessly integrates into the overarching corporate strategy.

From theory to practice, corporations operate globally, encountering diverse tax administrations with diverse moral perspectives. Divergent interpretations of events or laws between countries could lead to perceived breaches of the law in one jurisdiction due to practices deemed acceptable in another. Whether a tax action constitutes

"unacceptable fiscal behaviour" depends on the robustness of its tax control framework. While some countries often perceive the law as the minimum standard for acceptable tax behaviour, there is a paradigm shift in several regions. Increasingly, fiscal behaviour transcends mere compliance with tax laws, encompassing discussions related to Environmental, Social, and Governance (ESG) Principles, and the United Nations (UN) Sustainable Development Goals (SDGs) (Tan, 2022, p. 250).

Governance analysis examines decision-making actors, implementation processes, and established structures in all cases. Effective governance embodies several key characteristics (Alink and Kommer, 2016, p. 19) that define its nature and functionality: 1) participation; 2) consensus-oriented approaches; 3) accountability; 4) transparency; 5) responsiveness; 6) effectiveness and efficiency; 7) equitability and inclusivity; 8) following the rule of law.

Participation emphasizes the active involvement of both genders, either directly or through legitimate intermediary bodies (meaningful participation demands informed engagement and a robust civil society). A consensus-oriented approach requires mediation of differing viewpoints to reach a broad consensus beneficial to the entire community. Achieving such cohesive decisions necessitates a comprehensive understanding of historical, cultural, and social contexts (Gavriluță and Lotos, 2018, pp. 125-127). Furthermore, accountability forms a foundational pillar in good governance, extending beyond governmental institutions to encompass private sectors and civil society organizations. Also, upholding accountability relies significantly on transparency and adherence to the rule of law (especially important in managing public financial resources effectively). Transparency ensures that decisions that align with established rules are accessible and understandable.

Moreover, governance demands responsiveness, requiring institutions to act rapidly and effectively. However, effective, efficient governance goes beyond meeting societal needs, it involves optimizing available resources, embracing sustainable resource usage, and ensuring

environmental protection. Equitability and inclusivity further enhance social well-being by promoting opportunities for all members, particularly the most vulnerable (Arulrajah, 2015, pp. 17-18). Lastly, governance must operate within the rule of law framework, ensuring fair legal systems impartially enforced to safeguard human rights, especially those of minorities, through unbiased law enforcement and establishing an independent judiciary.

In conclusion, the eight propositions are not designed to be oblivious or "taken on their own" to form a set of tax responsibility principles. They are intended to indicate a "direction of travel", a path to good (tax) governance. As such, examining acceptable fiscal behaviour within multinational corporations reveals itself as a complex landscape, prompting considerations beyond mere legal compliance, including broader discussions of environmental and social principles. These discussions are shaped by stakeholders' perspectives and by integrating tax strategies into overarching corporate structures. Thus, analyzing governance underscores the essence of "effective governance", emphasizing stakeholder engagement, consensus, accountability, transparency, responsiveness, effectiveness, equitability, and adherence to the rule of law. These principles collectively advocate for an integrated approach, emphasizing the interconnectedness of taxation and social welfare.

3.3. A tax code of conduct? Linking governance and sustainable practices

Defining "acceptable tax behaviours" has drawn the attention of many who attempted to delineate these standards. Some actions aimed to offer voluntary guiding principles, while others advocated for obligatory legal guidelines. These guidelines, termed "tax codes of conduct", constitute a focal point of a company's good tax governance as part of their tax strategy. Essentially, a company's tax strategy incorporates specific tax objectives, the reason behind their establishment, and their perceived significance. Moreover, it "paints the picture" of how tax affairs are practically managed within the company.

We have identified two ongoing trends related to the issue at hand, viewed from the perspectives of both tax administrations and companies. A clear trend in contemporary tax compliance involves increasing companies choosing to disclose their tax strategies voluntarily. Qualifying companies are legally obliged to reveal key information in specific instances, such as those observed in the United Kingdom (HMRC, 2016). Incorporating acceptable fiscal behaviour within a tax code of conduct raises crucial considerations concerning the involved parties and their intended audience. Deciding whether all stakeholders or solely companies and tax authorities will participate is important. Moreover, inquiries emerge regarding the tax code's universal applicability, contemplating its scope across specific industry agreements, borders, or within particular countries. Simultaneously, tax administrations increasingly rely on taxpayers' voluntary compliance through self-assessment systems, withholding taxes, and third-party information reporting to combat tax evasion and aggressive tax planning, as seen in mechanisms like Country-by-Country reporting (HMRC, 2016).

Considering that more and more companies typically adhere to a purpose encompassing people, planet, and profit elements and endorse widely accepted governance codes, deviation from such company policies for tax purposes seems implausible. Companies typically align with governance codes based on complying with or explaining the principle, making divergence from these policies for tax purposes inconsistent. For instance, if companies refrain from exploiting loopholes in environmental or employment law regulations for profit maximization, a similar approach aligning with the broader governance principles is expected in tax-related decisions. The alignment with governance principles is crucial even when fiscal opportunities arise due to legislative omissions or differences between country laws that create a "tax vacuum".

This logic extends to the context of the UN's Sustainable Development Goals and concepts like "Governance, People, Planet & Prosperity" (WEF/IBC, 2020). Many companies base their strategic

objectives around SDGs within an Environmental, Social, and Governance (ESG) policy framework. These companies voluntarily supplement legal requirements related to the environment, working conditions, CO2 emissions, and human rights to demonstrate responsible citizenship within the societies in which they operate. This voluntary adoption of additional principles often stems from the intrinsic motivation to adhere to ethical standards or from stakeholder pressures (e.g., investors such as pension funds, hedge funds, and private equity firms). Tax is increasingly regarded as part of a company's ESG policy and commitment to accountability efforts. As an example, we may point to the largest Danish pension funds that formulated and outlined their tax code of conduct, expecting responsible tax behaviour from the companies they invest in (Åneman and Björk, 2022, pp- 51-98).

On the other hand, the concept of ESG, and even more so, the SDGs, remains an unfamiliar and unexplored terrain for many tax professionals. Another problem are the lack of binding force and control - which has to be assumed by companies themselves or external third-party auditors. An illustrative case is observed in the Netherlands. In December 2019, the Dutch Corporate Governance Code Monitoring Committee completed its assessment of implementing the Code Tabaksblat - a corporate governance code of conduct for listed companies - revealing that numerous Dutch companies fell short of complying with the Code's principles. The Committee highlighted deficiencies in compliance, stressing that listed companies ought to exert more effort to adhere to the Code Tabaksblat (Groenewald, 2005). In fact, attempting to sustain a voluntary standard to enforce certain behaviours artificially contradicts the intrinsic value expected from a non-legally binding code of conduct as a mechanism for self-regulation.

This trend represents a broader phenomenon, extending beyond the Netherlands. The Financial Reporting Council (FRC, 2018) published its review of the UK corporate governance code, noting that UK companies tend to interpret tax conduct too flexibly. Focusing

solely on complying with code literal requirements, rather than effective governance and reporting, undermines the spirit of such provisions. This neglects the interests of shareholders, stakeholders, and the public. The FRC's conclusions highlighted that many companies struggle to define their purpose precisely, often confined to slogans and marketing lines.

Lastly, as pointed out by the OECD, the challenge for a tax administration is to administer the law in a manner that sustains community confidence in their tax administration (OECD, 2004, pp. 12-14). Suppose the intention behind any tax code of conduct involves fostering contemplation regarding the overall design of tax policy and aiding in assessing its practical implementation. In that case, it serves as a suitable instrument. However, it might prove insufficient if the objective is to enhance stakeholder trust in the company's fiscal policy solely by introducing a tax code of conduct.

3.4. Corporate Social Responsibility

As we described above, corporate social responsibility is an essential concept to achieve the concept of sustainability alongside taxation. In fact, CSR constitutes a corporate commitment to ethical conduct and active contribution toward society's sustainable development. The foundational principles governing CSR are predicated on the holistic consideration of stakeholder interests, transparent enactment of business practices, safeguarding human rights, and proactive preservation of environmental integrity.

In the context of CSR, many companies voluntarily adopt sustainable practices that engender a plethora of advantages and benefits. And such advantages are not merely for environmental purposes. With sustainable practices, companies increase their reputation and image, generating a favorable reputation among consumers and society and promoting greater customer trust and loyalty. Additionally, companies demonstrating a dedicated commitment to social responsibility invariably become more appealing to professionals seeking alignment

between their employment choices and personal values regarding social and environmental concerns. But the advantages do not stop there. Embracing sustainable practices typically mitigates operational risks and curtails costs associated with social and environmental issues, such as fines resulting from non-compliance with environmental regulations. Finally, pursuing sustainable solutions invariably stimulates innovation within corporate spheres, conferring a competitive advantage within markets governed by heightened environmental and social consciousness. This is the main goal.

Governance has an important role to play in calling for CSR. Several countries have already designed tax initiatives fostering CSR and Sustainable Practices. For example, in Canada, corporations can deduct donations made to registered charities, incentivizing corporate contributions to societal welfare and fortifying CSR practices. Germany has implemented feed-in tariffs, guaranteeing fixed, long-term prices for renewable energy sources. This measure significantly encourages investments in renewable energy and facilitates the transition toward a low-carbon economy.

Another example is France, which has levied a special tax on environmentally harmful chemical products, primarily aiming to dissuade their use and promote more sustainable agricultural practices. Moreover, the United Kingdom imposed a levy on single-use plastic bags, substantially reducing their consumption while incentivizing the adoption of sustainable alternatives. Lastly, in Brazil, companies supporting socio-environmental projects benefit from fiscal incentives available under the Sports Incentive Law, the Culture Incentive Law, and the Environmental Incentive Law.

In sum, numerous countries provide tax benefits for charitable donations and investments in social projects. These fiscal incentives serve as catalysts encouraging corporate contributions to societal well-being and sustainable development. For all that has been set out above, there is no doubt that CSR and good governance have to go hand in hand on the path to sustainability through taxation.

3.5. Tax administrations governance

In this section, we examine developments placed on governance by tax authorities. Tax administrations exhibit an increasing inclination toward scrutinizing corporate governance. Tax authorities anticipate that integrating tax policy at the board level would result in less aggressive tax planning (Alink and Kommer, 2016, p. 175). Varying methodologies and terminologies are employed, diversifying discussions within tax authorities, encompassing corporate governance, corporate and social responsibility, moral standards, and ethics. These terms bear diverse interpretations and are employed in divergent contexts.

3.5.1. United Kingdom

The HM Revenue & Customs (HMRC) aims to engage in discourse with companies concerning the tax dimension of corporate responsibility. This dialogue comprises dimensions such as transparency, engagement, alignment of tax strategies with business underpinnings, acknowledgment of reputational risks, and adherence to legal integrity.

The HMRC asserts that minimizing the tax burden must align with commercial objectives, legal obligations, and ethical benchmarks (Daly, 2017). It discourages the engagement in artificial transactions primarily intended to curtail tax liabilities, especially those without any economic impact beyond tax reduction. HMRC's perspective on corporations' expectations from tax authorities revolves around various aspects: 1) a rigorous stance against non-compliance; 2) ensuring consistency; 3) providing support and well-defined guidance; 4) clarifying roles and accountabilities; 5) encouraging transparency; 6) facilitating timely resolution of issues; 7) facilitating shared assessments of tax risks; 8) encouraging collaborative work.

Moreover, HMRC manifests its commitment to corporate responsibility by addressing consumer demands for accessible services, demonstrating responsible business practices, sustaining an ethical organizational reputation, and achieving recognition in the corporate social responsibility index (Alink and Kommer, 2016, p. 175). While

corporate responsibility is generally regarded as a facet of corporate governance, the HMRC's approach seems to exceed the traditional boundaries of corporate governance (Donnelly and Heneghan, 2011). In the end, adhering to ethical standards in taxation, even without a clear legal foundation, presents a significant challenge for taxpayers and tax administrators.

3.5.2. Australia

The Australian Taxation Office (ATO) emphasizes the integration of tax risk management procedures within a company's corporate governance framework. Directors and senior management are expected to possess a "comprehensive" understanding of significant tax-related issues associated with ongoing business operations, particularly from financial and business standpoints. This includes the identification of material risks to ensure corporate processes promote tax compliance. Furthermore, they are encouraged to assess tax implications concerning major transactions, business structures, and strategies. Oversight of taxes paid by the business, comprehension of reasons for significant changes in these amounts, awareness of key indicators like effective tax rates, and comprehension of the company's relationship with the ATO and its scrutiny level are vital. Directors and senior management should be well-informed about the company's approach to tax compliance and planning (Alink and Kommer, 2016, p. 176).

Finally, ATO has introduced performance standards that allow companies to self-assess their risk profile and compare it against industry-specific populations. This evaluation helps companies understand their overall tax contribution and assess tax trends related to economic and accounting figures. Simultaneously, the ATO has initiated forward compliance arrangements with major corporate entities. These agreements involve evaluating the companies' systems, governance frameworks and controls to manage tax risks effectively. By engaging in these arrangements, companies can reduce their audit risks by demonstrating due diligence, potentially receiving relief from

administrative penalties, and decreasing interest charges in case of tax deficiencies (Braithwaite and Reinhart, 2019).

3.5.3. Chile

The Chilean Internal Revenue Service (SII) proposed a certification for «good taxpayers» to promote social responsibility among multinational companies. The *ratio* behind this is that, in today's landscape, consumers demand not just quality products but also ethical labor practices and environmentally responsible conduct from companies operating globally. Multinationals are increasingly expected to pay their fair share of taxes in the countries where they operate - as it reflects their global corporate behaviour. However, establishing a single global standard for corporate social responsibility lacks consensus, as no recognized international body validates a company's compliance.

Regarding taxation, companies usually rely on opinions from external auditors during their periodic audits to assess any pending tax liabilities. The proposed concept entails a certification system based on tax-related corporate behaviour. Companies adhering to determined principles would voluntarily seek certification from the SII (the maintenance of the certification is subject to verification and yearly follow-up). The idea aims to improve taxpayers' behaviour by accounting for their social responsibility and promoting the use of information technology by taxpayers and the SII (Alink and Kommer, 2016, p. 177). While Chile considers the implementation beneficial, they advocate for broader international adoption, envisioning global standards, international recognition, and information exchange mechanisms. This approach is seen as self-regulating, with companies encouraging each other to meet set standards.

3.5.5. Netherlands

The Dutch Tax and Customs Administration (*Belastingdienst*) introduced the concept of horizontal monitoring, focusing on self-regulation,

in alignment with the rising importance of corporate governance in rebuilding trust in large corporations (Widt, 2017). The *Belastingdienst* entered covenants with companies and trade organizations, aiming to enhance legal certainty and improve the climate for business establishment in the country. These agreements emphasize taxation in the past and future, stressing transparency, understanding, and trust between the parties involved. These short but impactful covenants symbolize a company's willingness to engage in dialogue with the Tax Administration to minimize uncertainties and avoid negative reputational impacts associated with tax issues. The primary goal is to demonstrate reliability and control, reassuring shareholders, stakeholders, and society.

While these developments raise concerns among tax scholars and advisors, most companies enthusiastically participate, prioritizing control and reliability over potential tax benefits (Widt, 2017). The agreements focus on fostering a cooperative relationship rather than ethical or moral standards, aiming for a win-win scenario for both companies and tax authorities.

3.5.6. Other relevant developments

Tax authorities in various countries are increasingly focusing on corporate governance.

The third meeting of the OECD Forum on Tax Administration in 2006 spotlighted the challenges encountered by revenue bodies, particularly international non-compliance, and the need for organizational reforms to enhance tax administration's effectiveness (Alink and Kommer, 2016, p. 181). The evolving global economic environment resulting from trade liberalization, capital mobility, and technological advancements has expanded the scope for various taxpayers, potentially challenging tax regulations. This openness in the global marketplace has given rise to structures that could challenge tax laws, leading to non-compliance by domestic and foreign taxpayers.

To address these concerns, efforts were directed toward improving practical collaboration among revenue bodies and other governmental

law enforcement agencies to counter non-compliance. Additionally, attention was drawn to corporate governance issues and the roles played by tax advisors, financial institutions, and other entities concerning non-compliance and the promotion of unacceptable tax minimization arrangements. Several areas were identified for further development or initiation, including enhancing the directory of aggressive tax planning schemes, studying the role of tax intermediaries, and expanding corporate governance guidelines to consider the linkage between taxation and good governance.

4. Conclusion

The imperative interdependence between environmental conservation and ensuring fundamental human entitlements stands unequivocal in the complex web of humanity's relationship with the environment. The capability to shape the environment through technological advancements accentuates mankind's responsibility to preserve it for present and future generations.

From this premise, our comprehensive analysis dived into taxation's role in sustainability. Taxation, often perceived merely as an economic tool, is entangled with multifaceted sustainability aspects - financial, environmental, and human. In environmental sustainability, taxation emerges as a critical instrument, acting as an incentive or deterrent, steering behaviour towards eco-friendly practices and addressing concerns about resource depletion and waste proliferation.

Nonetheless, challenges still persist, including economic burdens, irreversibility of incentives, and transparency issues, hampering their efficacy. Pursuing a sustainable world through taxation requires a paradigm shift in mindsets and behaviours across individuals, corporations, and governance structures. Taxation is not solely about economic incentives but also demands fairness to safeguard vulnerable social classes. Achieving this equilibrium is, however, a complex task,

requiring policies that assume income security for individuals and viability for businesses while steering toward sustainability.

Nevertheless, the path to sustainability transcends taxation, encompassing good governance and corporate social responsibility. The discourse on governance, particularly in taxation and corporate conduct, reflects an evolving landscape marked by paradigm shifts from conventional bureaucratic approaches to contemporary governance realms. This transition emphasized adaptive regulatory mechanisms, focusing on substantive public outcomes. Good governance transcends quantitative efficiency, emphasizing qualitative criteria and embracing principles of participation, consensus, accountability, transparency, responsiveness, effectiveness, equitability, and adherence to the rule of law.

Moreover, formulating tax codes of conduct is a key point in corporate tax strategies, illustrating responsible tax management. Integrating tax governance within broader corporate governance principles, like the UN's Sustainable Development Goals and Environmental, Social, and Governance policies, signifies a growing trend recognizing tax as an integral part of a company's commitment to social accountability. Additionally, Corporate Social Responsibility serves as a guiding principle for ethical corporate conduct and contributions to sustainable development. Voluntary adopting sustainable practices bring advantages like improved corporate reputation, talent attraction, risk mitigation, innovation, and cost reduction. Various fiscal initiatives worldwide incentivize CSR and sustainable practices through tax deductions, levies, feed-in tariffs, and incentives for charitable donations and social projects, stimulating welfare and sustainable development.

From the tax authorities' side, there is a growing interest in robust governance, emphasizing ethical behaviour, corporate responsibility, and transparency. Global tax administration examples, such as HMRC, Australia's Taxation Office, Chile's Internal Revenue Service, and the Netherlands Tax and Customs Administration, underscore this shift, focusing on aligning tax policies with commercial objectives and ethical corporate behaviour.

In conclusion, taxes stand as a potent driver for promoting sustainable behaviour. Through strategic tax policies, governments can incentivize environmentally friendly practices, encourage corporate responsibility, and nurture social behaviours towards sustainable development, promoting a collective movement towards a more sustainable future.

References

ALINK, M. and KOMMER, V. van (2016) Handbook on Tax Administration. Second. Amsterdam: IBFD.

ÅNEMAN, A. E. K.; BJÖRK, S. L. To What Extent are ESG Related Factors Integrated into Risk Management Practices in Nordic Pension Funds.

ARULRAJAH, A. A. (2016). Literature review on good governance in the organizations through human resource management: A corporate level analysis. International Business Research, 9(8), 14.

BARBOSA, A. (2022). Direito aduaneiro multinível. Portugal: Petrony.

BOERRILD, T.; KOHONEN, M.; SARIN, R. (2015). Getting to good: Towards responsible corporate tax behaviour.

BRAITHWAITE, V.; REINHART, M. (2019). The Taxpayers' Charter: Does the Australian Tax Office comply and who benefits?. Centre for Tax System Integrity (CTSI), Research School of Social Sciences, The Australian National University.

COOPER, Maggie; NGUYEN, Quyen T.K. (2020). Multinational enterprises and corporate tax planning: A review of literature and suggestions for a future research agenda. International Business Review, 29(3). Available at: https://doi.org/10.1016/j.ibusrev.2020.101692.

DALY, S. (2017). HMRC and the public: the case for reform of soft law (Doctoral dissertation, University of Oxford).

DENHARDT, R. B; GRUBBS, J. W. (2003). Public administration: An action orientation. Belmont: Thomson and Wadsworth.

DONNELLY, E.; HENEGHAN, J. (2017). The Role of Tax Authorities in Encouraging Corporate Social Responsibility and Good Governance. Available at: DOI:10.2139/ssrn.3187180

FINANCIAL REPORTING COUNCIL (2018), UK Corporate Governance Code. Available at https://media.frc.org.uk/documents/UK_Corporate_Governance_Code_2018.pdf.

GAVRILUȚĂ, A. F.; LOTOS, C. V. (2018). Good Governance and the Rule of Law-Major Pillars of Economic Efficiency. Journal of Public Administration, Finance & Law, 13.

GUÍMARO, C. (2017). Da adequação do paradigma da eGovernance na Administração Fiscal. In Ciência da Técnica Fiscal. 437

HOGAN, D. (2021): How taxation can help make the world a more sustainable place. EY. Available at: https://www.ey.com/en_ie/tax/how-taxation-canhelp-make-the-world-a-more-sustainable-place

HRMC (2016) Publish your large business tax strategy. Available at: https://www.gov.uk/guidance/large-businesses-publish-yourtax-strategy#who-must-publish-a-strategy.

MORISON, J. (2003). Modernising government and the e-government revolution: Technologies of government and technologies of democracy. In Public law in a multi-layered constitution (pp. 157-188). Oxford: Hart Publishing.

OECD (2004), Guidance note on Compliance Risk Management: Managing and Improving Tax Compliance. In Forum on Tax Administration, Compliance Sub-group.

OSBORNE, D.; T. GAEBLER (1992) Reinventing Government. How the Entrepreneurial Spirit Is Transforming the Public Sector 15. New York: Plume/Penguin.

PENSION DANMARK (2020). Tax Code of Conduct. Available at: www.pensiondanmark.com/globalassets/dokumenter/investering/new-tax-code-of-conduct.pdf.

RIBEIRO, J. (2022). A tributação ao serviço da proteção ambiental e desenvolvimento humano.

RHODES, R. A. (2012). Waves of Governance. In The Oxford Handbook of Governance 33. Oxford: Oxford University Press.

ROCHA, J.; BARBOSA, Andreia (2020). A soberania como responsabilidade no domínio fiscal.

ROTHSTEIN, B. (2012). Good governance. In The Oxford Handbook of Governance. Available at: https://doi.org/10.1093/oxfordhb/9780199560530.013.0010.

TAN, C. (2022). Private investments, public goods: regulating markets for sustainable development. European Business Organization Law Review, 23(1), 241-271. Available at: https://doi.org/10.1007/s40804-021-00236-w.

UNITED NATIONS (1972). Stockholm Declaration. Declaration on Human Environment.

VAN DER ENDEN, E.; KLEIN, B. (2020). Good Tax Governance?… Govern Tax Good!. Available at SSRN: https://ssrn.com/abstract=3610858 or http://dx.doi.org/10.2139/ssrn.3610858

VÉGH, G. (2018). Tax administration good governance. EC Tax Review, 27(1).

WIDT, D. (2017). Dutch horizontal monitoring: The handicap of a head start. Umeå universitet.

WORLD BANK (1991). Managing Development: The Governance Dimension, a Discussion Paper. Washington D.C.: The World Bank.

WORLD ECONOMIC FORUM (2020). Toward Common Metrics and Consistent Reporting of Sustainable Value Creation. Available at http://www3.weforum.org/docs/WEF_IBC_ESG_Metrics_Discussion_Paper.pdf

The role of VAT in the circular economy

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Abstract: Circular business models play a vital role in the transition towards a sustainable and circular economy. This transition is promoted by the Green Deal. The current legal and institutional system is based on the linear resource intensive – take, make, use, waste – economy with linear business models that often use planned obsolescence to maximise revenue. In difference to these models, circular business models require a close and continuous collaboration between business entities, their suppliers, and customers to be able to create a repetitive circular flow of products and materials with the aim to minimise resource leakage and retain the value of used resources. Value added tax (VAT) touches upon the transactions that take place within this continuous circular flow of products and materials. Although being a consumption tax, the EU-VAT-system is designed as a transaction tax and is based upon the characteristics of a linear economy. Consequently, it creates legal issues for circular businesses to comply with the current VAT-regulations and may create a competitive disadvantage for circular businesses. A number of these legal issues for specific circular business models will be discussed in this article. Solutions for these VAT-issues and for finding ways for VAT to accommodate the transition toward a circular economy are proposed by several authors. Some propose to structurally change in the tax system and transforming VAT into a green VAT. Other propose minor adaptations to the VAT-system in order to better accommodate circular transactions. This article

intends to provide an insight into these proposals and into a number of legal issues caused by VAT for circular business models.

Key words: circular economy; circular business model; circular transactions; VAT; transaction tax; VAT-system; LCA.

1. Introduction

The transition from the current linear – take, make, use and waste – economy into a circular economy, in which waste incineration and landfill is avoided as much as possible and recycling and reuse become the norm, is going to require substantial changes in our society.[1] Fischer in her dissertation on the impact of the Dutch institutional and legal system on circular business models, describes a number of obstacles and challenges caused by these systems for businesses that want to become circular. Not only in contracting with other companies and their customers but also in obtaining finance as a consequence of existing laws, rules and regulations that are designed for the linear way of doing business.[2] Circularity requires business models to change the supply chain and design new and disruptive ways of collaborating with suppliers and customers. Examples of circular business models are light as a service instead of selling light fixtures and light bulbs (Signify[3]), designing and making mobile phones that can be easily repaired, refurbished, remanufactured and recycled (Fairphone[4]), intensifying the use of tools by

1. Ellen MacArthur Foundation, *Towards the Circular Economy; economic and business rationale for an accelerated transition*, 2013, chapter 1 and 2, p. 13-34.

2. A. Fischer, *Circular economy - Forging institutions; On how circular business model innovation shapes the circular ec onomy while instigating the new rules of the game*, Wageningen, 2022, DOI https://doi.org/10.18174/567287.

3. https://www.signify.com/en-gb/sustainability (website visited on 20 October 2023).

4. https://www.fairphone.com/en/impact (website visited on 20 October 2023)

borrowing them from a neighbour (Peerby[5]) and making carpet tiles reusable and recyclable by using a take back-reversed logistic system by the producer (Interface[6]).

The transition towards a circular economy - with the aim to reach it by 2050 - has been the objective of the European Union (EU) which the EU Commission first put forward in detail in the first Circular Action Plan in 2015.[7] In 2020 the EU published a 'New Circular Economy Action Plan'[8]. This new action plan was announced in the Green Deal[9] as the EU Commission had to acknowledge that the transformation towards a circular economy was progressing too slowly.[10] In the special report of the European Court of Auditors on the progress of this transition within the 27 EU member countries, the court concluded that the member states together hardly have made any progress in the transition compared to the circularity rate in 2015.[11] By 2021, only 11.7% of the material use within the EU was circular.[12] Worldwide the figure is worse: only 7.2% of the world economy is circular. This percentage has been falling during the last couple of years.[13]

Value Added Tax (VAT) has been experienced by some circular businesses as favouring linear business models and creating a barrier for

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5. https://www.peerby.com/en-nl (website visited on 20 October 2023).

6. https://www.interface.com/GB/en-GB/sustainability/recycling.html (visited on 20 October 2023),

7. EU Commission, Closing the loop - An EU action plan for the Circular Economy, Brussels, 2.12.2015 COM(2015) 614 final (hereafter: Circular Action Plan 2015).

8. A new Circular Economy Action Plan For a cleaner and more competitive Europe, Brussels, 11.3.2020, COM(2020) 98 final.

9. The European Green Deal, Brussels, 11.12.2019 COM(2019) 640 final (hereafter: Green Deal)

10. Green Deal, p. 7.

11. European Court of Auditors, *Circular economy: Slow transition by member states despite EU action (Special Report)*, 2023, nr. 17, https://www.eca.europa.eu/en/publications/sr-2023-17, (hereafter: Report Circular economy).

12. Report Circular Economy, p. 17-19.

13. Circle Economy, *The Circularity Gap Report 2023*, Amsterdam 2023, p. 8.

transitioning into a circular business model.[14] Merkx remarks that the current VAT-system is designed in a linear manner by taxing transactions in a linear direction from mining activities through the production lines to the consumer, who is paying the VAT, be it indirectly. The current VAT-system is lacking an adequate regime for the return of goods from the consumer to the producer, which is crucial for the circular economy.[15] Recently academics like Milios and Kirchherr et al. point to the possibilities to use VAT to promote the transition towards the circular economy.[16] The VAT-system will be challenged by changes in society, in institutional and legal systems, as the economic system is changing to become circular by 2050.[17] Therefore, it is paramount to proactively discuss the challenges the VAT-system is going to encounter and consider the opportunities for accommodating these challenges by means of minor adaptations to the VAT-system or, maybe, by contemplating a complete overhaul of the system to a tax, based on the life cycle assessment (LCA) of goods and services, as proposed by some authors.[18]

First this article will describe the concept of circular economy and circular business models (paragraph 2). In paragraph 3 the role of VAT as a tax on the exchange of goods and services in relation to

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14. Copper8, *Circular Revenue Models: Required Policy Changes for the Transition to a Circular Economy*, 2019, www.copper8.com, p. 12-15.

15. M. Merkx, *A New (Circular) Economy: A New Special Arrangement for Second-Hand Goods!*, EC Tax Review, 2021-2, p. 64-69 (hereafter: Merkx), p. 64.

16. L. Milios, *Towards a Circular Economy Taxation Framework: Expectations and Challenges of Implementation*, Circular Economy and Sustainability, 2021, 1, p. 477–498, https://doi.org/10.1007/s43615-020-00002-z (hereafter: Milios); J. Kirchherr, L. Piscicelli, R. Boura, E. Kostense-Smit, J. Muller, A Huibrechtse-Truijens, M. Hekkert, *Barriers to the Circular Economy: Evidence From the European Union (EU)*, Ecological Economics 150 (2018) 264–272, https://doi.org/10.1016/j.ecolecon.2018.04.028 (hereafter: Kirchherr et al. 2018).

17. See note 8 and 9.

18. E. Traversa and B. Timmermans, *Value-Added Tax (VAT) and Sustainability in the European Union: A Radical Proposal Design Issues, Legal Aspects, and Policy Alternatives*, Intertax, 2021, Volume 49, Issue 11, p. 871-884 (hereafter: Traversa and Timmermans); C. De Camillis and M. Goralczyk, Towards stronger measures for sustainable consumption and production policies: proposal of a new fiscal framework based on a life cycle approach, International Journal of Life Cycle Assessment, 2013, 18, p. 263–272, DOI 10.1007/s11367-012-0460-5 (hereafter: De Camillis and Goralczyk).

circular business models will be discussed. Paragraph 4 will examine the legal issues from a VAT-perspective that a number of circular business models face as a consequence of the application of the rules of the current VAT-system. The article aims to give an insight into a number of these legal issues, but does not allow for a complete in-depth legal analysis of all VAT-issues related to these circular business models. After focusing on the legal issues, paragraph 5 will focus on a number of opportunities for changing the VAT-system. Paragraph 6 will give a conclusion as to the author's ideas on going forward.

2. Circular economy and circular business models

The idea that resources are finite finds its roots in academic thinking as far back as the ideas of the economist Malthus in the late 18th century on the notion – developed by this author - that population growth has to be contained because of the limited availability of resources for the production of food.[19] Until now, Malthus' ideas did not materialise due to the advances in agriculture and technology, which helped to accommodate a growing world population, be it unevenly distributed as by 2019 9% of the world population lived in conditions of extreme poverty.[20] In the sixties and seventies of the last century, economists like Kenneth Boulding[21], Herman Daly[22] and D.W. Pearce

19. T.R. Malthus, *An Essay on the Principle of Population*, volume two, Everyman's Library, London, 1967.

20. World bank, https://blogs.worldbank.org/opendata/september-2023-global-poverty-update-world-bank-new-data-poverty-during-pandemic-asia, website visited on the 23 October 2023.

21. Kenneth E. Boulding, *The Economics of the Coming Spaceship Earth*, in H. Jarrett (ed.), 1966, Environmental Quality in a Growing Economy, pp. 3-14, Baltimore, MD.: Resources of the Future/John Hopkins University Press.

22. Herman E. Daly, *Steady-State Economics*, Island Press, Washington D.C., USA, 1991.

and R.K. Turner[23] and – on assignment of the Club of Rome – scientists like Donella and Dennis Meadows and their team from MIT[24] started to question the sustainability of the exponential use of virgin resources (materials) in relation to pollution, resource depletion and population growth. By the end of the twentieth century in academic literature the ideas on concepts like industrial ecology and ecological economics were discussed in relation to the aim to reduce the exponential use of virgin resources and pollution. These concepts are linked to the concept of circular economy.[25]

In academic and grey literature, the definition of the concept of circular economy varies depending on the focus and the background of the author.[26] A good definition of the concept has become more relevant as from 2024, given that large companies have to report on the environmental (E) and social (S) impact of their economic activities on society and the environment, based on the Corporate Sustainability Reporting Directive[27] (CSRD) of the EU. This directive also requires them to provide an insight into the governance (G) of their company. To make these reporting requirements more concrete, the EU Commission adopted the European Sustainability Reporting

23. D.W. Pearce, R.K. Turner, *Economics of Natural Resources and the Environment*, John Hopkins University Press, 1990 (hereafter: Pearce and Turner).

24. Dennis Meadows, *De grenzen aan de groei (original title: The Limits To Growth); Rapport van de club van Rome*, Uitgeverij Het Spectrum N.V. Utrecht/Antwerpen, 1972.

25. A. Bruel, J. Kronenberg, N. Troussier, B. Guillaume, *Linking Industrial Ecology and Ecological Economics: A Theoretical and Empirical Foundation for the Circular Economy*, Journal of Industrial Ecology, 2018, Volume 23, Number 1, Yale University, DOI: 10.1111/jiec.12745.

26. J. Kirchherr, D. Reike, M. Hekkert, *Conceptualizing the circular economy: An analysis of 114 definitions*, Resources, Conservation & Recycling, 2017, 127, 221–232.

27. Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting (hereafter: CSRD). Note: In the USA the Securities and Exchange Commission (SEC) has also set up ESG-reporting requirements for companies (https://www.sec.gov/securities-topics/climate-esg) and so is the UK (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1147458/ESG_Ratings_Consultation_.pdf).

Standards (ESRS).[28] Under ESRS E5 'Resource use and Circular Economy' of the ESRS, circular economy is defined as: "*an economic system in which the value of products, materials and other resources in the economy is maintained for as long as possible, enhancing their efficient use in production and consumption, thereby reducing the environmental impact of their use, minimising waste and the release of hazardous substances at all stages of their life cycle, including through the application of the waste hierarchy. The goal is to maximise and maintain the value of the technical and biological resources, products and materials by creating a system that allows for durability, optimal use or re-use, refurbishment, remanufacturing, recycling and nutrient cycling*".[29]

Under CSRD and ESRS businesses have to report on the adaptation of their business model and strategy to become circular.[30] The basis of the report is the contribution of the business to the circular economy principles: "*refuse, rethink, reduce, re-use, repair, refurbish, remanufacture, repurpose and recycle*.".[31] In academic literature, definitions of the concept of circular business model are broader and include elements like closing the loop, intensification of use and dematerialisation.[32] However, the combination of the definition of circular economy with the circular economy principles - given in the ESRS – coincides in essence with the various definitions of circular business models in academic literature. These principles also correspond with the R-framework (also known as R-ladder) which categorises the activities that

28. Annex 1 to Commission Delegated Regulation (EU) .../... supplementing Directive 2013/34/EU of the European Parliament and of the Council as regards sustainability reporting standards, Brussels, 31.7.2023, C(2023) 5303 final (hereafter: ESRS), p. 2, objective 1. Remark: On the 18 October 2023 the attempt to scrab the ESRS has been rejected by the European Parliament.

29. ESRS, p. 145, Objective 3.

30. ESRS, p. 145, Objective 1(c).

31. ESRS, ESRS E5 Disclosure Requirement 5-1, AR 8-10, p. 153.

32. M. Geissdoerfer, M.P.P. Pieroni, D.C.A. Pigosso, K. Soufani, *Circular business models: A review*, Journal of Cleaner Production, 2020, 277, 123741, p. 1-17, https://doi.org/10.1016/j.jclepro.2020.123741, p. 5-7.

are typical within a circular economy.[33] The ESRS is linked to the Taxonomy Regulation (2020/852).[34] Article 13, paragraph 1 of the Taxonomy Regulations describes the activities of companies that the EU considers to be contributing to the transition towards the circular economy.

Even though, within academic literature, the debate on the definitions of the concepts of circular economy and circular business models is ongoing, in the author's opinion, within the EU, the definitions and descriptions provided by the ESRS, and the Taxonomy Regulation will probably lead the discussion. These are the basis for the reporting requirements based on the CSRD. For this reason, the author defines the concept of a circular business model as being a business model that develops and incorporates activities corresponding to the circular economy principles of the ESRS and those described in the Taxonomy Regulation, which are typical for a business model in a circular economy.

3. The role of VAT as a tax on transactions within the circular economy

In principle, VAT is a tax on consumption to be paid by the end-consumer. It is not intended to affect the prices of supplies in the supply chain.[35] Within the EU, this tax is levied from companies by means

33. T. Fornasari, P. Neri, *A Model for the Transition to the Circular Economy: The "R" Framework*, Symphonya, 2022, Emerging Issues in Management (symphonya.unicusano.it), (8), 78-91, https://dx.doi.org/10.4468/2022.1.08fornasari.neri, p. 82.

34. Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088(hereafter: Taxonomy Regulation); ESRS, General Requirement, 113, p. 17.

35. H.M.P. Scholte, *Indirecte belastingen*, Hoofdstuk (Chapter) 6, in '*Belastingen vanuit een economische invalshoek: Rapport van de Commissie Economie en belastingen*' (translation: Taxation from an economic perspective: Report of the Commission Economics and taxation), Vereniging voor Belastingwetenschap, 18 september 2023, p. 201-252, p. 210-212.

of a credit invoice-method, which obliges companies to charge VAT on their output-transactions and give them the right to claim back the VAT paid on their input-transactions, based on received invoices.[36] This method of taxing consumption works well within a linear take-make-use-waste-economy as every transaction in the supply chain is a part of this chain of charging and deducting VAT up till the end-consumer, who pays the VAT but cannot claim it back from the tax authority. The consumer uses the product and discards it after its use. The product ends up as waste in a landfill or an incineration oven.

In a circular economy, resources equal waste from mining activities, production phase and consumption phase.[37] Or, as Braungart and McDonough state in their book "Cradle to Cradle", waste equals food in the form of biological nutrient (waste from food and plants) and technological nutrients (for example, waste from discarded electronic equipment)[38]. So, in a circular economy there is no end of the line in the form of consumption by consumers, as consumers are the producers of biological and technological nutrients to be used in a 'new' circle of production and consumption. This notion requires an answer to the following question: Should consumers as producers of biological and technological nutrients have the same right as companies to reclaim the input-VAT on their groceries and purchases?

Although the answer to the question is open to debate, in the author's opinion the answer is: no. The goal of levying VAT is obtaining revenue for the government by means of taxing consumption in a way that in essence equals a retail tax on goods and services.[39]

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36. L. Ebrill, M. Keen, J-P. Bodin, V. Summers, *The Modern VAT*, International Monetary Fund, 2001 (hereafter: Ebrill et al.), chapter 2.

37. Pearce and Turner, p. 35-41.

38. M. Braungart, W. McDonough, *Cradle to Cradle: remarking the way we make things*, Vintage Books, London, 2009, chapter 4.

39. S. Cnossen, *The C-inefficiency of the EU-VAT and what can be done about it*, International Tax and Public Finance, 2022, 29:215–236, https://doi.org/10.1007/s10797-021-09683-0, p. 216; Ebrill et al., p. 18-19.

From the view of economists a VAT with a uniform rate equals an income tax with a uniform rate as they both equally constrain the consumer's budget.[40] From a legal point of view, taxing the circular use of materials is justified as VAT taxes the value added in each phase of production and the tax ends up being paid by the intended taxpayer: the end-consumer. As long as waste has no value, a negative value - when consumers or producers have to pay for disposal or recycling – or only the value inherent to the characteristics of the residual materials - like used metals -, the use of waste will start a new cycle of adding value to (secondary) resources when these resources enter a new production cycle. This is comparable to virgin resources that are not yet extracted, even though these resources may appear as assets on the balance sheets of mining companies. The Court of Justice of the EU (CJEU) states that in case a product loses its functionality and the materials - it is made from - can only be used to make new products, these materials become part of the new economic cycle of a new product. Therefore, the Court is of the opinion that in such a case there is no risk of double taxation.[41] However, despite of the Court's opinion and the economic rationale for charging VAT, in case waste - as a resource -, used products and parts of products - suitable for reuse – are valuable in themselves, which they are in a circular economy, the question arises whether the current VAT-system provides adequate possibilities for taxing circular transactions in a way that VAT does not hamper the transition towards a circular economy.

40. I. Crawford, M. Keen and S. Smith, Value Added Tax and Excises, Chapter 4, Mirrlees Review, April 2010, § 4.2.1. Remark: VAT is different from income tax as it distorts the supply of goods and services and not the supply and demand for labour as income tax does.

41. CJEU, 11 July 2018, C-154/17 (E Lats), considerations 33-34.

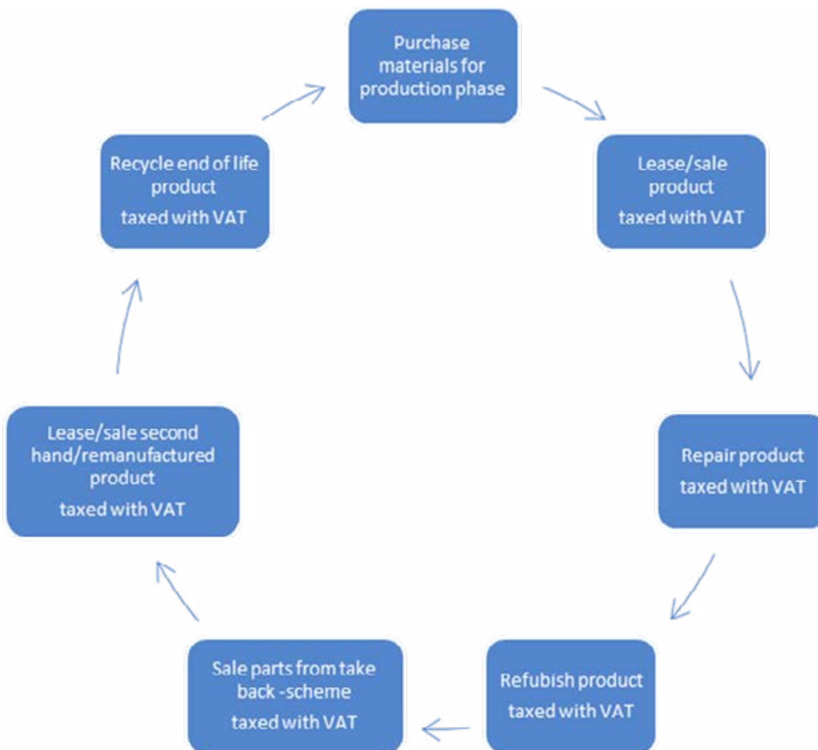

Figure 1. Schematic presentation of the circular use of materials and products indicating the liability for charging VAT for each circular transaction in a closed loop, where the same resources are charged with VAT over and over again.

In the author's opinion, this is a relevant question. Based on the current VAT-legislation and the schematic presentation of the closed loop in figure 1, VAT is charged during each phase of the circular use of a product and over its parts, from the production phase through to the recycling phase, and the reuse of the recycled materials as secondary materials. Based on the legal nature of VAT as a tax on added value, the continuous taxation of added value in a circular loop from the production to consumption and back to production can be regarded as justified. However, the current VAT-legislation and interpretation are likely to have an impact on circular business models as these add value in a different and often unfamiliar manner, compared to linear business models. This is likely to lead to discussions on the interpretation

of the application of the current VAT-legislation, which leads to uncertainty in the area of VAT-liabilities, and therefore, may become an risk factor for circular businesses.

4. Impression of VAT-issues related to the exchange of goods and services for compensation within the circular economy

The current VAT-legislation and the jurisprudence from the CJEU in VAT-related cases leads to uncertainties for VAT-taxable transactions within a circular economy. In this paragraph a number of issues will be discussed, some of which are linked to the issues mentioned in the previous paragraph. As the circular use of goods will impact the whole economy, we are only now starting to discover its consequences for VAT. A limited number of issues will be discussed in this article. The focus will be on the following topics: VAT-taxable persons within a circular economy; the reuse of goods; and business models that step away from the transfer of the ownership of products to the supply of a service that provides for the availability of the product to the customer. This paragraph will focus on the explanation of the legal aspects of these issues based on the current and in-force VAT-rules within the EU.

For the correct understanding of this paragraph it is relevant to define the terms goods and services from the perspective of VAT. The term good is broadly defined and entails any tangible property based on articles 14 and 15 of the VAT Directive[42]. So, this term includes products, used products, materials (virgin and secondary resources), waste, and also electricity. The supply of a service is any transaction that is not the supply of a good (article 24 of the VAT Directive).

42. Council Directive 2006/112/EC of 26 November 2066 (hereafter: VAT Directive).

4.1. The changing role of the consumer in a circular economy

As mentioned in the previous paragraph, the question is raised whether a consumer can become a VAT-taxable person under article 9(1) of the VAT Directive for the supply of used products, whatever the form (article 2(1)(a) and (c) of the VAT Directive). If so, has the individual consumer as a taxable person the right to claim back the input-VAT that the individual paid - based on article 168 of the VAT Directive – which embedded in the purchase price of the products and in the costs that the individual made to be able to deliver the used products or to perform the services. The CJEU gave a judgment on a case about the supply of electricity[43] to an electricity company by a private person who had solar panels on his house. In return for the supply the private individual received a reduction of the electricity invoice. Although this person was using most of the electricity generated by the solar panels for private use, the Court decided that the individual was a VAT-taxable person because of the indefinite and continuous nature of the supply of electricity to the electricity company and the compensation received for the supply.[44] This supply is therefore to be considered an economic activity. Accordingly the Court stated that, as this 'private person' is a VAT-taxable person for the supply of the electricity, he has the right to claim back the input-VAT on the acquisition of the solar panels and its installation.[45] This case is related to newly produced electricity by a 'private person' and not to the supply of used products and waste. So, in cases where consumers continuously supply used products, waste, services and maybe even secondary materials to companies and other private persons for a compensation, it remains to be seen whether the Court will come to the same conclusion and will regard a consumer – private person - in a circular economy as a VAT-taxable person.

43. Article 15 of the VAT Directive.

44. CJEU, 20 June 2013, C-219/12 (Fuchs), considerations 27 and 28

45. CJEU, C-219/12 (Fuchs), consideration 33.

In a circular economy, the reduction of the use of virgin materials by the intensification of the use of products is regarded as an important activity that contributes towards the circular use of these products.[46] On the internet, there are platforms that facilitate the sharing of products between neighbours. So, if products are being regularly shared among persons (sharing economy) for a compensation, whether monetary, in kind or in the form of a service in return, based on article 73 of the VAT Directive, which defines compensation very broadly, and based on the arguments mentioned in the previous subparagraph, these transaction may very well be VAT-taxable transactions. However, if this person is not acting independently but, for example, under the direction of a platform, like in the Uber-case[47] or of an employer, based on article 9(1)(a) of the VAT Directive, this person is very likely not acting as a VAT-taxable person.[48]

The legal complexity surrounding the question whether a person is acting as a taxable person for VAT, leads to the conclusion that under the current VAT-legislation, because of the broad interpretation of the terms taxable person, taxable transaction and compensation, consumers within a circular economy have a good chance of becoming taxable persons. Therefore, consumers may be faced with the obligation to charge VAT on certain regular circular transactions like selling and returning used goods and sharing goods for compensation. The more circular the economy becomes, the more regular consumers will engage in these circular transactions. The obligation to charge VAT with the right to claim back the input-VAT will come with compliance costs for the consumer and administrative costs for the tax authorities as well as loss of VAT-revenue for governments. The VAT

46. K. Dutz, M. Nagel, and N. Peach, *Obsolescence, Useful Life Extensionand New Educational Concepts: The Economy Needs Repair!*, in The Circular Economy in the European Union: An Interim Review, S. Eisenriegler (Ed.), p. 157-185, p. 165-166.

47. CJEU, 20 December 2017, C-434/15 (Uber), consideration 39. Remark: It should be noted that the Court in this case does not answer the question whether or not the non-professional driver are employed by the Uber or not.

48. VAT expert group, 22nd meeting – 1 April 2019, taxud.c.1(2019)2026442 – EN, VEG081, Brussels, 18 March 2019, p. 4.

Directive, under articles 281-292, allows member states to apply a revenue threshold under which VAT-taxable persons with a low yearly turnover are exempt from charging and deducting VAT. Notwithstanding, the possibility of limiting the number of taxable persons by applying such a revenue-threshold, clarity on the issue when a private person becomes a taxable person, is becoming more important due to the obligation of member states under DAC 7[49] (directive). This directive requires member states to demand from the platforms, that reside in their country, to report to the authorities the details of the persons who sell goods and services on these platforms and the income they obtain from these activities. The member states are obliged to share these details with the member states in which these sellers and service providers reside.[50] The information that becomes available under DAC 7 may lead to more persons being identified as qualifying as VAT-taxable persons, given that 20% of individuals in the EU in 2021 are using the internet for selling goods and services.[51]

4.2. Main VAT-issues related to the reuse of goods

Circular economy requires a product to be reused till it is not anymore possible to reuse it or its parts. After which, the product should be recycled to become secondary (recycled) materials to be used in the production of new products. VAT does not have a specific regime for the reuse of products and recycled materials in general. As long as used goods remain in the sphere of business to business (B2B) supply and delivery without any exemptions being applicable, in general charging VAT on the sale of used goods and claiming back input-VAT on the purchase will – in principle - lead to the burden of dealing with compliance costs and of having to deal with a

49. Council Directive (EU) 2021/514 of 22 March 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation (hereafter: DAC 7).

50. DAC 7, article 8ac.

51. https://www.statista.com/statistics/381234/online-c2c-commerce-penetration-in-the-eu/#statisticContainer (website view on 25 October 2023).

possible temporary impact on a company's liquidity while waiting for the input-VAT to be reimbursed. However, it becomes more complex when businesses purchase used goods from consumers or other non-VAT-taxable organisations (end-consumers). As stated in the previous paragraph, end-consumers do not have the right to claim back the input-VAT on their purchases nor the possibility to charge VAT on the (incidental) sales of goods. So, if they are not taxable persons, and, when they sell used goods to a business, they cannot charge VAT, and the business cannot claim back the input-VAT embedded in the purchase price. Without a special VAT-regime, when businesses are selling these goods, they would have to charge VAT on the complete sales price of the used goods based on article 73 of the VAT Directive. The consequence will be that VAT would be charged also on the VAT embedded in the purchase price and this would lead to double taxation. In order to avoid this double taxation of the sale of used goods purchased from end-consumers, the VAT Directive has a special regime for second-hand goods called profit margin scheme.[52] In these cases, article 315 of the VAT Directive allows traders in used goods to reduce the taxable amount to the profit margin the trader makes on the sale of the used goods. This way the trader does not have to charge VAT on the VAT embedded in the purchase price.

The special regime applicable for the sale of second hand goods to avoid double taxation, has its limitations. The regime is only applicable to used goods when they retain their functionality or can be repaired to continue their original functionality.[53] The CJEU delivered a judgment on the applicability of the profit margin scheme for spare parts removed from car wrecks that lost their functionality (end of life-goods). The Court is of the opinion that the sale of these spare parts, provided that they retain their functionality or after being repaired,

52. VAT Directive, articles 311-325.

53. See end note 42.

is covered by the profit margin scheme.[54] Based on a recent judgment of the Court, the sale of the car wrecks itself with the purpose of selling spare parts is also covered by the profit margin scheme, provided that these parts - after being removed - retain their functionality and, when necessary, after being repaired.[55] However, from this judgment it becomes clear that waste, that can only be reused after being recycled as secondary materials, is not covered by the profit margin scheme, because the product and its parts have lost their functionality. The secondary materials become part of a new economic cycle.[56] In the author's opinion, this is acceptable as long as waste has no value or a negative value. However, under the current VAT Directive waste purchased from end-consumers, that does have value, will have non-reclaimable VAT embedded in its purchase price. Therefore, - after the recycling process - this non-reclaimable VAT will be embedded in the sale price of secondary materials.[57] In these cases, the application of the VAT Directive will lead to double taxation and, as a consequence, a possible distortion of competition between the use of secondary and virgin materials.

Contrary to new goods, under the current VAT-regime the sale of used goods, which is covered by the profit margin scheme, is always taxed in the country, where the seller resides, based on article 35 and article 40 in conjunction with article 139(3) of the VAT Directive. Because the location of the purchaser of a margin good is not relevant, it may be interesting for end-consumers to purchase used goods in member states with a lower VAT rate.[58] This may lead to distortion of competition between sellers of used goods as a consequence of the

54. CJEU, 18 January 2017, C-417/15 (Sjelle Autogenbrug), considerations 36-39.

55. CJEU, 17 May 2023, C-365/22, (IT), consideration 23-25.

56. CJEU, C-365/22 (IT), consideration 25.

57. See also Merkx, p. 67.

58. Remark: The Commission of the EU has proposed to introduce the distance selling place of supply of goods to good covered by the profit margin scheme. If adopted the supply of used goods covered by profit margin scheme shall be taxed based on the country where the purchaser resides.

difference in VAT-rates between member states. Another consequence is the issue that a taxable person, residing in another member state than the seller, who purchases used goods covered by the profit margin scheme, will have to pay the full price, which includes the VAT charged in the seller's state of residence. This taxable person is unable to reclaim the VAT embedded in the sales price from the tax authority of that member state. Based on article 325 of the VAT Directive the seller is not allowed to specify the VAT amount included in the sales price on the invoice, so the purchaser does not know the amount of VAT included in the purchase price.[59]

Apart from the EU-wide obligation to provide for a take back system for batteries[60] and electronic equipment[61], more and more companies - like some mobile phone companies - are actively encouraging customers to return their old products (take back-system).[62] To reward the customer for the return of the old product some companies pay a compensation. When this reward is combined with the purchase of a new product, for VAT-purposes the reward is often regarded as a discount on the price of the new product which reduces the taxable amount for VAT based on article 79(c) of the VAT Directive. For the company a combination of a take back of the old product with the sale of a new good is preferable in case the used good is returned to the company by a non-taxable person. This way, the problem with non-reclaimable VAT embedded in the purchase price - discussed in the previous subparagraph - is avoided. However, in the circular economy, the use of take back-systems with a reversed logistic-system to accommodate the return of the products from the purchaser back

59. See also Merkx, p. 67.

60. Regulation concerning batteries and waste batteries, (EU) 2023/1542, adopted on 12 July 2023.

61. Directive on waste electrical and electronic equipment (WEEE), 2012/19/EU.

62. M. Lewandowski, *Designing the Business Models for Circular Economy—Towards the Conceptual Framework*, Sustainability, 2016, 8, 43; doi:10.3390/su8010043, www.mdpi.com/journal/sustainability, p. 1-28, p. 20.

to the seller is likely to become the norm.[63] Consumers will start to realise that used goods are valuable and will demand compensation for the return of the product. Not all consumers will be interested in buying a new product from the same company.

4.3. An impression of VAT-issues related to Product Service System-business models

Circular business models that focus on providing for the need of its consumer instead of selling a product to the consumer by transferring the ownership of that product, have become more visible in today's society. Most visible are bicycles and e-scooters available for rent per minute parked on the streets of many cities. These rentals are arranged and paid for by means of an app, and, contrary to traditional rentals, these bicycles and e-scooters can be left behind - at will - at any suitable public place within a specific area.[64] These business models are ranked as Product Service System-models (PSS). The concept of an PSS-business model can be defined as " *a business model focused toward the provision of a marketable set of products and services, designed to be economically, socially and environmentally sustainable, with the final aim of fulfilling customer's needs.*"[65]. PSS-models can be divided in three main categories[66]:

- Product orientated services – the product is still sold to the customer with added services like maintenance, finance and take back;

63. See endnote 61.

64. For example Felyx scooter rental, https://felyx.com/products/how-it-works/ (website viewed 27 October 2023).

65. A. Annarelli, C. Battistella , F. Nonino, *Product service system: A conceptual framework from a systematic review*, Journal of Cleaner Production, 2016, 139, p. 1011-1032, http://dx.doi.org/10.1016/j.jclepro.2016.08.061, p. 1017.

66. A. Tukker, *Eight Types of Product–Service System: Eight ways to sustainability? Experiences from SusProNet*, Business Strategy and the Environment, 2004, 13, 246–260, DOI: 10.1002/bse.414, p. 246-260, p. 248-249.

- Use orientated services – the producer retains the ownership of the product and rents it out to the customer to use either with full and unlimited access or with limited access, whereby the product is shared with more customers. The customer pays for the use of the product; and
- Result orientated services – the customer is paying for the result of the use. Examples are paying per printed page or per copy (Xerox) or – in the case of the business models with the e-scooters and bicycles mentioned above – paying per minute mobility.

The different categories have different VAT-issues attached to them. A company that uses a product orientated service-model, will in general face the same VAT-issues as a linear company when selling a product, depending on the type of product that it sells and the circumstances of the sale. However, a circular business model that offers added services attached to the sale of a product, will have to give specific attention to the way VAT qualifies these added services. The reason being that the CJEU has determined in the Levob-case that

"*every transaction must normally be regarded as distinct and independent and, secondly, a transaction which comprises a single supply from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system, the essential features of the transaction must in the first place be ascertained in order to determine whether the taxable person is making to the customer, being a typical consumer, several distinct principal supplies or a single supply*"[67]. Based on this judgment a company that supplies the added service of maintenance, insurance, take back-service, etc. attached to the sale of a product will have to determine whether these added services and the sale of the product need to be seen as the one single supply of a good (same VAT-rate and liabilities) or whether these added services need to be regarded as separate from the supply of the product. This is relevant because:

67. CJEU, 27 October 2005, C-41/04 (Levob), consideration 20.

- It is possible that VAT-rate applicable to the supply of the product differs from the rate applicable to the supply of the added service(s);
- The separate supply of the service may even be exempt from VAT. For example, insurance services could be exempted if the criteria for the exemption are fulfilled.[68] An exemption applicable for a separate supply of a service in general not only means that no VAT needs to be charged but also that no input-VAT can be reclaimed on the costs paid to provide these services and on a part of the indirect costs.[69]; and
- In case the product with the added services is sold to a customer who resides in another member state, the difference between the supply of goods (product) and the supply of services may determine where VAT needs to be declared and paid.[70]

With regards to use and result orientated services, the focus is on providing for the use of a product - instead of selling it – and often by renting the products out. Rent and lease are not new business models. So, VAT-issues related to renting or leasing are not typical for circular business models. However, by the end of the last century Walter Stahel made the link between use and result orientated services and the circular economy goals. The reason being that a business that focuses on making goods available to customers instead of focusing on the sale of a product will be interested in extending the use of the product through maintenance, repair, reuse and recycling. This will lead to a reduction in the extraction and use of virgin

68. VAT Directive, article 135(1)(a) and CJEU, 8 July 2021, C-695/19, Radio Popular.

69. VAT Directive, articles 168 and 173-175.

70. VAT Directive, articles 31 and following determine the place of the supply of a good, depending on whether the good are transported or not and in case of transport to another member states whether the customer is a taxable person or not. Articles 43 and following determine the place of the supply of a service, depending on whether the service is supplied to a taxable person or not.

materials.[71] So, discussing the VAT-issues relating to use and result orientated service-models will provide an insight into the dilemma's that VAT may cause for the circular businesses that choose one of these kinds of business models.

From the perspective of VAT, a company that meets a specific need of its customers by means of a result orientated PSS-business model will supply a service to that customer. The applicable VAT-rules for a supply of a service will be determined by the specifics and circumstances of the provision of that service. That does not mean that the characteristics of a specific product does not influence the VAT-consequences of providing for the use of that product by means of a service. For example, the VAT Directive has specific rules for car rental-services – short term or long term - to determine where the rental service is supplied to the customer depending on whether the customer is a taxable person or an end-consumer. This is relevant in order to establish the applicable VAT-rate and VAT-compliance procedures of the country where the supply takes place.[72]

The VAT-consequences of use orientated-business models can be more complicated. Firstly, because the provision of the use of an item may be contracted in such a way that it is not the supply of a service but it represents a financial lease or a hire-purchase contract, and therefore, a supply of a good. This will materialise when - based on the clauses of the contract - a transfer of ownership is to be expected at the end of the lease period. In that case, the transaction will be regarded as a supply of a good and not of a service based on article 14(2)(b) of the VAT Directive. Even in case the contract contains only an option for the transfer of ownership at the end of the lease period, but opting for this transfer of ownership is the only economically rational choice for the lessee, the transaction qualifies

71. W. Stahel, *The Utilization-Focused Service Economy: Resource Efficiency and Product-Life Extension*, in "The Greening of Industrial Ecosystems", B.R. Allenby and D. Richards (ed.), National Academy Press, 1994, p. 178-190.

72. VAT Directive, article 56 will be applicable instead of the articles 44 and 45.

as a supply of a good and not of a service.[73] The consequence is that, based on article 63 of the VAT Directive, the total amount of VAT on the value of the product is due at the moment the use of the product has been made available to the customer independent of the answer to the question whether the ownership will in fact be transferred to the customer at the end of the lease period. Another complication may arise when - next to making the use of a product available to the customer - a number of added services is supplied, like, for example, an app to reduce the electricity cost of the use of an electric appliance or to indicate when maintenance is due. The discussion in the previous subparagraph about added services together with the supply of a good, may also be applicable to these added services. The CJEU in the The Escape Center-case[74] formulated criteria for determining when added services are considered to be a part of the principal service. This will be the case when the customer regards the added services so closely linked to the principal service that it is objectively a part of that service and, also, in case the added services can be regarded as an ancillary service to the principal service. This needs to be determined based on the essential conditions of the contract and all the circumstances of the case.[75] So, the evaluation of these criteria for added services can lead to different outcomes, depending on the circumstances of each case, which creates uncertainty, and therefore, a liability risk for companies that want to make use of this kind of circular business model.

73. CJEU, 4 October 2017, C-164/16 (Mercedes Benz Financial Services), consideration 39.

74. CJEU, 22 September 2022, C-330/21 (The Escape Center).

75. CJEU, C-330/21 (The Escape Center), consideration 25-28.

5. Proposals for changing the VAT-system to promote the use of circular business models

There are various proposals to make changes to the current VAT-system and even to transform the system into a kind of Green VAT. In this paragraph some of these proposals to change the current VAT-system to solve some of the legal issues mentioned in the previous paragraphs will be discussed. Attention will also be paid to proposals that opt to use VAT to promote circular activities, and to more radical proposals to change the VAT-system to price in the negative externalities caused by pollution and the linear use of resources.

The proposals to make changes to the current VAT-rules come from Merkx and the present author who both focus on improving the VAT-treatment of transactions related to the reuse of goods including raw materials. In paragraph 4.2 some of the VAT-issues for the reuse of second-hand goods and secondary raw materials are discussed. On one hand, Merkx proposes to extend the profit margin-regime to secondary materials. She also proposes to alleviate the accumulation of VAT that is caused by the lack of the right to deduct the input-VAT embedded in the price of used goods in case these are purchased by taxable persons. In her opinion, taxable persons who purchase second-hand (margin) goods for business purposes, should have the right to claim a flat rate-deduction of the input-VAT embedded in the price.[76] On the other hand, in an earlier published article, the present author proposed to broaden the use of the reverse charge mechanism, which makes the purchaser (taxable person) liable for declaring and immediately also deducting the input-VAT in the same tax declaration.[77] By extending the reverse charge mechanism to include transactions related to the reuse of goods, businesses, that purchase second hand-goods and secondary materials, will have the financial advantage of not having to wait for

76. Merkx, p. 68-69.

77. VAT Directive, article 199 in conjunction with article 170(b).

the tax authorities to reimburse the input-VAT, as they do not have to pay the input-VAT on these purchases.[78]

The Green Deal and the 2020 New Circular Action Plan point to the use of VAT to promote sustainability and the transition towards a circular economy. The measures, that these EU-policy plans propose, are focused on the reduction of VAT-rates for certain transactions in order to promote sustainability and circular activities.[79] Also, in academic literature the reduction of VAT-rates for reuse of used products and repair services is proposed to promote the transition towards a circular economy.[80] However, based on limited empirical research into the use of reduced VAT-rates for repair services, it appears that reduced rates for repair services may not be an effective tool for promoting the repair of goods.[81] Another issue is fiscal neutrality. In a recent case on the question whether different VAT-rates may be applied to cold and hot chocolate milk drinks, the CJEU decided that this is possible, despite the fact that both products have the same ingredients. The CJEU is of the opinion that for the consumer there is a difference between a cold chocolate drink bought in a supermarket and a warm chocolate drink purchased in a restaurant, and therefore, these are not similar, even though both drinks fulfil the same consumption need.[82] However, it remains to be seen whether it is possible to apply different VAT-rates to the supply of products, that provide for the same needs,

78. H.M.P. Scholte, *Verleggingsregeling in de btw ter bevordering van het recyclen van materialen en de circulaire economie* (translation: Reversed charge mechanism to promote the recycling of materials and the circular economy), NLFW (NL Fiscaal Wetenschappelijk), 10 maart 2021, 2021/8, Judoreg: NFB4172, p. 9-11.

79. Green Deal, p. 17 and New Circular Action Plan 2020, 17.

80. K. Hartleya, R. van Santen, J. Kirchherr, *Policies for transitioning towards a circular economy: Expectations from the European Union (EU)*, Resources, Conservation & Recycling, 2020, 155, 104634, https://doi.org/10.1016/j.resconrec.2019.104634, p. 1-10 (hereafter: Hartleya et al.), p. 4-5; L. Milios, *Towards a Circular Economy Taxation Framework: Expectations and Challenges of Implementation*, Circular Economy and Sustainability, 2021, 1, https://doi.org/10.1007/s43615-020-00002-z, p. 477-498 (hereafter: Milios), p. 481-482.

81. Milios, p. 488-490.

82. CJEU, 5 October 2023, C-146/22 (Dyrektor Krajowej Informacji Skarbowej), considerations 54-55.

solely based on the fact that one is supplied by a company using a linear business model (planned obsolescence) and the other is supplied by a circular business that uses circular activities to prolong the life cycle of the product or has made the product (partly) of recycled content. Based on the judgment, these products need to be dissimilar for the consumer in order to make the differentiation of the VAT-rates applicable.

Since 2022, the Amendment to the VAT Directive[83] gives member states more options to reduce VAT-rates on the supply of some services and goods which are related to sustainability. These are mentioned in Annex III of the VAT Directive, like the repair of household appliances (paragraph 19), the sale and repair of bicycles (paragraph 25) and the sale of solar panels (paragraph 10c). This is in line with the legislative steps the EU has taken to require companies to design their products to be easily repairable. The object of this legislation is to end the often standard linear business model of many companies to make their products obsolescent within a short amount of time and difficult and expensive to repair in order to boost the sales of their new products.[84] Some member states like Sweden[85] and the Netherlands[86] have introduced reduced rates for certain repair services, although these were introduced before the amendment. Based on article 98 of the VAT Directive, member states are not obliged to introduce reduced rates for sustainable and circular activities. Furthermore, only a limited number of the circular activities, that are mentioned in article 13 of the Taxonomy Directive, are also mentioned in Annex III of the VAT Directive which lists the goods and services for which a reduced rate can be applied. Despite the possibilities for using differentiated

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83. Council Directive (EU) 2022/542 of 5 April 2022 amending Directives 2006/112/EC and (EU) 2020/285 as regards rates of value added tax.

84. Proposal for a Directive of the European Parliament and of the Council on common rules promoting the repair of goods and amending Regulation (EU) 2017/2394, Directives (EU) 2019/771 and (EU) 2020/1828.

85. Milios, p. 483.

86. Wet op de omzetbelasting, Bijlage I, paragraph b(4-6).

rates to promote goods and services that are produced and delivered in a circular manner, the issues of fiscal neutrality and economic effectiveness remain.

Except for possibilities to charge a reduced rate on the supply of some goods and services that can be qualified as circular and sustainable, the VAT-system does not provide for a Pigouvian type of taxation of environmentally harmful activities.[87] Because of this lack of an environmental dimension and the specific qualities of VAT as a broad tax on transactions, in academic literature, some authors propose a radical overhaul of the VAT-system. One of the ideas is to use differentiated VAT-rates based on the environmental burden of a product with the goal to price in the negative externalities of the production and distribution of a product or service.[88] De Camallis and Goralczyk propose to introduce a uniform VAT-rate plus adding an environmental VAT-rate based on the LCA-score (ecological footprint) of a specific product. The outcome of the sum of these rates will be the rate that needs to be charged.[89] De Camallis and Goralczyk recognise this proposal will lead to an added compliance burden for businesses and an increase of administrative costs for the tax authorities as well as possible consequences for the amount of VAT-revenue collected for governments.[90] However, this proposal may help circular business models as the reduction of the use of virgin materials will lower the LCA-score of their products and services.[91]

87. Traversa and B. Timmermans, p. 872-875.

88. Traversa and Timmermans; De Camillis and M. Goralczyk.

89. De Camillis and Goralczyk.

90. De Camillis and Goralczyk, p. 270-270.

91. B. Timmermans and W.M.J. Achten, *From value-added tax to a damage and value-added tax partially based on life cycle assessment: principles and feasibility*, The International Journal of Life Cycle Assessment, 2018, 23, p. 2217–2247, https://doi.org/10.1007/s11367-018-1439-7, p. 2224.

6. Conclusion

The transition towards a circular economy is progressing slowly. Global developments and the more limited availability of virgin resources are likely to make the transition more urgent and may become a driving force to speed up the progress of the transition.[92] In paragraph 4 of this article a number of VAT-issues attached to use of circular business models are discussed. As the transition progresses, it is probable that more VAT-issues will arise which will lead to more complexity and compliance issues, and with which circular businesses will have to deal.

In paragraph 5 some the proposals for changing the VAT-system are discussed. Not discussed is the plan for a comprehensive tax reform presented by The Ex'tax Project (Ex'Tax)[93] as it neither plans to change the VAT-system nor to use VAT to promote circular businesses. It proposes to increase VAT-rates and to introduce environmental taxes with the intent to reduce the use of resources and to promote the use of labour by reducing income tax and social security contributions. Based on macroeconomic models, this would promote the more labour-intensive circular economy and reduce the more resource intensive linear economy.[94]

Looking at the VAT-issues and proposals for adapting the VAT-regulation and -system discussed in this article, it is clear that VAT has an impact on circular business models and the transition towards the circular economy. However, it is not clear whether this impact makes VAT an obstacle that slows down the transition towards a circular economy. In the author's opinion this makes research into the scope of the impact of VAT on the circular economy relevant and maybe, makes it possible to proactively take actions to mitigate the negative effects of VAT on the transition.

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92. Ellen MacArthur Foundation, *Towards a Circular Economy: Business Rationale for an Accelerated Transition*, November 2015, p. 13-14.

93. The Ex'tax Project, *The Taxshift: An EU Fiscal Strategy to Support the Inclusive Circular Economy*, Utrecht, 2022, https://ex-tax.com/wp-content/uploads/2022/06/The-Taxshift_EU-Fiscal-Strategy_Extax-Project-2June22def.pdf (hereafter: Ex'Tax).

94. Ex'tax, p. 4-7 and 22-42.

E-commerce platforms: the EU-VAT eco-taxation of goods produced in high-carbon emission countries and sold to non-taxable persons, established in the European Union

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Abstract: The purpose of the article is to assess the possibility of introducing, in the field of the European Union - Value Added Tax common system, an e-commerce legal scheme, taxing electronic interfaces, such as online marketplaces/platforms, that facilitate goods, produced in countries with a significant carbon emission footprint, to non-taxable persons established in a given Member-State, with the main aim to counterbalance the effects of carbon leakage.

The scheme, to be based upon the current guidelines of the VAT Directive, concerning the selling of goods by e-commerce platforms, would not only align with the objectives set up by the carbon border adjustment mechanism (CBAM), but amplify it, in order to cover all goods deriving from third countries with a carbon footprint superior to a pre-determined limit of emissions per capita, to be assessed in accordance with the Emissions Database for Global Atmospheric Research (EDGAR).

Tax revenues, deriving from such a legal scheme, would be used in eco-projects, to be implemented in the European Union (EU), capable of decreasing worldwide levels of carbon-emission (e.g., reforestation/afforestation).

The article will also aim to determine the positive effects of such legal scheme, in trade competitiveness, for "*made in EU products*" and

its interoperability with the proposal for an Ecodesign for Sustainable Products Regulation.

Keywords: European Union; Value Added Tax; CO2 leakage.

1. Introduction

In the evolving landscape of global commerce, market-places/platforms have emerged as dominant players, facilitating transactions that span continents. Concurrently, environmental concerns have gained paramount importance, with carbon emissions and their consequential impact on climate change being at the forefront. The dilemma of CO2 leakage, by which regulatory disparities lead to carbon-intensive products, manufactured in less regulated regions, to be shipped, imported and sold in high-regulated regions, with lesser atmospheric CO2 levels, presents a significant challenge.

Our proposed e-commerce legal scheme in the field of EU´s Value Added Tax (VAT) provides an innovative solution, in order to address this dual challenge.

Our approach focused on the legal field, utilizing an empirical-dialectical model within a dogmatic research framework to explore theoretical and practical questions, ultimately seeking to add solutions. The methodology employed entailed conducting a comprehensive literature review to understand the complexities of global commerce, environmental concerns, and VAT regulations, which allowed, after analysis and reflection, to concretize the problematic of the existing regulatory landscape to identify disparities contributing to CO2 leakage and the importation of carbon-intensive products.

In summary, our research provides a pragmatic approach to address the dual challenge of market regulation and climate change mitigation, contributing to the ongoing discourse on global commerce and environmental responsibility.

2. The problem of CO2 leakage into the EU27

Despite the pause in the increase of Green House Gases' (GHG) emissions, in 2020, due to the COVID-19 crisis (with a 5.1% reduction in the global anthropogenic fossil CO2 emissions, in comparison with 2019), having been reached a global level equivalent to the anthropogenic GHG emissions of 2013 (36.0 Gt of CO2), the fact is that, since the beginning of the century, particularly when comparing with the last three decades of the 20th century, GHG emissions have been increasingly growing[1].

Justifications for this outcome are to be found in the increase of fossil CO2 emissions by China, India, and other emerging countries.

In 2020, the order of the top five CO2 emitters was as follows:

2020			
Country	**Total CO2 emissions**	**Emissions per capita/year**	**Share in global emissions**
China	**11.7 Gt**	**8.2 t**	**32.5%**
United States	**4.5 Gt**	**13.7 t**	**12.6%**
EU 27	**2.6 Gt**	**5.9 t**	**7.3%**
India	**2.3 Gt**	**1.7 t**	**6.7%**
Russia	**1.7 Gt**	**11.6 t**	**4,7%**
Japan	**1.06 Gt**	**8.4 t**	**3%**

From the analysis of this data, we can easily observe that China, the United States, India, Russia and Japan account for almost 60% of the total amount of CO2 emissions (even though, among these top emitters, only China has an increase in emissions, in this specific year, of 1,5%).

1. Crippa, M., Guizzardi, D., Solazzo, E., Muntean, M., Schaaf, E., Monforti-Ferrario, F., Banja, M., Olivier, J.G.J., Grassi, G., Rossi, S., Vignati, E.,"GHG emissions of all world countries - 2021 Report", EUR 30831 EN, Publications Office of the European Union, Luxembourg, 2021, ISBN 978-92-76-41547-3, doi:10.2760/173513, JRC126363

The most significant decline in emissions was made by the EU27 (-10.6%), followed by the United States (-9,9%), Japan (-6.8%), India (-5.9%) and Russia (-5.8%)[2].

Considering the fact that the EU27 has a 5.9t of emissions per capita/per year, one should conclude that whenever there is an import of goods produced in countries with a higher amount of per capita emissions, there is, effectively, a leakage of CO2 emissions to the EU27 (i.e., there is not only an import of the goods themselves but also an "*import*" of the CO2 emissions associated with the production of such goods).

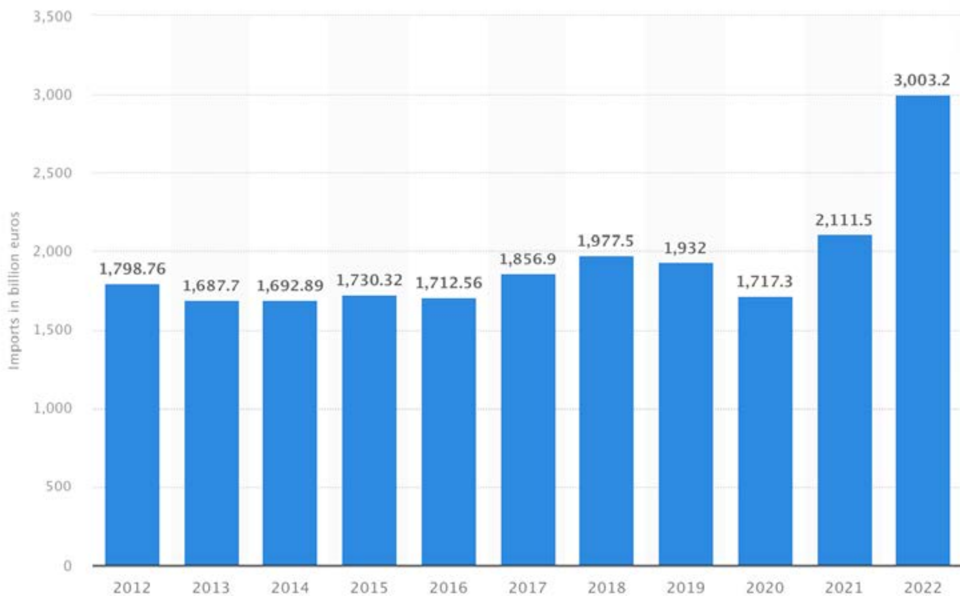
Offsetting the acquisition, by EU consumers, of goods manufactured in countries with a higher level of CO2 emissions per capita is, therefore, absolutely essential, in order to guarantee, amongst others, the goals adopted by the EU27 in the context of the Paris Agreement, of limiting global temperature increase to below 2 degrees Celsius, achieving global peaking of greenhouse gas emissions as soon as possible and obtaining "*climate neutrality*"[3].

The urgency to undertake tax policies that will help tackle the issue of the CO2's leakage is clearly perceived by the analysis of the growth in the importation of goods, by the EU27, felt in recent years (as seen below[4]):

2. "Crippa, M., Guizzardi, D., Solazzo, E., Muntean, M., Schaaf, E., Monforti-Ferrario, F., Banja, M., Olivier, J.G.J., Grassi, G., Rossi, S., Vignati, E., "GHG emissions…", op. cit., p. 4.

3. Please refer to Articles 2 and 4 of the Paris Agreement.

4. https://www.statista.com/statistics/253584/import-of-goods-to-the-eu/.



3. Is VAT a fundamental tool to stop the CO2 leakage?

Several criticisms have been made over the implementation of environmental taxes on the basis of their specificity.

3.1. Criticisms and recommendations for the use of VAT as a tool to fight climate change

Perhaps the most publicized criticism, concerning environmental taxes is the fact that, by only targeting a given industry/product, they would then originate: *(i)* a fast erosion of the tax base[5], *(ii)* an increase of compliance[6] and lobbying[7] costs (the latter deriving from

5. European Environment Agency, Environmental Taxation and EU Environmental Policies, Report No 17/2016 (6 Sept. 2016).

6. D. Fullerton, "Why Have Separate Environmental Taxes?", 10 Tax Policy Econ. 33–70 (1996).

7. N. A. Braathen, "The Political Economy of Environmental Taxation, in Handbook of Research on Environmental Taxation" 230–245 (J. E. Milne & M. S. Andresen eds, Edward Elgar Publishing 2014).

the need to counteract losses in competitiveness) and *(iii)* a sense of discrimination, felt by the targeted sectors[8]; caused by shifts in the environmental impact of a given industry to other(s), less burdened by taxation[9].

Nonetheless, Botes[10] - apart from pondering the adoption of a carbon tax and arguing in favor of influencing environmental behaviors, by levying eco-taxes on the selling of plastic bags, electricity generated by power plants and electrical filament lamps - sustained the possibility of denying the right to deduct the VAT that has been charged over the acquisition of goods/services, which are harmful for the environment (e.g., denying such a right for the acquisition of bottled water, if tap water is available).

Having claimed that, despite such a measure being an exception to one of the main features of VAT (i.e., the principle of neutrality, from which the deduction mechanism derives), there are no examples of VAT national schemes, which do not contemplate exceptions, that always give rise to complexities, but which are, nonetheless, fundamentally associated with nowadays' complex commercial reality.

Also, the exception of denying the right to deduct VAT, as part of a more general tax policy, intending to encourage more eco-friendly behaviors, is fully justified, given that it promotes a higher goal: the preservation of the environment.

We share, on the basis of these arguments, the view that VAT should be perceived as a tool to deter the CO2 leakage into the EU27.

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8. OECD, "Taxing Energy Use 2019: Using Taxes for Climate Action" (OECD Publishing 2019).

9. M. G. W. M. Peeters, "Twenty Years of EU Environmental Legislation After Maastricht: The Increasing Role of the EU as a Global Green Standard-Setter, in The Treaty on European Union 1993-2013: Reflections from Maastricht" 535–556 (M. D. Visser & A. P. V. D. Mei eds, Intersentia 2013).

10. Botes, M., "Should VAT Not Support the Environment?", 23, Intl. VAT Monitor 2 (2012), Journals IBFD (accessed 22 May 2023).

Not by means of limiting the right of deduction[11], but by using the One Stop Shop (OSS) special import scheme and imposing higher VAT rates on goods, originated and imported from countries with a significant carbon footprint (as a result of their associated means of production). Consequently, it would be possible to cause a shift in consumption (i.e., final consumers would then privilege the purchase of "*EU Made*" products or produced in third countries, with a lesser carbon impact).

However, this perspective is, by no means, consensual.

In fact, Kogels opposes the idea of the VAT being employed in order to support the environment, based on the argument that this is a general consumption tax (i.e., a tax that envisages to cover all economic transactions in a given Member State). Therefore, it should not be foreseen as an effective tool for increasing or reducing consumption of specific goods or services.

The author also argues that the possibility of using VAT as a "*carrot-and-stick*" instrument for environmental policy is rather dysfunctional, since VAT must comply with the principles of external and internal neutrality, by which, respectively, taxation should occur in the jurisdiction of consumption and the price paid by the final consumer should not include VAT, other than the VAT charged at the last stage of the distribution process and at the rate applicable to the price of the goods and services, in question.

Kogels took into consideration, for the purposes of making use of the VAT common system to promote a greener environment, Botes' proposal of denying the right to deduct VAT (concerning goods with a harmful ecological impact), having also analyzed: *(i)* the option to adopt a VAT exemption over those products, and *(ii)* the application of a lower rate to greener goods and services.

His conclusions, were the following:

- Denying the right of deducting VAT, in B2B transactions, would cause a hidden burden in the cost price of goods, thus

11. Which, as we soon shall see, creates distortions to the principle of neutrality, idiosyncratic to the VAT.

infringing the above-mentioned principle of (internal) neutrality;

- Providing an exemption for green products in B2B transactions, would also lead to a non-deductibility of input VAT, which would then cause the levying of an "*hidden tax*" at subsequent stages of the distribution process, leading up to the infringement - once again - of the principle of (internal) neutrality;
- Implementing reduced tax rates to green products would not have a negative impact on neutrality, in what concerns B2B transactions, since those rates would be neutralized, in each and every stage of the distribution process (i.e., the right to deduct input VAT would guarantee the effectiveness of the principle of neutrality). Only if such reduced rates were to be applied at the final stage (i.e., at the moment where such goods/services are to be sold to the final consumer) would there be a possibility for an increase in consumption (despite such an increase not being entirely granted, as shifts on consumption also depend on market conditions, the price elasticity of the products, inflation, etc.). Additionally, it should be noted that implementing reduced tax rates would necessarily give rise to higher costs of compliance and to an upsurge on the number of disputes, between taxable persons and tax authorities, regarding the boundaries of the application of the new rates.

As it is easily observed, with the exception of the denial of the right to deduct VAT, in what concerns goods/services that negatively impact the environment, the rest of the arguments/criticisms deal with the use of VAT to promote the selling of green products, through exemptions or the applicability of lower tax rates.

It should, however, be noticed that despite Kogels' criticism not being, therefore, specifically associated with our current proposal of imposing higher tax rates to goods produced in countries with significant levels of CO2 emissions, upon their importation to the EU 27, it is,

quite possible - based on the above-mentioned perspective of VAT as a general consumption tax and the criticisms over higher compliance costs and upsurges on litigation - that this author would also oppose to such an idea.

Nonetheless, our proposal of taxing, at higher VAT rates, such products, would, most definitively, not affect/infringe the principles of internal and external neutrality, given that:

- Allowing Member States to impose higher rates to products originated from third countries, to be acquired by private individuals, is well aligned with the principle of taxation in the jurisdiction of consumption, and does not enter in conflict with the inherent mechanics of the VAT, by which the price to be incurred by the consumer should only include the VAT charged at the last stage of the economic chain (i.e., levying such higher rates would be a legal consequence, associated with a national provision, and would not affect the other stages of distribution, since the importation of such goods by final consumers, would be, in this case, effectively the last stage of the commercial chain);
- The proposal of applying higher tax rates to importations from third countries with significant emission levels per capita, in order to stop the leakage of CO2 to the EU 27 would cover all goods, to be commercialized by electronic interfaces, post or any other means;
- The new scheme would, consequently, also not imply adding to the VAT Directive a list of specified goods, subject to those higher rates (meaning that an increase in litigation, though possible, with have a lesser impact than imposing such higher rates to an inventory of commodities).

3.2. The challenges identified by European bodies

It should be noted that the Commission is pondering to make a reform on the current tax framework of energy products, and that both the Commission and the European Committee of the Regions (taking into account the consensus regarding the distribution of responsibilities linked to tax policy[12]) have advocated lower VAT rates to be applied to certain economic sectors (e.g., repair services' industry), in order to promote sustainability[13].

In this latter case, the focus is to decrease the consumption footprint, by implementing a regenerative economic growth model, which ensures that resources are consumed at a pace consistent with the amount of their outputs, generated (annually) by the planet, particularly by doubling the circular use rate of products in the upcoming decade[14].

These views, issued by EU bodies, are a clear sign that, despite the abovementioned criticisms, concerning the implementation of specific legal schemes working as "*carrot-and-stick*" tools to shift consumption towards green products, there is a clear and undisputed EU consensus over the need to adjust VAT, in order to protect the environment.

Therefore, we can assertively conclude that - at least for the Commission and for the European Committee of the Regions - VAT should, most definitely, be a tool to fight climate change.

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12. Opinion of the European Committee of the Regions – New Circular Economy Action Plan (2020/C 440/18), OJ C 440/107 (18 Dec. 2020)

13. The Commission, in 2018, also proposed that green taxes should become EU own resources (please refer to Council Regulation (EU, Euratom) 2020/2093 of 17 December 2020 laying down the multiannual financial framework for the years 2021 to 2027, OJ L 433I/11 (22 Dec. 2020), at 11–22. Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom, OJ L 424/1 (15 Dec. 2020), at 1–10).

14. European Commission "*Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A new Circular Economy Action Plan. For a cleaner and more competitive Europe*, COM(2020) 98 final (11 Mar. 2020)

3.3. Traversa and Timmermans' proposal

Being very much aware of the views of these EU institutions, Traversa and Timmermans'[15] have put forward a theoretical framework to integrate, in the current EU VAT model, a tax function, not of the price of the product but of its quantity (weight or volume) and its associated Life Cycle Assessment (LCA), which consists of a method of assessing the impacts (or negative externalities) of any activity or product, not only on the environment, but also in human health, throughout its life cycle (e.g., extraction of the necessary raw materials, production procedure, transport and its disposal).

This model, named Damage VAT (DaVAT), would have a hybrid nature, given that it would imply:

- adopting a reduced (single/uniform) VAT rate;
- imposing an "*in rem*" tax rate, associated with the LCA score of each product or service (to be applied concurrently to the VAT rate);
- the maintenance of the current tax burden (i.e., although both rates would be levied, consumers would not be subject to an increase in overall taxation)[16].

The model proposed by these authors, represents, therefore, a substantial/meaningful change to the core nature of VAT.

15. Traversa, Edoardo and Timmermans, Benoit Value-Added Tax (VAT) and Sustainability in the European Union: A Radical Proposal Design Issues, Legal Aspects, and Policy Alternatives in Intertax, Vol. 49, Issue 11, p. 875.

16. Traversa, Edoardo and Timmermans, Benoit Value-Added Tax (VAT) and Sustainability in the European Union: A Radical Proposal Design Issues, Legal Aspects, and Policy Alternatives in Intertax, Vol. 49, Issue 11, p. 879.

3.4. Our proposal – Using the EU VAT One Stop Shop (OSS) to counter CO2 leakage

Our proposal is not so comprehensive, and not so striking/impacting, given that its specific intent is to (merely) use the current OSS special scheme, in order to counter CO2 leakage into the EU27.

We must begin by saying that, from July 2021, the so-called mini One Stop Shop (MOSS)[17] was replaced by the OSS.

The OSS is based upon three (optional) special EU VAT schemes, duly implemented on the VAT Directive[18], consisting of the non-Union scheme, the Union scheme[19] and the special import scheme.

Focusing on this latter scheme, we propose to use the OSS to allow levying higher VAT rates on goods imported from third countries that are objectively high CO2 emitters.

The scheme currently applies to the importation of goods, originated from third countries, which are sold by online market-places/platforms, to non-taxable persons, located in a given Member State.

For these B2C transactions, the VAT Directive prescribes that the VAT shall be applied at the tax rates in force at the Member State of consumption, and considers the referred online market-places/platforms as the deemed supplier of such products, thus being responsible for the payment of VAT.

It should be noted that a deemed supplier is considered to be a taxable person – established in the EU or outside the EU – who facilitates a supply of goods, imported from a third territory or a third country, in a consignment of a value not exceeding 150 euros, to a non-taxable person, via an electronic interface.

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17. Which was put in place on 1 January 2015.

18. Please refer to Chapter 6 of Title XII of the VAT Directive.

19. In general terms, these special schemes allow taxable persons, established, respectively, in third countries or in the EU, to declare and pay VAT due for B2C transactions (where the final consumer is established in another Member State), at the rates applicable in the Member State of consumption established, via a web-portal in the Member State in which they are registered for VAT purposes (i.e., its Member State of identification).

The tax over these transactions is paid by the online marketplace/platform to the tax authorities, where it registers for the OSS (the so-called Member State of identification) and subsequently transferred to the tax authorities of the Member State of consumption.

Should it decide not to register for the OSS, it would then be required to register in each Member State in which it supplies goods or services to customers, and its supplies are then considered as domestic transactions (subject, once again, to the VAT rates in force in each of the Member States of consumption).

The same applies to suppliers selling goods originated from third countries, through their own websites.

In this sense, by using the OSS, what we propose is to establish higher tax rates for products, with an intrinsic value below 150 euros, produced in third countries that have a certifiable emission coefficient "*per capita*" higher than the EU27, which, according to the most recent data available (2020) was, as seen above, of 5.9 t, and that are imported into the internal market.

The EU 27 "*per capita*" coefficient would therefore serve as the main criteria to determine the need to impose higher taxes on imported goods, in order to curtail the CO2 leakage. Which means that annual changes on this coefficient, would subsequently/innately create changes on the number of third countries subject to the special scheme (i.e., considering that the EU 27 has steadily declining its "*per capita*" CO2 coefficient, it is quite possible that the number of third countries, whose products would be subject to the special scheme, will increase in the future).

It should also be highlighted that each Member State of consumption (i.e., where the acquirer of the imported goods is located) would be the sole responsible for determining the (higher) VAT rates to be applied to such products.

Online market-places/platforms, as deemed suppliers, would consequently charge VAT at those (domestic) higher rates (i.e., issuing the invoice to the final consumer). They would then have to pay VAT to the tax authorities of the Member State of establishment (which

would, in accordance with the OSS special scheme, subsequently convey the tax to the tax authorities of the Member State of consumption).

As it is clearly seen, our proposal does not affect the current nature and main features of the VAT common system. Quite the opposite: it makes use of a special scheme that is currently in force, and that has proved itself in the past to be both effective and efficient.

4. Possibility for fraud and abuse

One other argument, sustained by Kogels, against the use of VAT to curtail the consumption is the fact that it would facilitate tax fraud/avoidance.

Even though, this author did not specified how tax fraud and avoidance would occur, one might consider, for instance, the possibility of incorporating an EU company, acting as the supplier, in the selling of the previously imported goods, to the final consumer, so that the final stage of consumption would not be associated with an importation but rather with a transaction made within the internal market.

Should there be - previous to the final stage of consumption - a B2B transaction (i.e., where the importation of goods is to be made by an EU taxpayer, who acquires the goods from a third country's company) this would, in reality, ultimately deprive the application of the OSS special import scheme.

In fact, the EU established company (acting as a taxable person, and, therefore, not being subject to the OSS) would be able to deduct the VAT incurred in the importation, and the subsequent selling of the goods to the final consumer would be subject to the normal domestic VAT rates.

In order to deter such practices, one should:

- Apply the principle of abuse of EU VAT law, that has been developed by the Court of Justice of the European Union (CJEU),

particularly in "*Halifax*"[20], by which the CJEU sustained that any given arrangement/transaction lacking economic substance and that has been implemented in order to (primarily) obtain an unjustified tax advantage, must be disregarded, for EU VAT purposes, and taxed in accordance with national law;
- Consider the possibility of denying the right to deduct VAT, due for the importation of goods, made by EU retailer taxable persons (this latter option would, nonetheless, be subject to the above-mentioned criticism of creating distortions to the principle of neutrality).

5. Positive effects of our proposal on CBAM and for trade competitiveness of "EU Made" products

In the fight against climate change, strategies that leverage existing systems can have profound positive impacts. Our proposal highlights such an approach, harnessing the EU's VAT system - specifically the OSS - to address CO2 leakage into the EU 27.

This chapter delves into the positive ramifications of such legal scheme, especially in what regards the EU´s Carbon Border Adjustment Mechanism (CBAM) as well as the positive effects for trade competitiveness for "*EU Made*" products and its interoperability with the Proposal for a ecodesign for sustainable products regulation.

5.1. Carbon Border Adjustment Mechanism (CBAM)

The CBAM[21] is an innovative environmental policy designed to mitigate the risk of CO2 leakage. This mechanism consists in a tariff that would be imposed on goods imported from countries with less

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20. ECJ Case C-255/02 ("*Halifax plc, Leeds Permanent Developments Services Ltd e County Wide Property Investments Ltd vs. Commissioners of Customs and Excise*") ECLI:EU:C:2006:121.

21. Regulation (EU) 2023/956 of the European Parliament and the Council of 10 May 2023 establishing a carbon border adjustment mechanism.

stringent climate regulations, ensuring a level of competitive landscape between EU industries that are subject to strict CO2 emission standards (and possibly carbon pricing, such as a carbon tax or a cap-and-trade system) and third countries industries that are, typically, not subject to these types of additional burdens.

Therefore, the primary aim of CBAM is to prevent CO2 leakage, a phenomenon where businesses transfer their operations to countries with lesser and more relaxed emission constraints to circumvent carbon costs, consequently stalling global emissions reduction.

Furthermore, it aims to protect EU industries subject to strict CO2 regulations that are at a potential competitive disadvantage, when compared to industries in countries without such regulations. The goal is to ensure that carbon-intensive goods entering the EU reflect their true environmental costs and to incentivize cleaner industrial production in third countries.

The CBAM´s operational method involves determining a charge based on the carbon content of imported goods. Therefore, mirroring the carbon cost that would have been incurred if the product had been produced under the EU´s carbon pricing framework. Hence, when goods are imported from countries without similar carbon pricing measures, a charge would be applied based on the carbon content of those goods. This charge would be equivalent to what domestic producers pay in terms of carbon pricing. By guaranteeing that the carbon cost of certain imported goods aligns with the cost of EU´s production, the CBAM reinforces the EU´s climate objectives.

The transitional phase of the CBAM has commenced from 1 October 2023, with an initial focus on specific carbon-intensive goods, and that are at most significant risk of CO2 leakage. Namely, cement, iron and steel, aluminum, fertilizers, electricity and hydrogen. From 1 January 2026, a permanent system will be in place, requiring importers to annually declare the quantity and carbon content of imported goods. Importers will be required to submit the equivalent number of CBAM certificates, and their cost will be determined by weekly average auction price of EU ETS allowances, represented in €/tone

of CO_2 emitted. Concurrently, the discontinuation of free allocation under the EU ETS will progress alongside the introduction of CBAM from 2026 to 2034.[22]

Therefore, our proposal would not only align with the objectives set up by the carbon border adjustment mechanism (CBAM), but amplify them, in order to cover all goods deriving from third countries with an emission coefficient "*per capita*" higher than the EU.

In what regards the alignment of our proposal and CBAM, the following reasons can be appointed:

- Objective of reducing CO_2 leakage: Both the CBAM and our proposal aim to address the issue of CO_2 leakage, by taxing goods produced in high-emission countries. Additionally, both mechanisms incentivize cleaner production and deter businesses from shifting production solely to exploit less stringent environmental policies and standards.
- Targeted approach: CBAM focuses on imports that do not meet the EU's climate standards, aiming to make sure that the cost of imports accurately reflects their carbon content. Our proposal is similar in this aspect, as it targets goods produced in countries with a significant carbon emission footprint.

In what regards the amplification of the objectives and aims of CBAM by our proposed e-commerce legal scheme, the following reasons can be appointed:

- Broadening the scope: our proposal aims to tax all goods from third countries that exceed the emission coefficient "*per capita*" of the EU (which, for 2020, was, as seen above, of 5.9 t). This means that while CBAM might focus initially on specific goods or sectors, our proposal can potentially cover a broader scope

22. European Commission, Guidance Document on CBAM implementation for Importers of Goods into the EU, 17 August 2023, p.14.

of products, thus extending the reach of the CBAM's intent/teleology.
- Focusing on e-commerce: The modern economy is increasingly digital, with e-commerce platforms playing a dominant role in global trade. By specifically focusing on electronic interfaces like online marketplaces and platforms, our proposal ensures that this major and fast-growing channel of trade is included in carbon-adjustment efforts. This is especially relevant as e-commerce can often bypass traditional import/export routes and regulations.
- Setting clear carbon limits: By defining a clear carbon emission per capita threshold for goods, our proposal offers a quantifiable and transparent metric. This makes it easier to identify and target goods produced in high carbon-emitting countries, thus strengthening the deterrent against high carbon footprint production.
- Potential for revenue reinvestment: our proposal suggests using tax revenues from this system for eco-projects within the EU, that are capable of decreasing worldwide levels of CO2 emission (e.g., reforestation/afforestation).This reinvestment amplifies the green impact by ensuring that funds raised are funneled back into environmental initiatives, further aligning with the broader objectives of CBAM to promote a sustainable economy.

In summary, our proposal not only aligns with the CBAM's foundational goal of countering CO2 leakage but also amplifies its impact by leveraging the expansive e-commerce sector, and redirecting revenues to further green initiatives.

5.2. Positive trade competitiveness effects for "EU Made" products and the proposal for ecodesign for sustainable products regulation

Goods produced entirely within the Member States of the EU are labelled as "*EU Made*" products. These products are held to the rigorous quality, safety, environmental, and regulatory standards imposed

by the EU, ensuring a high level of quality and trustworthiness. Such stringent guidelines often mean that "*EU Made*" products have less of an environmental footprint, greater safety measures, and generally adhere to ethical practices, from production to sale.

As the world grapples with the effects of climate change and recognizes the need for sustainable production and consumption, the EU has been at the forefront of these efforts. One of the key regulatory initiatives in this direction is the proposal for the ecodesign for sustainable products Regulation[23] published on 30 March 2022. This proposal advances the Commission´s strategy for more environmentally sustainable and circular products, evolving from the existing Ecodesign Directive[24], which currently only covers energy-related products.

However, given the expanding challenges related to sustainability and the increased awareness of the broader environmental impact of products (beyond just energy consumption), there has been a move to broaden the scope of the directive. The regulation expands the ecodesign approach to a vast array of products, targeting those with the most significant environmental consequences. It establishes a framework to set ecodesign prerequisites, focusing on sustainability attributes highlighted in the Circular Economy Action Plan[25]. These include product longevity, reusability, upgrade potential, reparability, minimizing harmful substances, energy and resource efficiency, recycled product content, remanufacturing, high-grade recycling, and the

23. European Commission, Proposal for a Regulation of the European Parliament and of the council establishing a Framework for setting ecodesign requirements for sustainable products and repealing Directive 2009/125/EC, COM/2022/142 final, 30.3.2022.

24. Directive 2009/125/EC of the European Parliament and of the Council of 21 October 2009 establishing a framework for the setting of ecodesign requirements for energy-related products

25. The circular economy is a model of production and consumption that involves sharing, leasing, reusing, repairing, refurbishing and recycling existing materials and products as long as possible. In this way, the life cycle of products is extended. European Commission, "Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions: A new Circular Economy Action Plan for a cleaner and more competitive Europe", COM/2020/98 final, 11.3.2020.

reduction of carbon and overall environmental imprints. In doing so, it will contribute to achieving the EU's overall climate, environmental and energy goals, while supporting economic growth, job creation and social inclusion.

Our proposal enhances competitiveness for "*EU Made*" products, by way of levying higher tax rates on products from countries with greater "*per capita*" emissions than the EU. In this way, our proposal makes "*EU Made*" products, which adhere to stricter environmental standards, relatively more competitive in terms of price. As non-EU products might become more expensive due to the imposed taxes, consumers could lean towards buying "*EU Made*" products, thereby creating a more equitable price competition.

In this sense, our proposed legal scheme not only amplifies the competitiveness of EU products but also integrates seamlessly with the proposal for ecodesign for sustainable products regulation, since both mechanisms synergize towards a unified mission of accentuating sustainability and minimizing products' ecological footprint. This confluence of regulations prompts an imperative for manufacturers, both within the EU and globally, to innovate and align with the EU's eco-centric standards, assuring their seamless entry and performance within the EU marketplace.

As the number of third countries subject to the special tax scheme might increase due to the EU's consistent reduction in its "*per capita*" CO2 coefficient, manufacturers from these countries may be incentivized to adopt greener production methods to avoid the additional tax. This resonates with the broader intent of the ecodesign proposal, which is geared towards promoting sustainable and environmentally-friendly production methods.

Additionally, our proposal also promotes the principles of the proposal for an ecodesign of sustainable products' regulation. Since the ecodesign proposed regulation emphasizes attributes like product durability, reusability, and energy efficiency, our proposal - by making products from third countries, that in principle do not adhere to such principles, more expensive - indirectly promotes the adoption

of ecodesign principles, not just within the EU but also globally. This could spur a global shift towards the manufacturing of more sustainable products.

Furthermore, by focusing on both the environmental footprint (emission coefficient) and the intrinsic value (below 150 euros) of imported goods, our proposal takes a holistic approach. This ensures that a wide range of products, especially those that are mass-consumed, come under the purview of the scheme, thereby magnifying its positive impact.

In essence, the proposed scheme aligns with the objectives of the ecodesign for sustainable products regulation, reinforcing the EU's commitment to foster sustainable production and consumption practices while simultaneously bolstering the trade competitiveness of "*EU Made*" products.

6. Conclusions

The authors propose to use the current OSS special import scheme, in order to counter CO2 leakage into the EU 27.

Higher VAT tax rates determined by each Member State, would consequently apply for products with an intrinsic value below 150 euros, produced in third countries that have an emission coefficient "*per capita*", higher than the EU and which are imported by online market-places/platforms, to be assessed in accordance with the EDGAR.

Tax revenues, deriving from such legal scheme, would be used in eco-projects, in the EU, so as to decrease worldwide levels of carbon-emission (e.g., reforestation/afforestation).

Such a proposal:

- Does not affect the current nature and main features of the VAT common system. Quite the opposite: it makes use of a special scheme that is currently in force, and that has proved to be effective and efficient.

- Does not create distortions to the principle of neutrality (both in its external and internal perspectives).
- Not only aligns with the CBAM's foundational goal of countering $CO2$ leakage but also amplifies its impact by leveraging the expansive e-commerce sector, and redirecting revenues to further green initiatives (i.e., it simultaneously promotes the fight against $CO2$ leakage but also contributes to global efforts to reduce carbon emissions).
- Not only amplifies the competitiveness of "*EU Made*" products but is also consistent with the ecodesign's proposal for sustainable products regulation, since it accentuates sustainability and the minimization of the products' ecological footprint.
- By imposing higher VAT rates on products with a high carbon footprint this proposal can also raise consumer awareness about the environmental impact of such purchases. Consequently, encourages more eco-conscious choices, and drives demand for sustainable products.
- Additionally, with the increased focus on sustainability, the authors´ proposal could stimulate innovation and the development of green technologies within the EU, given that businesses may invest more in research and development of eco-friendly products to avoid meeting the new standards.

In summary, the authors' proposal offers a well-balanced, practical, and effective solution to address carbon leakage, boost green initiatives, and promote sustainable production. This proposal leverages existing mechanisms and establishes a framework well aligned with broader climate objectives and able to generate a meaningful environmental impact.

References

Botes, M., “Should VAT Not Support the Environment?”, 23, Intl. VAT Monitor 2 (2012), Journals IBFD (accessed 22 May 2023).

Council Regulation (EU, Euratom) 2020/2093 of 17 December 2020 laying down the multiannual financial framework for the years 2021 to 2027, OJ L 433I/11 (22 Dec. 2020).

Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom, OJ L 424/1 (15 Dec. 2020).

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax.

Crippa, M., Guizzardi, D., Solazzo, E., Muntean, M., Schaaf, E., Monforti-Ferrario, F., Banja, M., Olivier, J.G.J., Grassi, G., Rossi, S., Vignati, E.,”GHG emissions of all world countries - 2021 Report”, EUR 30831 EN, Publications Office of the European Union, Luxembourg, 2021, ISBN 978-92-76-41547-3, doi:10.2760/173513, JRC126363

Directive 2009/125/EC of the European Parliament and of the Council of 21 October 2009 establishing a framework for the setting of ecodesign requirements for energy-related products.

D. Fullerton, “Why Have Separate Environmental Taxes?”, 10 Tax Policy Econ. 33–70 (1996).

ECJ Case C-255/02 (“*Halifax plc, Leeds Permanent Developments Services Ltd e County Wide Property Investments Ltd vs. Commissioners of Customs and Excise*”) ECLI:EU:C:2006:121.

European Commission, “Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions: A new Circular Economy Action Plan for a cleaner and more competitive Europe”, COM/2020/98 final, 11.3.2020.

European Commission “*Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A new Circular Economy Action Plan. For a cleaner and more competitive Europe*, COM(2020) 98 final (11 Mar. 2020)

European Commission, Guidance Document on CBAM implementation for Importers of Goods into the EU, 17 August 2023.

European Commission, Proposal for a Regulation of the European Parliament and of the council establishing a Framework for setting ecodesign requirements for sustainable products and repealing Directive 2009/125/EC, COM/2022/142 final, 30.3.2022.

European Environment Agency, Environmental Taxation and EU Environmental Policies, Report No 17/2016 (6 Sept. 2016).

M. G. W. M. Peeters, "Twenty Years of EU Environmental Legislation After Maastricht: The Increasing Role of the EU as a Global Green Standard-Setter, in The Treaty on European Union 1993-2013: Reflections from Maastricht" 535–556 (M. D. Visser & A. P. V. D. Mei eds, Intersentia 2013).

New Circular Economy Action Plan (2020/C 440/18), OJ C 440/107 (18 Dec. 2020)

N. A. Braathen, "The Political Economy of Environmental Taxation, in Handbook of Research on Environmental Taxation" 230–245 (J. E. Milne & M. S. Andresen eds, Edward Elgar Publishing 2014).

OECD, "Taxing Energy Use 2019: Using Taxes for Climate Action" (OECD Publishing 2019).

Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015.

Traversa, Edoardo and Timmermans, Benoit Value-Added Tax (VAT) and Sustainability in the European Union: A Radical Proposal Design Issues, Legal Aspects, and Policy Alternatives in Intertax, Vol. 49, Issue 11.

Regulation (EU) 2023/956 of the European Parliament and the Council of 10 May 2023 establishing a carbon border adjustment mechanism.

Taxing Unsustainable Food

Duarte Canau

Abstract: This article aims to study how taxation could be the most effective way to promote sustainable development and impose changes in modern farming, capturing the "true value" of food costs by including possible environmental and public health damages.

We also look at this policy option's risks, namely the competitiveness of farmers and producers, especially against others from countries that don't impose these taxes. As well as which indicators these taxes should target and how they can benefit national producers who promote a transition to a more sustainable economy.

With all this in mind, my investigation aims to answer two key questions: Should unsustainable food be taxed? And if so, how?

Key-Words: Food Production; Taxes; Unsustainable Economics.

1. Introduction

Economics is one of the most crucial aspects of our lives. Demand and necessities rule the pricing of all products, even the most essential ones, such as food, which sometimes results in companies trying to decrease their costs as much as possible in order to increase profit. This often doesn't mean adopting the most sustainable behaviors and results in many externalities that negatively affect consumers. These days it has become imperative for Governments to act and employ

public measures to change these behaviors and to mitigate these consequences. Taxation can be key to solving these issues, as we will explore throughout this article, the taxation of unsustainable foods can be an important solution that we aim to study and deepen in this piece, by in a manner that examines the different policy options, of not just the EU, but around the world, by uncovering, papers, news and some of the recent legislation on this matter.

2. Unsustainable Economics

2.1. The concept of sustainable economic growth

Before we dive into the theme of this article, it is important to understand the background of the issue we'll be discussing, and to do that, we first must comprehend the essence of economics.

It is often said that "economics is everywhere", and that leaves us thinking, what truly is economics?

To put it simply, it's "the allocation of resources to satisfy common necessities and the cause for the wealth of nations",[1] as described by Adam Smith in the 18th century. Despite its simplicity, this quote offers us the key to understanding the main cause for the existence of economics, which is a necessity.

Every human has necessities that can be extremely basic, like eating, drinking, sleeping, or rather excessive, like, the need to own a diamond necklace. These necessities create a demand on behalf of the people in question, who are also known as "consumers", and these necessities can be met by producers who can provide goods to satisfy consumers with whatever need they have, say a baker who makes a loaf of bread, a grocer who sells bottled water or even a jeweler who sells all types of diamond necklaces.

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1. SMITH, Adam (1776). "*The Wealth of Nations*". Book IV, as quoted in Groenewegen, Peter (2008). "Political Economy".

The point is necessities are the main cause of economics, but they are also the cause of economic growth, which can be defined as the increase in value of the goods and services produced by a certain region or country[2]. When consumers buy a certain product, they exchange goods with the producer, who is compensated a certain amount of money, and as a result, a producer who sells a lot of goods will make more money.

However, not all goods are the same, and some are easier to produce than others, for example, if we compare a loaf of bread and a diamond necklace. It is estimated that the wheat that is used in the production of the flour, which makes the bread, takes about 100 days to grow, meaning that by harvesting a full wheat field, we can produce many loaves of bread every 100 days. Meanwhile, a diamond takes 1 to 3 billion years to form and is much rarer.

I gave this example to illustrate that not all goods are valued the same. Some goods aren't too hard to produce and have a very high demand in the market, which results in a lower price, while other goods have a much harder production process and are much harder to produce.[3] If we look at a more complex object, like a car, its production process has a lot of phases, like building the engine, battery, and tires, among many other things, which therefore makes a car much more expensive than, say, a loaf of bread.

Despite this, it is also important to note that two different factors can make products more expensive, like the essentiality of certain products to consumers, say water or bread, two basic products whose demand by producers will rarely vary because they are essential to ensure a person's survival. However, a diamond necklace is not essential

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2. BARRO, Robert (1996), "*Determinants of Economic Growth: A Cross-Country Empirical Study*", NBER Working Paper No. w5698, Harvard University.

3. " Elasticity measures the responsiveness of one economic variable to a change in another, for example a change in pricing. An inelastic product will therefore be a product whose demand will not particularly change with the increase in pricing." *in* GANS, Joshua (2017). " *Principles Of Microeconomics*" . South Melbourne, Victoria: Cengage Learning. pp. 108–116.

to ensure someone's survival (even if they want it a lot). Therefore, it is considered a superfluous good.

The second factor to consider is the usage of resources. The production of a certain product can be rather simple or more complex. In other words, it can mean the use of more or fewer resources, as well as its production having more or fewer phases. Some products are pretty straightforward and rather undemanding, others not so much, like the example of the car that uses a lot of natural resources.

The problem is that some of these natural resources don't always meet the demands of humankind. While many apples grow on a tree from time to time, petrol is a resource that takes millions of years to produce. Not only that, but the usage of some resources can be quite expensive. So, the price of the final product can be higher or lower depending on that aspect, resulting in many producers attempting to spend the least on resources to produce their final product.

Simplifying the matter, every producer's objective is for their income to outweigh their costs in order to make a profit and achieve growth. The growth of producers and companies means economic growth for a certain region or country and can also cause inequalities between certain regions. As Adam Smith put it, economics is the cause of the "wealth of nations", and economic growth makes nations wealthier. However, wealth doesn't always go hand in hand with sustainability.

Sustainability can be defined as "meeting our necessities without compromising our future demand",[4] or, in other words, not using more resources than the earth can produce. This is what we call unsustainable economics, which is when economic growth can lead to a more considerable vulnerability to a crisis like a drought or making it difficult for the poor to access education[5].

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4. RAMSEY, Jeffrey (2015) . " *On Not Defining Sustainability*" , Journal of Agriculture and Environmental Ethics, pp. 4-5;

5. PRESCOTT, Jacques (2018), " *Current Economic Development is Unsustainable. How Can We Reverse this Trend?*" , Global Economic Review, pp.2-3;

This means that some usage of resources by producers may make a product's cost smaller, but they can also hide the "true cost" of that same product. A good example is the case of petrol production, which can lead to major economic growth but is also incredibly unsustainable because of the rate of production in comparison to the amount that exists on earth and the fact that this is not a renewable product.

The production of petrol can cause a major energy crisis in the future. Still, it also causes many crises right now, like the pollution of the oceans or its emissions of greenhouse gasses that can be considered as one of the main causes of Global Warming. These are some of the other concerns that can arise from unsustainable economics, also known as "Externalities".

2.2. Externalities

We can define *externalities* as an "indirect benefit or cost that was not expected from a certain economic activity that a third party feels"[6]. Externalities can also be seen as unpriced costs that weren't predicted when this economic activity began, and they can be either positive or negative.

A simple example of a positive externality would be a bee farm, as the bees contribute to the pollination of surrounding crops and help the environment. In contrast, a negative externality would be the pollution that is generated by the production of petrol, as well as the emission of greenhouse gasses which significantly contributes to global warming and the destruction of the ozone layer.

In recent years, governments have found ways to decrease negative externalities by regulating them to guarantee their impact is less felt by the general population. This is seen in the example we have been providing, the production and exploitation of petrol and other fossil fuels, with recent disasters such as the major oil spills in the oceans, the increase of the oceans' temperatures, and the rise of temperatures

6. PIGOU, Arthur Cecil (2017) . "*Welfare and Economic Welfare*: *The Economics of Welfare*" . Routledge, 2017, pp. 2-3;

worldwide. When the initial exploitation of petrol began in the 19th century, none of these externalities were in anybody's mind. Still, today, in the 21st century, they are an alarming reality that we all must worry about.

The European Union has implemented a Carbon Credit and Offset system that controls companies and the amount of greenhouse gasses they emit into the atmosphere by sanctioning those that exceed the set values and excluding companies that don't have appropriate licensing from the free market[7]. While this seems to be a good idea, it is not entirely efficient, as a lot of major companies prefer to pay a small amount for breaking these rules and negotiating with third parties outside the European Union rather than making the necessary changes.

The second problem is that for the rest of the world, this type of regulation isn't seen as a priority because most developing countries have other worries in mind and are desperately trying to grow their economy as fast as possible so they can compete with developed nations and achieve the same level of lifestyle.

However, there is a simple way to make these economic activities more costly and encourage companies and countries alike to make these types of economic activities less attractive: tax them at a higher rate.

2.3. Taxation as a mean to deal with Unsustainable Economics

As we know, Taxes are paid in return for the provision of public goods and services, or at least because of a legitimate expectation of such provision by the State. This establishes a direct correlation between, on the one hand, the amount of tax paid and, on the other hand, the benefits obtained from the central government.[8]

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7. HAMRICK, Kelley (2017). "*Unlocking Potential: State of the Voluntary Carbon Markets 2017*". Forest Trends' Ecosystem Marketplace. p.10.

8. GENSCHEL, Philipp; SEELKOPF, Laura, eds. (2022). " *Global Taxation: How Modern Taxes Conquered the World* ". Oxford University Press;

To this extent, taxes are the key instrument for financing the budgetary constraint of the State, i.e. taxes are the revenue needed to meet public expenditure. In balanced budget scenarios, the value of revenue equals or exceeds the value of spending. In deficit scenarios, the revenue value is insufficient to meet the totality of the State's commitments, materialized in concrete public expenditure. The tax system can be seen as a mechanism for meeting the financial needs of the State, which can determine the efficiency cost for the economy as a whole.

Therefore, most taxes entail market distortions, price correction phenomenon, and substitution effects. The emergence of a surplus burden, defined as the loss of overall welfare resulting from a distortive tax, is inevitable. The conclusion is that the tax system can be classified as a distortionary system. Governments can seek to adapt tax structures to market realities, always considering that the economy never has a starting point of efficiency. As such, if there is already a distortive effect in the economy, it is possible that the distortion induced by the tax can effectively rectify or eliminate the observed inefficiency.[9]

Indirect taxation is the most efficient type of taxation to adapt market structures and consumer behaviours. A straightforward example is the Value-Added Tax (VAT), which introduces different tax rates depending on the type of goods in question. This goes back to the discussion we had in the beginning on the types of goods that exist, with essential goods being taxed at a lower rate, while goods that aren't as essential have a higher rate.

Another type of taxation that is efficient in controlling and regulating consumption is "sin taxes", which are excise taxes specifically levied on certain goods deemed harmful to society and individuals, such as alcohol, tobacco, drugs, candies, soft drinks, fast foods, coffee, sugar, gambling (thus deemed sinful). These taxes are some of

9. KONTOPOULOS, Yianos; PEROTTI, Roberto (1999). "*Government Fragmentation and Fiscal Policy Outcomes: Evidence from OECD Countries*". National Bureau of Economical Research, pp. 81–102;

the most effective in decreasing negative externalities by increasing the prices of goods and discouraging people from consuming them. In many countries, there is already a special increased tax on petrol, to reflect the "true cost" of this product because despite its consumption not having an immediate and visible consequence on the environment, it is known to have long term consequences for the environment and society, which can have greater costs for the government. [10]

Many countries have also developed a series of taxes to change eating habits, like the so-called "sugar tax". These taxes are designed to reduce the consumption of sweetened beverages, as they have a series of negative externalities, especially for public health, namely heart disease, diabetes, and obesity (to name a few). These taxes add an increased value to these goods comparatively to how they would have been taxed under regular VAT tax rates, and this different treatment by public policy is a consequence of the many implications that candy, sodas, or other sweets have had to the general population in the last years. [11]

However, this is not the only externality that comes from food, like sugar or coffee, as other consequences arise from food, not due to its consumption but from its production (the so-called "unsustainable food"). Despite not being talked about as much, food production can have serious consequences for public health, whether it be by the lack of control of the resources used in the production process or because of the pollution these processes generate.

Many more negative externalities can arise from food production. Still, the most important aspect about them is that Governments are seemingly not doing enough to regulate this economic activity. Discouraging these behaviours has been so ineffective that it has contributed to unsustainable economic growth. Another important aspect

10. LORENZI, Peter (2004). "*Sin Taxes*" , Social Science and Public Policy.

11. "*Taxes on Sugar Sweetened Beverages: International Evidence and Experiences*" (2020), World Bank, accessed August 24 2023, https://thedocs.worldbank.org/en/doc/d9612c-480991c5408edca33d54e2028a-0390062021/original/World-Bank-2020-SSB-Taxes-Evidence-and-Experiences.pdf

that poses a big problem is that, in most cases, when it comes to food taxation, it always encumbers the consumer when, in this case, it is urgent to hinder producers to decrease these adverse effects and to regulate their activities.

3. Food Production

3.1. The challenges of Modern Food Production

Minimizing the risk of living on an unsustainable planet requires decreasing externalities from economic activities like food production. Most food producers worldwide are farmers who exploit less than two hectares of land, live in developing countries, and are just trying to survive. The problem comes with mass producer chains and the production of certain foods, major contributors to climate change.

Agricultural production contributes to one-fifth of the total greenhouse gas emissions[12] these days, with intensive farming methods that are harmful to the environment, such as using fertilizers and pesticides, which can contaminate rivers, contributing to their pollution and death of many species or even deforestation[13]. Big food production companies use poor agricultural practices to cut production costs, and due to these practices, millions of hectares of arable farmland become unusable every year, with millions more becoming unproductive.[14]

Simply put, practices that don't support plant life are considered unsustainable from an agricultural perspective because they do not

12. GUSTAFSON, Sarah , "*Global Food Policy Report calls for improved global food system* ". International Food Policy Research Institute, April 12, 2016, accessed August 5, 2023, http://www.ifpri.org/blog/global-food-policy-report-calls-improved-global-food-system;

13. "*Climate is changing. Food and agriculture must too*." Food and Agriculture Organization of the United Nations, accessed August 5, 2023, http://www.fao.org/world-food-day/2016/theme/en/;

14. BRAY, Siobhan "*The Good, the Bad, and the Ugly of the Global Food System*," The Regis"., accessed August 5, 2023,https://www.theregis.ca/politics-social/the-good-the-bad-and-the-ugly-of-the-global-food-system/;

allow future crops to grow. In the case of excessive chemical use to increase growth speed, the soil will consequently be nutrient deficient and produce less healthy foods. So these days, most of the food we consume has toxins and contributes to another negative externality: illness and disease.

Major food producers also employ another poor practice, which is not rotating the crops and repeatedly growing only one type of food on the same soil, which is a practice more susceptible to the usage of pests and pathogens. As a result, production growth will be slower, which leads to a repetitive cycle between this and using chemicals to make growth faster. [15]

Despite many other issues with modern food production (which we will come back to further), this economic acidity is a major cause of climate change and the deterioration of the earth's soil and oceans, as well as destroying wildlife and ecosystems. But just like we previously discussed, not all resources have the same production process, with some being more complex than others and having more negative externalities due to being more unsustainable and thus more harmful to the environment.

3.2. The main culprits

But what foods are most responsible for environmental damage and most contribute to this unsustainable growth?

The main culprit is beef, especially the cow and pig meat production process. As a whole, this production process is extensive. It has a lot of phases, all of which are associated with significant greenhouse emissions, especially methane, from the land that has to be cleared to give place to these animals and to feed them, as well as transportation, slaughtering, and packaging of their meats, which only gets worse with the increase of the processing of the meat in question, such

15. BOSQUE, Sydney. " *Poor Farming Practices & How They Affect Your Food*" . Thriving Food, accessed August 5, 2023, https://thrivingyard.com/poor-farming-practices-how-they-affect-your-food/

as with sausages and hamburgers. Cows emit a lot of methane just by being cows, but the increase in greenhouse gas emissions from these types of productions only harms the environment more. Finally, beef is also a considerable cause of deforestation, with countries like Brazil destroying some of their forests for more space for beef production. In addition, the whole industry is a major contributor to water pollution, and with both of these combined, we can see why beef production worsens the biodiversity crisis. [16]

The following industry is the fish farming industry, especially shrimp and prawns. Most of the world's production of shrimp and prawns is done in fish farms, in large ponds, in contrast to production in the ocean and their natural habitats. This industry is a major contributor to water pollution and the destruction of mangroves, among other types of biodiversity. These environments, such as mangroves, are essential to supporting marine life. Their destruction implies the emission of harmful gasses, which can be more harmful to the environment than the destruction of rainforests to make pastures for beef production. [17]

The Shrimp industry requires a large amount of feeding as shrimp are carnivorous, with a special demand for fishmeal and fish oil. Shrimps can eat twice their body weight daily in these products, which means their intensive farming is incredibly wasteful for the environment and damaging to the ocean's wildlife. [18]

Another unsustainable food can be found in many other products, even if we can't see it or taste it first hand, which is sugar. The production of sugar cane requires a large amount of water to grow, which significantly impacts biodiversity.

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16. DENT, Michael (2020). " The Meat Industry in Unsustainable", IDTechEx, accessed August 24 2023,https://www.idtechex.com/en/research-article/the-meat-industry-is-unsustainable/20231;

17. BAUMGARTNER, Urs; BONANOMI, Elisabeth (2021). " *Drawing the line between sustainable and unsustainable fish: product differentiation that supports sustainable development through trade measures*", Environmental Sciences Europe;

18. " *Farmed Shrimp*", World Wide Fund For Nature, accessed August 24 2023, https://www.worldwildlife.org/industries/farmed-shrimp ;

In addition, the sugar production process is a big contributor to the pollution of freshwater ecosystems because of the chemicals used and the amount of fertilizers that must be employed to fasten growth. One particular problem arising from sugar production is seen in Central and South America, where this production is especially prevalent. Contaminants from sugar production flow out to the sea and destroy many coral reef ecosystems. [19]

Other unsustainable foods include some of the most loved by consumers, like chocolate, whose methane emissions and carbon footprint are some of the biggest for food production, especially in West Africa, where legislation is practically non-existent. Cocoa production is a great contributor to damage to the environment and a big cause of deforestation[20]. And just like chocolate, coffee is another product widely produced in developing countries and considered rather unsustainable. Coffee production is like chocolate in many ways because it grows in areas of susceptible forests and ecosystems rich in biodiversity, with its plant growing under the shade of trees. Still, for intensive production, an increasingly large part of coffee is grown in whole light, often with intense deforestation, use of pesticides and water, and soil erosion.[21]

Dairy products, such as milk and cheese, are also very polluting because of the emission of greenhouse gasses that come from their production process and the complexity and treatment of the animals that they demand, even though we don't always see a lot of products using dairy, like milk or cheese, the economy's need for its production has become excessive due to the production's speed and the amount of resources that the world possesses. [22]

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19. EGGLESTON, Gillian; LIMA, Isabel (2015), " *Sustainability Issues and Opportunities in the Sugar and Sugar-Bioproduct Industries* ", Multidisciplinary Digital Publishing Institute.

20. MCMAHON, Peter; KEANE, Phillip (2023), *"Chocolate and Sustainable Cocoa Farming*", Cambridge Scholar Publishing;

21. VELMOUROUGANE, Kulandaivelu; BHAT, Rajeev (2017), " *Sustainability Challenges in the Coffee Plantation Sector*" , John Wiley & Sons Ltd.;

22. SHAMSUDDOHA, Mohammad; NASIR, Tasnuba (2023), " *A Sustainable Supply Chain Framework for Dairy Farming Operations: A System Dynamics Approach*", Multidisciplinary Digital Publishing Institute.

Finally, you could think that a vegetarian or vegan diet would be more sustainable for the environment, but surprisingly, some of the leading products produced are unsustainable. Soybeans produce tofu, soybean shoots, and other soy food. They are one of the main contributors to the world's deforestation, with the production process being quite demanding and complex, requiring heavy industrial processes with large quantities of chemical solvents like hexane, which produces greenhouse gasses and various forms of local pollution.[23]

3.3. Other issues

In addition to some negative consequences of modern food production, a few other problems have arisen in the past years, namely food waste, hunger, human rights abuse, etc.

Food waste comes from overproduction, which is a consequence of mass production and unsustainable food practices, with food being discarded like it was nothing, which increases the consumption of water and energy, with more and more resources being necessary to finance market demands. With population growth in the past years, the food system has faced challenges regarding producing adequate food to feed humanity. It is estimated that, by 2050, the world food system will have to provide food for more than 9 billion people.

These growing demands are challenging for agricultural capacities, which already have to fight significant disparities in the world's food consumption, with a large proportion of the world suffering from hunger and not getting the necessary nutrients, with around 738 million people in the world being hungry, and around 45% of the world's child deaths coming from illness derived from hunger. As we can see, there is a direct correlation between world hunger and overproduction, with there being an incorrect allocation of resources as we see most of the countries that suffer the most from hunger not receiving enough resources to feed their population, whilst other more

23. SCHAAFSMA, Marije (2021), "*The impacts of soy production on multi-dimensional well-being and ecosystem services: A systematic review* ", Journal of Cleaner Production.

developed countries have too much food when there is no need for it, which incidentally results in food waste, pollution, and even illnesses (i.e., obesity).

Another issue that arises from modern food production related to human rights abuse is the risk of a pandemic or zoonotic diseases that come from deforestation, the destruction of wildlife, and unhygienic food practices (i.e., Mad Cow Disease). [24]

Lastly, there are a lot of concerns about how workers are involved in these types of economic activities, particularly chocolate and coffee production. These two productions, in particular, are mostly done in Developing countries where there is ongoing exploitation of workers, particularly through slavery and the use of child labour. To earn enough to survive, many parents in these countries pull their children from school to work on the coffee plantations as Child labor is widespread in coffee and chocolate cultivation, and as the price of these products rises, the incentive for struggling families to withdraw their children from school and send them to work increases, but at the same time, a fall in prices increases poverty in regions that depend on the crop, which can also prevent children from attending school.[25]-[26]

These last questions, in particular, have major importance and should be the target of some form of regulation, but not necessarily through Tax Law. Criminal and international law seems to be more effective in combating these types of problems, specifically through sanctions.

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24. BOYD, David. " *Human rights depend on healthy and sustainable food systems*", United Nations Human Rights Special Procedures , accessed August 7, 2023, https://www.ohchr.org/sites/default/files/2022-05/Food-Summary-Final.pdf

25. "*Bitter Brew: The stirring reality of coffee*", Food Empowerment Project , accessed August 8, 2023, https://foodispower.org/our-food-choices/coffee/

26. "Child Labour And Slavery in the Coffee Industry", Food Empowerment Project , accessed August 8, 2023, https://foodispower.org/human-labor-slavery/slavery-chocolate/

4. Taxation of Unsustainable Food Production

4.1. The Reasons for Taxation

As we've already learned, taxation is one of the most effective mechanisms to reduce negative externalities, such as pollution, mainly from the emission of gasses such as methane and CO2, that occur from the production process of these foods.

Food production uses a lot of land and other elements of biodiversity, like trees or even different species of animals, with other concerns like public health issues. Governments can shift their taxation system and how their tax mix functions. However, an efficient tax mix is fixed with a clear objective in a way that can target all types of taxpayers and activities[27]. However, just like the Laffer Curve demonstrates, a tax rate that is fixed too highly can kill a certain product or economic activity, which is not the final objective of taxation.[28]

That is not the reason behind the taxation of this economic activity or even how it should be taxed. The reasoning behind the taxation of these activities is to encumber the producers and not the consumers, who are usually hindered by the taxation that targets them as the last part of an economic chain. However, in my opinion, the consumers are not the main culprits for these negative externalities as they do not fault the way companies and producers carry out their business and the type of resources they use, although they might know some of the dangers that these products may cause to the environment or public health, they never know the whole story behind the production of certain foods.

Ultimately, when we discuss global warming and pollution, it is becoming imminent that the most effective way to combat these

27. AKGUN, O. B. Cournède ; FOURNIER; J. (2017), "*The effects of the tax mix on inequality and growth*", OECD Economics Department Working Papers, No. 1447, OECD Publishing, Paris, https://doi.org/10.1787/c57eaa14-en.

28. MIRAVETE, Eugenio J.; SEIMB, Katja; THURK, Jeff (2018). "M*arket Power and the Laffer Curve*". Econometrica, pp. 1651–1687.

problems is to target significant companies and producers, which serve as intermediaries in this economic chain, by focusing legislative measures towards those who should be seen as the main culprits and are mostly exempt from taxation or any type of public policy.

4.2. Tax Shift

Tax shifting can influence consumers into not buying as much of a certain product by increasing their price, which can have terrible effects on the companies that will see their profits significantly decrease. The only way for these producers to not be as targeted by these companies is by adapting their production, which can sometimes have too much of a cost. Tax shift always concerns worries for tax justice, especially in terms of the distribution of taxation amongst taxpayers, which can mean that certain groups and activities have to be compensated[29] (i.e., farmers who don't work for major corporations).

Suppose we want to support a transition to a more sustainable side of farming and food production. In that case, several mechanisms can be used to ensure this, namely tax incentives and exemptions, which also lift important concerns in terms of equality because these mechanisms must be designed in a manner that benefits taxpayers that contribute to said objective and to one that "abuses" a norm to reduce its costs. Subsidies can also work in the same way and can be a rather effective manner to help the transition, especially for small producers.

A few other ways to help with tax shift alteration may include a State Aid program to help companies invest and adapt their production processes into a more sustainable and eco-friendlier activity. Or they may implement a Cap and Trade System, which already exists to control the emissions of pollutants and was created to combat similar externalities.

29. DURING , Alan Thein; YORAM, Bauman (1998). " *Tax Shift*" . Northwest Environment Watch;

4.3. Effective Types of Taxation

As we have already discussed, the most effective type of taxation to target economic activities, such as food production, is usually indirect taxation. This tax is levied upon goods and services before they reach the customer, who ultimately pays the indirect tax as a part of the market price of the purchased goods or services (i.e., Value Added Tax). [30]

Some forms of indirect taxation target specific products based on the negative externalities they generate, commonly known as "sin taxes". But both of these forms of taxation are too generalist and don't target food production specifically.

However, countries like Hungary and India have created taxes to target food production and negative externalities. Hungary created the so-called "Junk Food Tax", targeted not only fast food but also processed foods (i.e., microwave fast meals), and significantly decreased its consumption. Despite this form of taxation ultimately reducing negative externalities such as pollution, this was never the government's main objective, with these taxes being created to decrease the consumption of these products due to concerns for public health.[31]

The Indian "Fat Tax " is a tax that is imposed on junk foods and street foods that lead to body-related problems and increase body weight. The surcharge is collected based on selected foods that are responsible for increasing an individual's weight. Interestingly, this type of taxation in India addresses a different problem, which also targets the producers that contribute to these unsustainable food production processes. Once again, this type of taxation proved effective

30. SCHENK, Alan; Oldman, Oliver (2007). "*Chapter 1: Survey of Taxes on Consumption and Income, and Introduction to Value Added Tax*". Value Added Tax: A Comparative Approach (1st ed.). Cambridge University Press. pp. 5

31. BIRÓ, Anikó . "*Did the junk food tax make the Hungarians eat healthier?*", ScienceDirect, 2015. accessed August 23, 2023, https://www.sciencedirect.com/science/article/abs/pii/S0306919215000561.

in reducing the consumption of certain more unsustainable products in a heavily populated state. Still, it didn't address other concerns like pollution or target key factors in food production processes. [32]

In 2021, Dutch Agriculture Minister Carola Schouten became one of the first politicians to address these issues and the need to introduce a Tax on Unsustainable Foods, suggesting that consumers could opt for a more sustainable alternative by raising prices on unsustainable foods. One of her main concerns also comes from the fact that consumers don't see the difference in how food is produced when they shop at a supermarket or what kind of impact certain products have on the environment.

This tax model is attractive, and could prove much more effective, with the tax levy being used to promote the transition into more sustainable food production. This prompted a discussion amongst Dutch academics, who eventually concluded that pricing would be a much more effective way of changing consumer behaviour and that introducing tax measures is necessary. This type of taxation could have a regressive effect, which could have a significant impact on the "working poor" and may lift many concerns in terms of fairness, hence why they would need to be backed by financial levers to address the issue and could also be helped by decreasing the taxation of more sustainable and health foods.[33]

Another form of taxation deemed effective in dealing with the negative consequences of producing unsustainable foods is a combined carbon and health tax policy on food products that would apply to carbon-intensive foods like beef or unhealthy foods like sugar.

Taxes on food alone will not change the food system entirely. However, they can be part of a broader range of policies, such as cutting

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32. KRISHNAMOORTHY, Yuvaraj ." *Fat taxation in India: A critical appraisal of need, public health impact, and challenges in nationwide implementation*", National Library of Medicine, 2020. accessed August 23, 2023, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7036206/

33. ASKEW, Katy (2021). "*Dutch Ag minister calls for unsustainable tax*" , FoodNavigator Europe, accessed August 24, 2023, https://www.foodnavigator.com/Article/2021/10/04/Dutch-ag-minister-calls-for-sustainability-tax-on-food-but-will-it-catch-on

subsidies for producing unhealthy and high-emission foods and boosting investments toward producing healthy and environmentally friendly foods. [34]

"The knife can cut both ways", we can increase the prices of certain products by implementing an unsustainable food and carbon tax that would help decrease the consumption of those products, but we can also decrease the prices of healthier alternatives and incentive the production and promotion of those products with the money brought in from the unhealthy food and sugar tax.

4.4. Main Concerns

Fairness is a far-reaching issue, whether we're discussing domestic products or imported goods, especially because of the indicator on which some of these tax mechanisms focus (i.e., Carbon Tax, Greenhouse Gas emission Tax).

The UN attributes the emission of 15% of the World's Greenhouse Gas Emissions to livestock and the overall production of beef. However, this is not the case for every type of food production, or even for every producer around the world, with some countries not having as many big producers emitting GreenHouse Gasses, meaning that implementing, i.e., a single carbon tax that works in the same manner for every country in the world can be rather unfair to some producers.[35]

Implementing a Carbon Tax for food can also require a discussion about the range of the supply chain's externalities to ensure fair treatment, such as the activity's processing stage, its transportation, the way it exploits and uses the environment's resources (i.e., exploitation of land) and then doing a comparison to other economic sectors and their carbon footprint.

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34. CUERVO, Javier; GANDHI, Ved P.(1998). "*Carbon Taxes; Their Macroeconomic Effects and Prospects for Global Adoption - A survey for Literature*", IMF Working Paper, WP/98/73.

35. GILLMAN, Steve (2021), "*Should unsustainable food be taxed?*", accessed August 24,2023. https://www.spglobal.com/esg/s1/research-analysis/should-unsustainable-food-be-taxed.html

But we have to be careful not to make whatever kind of taxation we opt for too generic for food producers so as not to harm small farmers. It's important to focus these taxes on those who truly harm the environment and help regular and smaller producers in adapting production process to biome more sustainable, whether it be by creating incentives to maintain their income during this transitional period but also to help the promotion of more sustainable productions, next to consumers so they can change their diets. Taxation can be an effective method to change diets to a more sustainable diet by showing the "true cost" of unsustainable food and reflecting it on the final price of these food products.

Another important concern could be affordability, as most consumers are unwilling to change their diet and pay somewhat more for a more sustainable product, alongside the fact that there are no guarantees that every single country will implement any type of taxation targeted at food production, which makes this behavioural change much more complicated.

Without some sort of fiscal charge, most countries' diets will continue to contribute to climate change for the time being unless we see consumers put "their mouth" in a more environmentally friendly product. Not to say that people should change what they eat, but they should favour consuming a more sustainable version of the same food product.

5. Conclusions

Circling back to the beginning of this article, it is important to remember that different products have different values depending on how essential a certain product might be. The most critical products are essential to guarantee our survival and will have a lower value independently of market changes because they are inelastic. Therefore, these products will also be sold for a lower value and will have a lower tax rate.

However, as we have also learned, products with more complex production processes that require more resources will have a higher cost and, consequently, a higher market price. Producers consider reducing their production costs to become more competitive, increasing their demand and profits. Companies do this by replacing the resources they use with cheaper alternatives, but as we have also established, this doesn't always mean promoting the most sustainable behaviours.

As we've established, food production is one of the most unsustainable economic activities, which is one of the heaviest contributors to the world's emissions of Greenhouse gasses, pollution, and deterioration of soils and water, amongst other issues. Many food companies opt for a less sustainable production process because of the lack of legal restraints and the consequences that this could have for them to maximize their profitability.

To discourage companies from resorting to unsustainable resources and production processes, the most efficient way could be to increase the price of the final product by adding a tax, similar to what happens with "sin taxes". The value of the product in question is increased because of the externalities associated with it, like the sugar tax.

Whilst taxing unsustainable food could be a good idea, discouraging their consumption is also a very complex process because of these products' social, economic, and environmental aspects. The main concern is, as we have discussed, climate change and the advantage that decreasing the consumption of foods like meat, sugar, and dairy products could have on the environment, and many scientists have highlighted taxes as an effective way to decrease the consumption of these products.

While other informational measures could be effective to ensure that consumers realize the components and the production process of those products, it is also necessary to change the target of these taxes from the consumer side to the production side to hinder producers and companies from mitigating their unsustainable habits. Discussing a carbon tax for food also requires discussions about a range of supply

chain externalities to ensure fair treatment, such factors considering local environment impact, processing, and transport to measure the carbon footprint emitted by this economic sector and comparing it to others, to establish a fair tax rate.

A Tax on Carbon emissions related to food production seems to be the best solution to combat this issue. However, this should not be a "generic carbon tax", as it can be a rather smart tool to take into account the aforementioned unsustainable habits applied by producers, decreasing them and generating public revenue that can be used as state aid for smaller companies, farmers and producers to grow their business and incentivize sustainable habits, whilst also influencing more prominent companies to change their unsustainable behaviours.

Other tax measures can be made through Direct Taxation, namely through introducing changes to Corporate tax by adding certain benefits to encourage companies to adopt greener behaviours (i.e., reforming the deduction of expenses related to high-emitting carbon products in the company's production chain).

In conclusion, food production is one of the most critical sectors in the modern world as it provides consumers with goods or one of their essential needs. We can't ignore that this is still one of the main culprits regarding the emission of greenhouse gasses and the current pollution of the world's lands, rivers, and seas. Future consequences can be immeasurable and affect the lives of many so policymakers must take action and implement public policies, such as the earlier mentioned Carbon Tax on Unsustainable Foods, that take into account factors such as excessive water usage, the damage of terrains and lands or the emission of greenhouse gasses (to name a few). It is imperative to act, and taxation can be more than a solution. It can be the key to solving a far-reaching issue.

References

AKGUN, O. B. Cournède ; FOURNIER; J. (2017), "*The effects of the tax mix on inequality and growth*", OECD Economics Department Working Papers, No. 1447, OECD Publishing, Paris, https://doi.org/10.1787/c57eaa14-en.

ASKEW, Katy (2021). "*Dutch Ag minister calls for unsustainable tax*" , Food-Navigator Europe, accessed August 24, 2023, https://www.foodnavigator.com/Article/2021/10/04/Dutch-ag-minister-calls-for-sustainability-tax-on-food-but-will-it-catch-on

BARRO, Robert (1996), "*Determinants of Economic Growth: A Cross-Country Empirical Study*", NBER Working Paper No. w5698, Harvard University;

BAUMGARTNER, Urs; BONANOMI, Elisabeth (2021). " *Drawing the line between sustainable and unsustainable fish: product differentiation that supports sustainable development through trade measures*", Environmental Sciences Europe;

BIRÓ, Anikó . "*Did the junk food tax make the Hungarians eat healthier?*", ScienceDirect , 2015. accessed August 23, 2023, https://www.sciencedirect.com/science/article/abs/pii/S0306919215000561;

BOSQUE, Sydney. " *Poor Farming Practices & How They Affect Your Food*" . Thriving Food, accessed August 5, 2023, https://thrivingyard.com/poor-farming-practices-how-they-affect-your-food/;

BOYD, David. " *Human rights depend on healthy and sustainable food systems*", United Nations Human Rights Special Procedures , accessed August 7, 2023, https://www.ohchr.org/sites/default/files/2022-05/Food-Summary-Final.pdf

BRAY, Siobhan "*The Good, the Bad, and the Ugly of the Global Food System,*" The Regis"., accessed August

CUERVO, Javier; GANDHI, Ved P.(1998). " *Carbon Taxes; Their Macroeconomic Effects and Prospects for Global Adoption - A survey for Literature*", IMF Working Paper, WP/98/73.

DENT, Michael (2020). " The Meat Industry in Unsustainable", IDTechEx, accessed August 24th,2023,https://www.idtechex.com/en/research-article/the-meat-industry-is-unsustainable/20231;

DURING , Alan Thein; YORAM, Bauman (1998). " *Tax Shift*" . Northwest Environment Watch;

EGGLESTON, Gillian; LIMA, Isabel (2015), " *Sustainability Issues and Opportunities in the Sugar and Sugar-Bioproduct Industries* ", Multidisciplinary Digital Publishing Institute;

GANS, Joshua (2017). " *Principles Of Microeconomics*" . South Melbourne, Victoria: Cengage Learning;

GENSCHEL, Philipp; SEELKOPF, Laura, eds. (2022). " *Global Taxation: How Modern Taxes Conquered the World* ". Oxford University Press;

GILLMAN, Steve (2021), "*Should unsustainable food be taxed?*", accessed August 24,2023. https://www.spglobal.com/esg/s1/research-analysis/should-unsustainable-food-be-taxed.html

GUSTAFSON, Sarah , "*Global Food Policy Report calls for improved global food system* ". International Food Policy Research Institute, April 12, 2016, accessed August 5, 2023, http://www.ifpri.org/blog/global-food-policy-report-calls-improved-global-food-system;

HAMRICK, Kelley (2017). "*Unlocking Potential: State of the Voluntary Carbon Markets 2017*". Forest Trends' Ecosystem Marketplace;

KONTOPOULOS, Yianos; PEROTTI, Roberto (1999). "*Government Fragmentation and Fiscal Policy Outcomes: Evidence from OECD Countries*". National Bureau of Economical Research;

KRISHNAMOORTHY, Yuvaraj ." *Fat taxation in India: A critical appraisal of need, public health impact, and challenges in nationwide implementation*", National Library of Medicine, 2020. accessed August 23, 2023, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7036206/

LORENZI, Peter (2004). "*Sin Taxes*" , Social Science and Public Policy;

MIRAVETE, Eugenio J.; SEIMB, Katja; THURK, Jeff (2018). "*Market Power and the Laffer Curve*". Econometric

MCMAHON, Peter; KEANE, Phillip (2023), "*Chocolate and Sustainable Cocoa Farming*", Cambridge Scholar Publishing;

PIGOU, Arthur Cecil (2017) . "*Welfare and Economic Welfare: The Economics of Welfare*" . Routledge, 2017;

PRESCOTT, Jacques (2018), " *Current Economic Development is Unsustainable. How Can We Reverse this Trend?* " , Global Economic Review;

RAMSEY, Jeffrey (2015) . " *On Not Defining Sustainability*" , Journal of Agriculture and Environmental Ethic;

SCHAAFSMA, Marije (2021), "*The impacts of soy production on multi-dimensional well-being and ecosystem services: A systematic review* ", Journal of Cleaner Production.

SMITH, Adam (1776). "*The Wealth of Nations*". Book

SCHENK, Alan; Oldman, Oliver (2007). "*Chapter 1: Survey of Taxes on Consumption and Income, and Introduction to Value Added Tax*". Value Added Tax: A Comparative Approach (1st ed.). Cambridge University Press

SHAMSUDDOHA, Mohammad; NASIR, Tasnuba (2023), " *A Sustainable Supply Chain Framework for Dairy Farming Operations: A System Dynamics Approach*", Multidisciplinary Digital Publishing Institute..

SMITH, Adam (1776). "*The Wealth of Nations*". Book IV, as quoted in Groenewegen, Peter (2008). "Political Economy";

VELMOUROUGANE, Kulandaivelu; BHAT, Rajeev (2017), " *Sustainability Challenges in the Coffee Plantation Sector*" , John Wiley & Sons Ltd;

Tributação da economia insustentável: o caso das entregas ao domicílio de produtos adquiridos online

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Resumo: As entregas ao domicílio de produtos adquiridos *online* é uma realidade crescente na sociedade atual. Estes novos modelos de negócio implicam o aumento das emissões de CO2 decorrentes da entrega porta-a-porta de bens ao consumidor e a sobrecarga das infraestruturas urbanas derivada do incremento nos fluxos de trânsito e das necessidades de estacionamento para cargas e descargas.

No presente trabalho analisa-se uma forma particular de tributação da economia insustentável. Trata-se de uma taxa implementada na cidade de Barcelona que incide sobre o aproveitamento especial do domínio público para atividades de carga e descarga de bens para posterior distribuição aos consumidores que os adquiriram através de comércio eletrónico.

Palavras-chave: Tributação, taxa, comércio eletrónico, entregas ao domicílio

Abstract: Home delivery of products bought online is a growing reality in today's society. These new business models imply an increase in CO2 emissions resulting from door-to-door delivery of goods to the consumer and the congestion of urban infrastructures due to the increase in traffic flows and parking requirements for loading and unloading.

This work analyses a particular form of taxation for the unsustainable economy: a public fee implemented in the city of Barcelona,

which is levied on the special use of the public domain for loading and unloading goods for subsequent distribution to consumers who have purchased them through e-commerce.

Keywords: Taxation, public fee, e-commerce, home delivery

1. Introdução

Nos últimos anos temos vindo a assistir a uma progressiva digitalização da economia que inevitavelmente se faz acompanhar por novos modelos de negócio que vão fazendo sombra ao comércio tradicional. Nesses novos modelos de negócio, a presença física é substituída pela presença virtual e a proximidade ao consumidor consubstancia-se nas entregas ao domicílio.

No entanto, estes novos modelos de negócio apresentam enormes desafios do ponto de vista da sustentabilidade ambiental e urbana, já que implicam não só um aumento das emissões de CO2 decorrentes da entrega individual de bens a cada consumidor, como também uma sobrecarga das infraestruturas urbanas derivada do incremento nos fluxos de trânsito e das necessidades de estacionamento para cargas e descargas.

Por outro lado, gera-se uma situação de desequilíbrio concorrencial entre estes novos modelos de negócio e o comércio tradicional, que se vê obrigado a arcar com custos associados à sua presença física, custos esses que são alheios a estas novas formas de negócio.

Como resposta a estes desafios, em Espanha tem-se ponderado a possibilidade de tributar as entregas ao domicílio de bens adquiridos online. A cidade de Barcelona foi a pioneira nesta matéria e, em fevereiro de 2023 aprovou, através da *Ordenança fiscal núm. 3.20* ("OF"), a "*taxa per aprofitament especial del domini públic derivat de la distribució a destins finals indicats pels consumidors de béns adquirits per comerç electrònic*", também conhecida popularmente por "Taxa Amazon".

O apodo deve-se ao facto de a Amazon ser a face mais visível do comércio eletrónico. Não obstante, esta taxa incide sobre todas as

empresas que atuem como prestadoras de serviços postais e que, ao distribuir bens adquiridos por via eletrónica, beneficiem de forma especial do domínio público.

Com o presente trabalho pretende-se estudar a configuração desta taxa, abordando o que constitui o aproveitamento especial do domínio público, assim como as principais características desta taxa que, curiosamente, não se aplica à empresa que lhe dá nome.

2. O aproveitamento especial do domínio público

O artigo 2.º, n.º 1, alínea b) do *Real Decreto Legislativo 2/2004, de 5 de marzo, por el que se aprueba el texto refundido de la Ley Reguladora de las Haciendas Locales* (LRHL), estabelece como recursos próprios das entidades locais, entre outros, os tributos classificados como taxas. Por sua vez, o artigo 20.º, n.º 1-A da LRHL vai de encontro ao disposto *Ley 58/2003, de 17 de diciembre, General Tributaria* e esclarece que, em qualquer caso, serão consideradas taxas todas as prestações pecuniárias devidas pelo uso privativo ou especial do domínio público local.

Para a cabal compreensão desta norma é necessário ter em conta o artigo 85.º da *Ley 33/2003, de 3 de noviembre, del Patrimonio de las Administraciones Públicas* (LPAP), que define os tipos de utilização dos bens de domínio público, distinguindo entre o uso comum, o uso privativo e o uso que implica um aproveitamento especial do domínio público.

O uso comum dos bens de domínio público é aquele que permite a fruição livre e igual por todos os cidadãos, sem que a utilização de uns prejudique a de outros. Por sua vez, o uso privativo do domínio público determina a ocupação de uma parte do domínio público de forma a limitar ou excluir a sua utilização por outros interessados. Finalmente, o uso que implica um aproveitamento especial do domínio público não obsta ao uso do domínio público por outros interessados, mas implica um excesso de uso em relação ao uso que corresponde a

todos ou conduz à obtenção de uma rentabilidade singular por parte de determinado utilizador por comparação com os demais[1].

Precisamente por se tratar de uma utilização que pode prejudicar ou afetar negativamente o uso comum, o n.º 5 do artigo 92.º da LPAP prevê a possibilidade de o uso que implica um aproveitamento especial do domínio público estar sujeito a uma taxa, sempre e quando tal utilização implique um benefício económico para o interessado[2]. A nível local, esta mesma possibilidade está prevista no artigo 57.º da LRHL, que estabelece que, entre outros casos, as câmaras municipais podem cobrar taxas pelo uso especial de bens do domínio público municipal.

Ora bem, a Taxa Amazon que nos ocupa no presente trabalho baseia-se na premissa de que o comércio eletrónico com posterior entrega a domicílio de bens adquiridos pelos consumidores provocou um aumento do tráfego rodoviário e do estacionamento intensivo nas vias públicas do município de Barcelona. Esta taxa pretende tributar um novo tipo de utilização do domínio público para cargas e descargas, uma vez que já não se trata de assegurar o fornecimento ou distribuição de mercadorias ao comércio tradicional que dispõe de um estabelecimento físico, mas sim de levar a cabo uma atividade de entrega porta-a-porta de produtos provenientes de canais externos à estrutura comercial da cidade.

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1. Para uma análise mais detalhada sobre a utilização do domínio público pelos particulares no ordenamento jurídico espanhol, veja-se, por exemplo, SÁNCHEZ GOYANES, Enrique (2018), "Usos privativos en demanio de servicio público", in JIMÉNEZ DE CISNEROS CID, Francisco Javier (Dir.), *Homenaje al profesor Ángel Menéndez Rexach*, Aranzadi, pp. 537-562; y LÓPEZ PELLICER, José Antonio (1989), "Uso y aprovechamiento del dominio público local", in GÓMEZ-FERRER MORANT, Rafael (Dir.), *Libro homenaje al profesor José Luis Villar Palasí*, Civitas, pp. 641-662. Sobre a utilização do domínio público pelos particulares à luz do Direito português, veja-se, por exemplo, FREITAS DO AMARAL, Diogo (1972), *A utilização do domínio público por particulares*, Editora Juriscredi, pp. 103 e ss.; e MIRANDA, João (2021), *Direito Administrativo dos Bens*, AAFDL, pp. 154 e ss.

2. Para uma análise das taxas sobre o aproveitamento especial do domínio público no ordenamento jurídico espanhol, veja-se GALÁN SÁNCHEZ, Rosa María (2015), "Los bienes públicos y su régimen tributario", in GONZÁLEZ GARCÍA, Julio (Dir), *Derecho de los bienes públicos*, Tirant lo Blanch, pp. 579-642.

Com efeito, nestes casos, o domínio público é assumido como a plataforma física que permite o contacto entre o vendedor e o consumidor final. A utilização do domínio público constitui, assim, um fator de produção para estes operadores económicos que não é por si internalizado, gerando-lhes um benefício extraordinário que distorce o mercado em clara desvantagem para o comércio tradicional, que depende de instalações físicas para a prossecução da sua atividade e cujo custo tem de assumir. Além disso, a utilização intensiva do domínio público por parte destes operadores económicos acarreta importantes consequências para a população em geral, como são a redução do número de lugares de estacionamento disponíveis na cidade e o aumento do congestionamento das vias públicas.

Finalmente, cabe referir que a possibilidade tributar através de taxas o aproveitamento especial do domínio público não é estranha ao Direito português. Com efeito, estabelece-se no artigo 4.º, nº 2, da Lei Geral Tributaria que as taxas assentam na prestação concreta de um serviço público, na utilização de um bem do domínio público ou na remoção de um obstáculo jurídico ao comportamento dos particulares. Em particular, no caso das taxas por utilização de um bem do domínio público, entende-se que estas são devidas em contrapartida da utilização especial (aproveitamento) que ao sujeito passivo é permitido fazer do referido bem[3]. Pelo que a nível local, prevê-se a possibilidade de existência de taxas municipais devidas pela utilização e aproveitamento de bens do domínio público municipal, conforme se estabelece no artigo 6.º, n.º 1, alínea c), do Regime Geral das Taxas das Autarquias Locais.

3. TAVARES DA SILVA, Suzana (2008), *As Taxas e a Coerência do Sistema Tributário*, CEJUR - Centro de Estudos Jurídicos do Minho, pp. 29-30.

3. Elementos essenciais da Taxa Amazon

3.1. Incidência objetiva

Nos termos do artigo 2.º da OF, o facto tributário da Taxa Amazon é o uso que implica um aproveitamento especial do domínio público para atividades de carga e descarga de bens para distribuição a consumidores que os adquiriram previamente através de comércio eletrónico.

Não obstante, no artigo 3.º da OF estabelecem-se determinados casos sobre os quais esta taxa não incide. Trata-se das:

- distribuições bens efetuadas no âmbito de transporte de mercadorias por quem não intervenha no mercado como prestador de serviços postais (cfr. alínea a) do artigo 3.º da OF);
- distribuições de bens efetuadas a lojas da cidade com o objetivo de serem comercializados na fase de retalho (cfr. alínea b) do artigo 3.º da OF);
- distribuições de bens efetuadas sem a utilização de qualquer veículo, bem como as distribuições de bens feitas a centros de distribuição urbana de mercadorias a partir dos quais se realize a posterior entrega a através de meios sustentáveis (cfr. alínea c) do artigo 3.º da OF).
- distribuições de bens efetuadas em pontos de recolha (cfr. alínea d) do artigo 3.º da OF).

Desta forma, cabe notar que nem toda a utilização da via pública para levar a cabo distribuições de produtos adquiridos *online* consubstancia um facto tributário relevante para esta taxa.

Com efeito, a Taxa Amazon pretende taxar o uso que implica um aproveitamento especial do domínio público decorrente da carga e descarga na via pública de bens adquiridos através do comércio eletrónico para posterior entrega, sempre e quando essa distribuição seja especificamente efetuada por empresas que atuem no mercado como prestadoras de serviços postais.

Portanto, esta taxa não incide sobre as distribuições efetuadas no âmbito de transporte de mercadorias por quem não intervenha no mercado nessa condição. Tal exclusão está em linha, por um lado, com o disposto no considerando 17 da Diretiva 2008/6/CE do Parlamento Europeu e do Conselho, de 20 de Fevereiro de 2008, que altera a Diretiva 97/67/CE no respeitante à plena realização do mercado interno dos serviços postais da Comunidade, nos termos do qual "o transporte por si só não deverá ser considerado um serviço postal" e, por outro lado, com o disposto no artigo 4.º da *Ley 43/2010, de 30 de diciembre, del servicio postal universal* (LSPU), que exclui do seu âmbito de aplicação os serviços realizados em regime de auto-prestação, ou seja, aqueles efetuados diretamente pelo próprio remetente dos envios ou por terceiro em regime de exclusividade, já que nesses casos se considera que o remetente dos envios não intervém no mercado como prestador de serviços postais.

Por outro lado, não consubstanciam um uso que implique um aproveitamento especial do domínio público relevante para os efeitos desta taxa *(i)* as distribuições efetuadas do âmbito do comércio B2B (business-to-business), sempre que os bens adquiridos se destinem a ser comercializados na fase de retalho, e *(ii)* as distribuições que se levem a cabo através de um uso mais sustentável do domínio público.

Desta forma, o artigo 10.º, n.º 3, da OF esclarece que a taxa não incide sobre distribuições efetuadas exclusivamente a pé ou desde um centro de distribuição urbana de mercadorias através de meios de transporte ligeiros sustentáveis, tais como bicicletas, *cargobikes*, trotinetas ou similares.

No entanto, deve-se salientar que a norma não faz referência a veículos de zero emissões, pelo que não é claro se os carros ou motas elétricas são subsumíveis ao conceito de meios de transporte ligeiros sustentáveis. A este respeito, deve referir-se que, ainda que os veículos de zero emissões não sejam poluentes, o certo é que estes congestionam o tráfego rodoviário e ocupam os espaços para carga e descarga exatamente da mesma forma que o faria qualquer outro veículo menos sustentável. Por conseguinte, não parece irrazoável que as distribuições

de bens levadas a cabo mediante veículos de zero emissões estejam igualmente sujeitas à taxa por aproveitamento especial do domínio público.

Também não consubstanciam um uso que implique um aproveitamento especial do domínio público relevante para os efeitos desta taxa as distribuições efetuadas em pontos de recolha, que devem ser inscritos no Registo Municipal de Pontos de Recolha.

Finalmente, cabe referir que, na definição da incidência objetiva desta taxa, teria sido pertinente a introdução de algumas considerações de carácter social. Neste sentido, e a título de exemplo, não se deveria considerar um uso que implique um aproveitamento especial do domínio público relevante para os efeitos desta taxa as entrega de medicamentos, ou a distribuição de bens essenciais a pessoas com mobilidade reduzida ou em situação de vulnerabilidade em função da idade.

3.2. Incidência subjetiva

São sujeitos passivos desta taxa os prestadores de serviços postais que realizem o facto tributário dentro do município de Barcelona. Torna-se, portanto, essencial determinar o que se deve entender por prestador de serviços postais.

Segundo o disposto no artigo 5.º, n.º 3, da OF, consideram-se prestadores de serviços postais aqueles que estejam registados como tal, assim como aqueles que não o estejam, mas que reúnam as condições para o estar de acordo com a legislação estatal e que intervenham nas atividades de comércio eletrónico através da recolha, admissão, triagem, transporte, distribuição e entrega de bens a destinos finais na cidade de Barcelona.

Esta definição é similar à que consta na LSPU, que define “prestador de serviços postais” como qualquer pessoa física ou coletiva que preste um ou vários serviços postais (artigo 3.º, n.º 8, da LSPU), e “serviço postal” como qualquer serviço consistente na recolha, admissão, triagem, transporte, distribuição e entrega de envios postais (artigo 3.º,

n.º 1, da LSPU). Adicionalmente, de acordo com a jurisprudência do Tribunal de Justiça da União Europeia (TJUE), para a qualificação como "prestador de serviços postais" é suficiente o exercício de um dos serviços enumerados, desde que a atividade exercida não se limite apenas ao serviço de transporte[4].

Ora bem, ao definir-se os sujeitos passivos como os prestadores de serviços postais que realizem o facto tributário, limitou-se em enorme medida e inintencionalmente o alcance que se pretendia que esta taxa tivesse.

Com efeito, visava-se abranger os modelos de negócio alternativos, como os que assentam na economia colaborativa e nas plataformas de comércio eletrónico. Não obstante, por não serem subsumíveis ao conceito de prestadores de serviços postais, escapam à incidência desta taxa determinadas empresas que efetivamente realizam um uso que implica um aproveitamento especial do domínio público decorrente da carga e descarga na via pública de bens adquiridos através do comércio eletrónico para posterior entrega aos consumidores. É o caso das empresas que utilizam estafetas para a repartição de refeições ou de outros produtos em geral após encomenda através de uma plataforma digital, nomeadamente, e a título de exemplo, a Uber Eats, a Glovo e a própria Amazon.

Em relação à Amazon cabe esclarecer que, em 2020, após uma resolução *Comisión Nacional de los Mercados y de la Competencia*[5], algumas das suas empresas foram consideradas prestadoras de serviços postais e, consequentemente, sujeitas à regulamentação postal. Desta forma, quando esta taxa foi aprovada no início de 2023, entre os sujeitos passivos previsíveis desta taxa encontravam-se as referidas empresas da Amazon. No entanto, em julho de 2023, já após a entrada em vigor da taxa, a *Audiencia Nacional*[6] concluiu, no âmbito do recurso interposto

4. Acórdão do TJUE, de 31 de maio de 2018, nos processos apensos C-259/16 e C-260/16 (Confetra e o.), para. 34 (ECLI:EU:C:2018:370).

5. Cfr. Resolução da *Comisión Nacional de los Mercados y de la Competencia*, de 24 de setembro de 2020, no âmbito do processo STP/DTSP/006/20.

6. Cfr. Sentença da *Audiencia Nacional*, de 14 de julho de 2023, no âmbito do recurso 1223/2020 (ECLI:ES:AN:2023:4355) e sentença da *Audiencia Nacional*, de 17 de julho de 2023, no âmbito do recurso 1224/2020 (ECLI:ES:AN:2023:4604).

pela Amazon, que os serviços prestados pelas suas empresas não podiam ser qualificados serviços postais, pelo menos à luz do atual quadro normativo. Desta forma, a Amazon escapa à incidência subjetiva da Taxa Amazon.

3.3. O valor da taxa

Como é sobejamente conhecido, as taxas são tributos comutativos que incidem sobre prestações administrativas de que o sujeito passivo é beneficiário ou efetivo causador[7]. Ao tratar-se de tributos comutativos, as taxas têm como parâmetro material o custo que a prestação administrativa acarreta para a administração ou o valor do benefício que essa prestação representa para o sujeito passivo.

Nesse sentido, o artigo 4.º do nosso Regime Geral das Taxas das Autarquias Locais, sob a epígrafe "principio da equivalência jurídica", dispõe no seu número 1 que o valor das taxas das autarquias locais não deve ultrapassar o custo da atividade pública local ou o benefício auferido pelo particular.

No ordenamento jurídico espanhol, o artigo 7.º da *Ley 8/1989, de 13 de abril, de Tasas y Precios Públicos* (LTPP) estabelece, em termos mais ou menos semelhantes, que as taxas deverão cobrir o custo do serviço ou da atividade que constitua o facto tributário[8]. No caso de

7. VASQUES, Sérgio (2008), *O Princípio da Equivalência como Critério de Igualdade Tributária*, Almedina, p. 138.

8. No entanto, cabe referir que o artigo 31.º, n.º 1, da Constituição Espanhola estende a vigência do princípio da capacidade contributiva a todo o sistema fiscal, pelo que também no caso das taxas este será de aplicação. Tal postulado obriga a uma especial articulação entre o princípio da capacidade contributiva e o princípio da equivalência. Nesse sentido, considera-se que o benefício obtido pelo sujeito passivo conforma uma particular manifestação de riqueza que é objeto de tributação. Cfr. CORS MEYA, Francesc Xavier (1986), "Las tasas en el marco de un sistema tributario justo", in *Civitas. Revista española de derecho financiero*, N.º 51, p. 327; MARTÍN DELGADO, José María (1979), "Los principios de capacidad económica e igualdad en la Constitución española de 1978", in *Hacienda Pública Española*, N.º 60, p. 80; SÁINZ DE BUJANDA, Fernando (1963), "Reflexiones sobre un sistema de derecho tributario español", in *Revista de la Facultad de Derecho de la Universidad de Madrid*, Vol. 7, N.º 16-17, pp. 100-104; RUIZ GARIJO, Mercedes (2014), "Las tasas locales", in

utilização privativa ou aproveitamento especial de bens do domínio público, o artigo 24.º, n.º 1, alínea a), da LRHL determina que, como norma geral, o valor da taxa deve fixar-se por referência ao valor que teria no mercado a utilidade derivada da referida utilização ou aproveitamento, se os bens afetados não fossem de domínio público[9].

No caso da Taxa Amazon, os critérios que permitiram definir o valor de mercado da utilidade derivada do aproveitamento especial do domínio público para atividades de carga e descarga de bens para sua posterior distribuição aos consumidores que os adquiriram através de comércio eletrónico encontram-se no relatório técnico-económico que serviu de suporte à OF[10].

Segundo este relatório, para a determinação do valor de mercado da utilidade derivada do aproveitamento especial do domínio público neste caso tomou-se por referência o valor de mercado do estacionamento público na cidade de Barcelona. Na ausência de dados oficiais e em obediência a um princípio de prudência valorativa, considerou-se uma percentagem mínima de utilização do domínio público por parte dos prestadores de serviços postais, fixando-se tal percentagem em 5%[11]. Por conseguinte, estimou-se que o valor de mercado da utilidade derivada do aproveitamento especial do domínio público neste caso equivaleria a 2.590.725 euros por ano.

Por outra parte, constatou-se que o total de faturação na cidade de Barcelona dos prestadores de serviços postais autorizados ascendeu, no ano de 2020, a 203.477.600 euros.

CHICO DE LA CÁMARA, Pablo, y GALÁN RUIZ, Javier (Dir.), *Los tributos locales y el régimen fiscal de los ayuntamientos*, Valladolid: Lex Nova, Thomson Reuters, p. 496.

9. A este respeito veja-se RUIZ GARIJO, Mercedes (2019), "Cuestiones de urgencia para una reforma de las tasas locales a partir de la jurisprudencia y los autos del Tribunal Supremo", in CHICO DE LA CÁMARA, Pablo (Dir.), *Aspectos de interés para una futura reforma de las Haciendas locales*, Tirant lo Blanch, pp. 327-328.

10. "Informe econòmic per a la determinació de la quantia de la taxa per aprofitament especial del domini públic derivat de la distribució a destins finals indicats pels consumidors de béns adquirits per comerç electrònic (business to consumer, B2C)", que se encontra disponível para consulta em: 05_informe_tecnic-economic.pdf (barcelona.cat).

11. Ibid., pp. 10-12.

Consequentemente, no referido relatório técnico-económico concluiu-se que, para se reaver o equivalente ao valor de mercado da utilidade derivada do aproveitamento especial do domínio público por parte dos prestadores de serviços postais seria necessário aplicar uma taxa de 1,25% ao seu valor de faturação anual na cidade de Barcelona.

É precisamente este o valor fixado para esta taxa, conforme se estabelece no artigo 7.º da OF. Esta taxa aplica-se sobre os rendimentos brutos que os sujeitos passivos tenham faturado na cidade de Barcelona, derivados de entregas realizadas a consumidores de produtos adquiridos *online* durante o período de tributação[12], de acordo com o disposto no artigo 6.º, n.º 1, da OF. Não obstante, no n.º 2 do referido artigo, clarifica-se que desses rendimentos brutos devem-se excluir os rendimentos derivados de distribuições na cidade de Barcelona de produtos adquiridos *online* que não consubstanciam um facto tributário relevante para esta taxa, conforme analisado *supra*, no ponto 3.1.

Desta forma, os sujeitos passivos vêem-se afetados por esta taxa na proporção dos seus rendimentos brutos derivados da realização do facto tributário. Procura-se, pois, que os sujeitos passivos sejam tributados na medida do aproveitamento especial do domínio público que cada um de si tenha levado a cabo, alcançando-se assim uma compensação equivalente ao benefício derivado por cada um.

Não obstante, na OF estabelecem-se duas isenções.

Nos termos do artigo 4.º, n.º 1, da OF, os prestadores de serviços postais cujos rendimentos brutos derivados da realização do facto tributário sejam inferiores a um milhão de euros estão isentos desta taxa. Nestes casos estende-se que o uso do domínio público por parte dos prestadores de serviços postais é menos intensivo e o seu benefício

12. Nos termos do artigo 8.º, n.º 1 da OF, o período de tributação coincide – norma geral – com o ano civil. Só assim não será nos casos em que o início da atividade tenha ocorrido em data posterior a 1 de janeiro, ou em que o sujeito passivo deixe de ser considerado prestador de serviços postais em data anterior a 31 de dezembro, conforme se prevê no n.º 2 deste artigo.

económico é mínimo, não alcançando a relevância suficiente para que se possa exigir o pagamento da taxa[13].

Por outro lado, nos termos do n.º 3 do mesmo artigo, encontra-se igualmente isenta a entidade concessionária do Serviço Postal Universal em relação à atividade levada a cabo nesse âmbito[14].

4. Conclusão

A sociedade de consumo está a evoluir: já não se trata de consumir, mas de consumir sem sair de casa. Com efeito, as entregas ao domicílio popularizaram-se e generalizaram-se nos últimos anos, e é hoje comum comprar todo o tipo de produtos (refeições de restaurante, as compras de supermercado, vestuário, livros, eletrodomésticos, equipamentos eletrónicos, etc.) através de plataformas digitais.

No entanto, as distribuições efetuadas no âmbito do comércio eletrónico têm um enorme impacto ao nível da sustentabilidade ambiental, como assim o demonstra o estudo levado a cabo pela Comissão Europeia[15].

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13. Conforme referimos *supra*, na nota de rodapé n.º 8, no ordenamento espanhol é necessário articular o princípio da equivalência com o princípio da capacidade contributiva. Com efeito, no artigo 8.º da LTPP estabelece-se que na determinação das taxas se terá em conta, quando as circunstâncias assim o permitam, a capacidade económica das pessoas que as devem satisfazer. Igualmente, no artigo 24.º, n.º 4, da LRHL prevê-se que, para a determinação da quantia das taxas, se poderá ter em conta critérios genéricos relacionados com a capacidade económica dos sujeitos obrigados ao seu pagamento. A isenção referida é, pois, uma consequência destas normas, já que se considera que nestes casos o benefício económico para os sujeitos passivos é residual, não sendo expressão de capacidade contributiva. Neste sentido veja-se MORIES JIMÉNEZ, María Teresa (2023), "Análisis de la nueva tasa por aprovechamiento especial del dominio público derivado de la distribución a destinos finales indicados por los consumidores de bienes adquiridos por comercio electrónico: la llamada 'tasa amazon'", in *Tributos Locales*, N.º 163, p. 71.

14. No ordenamento espanhol, o Serviço Postal Universal encontra-se definido e regulado na já referida LSPU, e em Portugal na Lei Postal (Lei n.º 17/2012, de 26 de abril, na redação em vigor).

15. Comissão Europeia (2022), *Study to assess and analyse the impact of e-commerce driven transport and parcel delivery on air pollution and CO2 emissions: final report*, Publications

A taxa objeto de análise ao longo deste trabalho constitui, sem dúvida, uma forma original de tributar a insustentabilidade destes novos modelos de negócio, exigindo-se a contraprestação pelos benefícios derivados de uma utilização intensiva do domínio público para atividades de distribuição ao domicílio de produtos adquiridos *online*.

Esta taxa é, pois, fruto de crescentes preocupações com o ordenamento do território e com a proteção do meio ambiente. Prova disso é a letra do artigo 1.º, n.º 2, da OF, que estabelece que as receitas derivadas desta taxa devem servir para financiar medidas orientadas ao fortalecimento do comércio de proximidade na cidade de Barcelona, permitindo um uso mais sustentável do domínio público.

Igualmente, tais preocupações encontram-se patentes na definição do facto tributário, ao estabelecer-se que esta taxa não incide nem sobre distribuições porta-a-porta efetuadas a pé ou desde um centro de distribuição urbana de mercadorias através de meios de transporte ligeiros sustentáveis, tais como bicicletas, *cargobikes*, trotinetas ou similares, nem sobre distribuições efetuadas em pontos de recolha.

No entanto, a definição da incidência subjetiva desta taxa limitou severamente o seu alcance prático.

Com efeito, esta taxa não incide sobre todos os operadores económicos que, no âmbito do comércio eletrónico, façam um aproveitamento especial do domínio público para atividades de carga e descarga de bens para a sua posterior distribuição porta-a-porta, mas apenas sobre os prestadores de serviços postais que levem a cabo essas atividades. Por conseguinte, escapam à incidência desta taxa algumas empresas que, pela natureza da sua atividade e presença quotidiana nas vias públicas da cidade, seria expectável que se encontrassem sujeitas. É o caso de empresas como a Uber Eats, a Glovo ou a própria Amazon, que não se pode considerar que sejam prestadoras de serviços postais.

Por outro lado, encontram-se isentos desta taxa os prestadores de serviços postais cujos rendimentos brutos derivados da distribuição porta-a-porta de produtos adquiridos *online* sejam inferiores a um

Office of the European Union.

milhão de euros, já que nestes casos entende-se que o uso do domínio público é menos intensivo e o benefício económico obtido pelo sujeito passivo não alcança relevância suficiente para que o pagamento da taxa seja exigível.

Desta forma, pese embora a bondade da iniciativa, esta taxa fica muito aquém das expectativas, sendo mais uma declaração de vontade política do que um meio para assegurar a devida contraprestação pelos benefícios derivados de um aproveitamento especial do domínio público. Será, pois, de esperar que esta taxa tenha um efeito útil meramente residual, ao não se aplicar a uma grande parte dos operadores económicos que utilizam o domínio público como plataforma física para pôr em contacto vendedores e consumidores.

Bibliografia

Comissão Europeia (2022), *Study to assess and analyse the impact of e-commerce driven transport and parcel delivery on air pollution and CO2 emissions: final report*, Publications Office of the European Union.

CORS MEYA, Francesc Xavier (1986), "Las tasas en el marco de un sistema tributario justo", in *Civitas. Revista española de derecho financiero*, N.º 51, pp. 325-340.

FREITAS DO AMARAL, Diogo (1972), *A utilização do domínio público por particulares*, Editora Juriscredi.

GALÁN SÁNCHEZ, Rosa María (2015), "Los bienes públicos y su régimen tributário", in GONZÁLEZ GARCÍA, Julio (Dir), *Derecho de los bienes públicos*, Tirant lo Blanch.

LÓPEZ PELLICER, José Antonio (1989), "Uso y aprovechamiento del dominio público local", in GÓMEZ-FERRER MORANT, Rafael (Dir.), *Libro homenaje al profesor José Luis Villar Palasí*, Civitas.

MARTÍN DELGADO, José María (1979), "Los principios de capacidad económica e igualdad en la Constitución española de 1978", in *Hacienda Pública Española*, N.º 60, pp. 61-93.

MIRANDA, João (2021), *Direito Administrativo dos Bens*, AAFDL.

MORIES JIMÉNEZ, María Teresa (2023), "Análisis de la nueva tasa por aprovechamiento especial del dominio público derivado de la distribución

a destinos finales indicados por los consumidores de bienes adquiridos por comercio electrónico: la llamada 'tasa amazon'", in *Tributos Locales*, N.º 163, pp. 33-95.

RUIZ GARIJO, Mercedes (2014), "Las tasas locales", in CHICO DE LA CÁMARA, Pablo, y GALÁN RUIZ, Javier (Dir.), *Los tributos locales y el régimen fiscal de los ayuntamientos*, Valladolid: Lex Nova, Thomson Reuters.

RUIZ GARIJO, Mercedes (2019), "Cuestiones de urgencia para una reforma de las tasas locales a partir de la jurisprudencia y los autos del Tribunal Supremo", in CHICO DE LA CÁMARA, Pablo (Dir.), *Aspectos de interés para una futura reforma de las Haciendas locales*, Tirant lo Blanch.

SÁINZ DE BUJANDA, Fernando (1963), "Reflexiones sobre un sistema de derecho tributario español", in *Revista de la Facultad de Derecho de la Universidad de Madrid*, Vol. 7, N.º 16-17, pp. 7-199.

SÁNCHEZ GOYANES, Enrique (2018), "Usos privativos en demanio de servicio público", in JIMÉNEZ DE CISNEROS CID, Francisco Javier (Dir.), *Homenaje al profesor Ángel Menéndez Rexach*, Aranzadi.

TAVARES DA SILVA, Suzana (2008), *As Taxas e a Coerência do Sistema Tributário*, CEJUR - Centro de Estudos Jurídicos do Minho.

VASQUES, Sérgio (2008), *O Princípio da Equivalência como Critério de Igualdade Tributária*, Almedina.

Promoting sustainable development through a binding taxpayers' rights charter: Ensuring tax justice and strong institutions

Marta Carmo, Alice Ferraz de Andrade

Abstract: Sustainability is a key factor in shaping the future. Therefore, the United Nations ("UN") Sustainable Development Goals ("SDGs") are at the forefront of the movement towards a more sustainable world in all areas of society, which includes taxation since it enables public funding (and consequently the SDGs' fulfilment).

However, taxpayers' rights are often not effectively protected by the current enforceable instruments of legal protection, which impairs the tax justice (which should be considered part of SDG 16 – Peace, Justice and Strong Institutions). Against this backdrop, our research explores the potential benefits of a binding Taxpayers' Rights Charter, in particular how it could strengthen the rule of law, effective tax institutions, responsive decision-making and public access to information, as outlined in several guidelines of SDG 16.

According to our hypotheses, a binding charter of taxpayers' rights could promote tax citizenship, rebalance the tax relationship and redesign tax systems to better serve the public interest. Additionally, it would increase the State (and Tax Authorities') accountability and transparency and consequently improving taxes legitimacy. Achieving these benefits, however, requires careful consideration of the practical challenges of implementation, to promote good governance and effective institutions.

Therefore, our research aims to contribute to the ongoing global discussion on the role of taxation in promoting sustainable development, by exploring how a binding Taxpayers' Rights Charter may lead to more effective and equitable tax policies and systems.

Keywords: Taxpayers' Rights | Tax Justice | Strong Tax Institutions | Rule of Law

1. Introduction

The connection between SDGs and taxation is usually linked to a perspective that can be summarized, in a very synthetic (and perhaps simplistic) way, by considering taxation as a tool to raise **tax revenues** that allow States to **fulfil human rights**, especially Economic, Social and Cultural rights. In addition, taxation also serves as a redistribution mechanism and for regulatory purposes, which would enable the achievement of several SDGs[1]. However, there is a perspective that we believe remains to be explored: the connection that arises from the SDGs that implies **the fulfilment of taxpayers' rights**[2]. In this way, we intend to show how a Taxpayers' Rights Charter would allow the SDGs to be met.

Taxpayers' rights are often not effectively protected by the current enforceable legal protection instruments, leading to an **impairment of tax justice**. In fact, binding legal instruments of a general nature [such as the European Convention of Human Rights ("ECHR"), the Charter of Fundamental Rights of the European Union ("CFREU"), the International Covenant on Civil and Political Rights ("ICCPR"), the International Covenant on Economic, Social and Cultural Rights ("ICESCR") or national Constitutions] apply to all relations between

1. Alice Pirlot argues that in the first case there are indirect positive and negative interactions between taxation and SDGs, while in the second case those interactions are direct (also either positive and negative) – v. (Pirlot, 2020, pp. 90-99).

2. Also defending the absence of such connection v. (Kokott & Pistone, 2022, pp. 76-77).

citizens and states and therefore *prima facie* also apply to tax matters, since taxes are a manifestation of sovereign power[3]. However, the protection of fundamental rights in tax law has mostly been developed through case law (either in national, regional or international courts), or in scattered *infra*-constitutional legislation[4].

On the other hand, specific soft law instruments (such as the Organization for Economic Co-operation and Development ("OECD")'s "Taxpayers' Rights and Obligations – Practice Note"[5], the more recent European Commission's "Guidelines for a Model for A European Taxpayers' Code"[6] or non-binding national taxpayers' charters) do not provide legal certainty or enforceability and therefore the taxpayers' fundamental rights are not always adequately protected.

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3. For an explanation of tax sovereignty as one aspect of State sovereignty, although not being an unlimited power, v. (Casalta Nabais, 2004, pp. 290ff). Usually the justification for taxation comes from the justification of the state itself and from social contract theories – see on this regard (Vogel, 1988, pp. 33ff).

Allison Christians criticizes most of the scholarship that typically assumes the state's power to tax based on sovereignty, defends that this is not normatively acceptable to justify taxation (since nexus via residence and source is also insufficient), and concludes that the membership principle may be a more normatively acceptable justification for tax jurisdiction (but it remains to be seen) – see (Christians, 2017).

Nevertheless, justifying taxation in the abstract means exploring why taxes are levied, as in the theories of utility and sacrifice, which ultimately amount to the same thing: the basis is public services. The main difference between them is the very concept of the State, since the benefit theory assumes that the State is an autonomous entity vis-à-vis the citizens, so taxes were paid on the benefits received, whereas the sacrifice theory starts from a contractualist logic, in which the State is the citizens, so they contribute. Another different issue is the distribution of the tax burden, which affects who, what and how to tax (and not necessarily why to tax). A third issue is the question of tax sovereignty from the perspective of jurisdiction, i.e. who can be taxed by that state and to what extent, a discussion of the relevant connecting factors (political vs. social and economic elements of belonging).

However, all these issues are outside the scope of this work and for this purpose we assume that a state has the power to tax because it is a sovereign state. What is relevant to this paper is that the state's power to tax has limits: the human rights of taxpayers.

4. V. e.g. affirming the lack of effective protection see e.g. (IBFD Observatory on the Protection of Taxpayers' Rights, 2019, p. 10).

5. V. (OECD Committee of Fiscal Affairs Forum on Tax Administration, 2003).

6. V. (European Commission, 2016).

Consequently, we argue that a **possible solution is a Binding Taxpayers' Rights Charter**, i.e., a specific and enforceable legal instrument to protect taxpayers' rights. A clear definition of taxpayers' rights and obligations would be a way to ensure that taxpayers pay their fair share (*i.e.*, protection of the tax bases) with a fair balance (*i.e.*, protecting taxpayers). This would improve the fairness of the tax system, which would also increase tax compliance[7]. Finally, a legal clarification of taxpayers' rights and obligations, by increasing the tax transparency on both sides, would improve taxpayers' tax morale[8] and thus mutual trust and, ultimately, tax disputes.

On the other hand, the binding definition of the fundamental rights of taxpayers would enable them to react in a comprehensive, transparent, and certain manner, and, consequently, to legally enforce these rights[9]. This would make States more accountable for the taxes they collect. Indeed, the complementarity between substantive and adjective rights must be ensured, in order to have effective taxpayers'

7. The relation between the perception of tax fairness and tax compliance is well established in tax psychology and sociology. See e.g. (Richardson, 2007); (Lopes, 2011); (Saad, 2014); (Jayawardane, 2015).

8. Tax morale can be defined as the collective attitude towards tax compliance and its respective motivation – v. e.g. (Lisi, 2013, p. 1; Jayawardane, 2015, p. 135). Arguing that a transparent and fair system improves tax compliance and tax morale – v. e.g. (Lopes & Santos, 2013, p. 13830). On how the protection of taxpayers' rights improves tax compliance and tax morality by conferring moral legitimacy to tax legislators and tax authorities (Carmo, 2021, pp. 292–293).

9. For instance, Servaas van Thiel argues that "*What is clear from these and other cases is that domestic constitutional systems sometimes fail to protect taxpayers against politically motivated tax authorities that act beyond the limits of domestic law and in violation of basic taxpayer rights, and it is in these cases that international human rights enforcement mechanisms may play a useful role in the tax arena*" - (Thiel, 2011, p. 177). Also, Ricardo García Antón argues that taxpayers' rights are being neglected in the fight against tax avoidance and that a multilateral taxpayers' bill of rights is needed for the judicial adjudication of those rights (Antón, 2018, pp. 131–135). Additionally, as Cadesky, Hayes & Russell point out, "*The results of our survey, and the comments made, indicate that the Taxpayer Charter should have legal force to the extent possible, in order for it to be fully effective*. [..] *laws which are not capable of enforcement have no real effect*." - (Cadesky, Hayes and Russell, 2016, p. 110).

rights. Following this idea, a binding Taxpayers' Rights Charter could lead to **more effective and fair tax policies and systems**[10].

2. The Sustainable Development Goals

Peace, stability, human rights and effective governance based on the rule of law are considered to be the fundamental pillars of sustainable development, feeding the seventeen SDGs in the UN's 2030 Agenda [11]. In 2015, these fundamental principles were given new prominence with the global commitment of the international community to achieve the **SDGs agenda**[12]. Created as response to the limitations of the Millennium Development Goals ("MDGs"), this agenda represents an ambitious and transformative vision for shaping the future[13]. Unlike its predecessor, as outlined in the document *Transforming our World: the 2030 Agenda for Sustainable Development*, it adopts a universal approach that transcends the boundaries between developed and developing countries[14]. The UN General Assembly's Open-ended Working Group on the SDGs played a key role, producing a list of

10. This paper will not cover the problem to know in which level such Charter should be enacted: international, regional, or national.

11. On the SDGs in general, v. e.g. (Silva, Beraldo & Vitorino, 2023, pp. 109-112).

12. (United Nations, 2015, p.6.)

13. (Fredman, 2018, p.6)

14. Indeed, the starting point for the SDGs was the 2012 UN Conference on Sustainable Development, Rio+20. At this event, the UN Member States launched *The Future We Want*, which triggered a process of intergovernmental cooperation involving the scientific community and civil society, with the precise aim of developing the SDGs – v. (Kimberly Brown, 2019, p.9). The UN General Assembly's Open-ended Working Group on the SDGs played a key role, producing a list of 17 goals with 169 targets. Thus, the year 2015, marked by the adoption of the 2030 Agenda at the 70th UN General Assembly, was a crucial milestone in defining global sustainable development goals. The same year also saw the adoption of the Paris Agreement on Climate Change (COP 21), the Addis Ababa Action Agenda as an integral part of the 2030 Agenda, and the Sendai Framework for Disaster Risk Reduction.

coherent and integrated **17 goals**[15] **with 169 targets**, that the world is committed to achieve by 2030, addressing the most pressing global challenges of our time. Under the foundational pillars of people, planet, prosperity, peace and partnerships, these goals set targets across the social, economic and environmental dimensions[16]. However, the effective implementation of the SDGs, requires critical reflection by

15. These are the SDGs:

- Goal 1. End poverty in all its forms everywhere
- Goal 2. End hunger, achieve food security and improved nutrition and promote sustainable agriculture
- Goal 3. Ensure healthy lives and promote well-being for all at all ages
- Goal 4. Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all
- Goal 5. Achieve gender equality and empower all women and girls
- Goal 6. Ensure availability and sustainable management of water and sanitation for all
- Goal 7. Ensure access to affordable, reliable, sustainable and modern energy for all
- Goal 8. Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all
- Goal 9. Build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation
- Goal 10. Reduce inequality within and among countries
- Goal 11. Make cities and human settlements inclusive, safe, resilient and sustainable
- Goal 12. Ensure sustainable consumption and production patterns
- Goal 13. Take urgent action to combat climate change and its impacts (Acknowledging that the United Nations Framework Convention on Climate Change is the primary international, intergovernmental forum for negotiating the global response to climate change.)
- Goal 14. Conserve and sustainably use the oceans, seas and marine resources for sustainable development
- Goal 15. Protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss
- Goal 16. Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels
- Goal 17. Strengthen the means of implementation and revitalize the global partnership for sustainable development

16. (Sen, 2022, p.51)

all interested parties[17], businesses[18], civil society[19], universities and knowledge institutions must examine their practices in the light of the SDGs[20].

The SDGs agenda calls for a **renewed global partnership**, encouraging cooperation at all levels between States, local governments, businesses and other civil society organisations[21]. However, this goal of collaboration depends on sustained action by civil society to hold governments accountable to their commitments on the SDGs and the human rights framework, mobilising all relevant forums, both international and national. At the **national level**, governments have a crucial role to play. Long-term planning, beyond electoral cycles, is

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17. Consider that today some 700 million people still live below the World Bank's poverty line, and billions more suffer some form of deprivation. Inequalities have increased in many societies despite average economic progress. In addition, the entire world faces serious environmental threats, such as human-induced climate change and biodiversity loss. Poor governance, official corruption and, in dramatic cases, outright conflict now plague much of the world.

18. For example, companies should see the SDGs as an opportunity to evaluate their business practices in their interactions with customers, suppliers and the natural environment.

19. Civil society, in turn, should use them as an opportunity to reflect on more holistic and cross-sectoral approaches to poverty reduction and environmental management.

20. Many organizations around the world have formally committed themselves to these goals. A significant number have done so through the United Nations Global Compact (UNGC). This is currently the world's largest sustainability initiative, overseen directly by the United Nations Secretary-General and involving over 20 000 organizations worldwide. Essentially, the UNGC calls on companies and organizations to align their strategies and operations with ten principles with the aim of achieving the Sustainable Development Goals set out in the UN's 2030 Agenda. In the Portuguese context, the UN Global Compact Network Portugal (UNGCNP) is the name of the Portuguese Global Compact Association, which brings together participants in the initiative with headquarters or operations in Portugal. Participants include major Portuguese companies and universities, such as Banco BPI, S.A., Banco Comercial Português, S.A., Corticeira Amorim, S.G.P.S., S.A., Delta Cafés, SGPS, Galp Energia, SGPS, S.A., Grupo Visabeira, SGPS, S.A., NOVA School of Law, Universidade Católica Portuguesa, Universidade de Coimbra and Universidade do Minho.

21. (United Nations, 2015, p.9)

essential[22]. As such, civil society also has a fundamental role in implementing the SDGs, especially when it comes to holding governments accountable. At the **international level**, among the various forums and organisations, the OECD's intervention on the SDGs is noteworthy[23]. This organisation, in close collaboration with the UN system, has been actively working to incorporate the SDGs into its thematic strategies, with the aim of contributing to the implementation of the 2030 Agenda. These efforts include assessing the readiness of OECD countries for the SDGs, analysing the impact of internal policies on the achievement of the SDGs globally, and contributing to OECD countries' strategies to promote SDG outcomes.

However, despite the commitments and efforts made to achieve the SDGs, there is no doubt that the implementation of these goals is far from complete[24]. In the **economic context**, financial instability and economic crises can divert countries' attention and resources to

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22. Few of today's governments will be in power a decade from now. To meet this challenge, countries need long-term plans and strategies that transcend normal day-to-day politics and electoral cycles. National governments are the primary guardians of the SDG agenda. Having endorsed the agenda in 2015, national governments are now obliged to engage in a comprehensive implementation programme by developing a national strategy, agreeing on a national monitoring framework and an implementation process. To this end, the relevant ministries that make up the executive branch of each country should be involved at an early stage. In addition, the committees set up to monitor the implementation of the SDGs should include government representatives as well as participation from civil society and the academic community.

Now, recognising the real challenge of the 2030 Agenda and to ensure its implementation and maintain strong political momentum, the Swedish government has formed a high-level group of nine leaders from different countries to ensure that all stakeholders are genuinely committed to the implementation of the SDGs and the 2030 Agenda. On this subject, see, (United Nations, 2015, p. 18)

23. (OECD, 2016, p. 3).

24. The journey towards a sustainable future faces several significant challenges, which require critical attention and coordinated action. A pressing challenge is the uneven progress across countries and regions. At the same time, the climate crisis is emerging as a major obstacle to achieving the SDGs. The urgency of action to address climate change and protect ecosystems is becoming increasingly clear, highlighting the need for synergies between SDGs related to the environment. In addition, geopolitical tensions and trade disputes threaten to undermine the international cooperation efforts needed to achieve the SDGs.

immediate problems, hindering the investment needed for long-term sustainable development[25]. In addition to these challenges, lack of awareness and resistance to change in certain sectors of society can prevent the acceptance and adoption of practices aligned with the SDGs. The global community must face these challenges head-on, fostering inclusive partnerships, stimulating innovation and aligning policies to ensure that no nation or community is left behind in this collective journey towards a sustainable future[26]. It requires not just declaratory commitments, but a profound shift in policies, practices and mindsets to ensure that no challenge is overlooked in the pursuit of a fairer, healthier and more prosperous world for all.

The SDGs cover several critical areas for building a sustainable future. However, in this work we will focus specifically on **SDG 16**, with a particular emphasis on some of its specific targets. This strategic choice is motivated by our **focus on taxation**, where we will explore the potential need for a binding taxpayers' rights charter under the implementation of SDG 16 at the global level. In this sense, this work aims to contribute to the understanding and discussion of this specific facet of the SDGs, recognising the intrinsic link between the social, economic and environmental dimensions of sustainable development, as discussed above. The SDG16 refers to the **promotion of peace, justice and strong institutions for all, with effective,**

25. Often a country's resources are used to deal with immediate and sometimes unexpected problems. Numerous studies point to Covid-19 as a factor causing economic disruption, as the reaction of financial markets to the fall in global stock indices was immediate. Businesses experienced disruptions and contractions in production, transport was restricted between and within countries, and consumption patterns were distorted, creating market anomalies orchestrated by consumer and business panic. In fact, Covid-19 has affected all aspects of life, leading to an increase in the loss of GDP for countries, which indicates growing poverty, risks to the health of individuals and societies, as well as threats to education and other aspects of life. In other words, the Sustainable Development Goals are having a negative impact. About this subject, v., e.g., (Iwuoha &Iwuoha, 2020, p. 104).

26. All this with the idea that: despite the universal nature of the 2030 Agenda, many of its targets – particularly those related to the implementation of the SDGs – recognise and call for international cooperation and support for capacity building in developing countries. About this subject, v., e.g., (Arajärvi, 2017, p. 25).

accountable and inclusive institutions. And in our opinion, **Tax Justice** should be included in such SDG. Going beyond the mere concept of peace and security, this SDG focuses on key issues that often act as catalysts for conflict, addressing issues such as access to justice, institutional transparency, the fight against corruption, the guarantee of fundamental freedoms and the promotion of participatory governance[27]. In fact, **SDG 16** not only occupies a prominent position, but is also positioned as a **central piece in the achievement of other goals**, and therefore an essential prerequisite for global progress [28].

In addition to what has already been said, **justice and access to information** are also at the heart of SDG 16. The pursuit of effective and transparent justice systems is essential for the consolidation of sustainable peace, which also includes the promotion of inclusive mechanisms that ensure active **societal participation in decision-making**[29]. As we will see, tax justice goes beyond equity in tax systems to include transparency, accountability and citizen participation in tax decision-making. The inclusion of tax justice in SDG 16 recognises that taxation is an important tool for promoting social and economic equality and in fact, the promotion of tax justice is not just an economic issue, but a cornerstone for achieving the global SDG and building peaceful and inclusive societies. One example of an institutional connection between the SDG 16 and taxpayers' rights was made by the Taiwanese city of Taoyuan, which officially published the mechanisms by which it promoted this goal, including the taxpayers'

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27. (Raman & Pritam, 2018, p.).

This goal has 12 targets: three related to reducing violence, organised crime and illicit financial and arms flows; seven related to institutions, the rule of law and some aspects of governance; and two related to the implementation of SDG 16 itself. To mitigate the impact of violence and insecurity on development, the 2030 Agenda incorporates peace as a cross-cutting issue from the outset, recognising it as an essential element for sustainable progress. SDG 16 thus emerges as a direct response to the conditions that fuel conflict, in line with the vision that peace is fundamental to the overall success of the SDGs.

28. Some argue that SDG 16 is at the heart of the SDGs as a whole. About this subject, v., e.g., (Supatra, 2022, p.51).

29. (Arajärvi, 2017, p.5).

rights protection among them, through a Taxpayer's Rights Protection Law and a Taxpayer Protection Officer[30].

Therefore, the core of this work will focus on SDG 16 related to tax justice, taking into account the possible need for a charter of taxpayers' fundamental rights, guided by the conviction that tax justice is closely linked to peace and social inclusion, and is an essential contribution to the wider realisation of the SDGs.

3. The idea of a Taxpayers' Rights Charter

There is **no consensus on a concept** of what is a Taxpayers' Rights Charter. However, the term is used to refer to a specific, usually national, instrument for the protection of taxpayers' rights. In addition, a charter should provide a simple way for a taxpayer to understand his/her main rights and obligations.

However, **many National Taxpayers' Charters are not legally binding**[31]. In fact, several of these charters are aimed at the quality of service provided by tax administrations and their relationship with taxpayers.[32]. Additionally, some are endorsed by administrative and legislative institutions.[33]. According to Baker and Pistone, "*The distinction between a taxpayers' charter and a taxpayers' bill of rights can be derived from the form that the document takes. A charter is issued by*

30. V. https://ws.tycg.gov.tw/Download.ashx?u=LzAwMS9VcGxvYWQvMjcvUmVsRmlsZS84MzY3LzMzOTA5Ni9Hb2FsIDE2LnBkZg%3D%3D&n=R29hbCAxNi5wZGY%3D – p. 140.

31. According to the IBFD OTPR, a taxpayers' charter or bill of rights existed in 54% of reports, but only 31% of these had legally enforceable provisions. - (IBFD Observatory on the Protection of Taxpayers' Rights, 2022, pp. 205–206)

32. (Bentley, 2007, p. 16).

33. An example of administrative taxpayer charter is the Taxpayer Bill of Rights approved by the Canada Revenue Agency, available at https://www.canada.ca/content/dam/cra-arc/formspubs/pub/rc17/rc17-22e.pdf.

An example of charter approved by legislation is the US Taxpayers' Bill of Rights, stablished in the Internal Revenue Code § 7803(a)(3), available at https://www.law.cornell.edu/uscode/text/26/7803.

the revenue authority, though sometimes with statutory backing (as in the case of the United Kingdom). A bill of rights is contained in legislation itself."[34]. Notwithstanding, we do not agree with such a formal terminological distinction, since several national and supranational declarations of human or fundamental rights a general nature, contained in binding legislation or international treaties, use the expression "Charter", such as the Canadian Charter of Rights and Freedoms (which is part of the Canadian Constitution), the Victorian Charter of Human Rights and Responsibilities Act 2006 (an Act of Parliament of the state of Victoria, Australia), the aforementioned CFREU (which has the same legal effect as an EU Treaty) or the African Charter on Human and Peoples' Rights (under the aegis of the current African Union).

Still, for the purposes of this research, we do not consider such terminological distinctions, but instead focus on what a Binding Taxpayers' Rights Charter actually is: **a legal instrument containing taxpayers' rights and obligations**. The reason for this approach is that in several situations, taxpayers do not have effective protection of their rights through the legal system. In fact, Cadesky, Hayes & Russell found that taxpayers' rights [either in a taxpayer charter or recognised by legislation (constitutional, tax, etc.)] have at least one of the following **limitations**[35]:

- Taxpayers' charters are generally not legally binding, which leads taxpayers, tax advisors and tax administrations ignore them;
- Taxpayers' rights are not comprehensive;
- Recognised taxpayers' rights are listed in such general terms that they are not enforceable;

An example of a charter for the tax administration service delivery is the one issued by the South African Revenue Service, available at https://www.sars.gov.za/wp-content/uploads/Docs/ServiceCharter/Service-Charter-2022-Updated-23052022.pdf.

34. (Baker and Pistone, 2015, p. 58).

35. See (Cadesky, Hayes and Russell, 2016, p. 4). See also footnote 4.

- Taxpayers' charter are mostly policy statements issued by tax administrations in a self-serving fashion and mostly focused on enforcement;
- No attempts to hold tax administration accountable to taxpayers;
- There are no drafting standards for tax legislation on fairness and clarity.

Therefore we argue that one possible solution to address this undermining of tax justice would be the adoption of a **binding taxpayers' rights charter**, which is a specific and enforceable legal instrument for their protection. In addition, as mentioned above, we believe that tax justice should be included in SDG 16 and consequently, a binding charter of taxpayers' rights could promote **more effective and fair tax policies and systems**. Indeed, the full status of a taxpayer as a citizen implies (i) awareness of and compliance with the obligations deriving from that status, (ii) but also a total respect by her/his fundamental rights as a taxpayer.[36].

To cite just one example, in 2016 the European Commission published Guidelines for a Model European Taxpayers' Code[37], non-binding instrument that sets out a number of key principles for balancing the rights and obligations of taxpayers and tax administrations. The aim is to encourage voluntary compliance, to combat tax evasion, fraud and avoidance and to increase in tax revenues.[38]. The reasons given for developing this instrument were: to ensure equal treatment of taxpayers and a greater level of legal certainty; increase transparency; to reduce disputes and standardise compliance procedures; to improve tax practices to establish principles to ensure better understanding when communicating with the tax administration of another

36. Indeed, if citizenship is the free exercise of a citizen's civil, political and social rights and duties, then to exercise citizenship it is necessary to be aware of one's rights and duties. (Pereira, 2014, p. 5).

37. (European Commission, 2016).

38. Cfr. pp. 4-5.

Member State[39]. It also encourages cooperative compliance[40]. Therefore, notwithstanding the merits of such goals, we believe that there is no real focus on taxpayers' rights as an objective in itself[41].

It should also be noted that the OECD[42] has highlighted some of the best practices and recommendations to build trust and improve transparency and communication with taxpayers, which include, under the theme of "Expectations and accountability for behaviour", "Taxpayers' charters and ombudsmen." In this context, the OECD notes that Taxpayers' Charters taxpayers with clear service expectations to taxpayers, while a tax ombudsman service plays a useful role in resolving procedural and administrative issues. Indeed, even with Taxpayers' Charters, difficulties arise in relations with the tax administration, an aspect where a **tax ombudsman** focusing on the functions of the tax administration proves useful. However, clear expectations about legal processes are also needed.

In fact, the State, namely the tax authorities, has sovereign public prerogatives, resulting in an unbalanced legal relationship that needs to be balanced by the rights of the subject. The fact that tax evasion and aggressive tax planning are becoming more evident in the case of some taxpayers (e.g. big tech companies) and the search for a fair share not alter the legal vulnerability of most taxpayers[43]. However, the taxing powers of States do not always take into account the fundamental rights of taxpayers. The idea of **not instrumentalising human beings** is even more evident in the case of the fundamental duty to pay taxes, because if it touches the essential core of the fundamental rights of taxpayers, it cannot but be considered a violation of the

39. Cfr. pp. 7.

40. Cfr. pp.. 22-23. On the importance of taxpayers' rights for tax compliance, v. (Carmo, 2021).

41. The fact that this Code does even use terms such as "fundamental rights", "human rights" or "human dignity" shows that the European Commission does not regard taxpayers' rightsas fundamental or human rights.

42. (OECD, 2022).

43. V. (Kokott, Pistone and Miller, 2020, p. 46).

human dignity[44]. To put it simply: **taxes must be humanised**. In other words, the tax state should **pursue a fair share with a fair balance**[45].

However, without **remedies or enforceability**, a charter will not be enough[46]. In fact, "*The practical protection of taxpayers' rights requires the enactment of a taxpayers' charter of rights, as well as the forming of institutions whose aim is to conduct practical activities to ensure the enjoyment of the taxpayers' guaranteed rights. Several countries have organized formal structures of taxpayers' advocates or ombudsmen to scrutinize the activities conducted by the tax administration and intervene in appropriate cases. Such entities may be part of the tax administration, but shall remain independent from the normal operations of that authority*"[47]. We therefore continue our analysis on the basis of a binding and enforceable taxpayers' rights charter.

44. (Bispo Farias, 2015, p. 342). "(…) *Taxpayers' rights shall be understood as a whole, i.e., a bundle of* constitutional rights positions *that protect them when dealing with the state in tax matters, so they are treated by tax authorities with equal concern and respect, in conditions compatible with human dignity*" - (IBFD Observatory on the Protection of Taxpayers' Rights, 2019, p. 11).

45. To paraphrase KANT, the citizens (i.e., in this context, taxpayers), should always be considered in the state not solely as a means (i.e., subject to the fundamental duty to pay taxes), but also at the same time as an end in itself. V. (Kant, 2017, p. 231). Rawls reinterprets this concept of human dignity in the light of his theory of the veil of ignorance as the need to treat human beings according to the principles to which they would give their consent in an original position of equality, so that they see themselves as ends in themselves. - (Rawls, 2013, p. 150).

46. "*However, these valuable efforts towards a soft-law instrument codifying taxpayers' rights are not enough if the adjudication layer is utterly neglected*" - (Antón, 2018, p. 134). In the same sense (Cadesky, Hayes and Russell, 2016, p. 109).

47. (IBFD Observatory on the Protection of Taxpayers' Rights, 2019, p. 189). Also arguing that there are several manners to make a Charter enforceable and a taxpayer Ombudsman could be one of them - (Cadesky, Hayes and Russell, 2016, p. 110)

4. Target 16.3 - Promote the rule of law at the national and international levels and ensure equal access to justice for all

4.1. The Target 16.3. in general

The principle of the **Rule of Law** provides a **fundamental framework** in which the exercise of public power is bound by legal rules that ensure accountability, fair governance and justice accessible to all. Based on the belief that legitimate authority derives from compliance with the law, the Rule of Law requires that government action be constrained by established legal norms and procedures. As once developed by the UN Secretary-General in 2004[48], the Rule of Law, as concept placed *in the heart of the UN's mission*, implies that all entities, including the State itself, are subject to publicly enacted, equally applied and independently adjudicated laws in accordance with international human rights standards. This principle, enshrined in the UN's Charter[49] and the Universal Declaration of Human Rights (UDHR)[50], is the cornerstone of the maintenance of justice, peace and respect for human rights at the national and international levels.[51]

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48. (United Nation's Secretary, 2004, p.4).

49. As we can see from its preamble when it states that "*we the peoples of the united nations determined (…) to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained*".

50. Moreover, the UDHR places the Rule of Law at the forefront, affirming, also in its preamble, that "*Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law*".

51. In this context, at European level, it is also recognised that the European Community operates on the basis of the rule of law, in which its institutions are subject to judicial review as to the conformity of their actions with the Treaties and other general principles of law, including fundamental rights. This idea results directly from the CFREU preamble which states that "*Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice*".

While the 2030 Agenda is not legally binding, SDG 16 and its targets are consistent with existing obligations of States in the international context. Moreover, the SDG 16 includes broad targets that have a direct impact on the **effectiveness of the rule of law**. Challenges such as judicial delays, bureaucracy, associated costs and sometimes lack of impartiality are key barriers to access to justice. These issues have a direct effect on the objective and lead to a situation where inaction, often due to resource constraints, results in the violation of fundamental rights[52]. In certain circumstances, this reality can lead to the **social exclusion of certain segments of civil society**[53], undermining fundamental rights and eroding confidence in the legal system and democratic principles.

Within this context, as a strategy for strengthening access to justice and ensuring the rule of law, some doctrines therefore make a number of **recommendation**s. First and foremost, it is imperative for States to ensure **access to information**[54], as the provision of legal information is essential for empowering communities. Furthermore, access to justice and the promotion of **active citizenship** would benefit from the possible establishment of support centres or legal aid offices, preferably free of charge, to ensure assistance to citizens, including those

Also, on a national level, the Portuguese Republic is founded on the principle of the rule of law. As a Democratic Rule of Law, is based on popular sovereignty, pluralism of expression, democratic political organisation, and the respect and guarantee of the realisation of fundamental rights and freedoms, as well as the separation and interdependence of powers (according to Article 2 of the Portuguese Republic's Constitution). Thus, the Constitution of the Portuguese Republic provides for a series of fundamental rights, such as the right to liberty and security, equality and non-discrimination, physical and moral integrity, assembly and demonstration, political participation, freedom of expression, association, conscience, religion and worship, ensuring that everyone has access to justice and the courts to defend his or her own interests, and that justice is not denied on the grounds of economic insufficiency, social or cultural condition. Other rights include the right to information, to be informed and to receive information without hindrance or discrimination.

52. (Wallat, 2019, pp.604-605).

53. (Wallat, 2019, p.591).

54. On this subject, v., e.g., (Carmona, 2012, pp. 6 and 8).

from more disadvantaged socio-economic backgrounds[55]. This would reduce barriers and increase equity in the legal system, contributing to a fairer and more inclusive society.

Investing in **ADRs**[56], which are typically characterised by informal systems, can be culturally relevant as they strengthen the efficiency of the legal system, reduce the workload and backlog of courts, increase access to justice and contribute to the effective resolution of conflicts, thereby consolidating fundamental principles inherent to the rule of law. At the same time, ***erga omnes*** **effects in socially relevant litigation** can also be a very fruitful measure to pursue these objectives. **Judicial decisions that have a wider impact on society**, rather than being limited to the parties involved, allow a greater number of people to benefit from the resolution of specific legal problems and serve as instruments to prevent and even correct systemic injustices, discriminatory patterns or practices that affect large sections of the population[57]. This would, of course, enhance the effectiveness of the legal system, promote confidence in legal institutions and strengthen the commitment to justice, equality and social cohesion, in line with the fundamental principles of the rule of law, which aim to ensure equality before the law.

As we have seen, revitalising the objective of access to (tax) justice is indeed proving to be a fundamental element in achieving the rule of law. Indeed, in this context, the link between tax justice, the rule of law and the SDGs highlights the importance of tax systems contributing to **broader goals** such as **eradicating poverty and promoting equality**. And it is in this context that a charter of taxpayers' fundamental rights can become an essential tool for protecting individual

55. Another important recommendation in terms of access relates to the very idea of extending the geographical reach of the justice system: Courts, especially appeals courts, are often located only in capital cities or large towns. Lawyers are also highly urban-based. In these circumstances, people living in poverty often have to travel long distances at high cost to access the justice system. On this subject, v. e.g., (Carmona, 2012, p.15).

56. Alternative Dispute Resolution (ADR) means, such as arbitration, mediation and negotiation.

57. About that, again, in great detail, (Carmona, 2012, p.24).

rights and balancing the power of the state with the interests of taxpayers.

4.2. The Promotion of the rule of law in taxation at the national and international levels and ensure equal access to justice for all taxpayers

As we saw above the rule of law also requires the protection of taxpayers' fundamental rights, including their **legal certainty and clarification**, in the context of target 16.3. A sustainable tax system implies **fairness** and that all taxpayers have **equal access to tax justice,** by ensuring that their rights are legally binding, comprehensive in scope and enforceable. As the current protection of taxpayers provided by the existing instruments of taxpayers' protection (e.g. ECHR, CFREU, National Constitutions, National legislations, etc) seems *prima facie* deficient[58], a charter of taxpayers' rights with binding nature could promote such protection. Such codification and specification is useful and necessary to balance and **empower taxpayers**. In the three stages of the relationship between legislators and tax administrators as well as taxpayers, such empowerment should be reflected.[59]:

i. the moment of **creation of the tax law** and the possibility or impossibility of intervening in the legislative process;
ii. the moment of **application of the law**, from the point of view of the relationship with the **tax administration;** and
iii. the moment of **application of the law** in the context of **litigation**.

58. Arguing this, see e.g. (IBFD Observatory on the Protection of Taxpayers' Rights, 2019, p. 189). Arguing that it is the case of Portugal (Palma, 2010, p. 7). Still, the same author concludes, afterwards, that "*Practice reveals, however, that effective protection falls short of the "promise" stemming from the legal texts*". *Ibid*, p. 11.
Arguing that, in general there is a need for international enforcement of human rights in the area of taxation where national constitutional systems, and even regional "constitutional" systems fail to protect such rights - (Thiel, 2011, pp. 175ff.).

59. (Lopes, 2003, p. 51-83)

Consequently, "(…) *the way the tax law is constructed and how it is de facto applied affects sustainability*"[60]. A democratic society guided by the rule of law and the principle of human dignity[61], cannot consider taxpayers as simple subjects with a basic duty to pay taxes: **taxpayers should also be entitled to fundamental rights** that must be fully respected by the State. Consequently, the rule of law is the key to preventing fiscal authoritarianism in these three phases, by improving the relationship in a democratic way, focusing on the social contract. Such a focus will promote greater respect for transparency and fiscal citizenship, as well as greater legal certainty[62].

60. v. (Rendahl & Nordblom, 2020, p. 413).

61. Additionally, the principle of human dignity (resulting from the idea of the democratic rule of law), from a Kantian point of view,, implies the inability to treat the person as a mere object of state power, as an instrumentalization or objectification of the person in the hands of the State -v. e.g. (Novais, 2006, p. 30). The principle of human dignity must be seen as giving value to any legal system (including tax systems), as it is the ethical source of all fundamental rights and the material nourishment of principle of equality.

The principle of human dignity is foreseen in article 1 of the UDHR (and some references in its preamble and articles 22 and 23(3)), article 1 of the International Covenant on Civil and Political Rights (ICCPR) and article 1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). It follows from this principle that all must have the minimum conditions to achieve not only their vital autonomy, but also a quality of life and self-determination. This is also the meaning of article 11, no. 1, of the ICESCR. The CFREU even dedicates its Title I to this principle, with Article 1 stating that human dignity is inviolable.

On this principle in the Portuguese Constitution (Vieira de Andrade, 2004, p. 97) and in the UDHR (Carozza, 2015, pp. 347ff).

On the other hand, if it is true that the ECHR does not contain an explicit reference to the principle of human dignity, the ECtHR has already stated on several occasions that the very essence of the Convention leads back to respect for this principle. Thus, its functions are to justify a broad interpretation of human rights, to strengthen the centrality and importance of the right in question, to limit its possible exceptions and also to serve as a normative reference in the various international treaties and conventions, giving them new content. V. (Carozza, 2015, pp. 351ff). The principle of human dignity is also clearly stated in several Constitutions, e.g. in article 1 of the Portuguese Constitution, article 101 of the Spanish Constitution, and article 3 of the Italian Constitution.

62. As Clotilde Celorico Palma states, "*Without Education there is no Citizenship, and there is no Citizenship or Education without Morals. These are transversal dimensions that take on a particular meaning in the tax area. Underlying these concepts is, inevitably, a "contractual relationship" established between the State and the taxpayer, based on a social contract, on the*

Moreover, the **principle of equality**[63] also applies in the tax context (even if there is no explicit reference to its application to tax law), namely through the principle of the ability to pay (which is also commonly and jointly based on human dignity). The principle of equality derives from the equal social dignity of all human beings. From a formal point of view, the principle of tax equality imposes the *generality* of taxes, i.e., they must be universal (non-discriminatory), leading to equality before the law. From a material perspective[64], the principle of tax equality also imposes a *uniformity* of taxes, i.e., the criterion of identity[65]. On the basis of this criterion, the principle of horizontal tax equality (what is essentially equal must be taxed equally) and the principle of vertical tax equality (what is essentially unequal must be taxed unequally to the extent of this difference)[66]. Any different tax treatment must have a justification that meets *three* requirements: (i) the justification must be objective and not based on prejudice; (ii) the justification must be reasonable; and (iii) it must be proportionate to the objective[67]. If we find a discriminatory tax law, it is obviously illegitimate, unfair and contrary to the rule of

construction of a life in society and on the fundamental duty to pay taxes." (Palma, 2020, p. 2) (free translation from Portuguese).

See also (António, Carmo & Cruz, 2023, p. 35)

63. This principle can be found in several general instruments, such as article 13 of the Portuguese Constitution, article 53 of the Italian Constitution and article 31(1) of the Spanish Constitution, articles 1 and 2 of the UDHR, article 14 of the ECHR, articles 2, 3 and 26 of the ICCPR, Articles 2 (2) , and 3 of the ICESCR. At the level of the European Union, the principle of equality is provided by articles 2 and 3(3) of the TEU and in the articles 8, 153(1)(i), and 157 of the TFEU. The CFREU also devotes a title to the principle of equality (Title III), highlighting the provisions on equality before the law (article 20) and non-discrimination (article 21). See e.g. on the prohibition of discrimination and the principles of tax equity (Jiménez, 2011, pp. 526–528)

64. It should also be considered from a procedural perspective: the right to equality before the courts and tribunals and to a fair trial, which should of course apply to tax proceedings.

65. (Casalta Nabais, 2004, pp. 151-152).

66. On the principles of tax equality, ability to pay and human dignity, see (Carmo, 2020, pp. 48-54).

67. (Peters and Snellaars, 2001, p. 13).

law[68]. Therefore, any serious application of target 16.3. in the context of the tax law cannot disregard the principle of equality in these respects.

5. Target 16.6 - Develop effective, accountable and transparent institutions at all levels

5.1. The Target 16.6. in General

A sustainable development, based on the values of human rights, the rule of law, access to justice and information, transparency, and institutional accountability, should be built along with **effective institutions capable of fulfilling the assigned tasks**, ranging from the provision of basic services to equally essential services such as security and access to justice (including for tax issues) [69]. However, this robust architecture depends first and foremost on the responsible and transparent management of public resources by the executive branches of government, underlining the importance of competitive and sustainable fiscal policies for medium and long-term economic growth.

Nevertheless, the political scenario in recent years has been marked by a widespread **political crisis**, undermining trust in public institutions due to a **lack of transparency and an increase in corruption**[70]. This situation fosters the spread of fake news and speculation, creating uncertainty and instability and contributing to a decline in civic participation. To sum-up, there is a distrust in the institutions, putting into question the **legitimacy of the decision-making process** (the first phase of the relationship between the taxpayers and the State, i.e., the tax legislator, as we saw *supra*). This reality is closely linked to target 16.7 (see below), and the target focus on tool for restoring the power

68. In the same sense, v. (Rendahl & Nordblom, 2020, p. 413).

69. (Portuguese Ministry of Foreign Affairs, 2014, p.12).

70. (Sgueo, & 2019, pp.3-4).

of civil society, allowing it to question governments and corporations on their efforts to achieve the proposed targets.

In the specific context of taxation, **transparency** takes on an even more urgent meaning. The need for responsible and transparent management of public resources, as outlined in Goal 16.6, is fundamental to effectively combating cases of fraud and public financial mismanagement, but also in the formulation of tax policies, in order to **strengthen accountability and promote taxpayer confidence**.

However, the successful implementation of these transparent tax practices also requires a **proactive approach to the protection of taxpayers' fundamental rights as another side of tax transparency**, usually forgotten. In this sense, the creation of a Charter of Taxpayers' Fundamental Rights is essential, as it would serve as a legal instrument to clearly define such rights of taxpayers with a treatment of fairness, justice and transparency. Further, such Charter would also provide a **solid foundation for citizen participation**, consolidating the foundations for truly inclusive and equitable sustainable development.

5.2. The Development of effective, accountable and transparent tax institutions for Taxpayers and their Fundamental rights

As foreshadowed in the previous section, **target 16.6**. should also focus on empowering taxpayers by **balancing tax relations** (at the stages of tax law creation and tax law application, by the tax administration and the judiciary) and **tax systems.** Legal enforceability contributes to **fairness, predictability, accountability and transparency** of tax institutions. As a result, **tax legislation and tax collection** will gain more **legitimacy**[71]. In fact, the binding nature of the fundamental rights of

71. "*The principle of "certainty and simplicity" is constructed is important for both efficiency and legitimacy reasons. When taxpayers have certain rules to follow, less resources are need for the correct raising of tax revenues-, thus, efficiency is enhanced. Moreover, when tax rules are clear and well know, legitimacy is also enhanced since taxpayers understand how much they are supposed to pay and can easily verify that the rules are the same for everyone. If the tax law is fair, but very complicated, people may doubt the fairness. (…) Simplicity therefore enables perceived fairness of a fair tax system.*" - v. (Rendahl & Nordblom, 2020, p. 413).

taxpayers would allow them to react in a comprehensive, transparent, and certain manner and, consequently, the legal enforcement of these rights. It would make states accountable for the taxes they collect, in terms of how they legislate and collect them. In addition, the practical and/or legal enforcement of taxpayers' rights can (and often is) pursued by **a taxpayer advocate or ombudsman**[72].

Consequently, the proper assurance of such rights through the charter (and possibly combined with a taxpayer advocate) would improve fairness, predictability, accountability, and transparency of the tax system, but also **tax compliance**[73]. Still, the focus on tax compliance and fair share cannot be blind: a clear definition of taxpayers' rights and obligations would be one way of ensuring that taxpayers pay their **fair share** (*i.e.*, protecting the tax bases) **with a fair balance** (*i.e.*, protecting taxpayers). As a result, the fairness of the tax system would be improved, which would also increase tax compliance. Finally, a legal clarification of taxpayers' rights and obligations, by increasing the tax transparency on both sides, would improve taxpayers' tax morale and thus mutual trust and, ultimately, tax disputes. On the other hand, the tax legislator and the tax administration must also act in a moral and ethical manner, since the

72. According to the IBFD OTPR, in 58% of the reports, there was a (tax) ombudsman/taxpayers' advocate, but in only 39% of the cases can the ombudsman intervene in an ongoing dispute between the taxpayer and the tax authority (before it goes to court), but in 46% of the cases the tax ombudsman is independent of the tax authority - (IBFD Observatory on the Protection of Taxpayers' Rights, 2022, pp. 208–209).

73. "*Degree to which a taxpayer complies (or fails to comply) with the tax rules of his country, for example by declaring income, filing a return, and paying the tax due in a timely manner*" OECD, 'Glossary of Tax Terms' <https://www.oecd.org/ctp/glossaryoftaxterms.htm#c> [accessed at 11 November 2020 - but no longer available] . See also (Carmo, 2021, pp. 287ff)
Non-compliance can be voluntary (where the taxpayer chooses not to comply) or involuntary (where it is due to ignorance or error). Several studies have shown that there are several factors that the level of taxpayer compliance, with emphasis on gender, age, religion, level of education, level of technical knowledge, level of income, instability, legal and fiscal complexity, perception of fiscal justice and public financial spending,, civic sense and individualism. V. footnote 9 *supra*.

tax morality of the State directly influences the tax morality of the taxpayer, even as a condition of reciprocity[74].

Such a morality implies that taxpayers should be able to respond in a comprehensive, transparent, and certain manner, and consequently, the legal enforcement of these rights[75]. This would make states accountable for the taxes they collect, in terms of how they legislate and collect them. A charter should provide such **moral empowerment for taxpayers, balancing the tax relationship** and reshaping not only that relationship but also the tax systems themselves. Indeed, "*The practical protection of taxpayers' rights requires the enactment of a taxpayers' charter of rights, as well as the forming of institutions whose aim is to conduct practical activities to ensure the enjoyment of the taxpayers' guaranteed rights. Several countries have organized formal structures of taxpayers' advocates or ombudsmen to scrutinize the activities conducted by the tax administration and intervene in appropriate cases. Such entities may be part of the tax administration, but shall remain independent from the normal operations of that authority*"[76]. Therefore, the role of taxpayers' advocates or tax ombudsmen in the binding effect of a Charter will also need to be further developed as an important contribution to the protection of taxpayers' rights.

Only within this broad framework will it be possible to **rebuild a contentious relationship**: through procedural justice and substantive legitimacy of tax law. Likewise, "(…) *taxpayers' rights are not only relevant to protecting the citizen, but also to optimizing the functioning of the tax administration and the tax system in general. Taxpayers' rights are the cornerstone of a good administration, as well as a powerful tool for the efficiency of tax systems, including a higher level of voluntary compliance, a higher degree of certainty in the amounts of taxes assessed and a higher level of taxes collected*"[77].

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74. (Tipke, 2002, pp. 121ff).

75. V. footnote 11 *supra*.

76. (IBFD Observatory on the Protection of Taxpayers' Rights, 2019, p. 189). Also arguing that there are several manners to make a Charter enforceable and a taxpayer Ombudsman could be one of them – (Cadesky, Hayes and Russell, 2016, p. 110).

77. (IBFD Observatory on the Protection of Taxpayers' Rights, 2019, p. 12).

6. Target 16.7 - Ensure responsive, inclusive, participatory and representative decision-making at all levels

6.1. The Target 16.7. in General

Contemporary democratic dynamics require the formulation of robust criteria for political participation that go beyond the act of voting. Indeed, the role of citizens goes beyond the mere choice of leaders: it includes **the fundamental right to actively participate in decisions** that affect their fundamental rights at all levels, in which we should include taxation. Currently, the gap between what citizens experience in their daily lives and how politics and democracy are conducted is one of the main factors contributing to the decline of trust in democratic institutions[78].

In this context, SDG 16 stands out emphasising the importance of **participatory democracy**, promoting dialogue between those elected and the electorate, contributing to civic education, tailoring public policies to citizens' needs and expectations, increasing the transparency of government activities, promoting informed, active, and constructive citizen participation, and developing new practices of community engagement. Consequently, this specific objective also underlines the need to create effective and, above all, more accessible mechanisms for citizens to exercise some control over public administration. It is increasingly argued that part of these mechanisms can indeed involve the use of **digital technologies**, as crucial tools for revitalising participation, promoting more informed decision-making and thus strengthening trust in democracy. An example of this reality is the so-called **participatory budget**, a mechanism for promoting active citizenship[79].

78. (Sgueo & Sgueo, 2019, p.7).

79. Through a system in which the destination of part of public resources is subject to public consultation and, after voting on the priorities, the results are transmitted to the executive, the aim is to contribute to bringing citizens and the executive closer together, making them co-responsible in the governance and decision-making processes, especially

Furthermore, to promote dialogue between citizens and the administration and to increase citizens' confidence in public policies, it is also essential to revitalise **access to information**. This access must be more inclusive and adapted as far as possible to all age groups and different socio-economic contexts. Here too, digitisation and the use of information technologies, as well as the creation of interactive forums, can help[80]. Indeed, as we will see, the relevance of this SDG 16 target is undeniable, even in taxation due to the concept of **representation** ("*no taxation without representation*")[81], which underpins

with regard to the financial resources allocated. The implementation of participatory budgeting may initially be easier at the local level. In the case of Portugal, we can highlight the municipality of Barcelos, where participatory budgeting operates as a tool made available by the Barcelos Municipal Council to its residents to encourage their participation through the exercise of active and responsible citizenship. Recently, in 2023, the participatory budget was endowed with a total of half a million euros, to be distributed among five different themes. Each of the winning projects was awarded a sum of up to 100,000 euros for its implementation. The thematic areas for which projects were submitted included: Environment; Culture; Education; Sport; Solidarity.

80. One example of this is the Economy initiative launched by the European Central Bank (ECB). European citizens who access the website hosting this initiative are presented with the basic concepts of monetary policy. The aim is to spread knowledge about inflation rates and the ECB's supervisory role.

Another example is the Kid's Corner, the web portal where young EU citizens can learn about the historical, social, legal and political aspects of euro integration through a series of educational games.

81. *No taxation without representation* is a political principle that emphasizes the need for democratic representation to justify the imposition of taxes. This emblematic phrase, which dates to the American Revolution, captures the essence of the idea that governments have the right to demand taxes from citizens only if they have significant participation in the political process. In essence, it means that citizens must have a voice and influence in government decisions that affect their lives and financial resources.

However, such notion is not limited to the historical period of the United States' independence; it echoes through time, shaping contemporary debates about tax fairness and the legitimacy of government power. At the heart of this principle is the belief that tax collection must be supported by the will of the people, as expressed through democratically elected representatives. This not only ensures government accountability to citizens, but also promotes a social contract in which citizens agree to contribute financially to a government that adequately represents them.

Therefore, *no taxation without representation* remains a fundamental principle of contemporary political theory, serving as a constant reminder that the power of government to

taxation, putting citizens at the centre of **tax decision-making**. In this regard, it is important to refer to the theory of the **4 R's**, on the functions that allow taxes to be **an important tool in the development of substantive equality**[82]:

- **Resourcing revenue or resource mobilisation** (by providing accessible and quality public services through tax revenue)[83];
- **Redistribution:** by ensuring the fairest possible redistribution of income and wealth - it allows the fight against inequalities and the realisation of human rights, in particular through progressive taxation;
- **Representation:** by strengthening the voice and empowerment of disadvantaged women and men in political and fiscal matters, and by holding those in power accountable. This is a reference to the social contract[84], its construction and to reminding governments of their accountability to citizens, which is essential in a democratic rule of law (since without tax justice and equality, the social contract is broken);

    - Tax can and should ensure that governments establish channels and institutions responsible for the fulfilment of human rights. These include schools, health systems, and legal and regulatory institutions.
    - At the same time, the collection and redistribution of revenue through progressive tax policies and financial transparency laws acts as a check and balance on the political and economic power of some taxpayers.

levy taxes is directly linked to its responsibility to represent and serve the interests of the people. – v. (Andrade, Maçarico & Correia, 2023, p. 145).

82. V. e.g. (Sepúlveda, 2014, p. 3); (Tax Justice Network, 2021); (Silva, Beraldo & Vitorino, 2023, pp. 105-107); (Andrade, Maçarico & Correia, 2023, p. 159).

83. It should be noted, for example, that ICESCR Signatory States have the obligation to mobilize the maximum available resources for the progressive realization of human rights – (Capraro, 2016, p. 19).

84. V. (Andrade, Maçarico & Correia, 2023, pp. 137-148).

- **Re-pricing**: by adjusting the prices of goods and services to create positive and negative incentives and correct market distortions.

While these four functions make taxes an important tool for the development of substantive equality and human rights, this chapter will focus on **representation**, namely on how active citizen participation in the decision-making process and access to tax justice, especially under a charter of fundamental taxpayers' rights. Therefore, the SDG perspective will deal with the first stage of contact between the states and tax authorities: the legislative process.

6.2. The Taxpayers' Rights Charter as a means to ensure responsive, inclusive, participatory and representative decision-making at all tax levels

A binding charter for taxpayer's rights should be a **tool for taxpayer education and citizenship**, since citizens' participation requires **awareness of rights and obligations**. Education is a fundamental human right, recognised, for example, in article 26 of the UDHC, article 2 of the First Additional Protocol to the ECHR and article 14 of the CFREU. However, tax education is often not discussed, although it can and should be a public policy with the main objective of promoting active citizenship where taxpayers are **aware of their rights and obligations**. Additionally, another objective should be to provide **tax knowledge**, which "(…) *includes a range of aspects, from the practicalities of how to file a tax return, through to an understanding of the links between tax and public spending. It also includes knowledge of different tax types, how they are collected, taxpayers' rights, and how to navigate any appeal system*"[85]. Finally, it should also be noted that tax education does not only take place in the context of the educational system: it can (and should) take place in the daily communication and relations

85. (Mascagni, no date)

between citizens and tax administrations, and also in the context of public and private initiatives, through physical and virtual means[86].

Tax citizenship confers **legitimacy to taxation** by consolidating the rights of taxpayers to control public expenditure as a form of government accountability, as well as the knowledge of the obligations and responsibilities of each citizen (in a desirable two-way relationship, not only focused on the basic duty to pay taxes). However, the exercise of such tax citizenship, tax education and citizens' tax awareness are essential conditions for rational decision-making[87]. Since a **charter is also a means of educating taxpayers** and, consequently, tax citizenship, it would give legitimacy to taxation by consolidating the rights of taxpayers to control public expenditure as a form of government accountability, as well as the knowledge of the obligations and responsibilities of each citizen, thus promoting the fulfilment of the fundamental duty to pay taxes. As OECD noted that "*Taxpayer education is a means to building tax culture, compliance and citizenship. It is not only about encouraging people to pay taxes, but also about explaining taxation and its place in society as a whole*"[88].

In short, taxpayers with a good tax education will not only fulfil their obligations but will also participate more actively in the community, pass on their tax knowledge and become agents for the dissemination of tax knowledge[89]. On the other hand, increasing tax education, including on taxpayers' rights, makes tax relations more transparent and thus enables active citizens to demand more fairness, equity, good faith, and accountability from the State. Indeed, a formally attractive, simple, efficient, effective and fair tax system will only be so in

86. See (Lopes, 2011, p. 25); (OECD, 2021, p. 14); (António, Carmo & Cruz, 2023, p. 32).

87. (Santos, 2018, pp. 15–16).

88. (OECD, 2021).

89. (OECD, 2021).

A taxpayer will only fully respect his status as a citizen if he is aware of the obligations arising from this status, but also if his fundamental rights as a taxpayer are fully respected. Indeed, if citizenship is the free exercise of a citizen's civil, political and social rights and duties, then to exercise citizenship it is necessary to be aware of one's rights and duties - (Pereira, 2014, p. 5).

a democratic context if the taxpayer and the tax authority act **within a framework of tax ethics** promoted by tax education as an essential step towards the **humanisation of taxes**.

7. Target 16.10 - Ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements

7.1. The Target 16.10. in General

Target 16.10 of SDG 16 stands out as a crucial element in the pursuit of equality in the **indispensable access to legal information** and, consequently, to justice[90]. In this regard, the United Nations Educational, Scientific and Cultural Organization (UNESCO) itself, as the UN's custodian of SDG indicator 16.10.2, which monitors global progress on the number of countries adopting and implementing legal guarantees of access to information, places great emphasis on the importance of proactive disclosure of government information[91]. This goal is, as

90. Ensuring public access to information is a key element in promoting material equality, based on the principle of equality enshrined in various legal instruments, such as our Constitution of the Portuguese Republic (Article 13), the UDHR (Articles 1 and 2), the ECHR (Article 14), the ICCPR (Articles 2, 3 and 26) and the ICESC (Article 2, paragraphs 2 and 3). Similarly, at European Union level, the principles of equality and non-discrimination on grounds of gender are enshrined in the Treaty on European Union (Articles 2 and 3(3)) and the Treaty on the Functioning of the European Union (Articles 8, 153(1)(i) and 157). The CFEU also devotes a section to the principle of equality (Title III), highlighting provisions on equality before the law (Article 20), non-discrimination (Article 21) and equality between men and women (Article 23).

91. In fact, UNESCO, through its International Programme for the Development of Communication, has been mandated by its Member States to monitor and report on the progress of this indicator worldwide. In this context, UNESCO carries out the annual Survey on Public Access to Information with the aim of collecting data on the adoption of legal guarantees of access to information, as well as the main trends in the implementation of these guarantees. You can find out more about this programme at: A Steady Path Forward - 2022 | 2022 Report on Public Access to Information (SDG 16.10.2) (unesco.org).

described by this Organization, truly *critical* to promoting transparency, **holding institutions accountable and empowering people**[92].

Indeed, the basis of all these provisions is the **equal social dignity of all individuals**, since it is a corollary of the equal human dignity that derives from the idea of a democratic constitutional state. Indeed, the principle of equality imposes the need to provide minimum conditions for vital autonomy, quality of life and self-determination. The provision of accessible legal information is essential to ensure that all individuals, regardless of their socio-economic status, can enjoy and assert their rights, particularly in relation to public administration. However, as we have seen, people living in poverty are often deprived of relevant information about their rights, laws, and legal services. To overcome these obstacles, it is essential to integrate accessible mechanisms into justice and other public services, such as social programmes, and to ensure communication channels that overcome problems of low literacy, limited access to technology and transportation costs. In short, ***knowledge is power.***

In the context of taxation, **simplification and understanding of legislation** are essential to ensure that all taxpayers are aware of their rights. Proactive training of taxpayers by the tax administration (or other entities) to promote tax and financial literacy is a pressing need. Lack of knowledge is a widespread and significant problem, even among the more educated generations. Few taxpayers fully understand their rights, especially when their main contact with the tax administration is to fulfil tax obligations. Thus, SDG 16.10 plays a fundamental role in advocating the need for states to pay more attention

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Furthermore, for 2022, the report prepared by UNESCO summarises the main conclusions of the data from 123 countries and territories on SDG 16.10.2 and is entitled A Steady Path Forward: UNESCO 2022 Report on Public Access to Information (SDG 16.10.2), which is available at: A steady path forward: UNESCO 2022 report on public access to information (SDG 16.10.2) - UNESCO Digital Library.

92. Moreover, from the perspective of the implementation of the 2030 Agenda itself, this objective is highly relevant for evaluating the performance of public officials in implementing and monitoring the SDGs, as well as for facilitating effective public participation in this collective project.

and make efforts to ensure public access to legal information, thereby strengthening legal empowerment and promoting a fairer society. A Charter would be crucial in informing and protecting taxpayers' rights, contributing to building trust and promoting more informed and active participation in society.

7.2. The Charter as a means to ensure public access to information and protect Taxpayers' Fundamental rights

Taking into account the fact that the charter has an **informative** role to the **protection of taxpayers (by setting limits for the tax legislator and tax authorities)**, it is a step towards **target 16.10**. In fact, as explained above, a charter of taxpayers' rights can help the average taxpayer to be aware of his tax rights and obligations. Additionally, the Charter should protect the rights and freedoms of taxpayers by **setting limits** to the scope of legislative adaptation and enforcement of tax law in order to guarantee the dignity of taxpayers and their respective fundamental rights. And, as mentioned above, a Charter of Taxpayers' Rights can help to raise awareness of these rights[93]. As the OECD points out[94], the greater the complexity and subjectivity, the lower the perception of trust in information and transparency, and the lower the willingness to cooperate when information is not easily available. Considering that a charter of taxpayers' rights should pursue **several objectives, including raising awareness**, it should be a paradigm of **codification and specification in an accessible, systematic and understandable way, given the** increasing complexity of the tax system[95]. Thus, the charter should provide a simple manner for a taxpayer to understand his/her main rights and obligations.

93. On how the US Taxpayer Bill of Rights aims to raise awareness - (Abreu e Greenstein, 2017, pp. 17ff).

94. (OECD,2022).

95. "*Tax administration is notorious for its complexity and, often, its lack of accountability*" - (Bentley, 2007, p. 103).

Indeed, when the tax authorities seek to raise **awareness of taxpayers' rights**, this behaviour of transparency and good faith increases **trust in the State**. In this way, the degree of effective cooperation makes it possible to foresee the symbiosis between taxpayers' rights and the respective degree of tax compliance[96]. Therefore, a context that truly promotes voluntary compliance must undeniably take into account **the perspective of guarantees**, i.e. the rights and freedoms of taxpayers, because only in this way will we have a **fair tax system**. Like any specific charter of human rights, such a specification should lead to a content that makes it possible to **delimit the margin of legislative adaptation and enforcement of tax** law in order to guarantee the dignity of taxpayers and their respective fundamental rights.

8. Conclusions

This paper explored how a binding taxpayers' rights charter can promote **sustainable development by ensuring tax justice and strong institutions**. First, the concept of a binding taxpayers' rights charter was addressed (a **specific and enforceable legal instrument for the protection of taxpayers**) was presented as a possible solution to address the **impairment of tax justice** resulting from the fact that taxpayers often have no effective legal protection of their rights. Thus, this research explored the potential positive impact of a binding taxpayers' rights charter on the promotion of sustainable development through the lens of tax justice and institutional strengthening, by clarifying how such a charter is relevant to the SDG, in particular SDG 16, namely improving an inclusive societies and access to tax justice.

We then noted that the pursuit of such SDG (namely the promotion of inclusive societies that provide access to justice for all, with effective, accountable and inclusive institutions) should include tax justice. In addition, a binding Charter of taxpayers' rights could

96. V. (Carmo, 2021, p. 291).

promote **more effective and fair tax policies and systems**. Indeed, a focused analysis of the applicable targets under Goal 16, shows that a binding taxpayers' rights charter can act as a catalyst for improving the **fairness, transparency and accountability of tax systems**. By protecting taxpayers' fundamental rights, ensuring **equal access to tax justice and promoting taxpayer empowermen**t, such a Charter can make a significant contribution to achieving the SDGs.

Getting closer to SDG16's targets, namely target 16.3, it was noted that the **rule of law** requires the protection of taxpayers' fundamental rights, including their **legal certainty and clarification**. Additionally, it is essential that all taxpayers have **equal access** to tax justice and the charter can provide such access, by empowering taxpayers. Furthermore, target 16.6. should also be considered, as such empowerment will **balance tax relations and tax systems**. Enforceability contributes to the fairness, predictability, accountability and transparency of tax institutions, thereby enhancing tax legitimacy.

Furthermore, a Charter is a tool for **taxpayer education** and civic engagement, as civil participation requires **awareness of rights and responsibilities**, thus contributing to the achievement of target 16.7, by promoting informed and participatory societies. As a consequence, a Charter promotes active citizenship and contributes to the overall goal of building accountable and inclusive tax institutions. Finally, a charter is also a step towards target 16.10 through its informative role, but also through the protection of taxpayers, as it would **set limits for tax legislators and tax authorities**. Ultimately, the adoption of a binding taxpayers' rights charter is a crucial step towards achieving the objectives of SDG16, particularly in terms of increasing **legal certainty**, rebalancing tax relations and limiting the powers of tax authorities. By promoting fairness, predictability and legitimacy in tax systems, a charter would be an important tool for advancing both the tax justice and sustainable development agendas at the global level.

References

Abreu, A., & Greenstein, R. (2017). Embracing the TBOR. *Tax Notes*, *157*(Winter), 9ff.

Andrade, Alice Ferraz, Maçarico, Iara & Correia, Catarina Gomes, *Chapter 4 - The Role Of Taxation For The Social Contract & Public Governance Of Tax Revenue And The Search For A Sustainable Social State*, Nova Tax Research Series, 1st Editions, 2023, Bubok, pp. 137-162.

Antón, R. G. (2018). The Fragmentation of Taxpayers' Rights in International Dispute Resolution Settings: Healing Anxieties through Judicial Dialogue. *World Tax Journal*, *10*(1), 131–162.

António, João Comenda, Carmo, Marta & Cruz, Rafaela, *Chapter 1 - - Tax & Citizenship: Tax Education Project*, Nova Tax Research Series, 1st Editions, 2023, Bubok, pp. 25-64.

Arajärvi, Noora, The Rule of Law in the 2030 Agenda, *KFG Working Paper Series*, No. 9, June 2017. https://d-nb.info/1217812687/34

Baker, P., & Pistone, P. (2015). The practical protection of taxpayers' fundamental rights - General Report. In *Cahiers de Droit Fiscal International* (Vol. 100b, Issue 2). https://www.ifa.nl/media/2139/ifa-cahier-2015-vol100b.pdf

Bentley, D. (2007). *Taxpayers Rights: Theory, Origin and Implementation*. Kluwer Law International.

Bispo Farias, R. (2015). O Dever Fundamental de Pagar Tributos e a Teoria do Limite dos Limites aos Direitos Fundamentais. In M. A. P. Valadão, L. A. Meira, & A. de Moura Borges (Eds.), *Direito Tributário Constitucional: temas atuais relevantes* (pp. 329–346). Almedina Brasil.

Brown, Kimberly, J.D., The Transformative Power of Sustainable Development Goal 16: The Rule of Law, Controlling for Nuance, and Unlocking Potential, 2019 M.A. - International Development and Policy Independent Research Supervised by Prof. Tom Ginsbu, University Of Chicago's Harris School Of Public Policy, May 2019.

Cadesky, M., Hayes, I., & Russell, D. (2016). *Towards Greater Fairness in Taxation: A Model Taxpayer Charter*. IBFD.

Capraro, C., & Rhodes, F. (2016). *Why the Panama Papers are a feminist issue | openDemocracy*. Open Democracy. https://www.opendemocracy.net/en/5050/why-panama-papers-are-feminist-issue/

Carmo, M. (2020). Justiça Tributária e Direitos Humanos: As questões de igualdade de género. In F. Pereira Coutinho, E. de Oliveira, & M. J. Carapêto (Eds.), *Livro de Atas da Conferência Igualdade de Género e Mobilidade: Desafios e Oportunidades na Lusofonia* (pp. 47–78). Universidade Nova de Lisboa, Faculdade de Direito, CEDIS.

Carmo, M. (2021). Direitos dos Contribuintes e Compliance Fiscal. In F. de L. da C. Pinto, I. L. Benito, & F. P. Coutinho (Eds.), *Compliance y lucha contra la corrupción en España, Portugal e Iberoamérica* (pp. 287–302). Dykinson.

Carozza, P. G. (2015). Human Dignity. In D. Shelton & D. Harris (Eds.), *The Oxford Handbook of International Human Rights Law*. Oxford University Press, Inc.

Casalta Nabais, J. (2004). *O Dever Fundamental de Pagar Impostos - Contributo para a compreensão constitucional do estado fiscal contemporâneo* (4.ª reimpr). Almedina Editora.

Christians, A. (2017). *Human Rights at the Borders of Tax Sovereignty*. https://doi.org/http://dx.doi.org/10.2139/ssrn.2924925

European Commission. (2016). *Guidelines for a Model for A European Taxpayers' Code*. https://ec.europa.eu/taxation_customs/sites/taxation/files/guidelines_for_a_model_for_a_european_taxpayers_code_en.pdf

Fredman, Sandra, FBA QC (hon), Working Together, Human Rights, the Sustainable Development Goals and Gender Equality, *in The British Academy*, November 2018,

IBFD Observatory on the Protection of Taxpayers' Rights. (2019). *2018 General Report on the Protection of Taxpayers' Rights*. https://www.ibfd.org/sites/ibfd.org/files/content/pdf/2018 OPTR General Report %28Final%29 %28002%29.pdf

IBFD Observatory on the Protection of Taxpayers' Rights. (2022). *The IBFD Yearbook on Taxpayers' Rights 2021*. https://www.ibfd.org/sites/default/files/2023-02/2021-optr-yearbook-final-version.pdf

Iwuoha, Jude/ Iwuoha, Adaeze, Covid-19: Challenge to SDG And Globalization, *Electronic Research Journal Of Social Sciences And Humanities*, Vol 2: Issue III, 2020. https://www.researchgate.net/publication/343306086_Covid-19_Challenge_to_SDG_and_Globalization

Jayawardane, D. (2015). Psychological Factors affect Tax Compliance - A Review paper. *International Journal of Arts and Commerce*, *4*(6), 131–141.

https://ijac.org.uk/images/frontImages/gallery/Vol._4_No._6/15._131-141.pdf
Kant, I. (2017). *A Metafísica dos Costumes* (3rd ed.). Fundação Calouste Gulbenkian. https://gulbenkian.pt/publications/a-metafisica-dos-costumes/
Kokott, J., & Pistone, P. (2022). Taxpayers in International Law. In *Taxpayers in International Law*. Hart Publishing. https://doi.org/10.5040/9781509954032
Kokott, J., Pistone, P., & Miller, R. (2020). *Public International Law and Tax Law: Taxpayers' Rights - The International Law Association's Project on International Tax Law - Study Group International Tax Law Final Report Kyoto 2020*. https://www.ila-hq.org/en_GB/documents/study-group-international-tax-law-final-report-kyoto-2020
Lisi, G. (2013). Tax morale, tax compliance and the optimal tax policy. In *Discussion Papers in Economic Behaviour* (Vol. 0313). https://ideas.repec.org/p/dbe/wpaper/0313.html
Lopes, A. F. (2011). *Atitudes e comportamentos dos contribuintes em relação ao sistema fiscal português: aplicação prática em Imposto sobre o Rendimento das pessoas Singulares em Portugal*. https://estudogeral.sib.uc.pt/handle/10316/24144
Lopes, C. M. da M., & Santos, A. C. (2013). O cumprimento fiscal em Portugal: factores associados a erros e atrasos na entrega das declarações fiscais das pessoas singulares. *RIDB – Revista Do Instituto de Direito Brasileiro*, *2*(12), 13 825---13 853.
LOPES, Cidália M. Mota, Simplicidade e complexidade do sistema fiscal: algumas reflexões, In: Fiscalidade. - Lisboa. - ISSN 0874-7326. - Nº 13-14 (Janeiro-Abril 2003).
Mascagni, G. (n.d.). *Taxpayer education: Why it matters and how research can help*. International Centre for Tax and Development (ICTD). Retrieved February 1, 2023, from https://www.ictd.ac/blog/taxpayer-education-research/
Novais, J. R. (2006). *Direitos Fundamentais: Trunfos contra a Maioria*. Coimbra Editora.
OECD (2022), Tax Morale II: Building Trust between Tax Administrations and Large Businesses, OECD Publishing, Paris, https://doi.org/10.1787/7587f25c-en .

OECD Committee of Fiscal Affairs Forum on Tax Administration. (2003). Taxpayers' Rights and Obligations – Practice Note. In *Tax guidance series*. OECD Publisher. https://www.oecd.org/tax/administration/Taxpayers'_Rights_and_Obligations-Practice_Note.pdf

OECD, Better Policies for 2030: An OECD Action Plan on the Sustainable Development Goals, Meeting of the OECD Council at Ministerial Level, Paris, June, 2016. https://www.oecd.org/dac/Better%20Policies%20for%202030.pdf

Palma, C. C. (2020). Cidadania, Educação, Moral Tributária e Coesão Económica e Social em tempos de COVID-19. *Revista Electrónica de Fiscalidade Da AFP - Associação Fiscal Portuguesa*, *II*(2). https://www.afp.pt/revista/edicoes/708-revista-electronica-de-fiscalidade-da-afp-ano-ii-n-2-2020?start=2

Palma, R. C. (2010). An Overview of the Protection of Taxpayer Rights in Portugal. *European Taxation*, *January*, 3–12.

Pereira, A. I. T. D. (2014). *Literacia fiscal : um estudo empírico*. https://ria.ua.pt/bitstream/10773/14293/1/Tese.pdf

Peters, C., & Snellaars, M. (2001). Non-discrimination and tax law: structure and comparison of the various non-discrimination clauses. *EC Tax Review*, *1*, 13–18.

Pirlot, Alice, " Chapter 4: A Legal Analysis of the Mutual Interactions between the UN Sustainable Development Goals (SDGs) and Taxation" in *Tax Sustainability in an EU and International Context*, Ed. Cécile Brokelind, & Servaas van Thiel, June 2020, ISBN 9789087226206, IBFD Amsterdam, pp. 87-114.

Portuguese Ministry of Foreign Affairs, Portugal's Position Paper on the Post-2015 Agenda, 2014, Camões, Instituto da Cooperação e da Língua. https://www.instituto-camoes.pt/images/agendaPos2015/DocPosicao_POS2015.pdf

Raman, Kumar/Pritam, Roy, War and peace: Is our world serious about achieving Sustainable Development Goals by 2030?, *Journal of Family Medicine and Primary Care*, Volume 7: Issue 6, November-December 2018, Published by Wolters Kluwer - Medknow. https://www.researchgate.net/publication/329370899_War_and_peace_Is_our_world_serious_about_achieving_Sustainable_Development_Goals_by_2030 .

Rawls, J. (2013). *Uma Teoria da Justiça* (C. P. Correia, Trans.; 3.ª Edição). Presença.

Rendahl, Pernilla & Nordblom, Katarina, "Chapter 17: Identifying Challenges for Sustainable Tax Policy" in *Tax Sustainability in an EU and International Context*, Ed. Cécile Brokelind, & Servaas van Thiel, June 2020, ISBN 9789087226206, IBFD Amsterdam, pp. 393-418.

Richardson, G. A. (2007). The Relationship between Culture and Tax Evasion: A Cross-Country Study. In *SSRN Electronic Journal*. Elsevier BV. https://doi.org/10.2139/ssrn.1008712

Saad, N. (2014). Tax Knowledge, Tax Complexity and Tax Compliance: Taxpayers' View. *Procedia - Social and Behavioral Sciences*, *109*, 1069–1075. https://doi.org/10.1016/j.sbspro.2013.12.590

Santos, A. C. dos. (2018). *Cidadania e fiscalidade : que relação?* https://antoniocarlosdossantos.files.wordpress.com/2018/10/cidadania-luanda-12-10-vf.pdf

Sen, Supatra, Associate Professor, Asutosh College, *Achieving SDG 16: Major Step to Sustainability*, SDG 16 & Sustainability, Harvest (Online); Bi-Annual, Volume 7 (1); 2022.

Sepúlveda Carmona, M. (2014). *Report of the Special Rapporteur on extreme poverty and human rights, A/HRC/26/28, 22/05/2014*. https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/033/74/PDF/G1403374.pdf?OpenElement

Sepúlveda Carmona, Magdalena, Improving Access to Justice for People Living in Poverty: Recommendations and Innovative Approaches (November 26, 2012). https://ssrn.com/abstract=2533877 or http://dx.doi.org/10.2139/ssrn.2533877

Sgueo, Gianluca and Sgueo, Gianluca, Transparency in the EU Institutions - An Overview, May 24, 2019. https://ssrn.com/abstract=3393460 or http://dx.doi.org/10.2139/ssrn.3393460

Silva, Lara, Beraldo Mariana Passos & Vitorino, Sara, *Chapter 3 - The Importance Of Paying The Fair Share For The Fulfilment Of Economic, Social, And Cultural Rights And To Achieve The Sustainable Development Goals*, Nova Tax Research Series, 1st Editions, 2023, Bubok, pp. 99-136.

Tax Justice Network, *Tax Justice & Human Rights: The 4 Rs and the realisation of rights*, 2021, available at https://taxjustice.net/wp-content/uploads/2021/12/Tax-Justice-Human-Rights-Report_July_2021.pdf

Thiel, S. van. (2011). Is there a Need for International Enforcement of Human Rights in the Tax Area? In G. Kofler, M. P. Maduro, & P. Pistone

(Eds.), *Human Rights and Taxation in Europe and the World* (pp. 153–184). IBFD.

Tipke, K. (2002). *Moral tributaria del Estado y de los contribuyentes (Besteuerungsmoral und Steuermoral)*. Marcial Pons, Ediciones Jurídicas y Sociales.

United Nation's Secretary-General Report *The rule of law and transitional justice in conflict and post-conflict societies* (S/2004/616), New York, 2004, available at https://digitallibrary.un.org/record/527647.

United Nations, Getting Started with the Sustainable Development Goals, A Guide for Stakeholders, December 2015. https://sustainabledevelopment.un.org/content/documents/2217Getting%20started.pdf

Vieira de Andrade, J. C. (2004). *Os direitos fundamentais na Constituição Portuguesa de 1976* (3.ª Edição). Almedina Editora.

Vogel, K. (1988). The Justification for Taxation: A Forgotten Question. *American Journal of Jurisprudence*, *33*(1), 19–60.

Wallat, Katherine S., Reconceptualizing Access to Justice, Marquette Law Review, Volume 103, Issue 2, Winter 2019. https://scholarship.law.marquette.edu/mulr/vol103/iss2/10/.

Deduction of sustainable expenses: The Peruvian case

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Abstract: According to the Peruvian Income Tax Law, for an expense to be deducted to determine the net taxable income, it must comply with the causality principle. This principle establishes that an expense is acceptable for tax purposes if it relates to creating or maintaining an income source. Considering this condition, it is necessary to establish that sustainable expenses, understood as the ones that provide the possibility to develop an economic activity considering the protection of the environment as well, can be considered deductible if some conditions are fulfilled according to a new regulation. Therefore, it is important to analyse the feasibility of a law change that could signify the inclusion in the Peruvian Income Tax Law of such deductible expenses as a tax incentive for the companies that incur on the previously mentioned disbursements. The legislation, doctrine, and jurisprudence have been considered for the current analysis. This has allowed us to conclude that a sustainable expense could be deducted to determine the net taxable income according to the PITL to create environmental consciousness.

Keywords: Sustainable; Expenses; Income Tax; Taxpayer.

1. Introduction

The Peruvian Income Tax Law - PITL regulates several expenses considered deductible to determine the net taxable income. Even though Article 37 of this regulation establishes the individual treatment that applies to several expenses, there is a general rule to be observed, according to which even those expenses that do not have an individual treatment regulated by the PITL can be accepted. This is the causality principle - CP that establishes that any expense is accepted as long as the company that incurs it does it intending to create an income source or to sustain this source.

Peru is a country that has been severely affected by several environmental disasters. Most of the time, the reason is the negligence by which the companies develop their activities. Therefore, it is important to analyse if a tax incentive could be created to promote environmental protection measures, considering that their implementation would derive a general benefit.

Another way to apply taxation to reduce contamination is by using a tax because of the environmental damage produced by a specific entity that would be considered a taxpayer.

Each of these perspectives has been considered in this article to establish whether they are feasible.

For this investigation the systemic methodology has been applied in order to analyse if a disbursement related to the environment protection can be considered as deductible according to the Peruvian Tax System. The objective of this article is to the determine if an expense related to mitigate the effects of an economic activity on the environment and the payment of an environmental tax can be deducted according to the Peruvian Tax legislation.

2. The Tax Deductions

The CP is the main criterion to be observed by any taxpayer that analyses whether a disbursement can be considered a deductible expense. This principle implies that a disbursement is deductible if it is related to the maintenance of the income source or the creation of the income source. The CP is regulated by Article 37 of the PITL as a rule applicable to every disbursement subject to a taxable analysis. The first question to be considered to determine whether an expense is considered deductible is if it complies with CP.

On this subject, the Peruvian Supreme Court - PSC has established that to identify an expense as deductible to determine the net taxable income, the following criteria must be observed: i) the expenses must take place with the objective of obtaining taxable income (subjective cause); and ii) the expenses must be objectively related to the business activities (objective cause). Therefore, not every disbursement can be deducted, but only those whose relation with the business activities and their objective is to generate income have been proven (SUPREME COURT SENTENCE, 2021).

Nevertheless, besides the CP, several special rules apply to expenses with certain limitations, such as donations, employee payments, or financial expenses.

It is essential to considerer that even if an expense is not included among the special rules contained in the article, if the disbursement fulfils the CP, it will be deductible to determine the net taxable income.

On this subject, the Peruvian Tax Court – PTC has established that to determine the net taxable income, there will be deducted such expenses related to the generation of income and to the conservation of its source, as well as those related to the obtention of capital gains, as long as there is no legal prohibition on the matter (PERUVIAN TAX COURT RESOLUTION, 2023).

The Tax Administration – TA has issued a report analysing the nature of the CP and the elements that need to be present on each

expense for them to be considered deductible without any risk of a future challenge. This entity mentioned that the CP is consigned to Article 37 of the PITL, according to which every expense made to obtain taxable income or maintain its source is deductible if no legal prohibition or limit applies. The TA also indicates that besides the CP, for the expense to be deducted, it must fulfil the normality, proportionality, and reasonability principles (ADMINISTRATION, 2023).

These principles can be described as follows:

- Normality Principle: The expense must correspond to a regular disbursement regarding a specific business. For an expense to be deducted, it must be expected for the line of business, which includes those directly or indirectly related to the obtention of gains for the company. For example, a new restaurant will have to invest in marketing to earn a position in the market and gain recognition from potential customers.
- Proportionality Principle: The expense amount must be related to the income expected to be obtained with such disbursement. On this matter, it is necessary to point out that there are some situations in which, even if there is a disbursement, it will not produce gains for the company that incurs on them. This could happen for several reasons, nevertheless, the main issue to be considered is that just because a certain disbursement did not have an immediate and direct effect on the generation of economic gains, that does not mean that the expense cannot be deducted. The reason for this is the potential causality, according to which an expense must be accepted to determine the net taxable income, even when it does not generate gain, as long as the reason for such expense is to create income to maintain its source.

  As an example of the proportionality principle, we have the payment of dividends among the employees of a company, which must consider the amount to be paid does not exceed the proportion

between the full payment made by such concept and the number of employees to receive the benefit.

- Reasonability Principle: To comply with this principle, an expense must be related to the income source or its creation. As an example, we can consider that companies in the construction business invest in acquiring special insurance for their employees, which is reasonable if we assume that the nature of their activities implies exposure to more accidents than those workers who provide their services in an office.

We must be clear on the fact that the verification of the presence of the previously mentioned elements does not mean that the TA will not challenge the nature of the disbursement. Still, instead, it means that the taxpayer has a good chance of obtaining a favourable result when the controversy is analysed by the PTC or even at a judicial court.

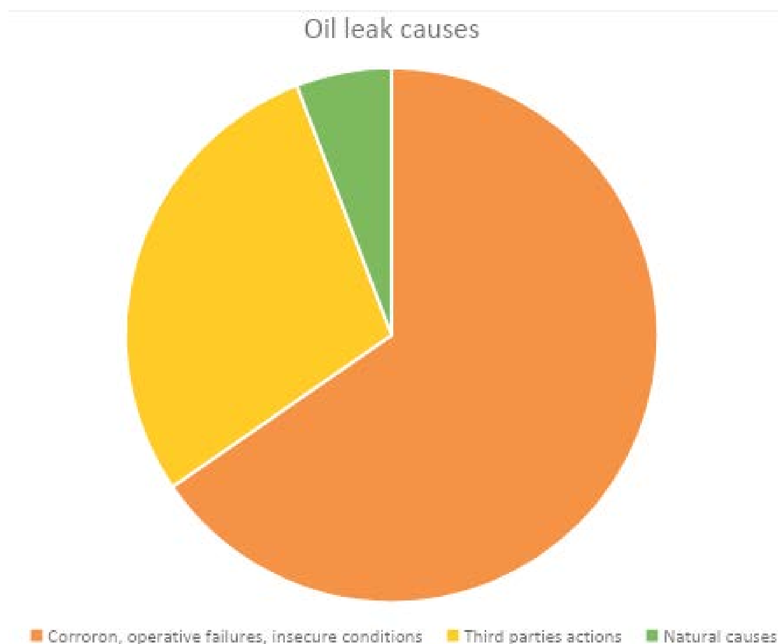
Another requirement of the expenses, which may sound redundant, is that the expense must correspond to an actual transaction. On the subject, the PTC has established that the responsibility of proving that a particular operation has taken place falls on the taxpayer who has considered an expense as deductible to determine the net taxable income (TAX COURT RESOLUTION, 2023).

Regarding the environmental protection and mitigation expenses, the PTC has issued the resolution 01333-11-2021, which analysed if an expense to remediate the contamination produced by a company could be deducted to determine the net taxable income. On such pronouncement, the PTC maintained the argument through which the TA concluded that the disbursements under this concept could not be deducted. Nevertheless, it is important to consider that the reason for which the observation is sustained is that according to the TA and the PTC the expenses had not been proved to have taken place during the legal process (PERUVIAN TAX COURT RESOLUTION, 2021). This pronouncement can be interpreted to consider that an expense related to the remediation of an act of contamination can be deducted if it is proved that the disbursement had such an objective.

3. The Sustainable Expenses

The IQAir report has established that Peru is number 38th on the list of countries with the worst air quality in the world (IQAir, 2023). But this is not the only indicator that should concern the Peruvian population. Suppose we only want to consider the tax law sources to identify the damage produced on the environment. In that case, we can refer to several resolutions issued by the PTC where it is evidenced that there have been several leaks of contaminating substances on the rivers of the Peruvian jungle such as the resolutions 03316-1-2015, 16591-1-2015 and 04335-9-2014, among others.

According to the Peruvian Society of Environmental Law, during the period from the year 2000 until 2019, the main reason for the oil leak in the Amazon region has been the negligence of several companies regarding the transportation of such products. This is better explained on the following chart:



(LAW, 2022)

From the previously mentioned data, it is possible to confirm that Peru is a country that has a significantly damaged environment. Therefore, the economic agents must work taking into consideration that their activities have severe consequences regarding the environment, which also has an impact on the quality of life that the citizen may aspire to have or even the possibility of having an everyday life without negative repercussions caused by the contaminated environment where they live.

Following this idea, it becomes imperative to have a tax regulation that establishes benefits for the taxpayer that include procedures in their activities that mitigate or nullify the negative environmental repercussions that such activities generate. The existence of these legal benefits can modify the taxpayers' conduct since they will mean that the tax debt will be considerably reduced because of the environmental responsibility applied to their operations.

Nevertheless, I do not wish to sound naïve and point out that the sole damage to the environment could modify the procedures of an entity that works with products that can severely contaminate the environment. It is necessary to provide the taxpayers with an incentive to reach acceptable levels of contamination since it cannot be discussed that every human activity will impact the environment. The incentive can be constituted by the possibility of increasing the tax credit for money invested in environmental protection measures. These incentives could imply that a taxpayer who has invested in developing certain measures to protect the environment will have an increase on the credit up to 50% of the amount invested. For example, if a company invests a million dollars, it could consider one and a half million dollars as a deductible expense.

A change in the tax regulation to benefit the investment and development of a certain activity is not new in the Peruvian tax system. There is an incentive for investment in scientific investigation, technology development, and technological innovation. Having this in our tax regulation could serve as an example for the tax legislator to establish tax incentives on the entities that decide to invest in

environmental protection measures as long as the company applies them.

All of this is sustained by the fact that the development and consequent use of environmental protection measures will benefit the community as a whole and not only the entity that carries out the investment. Some examples of an environment protection investment that could lead a company to the obtention of the benefit are:

- Renewable energy investments. This refers to the investment in more ecologically efficient means to obtain energy to keep their activities.
- Recycling allows companies to be more efficient in the use of their assets by a company.

In both examples, the company that wants to implement them must carry out an important disbursement to include any of those measures. After the competent administrative entity has revised those measures, the company could apply such disbursement as a tax credit to reduce their tax obligation, with a corresponding incentive increasing the amount of the credit by the percentage established in the applicable regulation.

Another example is green transportation, which reduces the use of fossil fuels by changing the means of transportation to hybrid or electric vehicles, reducing the contaminating effect of a specific activity. It would be an essential change if companies dedicated to the land transportation of persons or merchandise changed their vehicles or acquired new ones so they do not use fossil fuels but another power source that does not affect the environment as much.

Using this example allows me to analyse which tax treatment could apply to the fixed assets used to produce taxable income but are also developed to function without harming the environment. If a company starts using assets as such, a new tax regulation could allow it to increase the percentage of each asset's value to be deducted each year by depreciation.

On this matter, it is crucial to understand that the depreciation of fixed assets is the means the tax legislator has established for the companies to recover the investment made on acquiring fixed assets. This treatment does not apply to intangible assets since they do not qualify as fixed assets.

The PITL Regulation establishes the different rates that could be applicable for the depreciation of assets each year. Considering that a company may acquire new assets that fulfil the environmental regulations, applying a different and more beneficial depreciation rate would be possible. This would allow such entities to recover their fixed asset investments sooner than those that decide not to make such investments.

This new rate would apply when those assets are used and functioning to produce taxable income. This rule applies currently in the Peruvian tax system, and it would be necessary to keep it for future changes regarding the tax depreciation of assets.

Suppose an asset is changed for its functioning system to be environmentally acceptable. In that case, the new depreciation rate should apply since the change has occurred, and the asset is used to produce taxable income. Both requirements must be fulfilled for the benefit to apply.

It is important to consider that the CP is also present on these sorts of expenses since the depreciation could not be used as a tax shield by the companies if the assets have not been used to produce taxable income. The depreciation does not apply if the asset is not used to produce taxable income.

Some taxpayers may question what happens if there are moments of the year when the asset is not being used to produce taxable income? Would that mean that no depreciation can be applied for the period when the asset was not used to produce taxable income?

The answer is that depreciation applies throughout the year, even if the asset is not used entirely during this period. This is as long as the asset is not used to obtain non-taxable income. Let me explain: if the company uses an asset to the obtention of income that will not

be considered to determine the net taxable income of the year, the period on which this situation occurred is not to be taken under consideration to establish the depreciation of such asset for that year. But suppose the asset is not used and it remains in the warehouse of the company because of different reasons, such as a legal prohibition that forbids a certain activity. In that case, the depreciation can still be applied for the whole year. For example, suppose the government forbids fishing during some months of the year. In that case, the company that keeps their ships at shore is not stopping their activity of their own will but as a consequence of a legal prohibition. They would continue with their activity if this prohibition were not in force. Therefore, the depreciation will apply for the whole year since the reason for not using their assets to produce taxable income does not come from their decision to carry out another activity that produces non-taxable income. Still, it is a consequence of the fact that a legal mandate keeps them from using those assets.

4. Environmental Tax

The international doctrine considers that tax justice does not exclusively identify with the economic capacity principle. The environmental tax is considered to be the expression of the duty to contribute and the environmental obligation that falls on the taxpayers. (BORRERO MORO, 2009)

Under this understanding, the taxes applied after a taxpayer have the nature of sanction since they do not respond to a manifestation tax capacity (economic capacity).

To understand the importance of considering an environmental tax as a sanction from any regular tax that obeys the tax capacity principle of the passive subject, we must define what such principle means. According to the Peruvian Constitutional Court[1] - PCC, the aforemen-

1. (Sentence 04014-2005-PA/TC, 2005)

tioned principle qualifies as an aptitude to be levied with a tax burden that has to be sustained in certain manifestations of wealth.

Regarding such capacity, the international doctrine considers it an aptitude to pay taxes, which means that the subject has enough assets to cover the tax debt. It has also been established that there is a difference between the tax and economic capacity since the latter refers only to the possibility of earning enough resources to have a worthy life. (SPISSO, 2011)

I consider the tax capacity principle to be the most important principle, from an economic perspective, to be considered for a new tax to be implemented in our system. This is even after considering that our constitution has not considered such a principle. Still, the jurisprudence and doctrine identify it as a constitutional tax principle that derives from the equality principle included in the Constitution. Let me explain. The tax capacity principle establishes a requirement for any tax to be constitutional for it to only tax events that represent a manifestation of wealth, either by identifying earnings or expenses, as well as by the property. Therefore, no tax can be levied on the subject if none of these situations is identified since no tax capacity has been configured.

Suppose there is a new regulation that establishes a tax burden without considering the configuration of the tax capacity principle as an unavoidable element of constitutional taxation. In that case, it may be challenged by the taxpayer arguing that its application does not obey our constitutional regulation.

After saying this, we go back to discussing the nature of an environmental tax. If the tax is created as a consequence of contaminating the environment by a specific taxpayer, it would mean that its objective is not to collect economic resources from the passive subjects of the tax relation but as a sanction, since it is designed to penalize the taxpayer for the damaged caused on the environment.

If this is the case, I believe no tax capacity can exist for applying the environmental tax. This is because no external sign of wealth can be levied with the corresponding tax. The act of contaminating or

damaging the environment is not a manifestation of wealth because the sole act does not imply the existence of earnings, even if that may be a subsidiary effect on a company that does not comply with environmental protection laws. To contaminate also does not mean that an act of consumption or expense could be considered a manifestation of tax capacity. Finally, the damage to the environment cannot be considered to constitute or configure the existence of property, which is also a means to externalize the existence of tax capacity.

As I have expressed previously, environmental tax searches to penalize an entity for the damage it has caused to the environment through the contamination produced either with or without this intention. This premise allows me to affirm that the nature of the payment is not a tax but a penalty, an administrative penalty for that purpose.

To name such a payment as an environmental tax does not mean that its nature changes, but only the name can be applied to a sanction.

Following this idea, I would like to analyse how this would work under the Peruvian tax system. If an environmental tax is created and a law is issued by Congress considering the regulation of such tax burden, I would suppose it would be unconstitutional since it would not comply with the tax capacity principle.

On the other hand, if we put the constitutional analysis aside, this environmental tax could be an abnormal sanction. And what does this mean?

The abnormal sanction is configured when the tax legislator creates or includes a new regulation with the sole objective of penalizing specific actions from the subject. Still, the text of such regulation is not the one of an infraction that the legal system penalizes. This sort of sanction exists when a penalty applies as a consequence for certain acts or circumstances that the TA has verified.

Suppose it is included as an environmental tax in the Peruvian tax system, and it is established that the taxable event is the verification that there has been environmental damage, where the assumption of the passive subject condition falls on the entity that has incurred in

the act of contamination. In that case, there is no external tax capacity; instead, there is the configuration of an infraction by the taxpayer.

Then, the payment for the TA is a direct consequence of an infraction. Therefore, this is a sanction, not a taxable event, even if the text that regulates the obligation qualifies the payment as a tax burden.

The name of the economic burden that falls on the subject obliged to comply with the payment becomes irrelevant since its nature is not the one of a tax event. Therefore, if there ever happens to exist an environmental tax under the aforementioned conditions where the attribution of the passive subject depends on the existence of an act of contamination, it will not have a tax nature but instead the nature of a sanction since the collection of the economic payment is conditioned to the damaged produced. This would mean it would be an abnormal sanction, not a tax regulation.

It is also important to analyse whether an environmental tax can be considered to be a tax with a non-taxable objective directed to motivate the companies to avoid causing environmental damage. The answer to such question is no. This is because for a tax to be considered a non-taxable objective, the economic burden must first have a tax nature.

As has already been explained in the previous paragraphs, an environmental tax does not have a tax nature as long as it is collected when the passive subject incurs acts that imply the contamination of the environment, which means that they have a sanctioning nature.

5. Conclusions

The fulfilment of the CP is the main requirement that needs to be observed for an expense to be deductible.

Tax incentives are a means that the tax legislator could consider motivating the companies that cause damage to the environment to modify such behaviour and allow them to access more attractive tax credits as long as they fulfil the legal requirements.

One tax incentive could be an increase in the percentage of deductible expenses related to protecting the environment to determine the net taxable income.

A different depreciation rate is another possibility for the tax legislator to create an incentive that would allow the companies that act according to the protection of the environment to access a more beneficial tax treatment when determining the net taxable income.

An environmental tax has a sanctioning nature and could be applied to penalize companies that damage the environment.

References

ADMINISTRATION, P. T. (2023). *Report 000026-2023-SUNAT/7T0000*.

BORRERO MORO, C. (2009). The environment protection as a tax law moderator. In *Tax Law*. Lima: Grijley.

IQAir. (2023, October 17). *https://www.iqair.com*. Retrieved from https://www.iqair.com/es/peru

Peruvian Society of Environmental Law. (2022). Retrieved from https://www.actualidadambiental.pe: https://www.actualidadambiental.pe/derrames-de-petroleo-en-la-amazonia-desastres-de-gran-impacto-pero-con-menos-atencion/

PERUVIAN TAX COURT RESOLUTION, 01635-2-2023 (Peruvian Tax Court 2023).

PERUVIAN TAX COURT RESOLUTION, 01333-11-2021 (Peruvian Tax Court 2021).

PERUVIAN CONSTITUTIONAL COURT, Sentence 04014-2005-PA/TC, 04014-2005-PA/TC (Peruvian Constitutional Court 2005).

SPISSO, R. (2011). *Contitutional Tax Law*.

SUPREME COURT SENTENCE, 22416-2021, Lima (Supreme Court 2021).

TAX COURT RESOLUTION, 00377-8-2023 (Tax Court 2023).

O imposto territorial rural como instrumento de incentivo a modelos agroecológicos de produção

Filipe Casellato Scabora, Flávio Felipe Pereira Vieira dos Santos

Resumo: A natureza extrafiscal da tributação ambiental, caracterizada não apenas pelo mero intuito arrecadatório, mas também pela tentativa de estimular comportamentos sustentáveis dos contribuintes-cidadãos, desponta como instrumento para o desenvolvimento de modelos de produção agroecológicos.

No Brasil, o Imposto Territorial Rural (ITR) é um tributo extrafiscal por excelência, que tem por objetivo norteador alcançar a função socioambiental da propriedade rural (art. 186, I e II, da Constituição Federal), onerando com alíquotas progressivas as unidades rurais menos produtivas e maiores e concedendo isenções aos pequenos produtores (art. 153, IV, § 4º, I e II, da Constituição Federal).

A despeito disso, tem-se apontado deficiências normativas no cumprimento desta função extrafiscal do ITR, decorrentes, sobretudo, da natureza autodeclatatória da base de cálculo do imposto, de dificuldades de fiscalização e das limitações de sistemas de cadastro de imóveis georreferenciados. que impedem o tributo de alcançar plenamente seu potencial socioambiental.

Nesse contexto, são sugeridas propostas normativas para o aperfeiçoamento do ITR, a fim de que ele atue como catalisador de modelos agroecológicos sustentáveis de produção rural, como o tratamento tributário mais benéfico para policulturas e imóveis com áreas de interesse ambiental que excedam o mínimo legal, regulamentação de critérios de produção sob uma perspectiva socioambiental, bem como a exigência

do cumprimento do índice mínimo de produtividade pecuária para produtores de médio porte, além do fim da autodeclaração do Valor da Terra Nua (VTN) como base de cálculo do imposto, entre outros.

Palavras-chave: extrafiscalidade; imposto territorial rural; agroecologia; sustentabilidade.

1. Introdução

A tributação ambiental, com sua natureza extrafiscal, tem ganhado destaque como uma ferramenta de estímulo aos comportamentos sustentáveis dos contribuintes-cidadãos. No contexto brasileiro, o ITR desponta como um tributo extrafiscal por excelência, cujo objetivo é alcançar a função socioambiental da propriedade rural. Ao impor alíquotas progressivas sobre as unidades rurais menos produtivas e maiores, bem como conceder isenções aos pequenos produtores, o ITR busca promover uma distribuição mais justa da carga tributária, incentivando práticas sustentáveis no meio rural.

Entretanto, apesar das boas intenções subjacentes ao ITR, deficiências normativas têm sido identificadas em seu desenho institucional e legal. Essas deficiências são principalmente decorrentes da base de cálculo autodeclaratória do imposto, das dificuldades de fiscalização e das limitações dos sistemas de cadastro de imóveis georreferenciados. Esses obstáculos têm impedido que o ITR atinja plenamente seu potencial socioambiental, comprometendo a promoção efetiva de modelos de produção agropecuários sustentáveis.

Diante desse cenário, são propostos diagnósticos para a atual situação do ITR enquanto tributo socioambiental e, a partir deles, sugeridas medidas de aprimoramento, visando transformá-lo em um catalisador de modelos de produção rural sustentáveis e agroecológicos. Acredita-se que o fortalecimento da extrafiscalidade do ITR contribuirá para a construção de um setor agropecuário mais equitativo, eficiente e ambientalmente responsável.

O método adotado é o hipotético-dedutivo, tal como definido por Marconi e Lakatos (2003), no qual parte-se da constatação de uma lacuna no estado da arte, ensejando a formulação de uma hipótese, e a subsequente inferência dedutiva para o teste das hipóteses levantadas. Diante do problema de pesquisa já delineado, foram elaboradas conjecturas a partir de levantamentos bibliográficos, doutrinários e legislativos. Após, na etapa de falseamento, as hipóteses declinadas serão comparadas ao substrato teórico levantado, a fim de corroborá-las ou rejeitá-las. Os procedimentos metodológicos, por seu turno, são o bibliográfico documental e a revisão de literatura não sistematizada.

2. Extrafiscalidade em Matéria Ambiental no Brasil: O ITR como Tributo Socioambiental

Os debates envolvendo a extrafiscalidade têm ganhado espaço nas searas jurídicas e políticas no Brasil, seja sob a perspectiva de que benefícios fiscais ou normas tributárias possam induzir comportamentos positivos e negativos nos contribuintes, seja sob o viés de que tais instrumentos, enquanto renúncias de receitas públicas, deveriam ser submetidos a políticas de controle, acompanhamento e fiscalização mais adequadas (PEREIRA, 2022).

Como exemplo mais recente e representativo da relevância da extrafiscalidade no cenário político jurídico brasileiro, cita-se a proposta de criação do Imposto Seletivo nas discussões envolvendo uma ampla reforma tributária no país, o qual incidiria sobre "*bens e serviços que prejudicam a saúde e o meio ambiente*" (CÂMARA DOS DEPUTADOS, 2023).

Não se trata de uma inovação brasileira. Modelos semelhantes de tributos voltados para desestimular o consumo de bens e serviços tidos como deletérios em alguma área de interesse econômico, social ou ambiental se disseminaram por diversos países ao longo do tempo, desde a seletividade dos produtos a base de álcool e nicotina até o caso mais recente do *sugar tax* na última década (PIGNATARI, 2022).

A própria ideia de função extrafiscal da tributação não é nova, tendo origem com Adolph Wagner (ADAMY, 2023), economista e político alemão que em finais do século XIX trouxe a ideia de conformação político-social (*Sozialpolitische Gestaltung*) e de indução (*Lenkung*) do direito tributário. Adolph Wagner propunha que os efeitos da tributação na economia e na sociedade seriam, também, finalidades do poder estatal, e não apenas o efeito arrecadatório (WAGNER, 1890).

Em termos gerais, embora o objetivo precípuo da tributação seja a arrecadação de receitas públicas, ela também pode atuar como instrumento de indução de comportamentos sociais e econômicos, de modo a aumentar o bem-estar por meio de estímulos positivos – isenções, reduções de alíquota, benefícios fiscais – ou negativos – elevação da carga tributária – sobre determinados bens e serviços (CARRAZZA, 2009).

De forma específica, a extrafiscalidade em matéria ambiental busca estimular comportamentos sustentáveis por meio da diminuição da carga tributária para atividades ecologicamente eficientes – como energias e combustíveis limpos – e, noutro giro, desestimular condutas nocivas ao meio ambiente, elevando a carga tributária sobre tais atividades (PEREIRA; SCABORA, 2022).

A Constituição Federal, em seu artigo 170, VI, coloca como um dos princípios da ordem econômica a proteção do meio ambiente, inclusive com tratamento diferenciado para produtos e serviços. Em outras palavras, o próprio texto constitucional traz o dever do Estado de balizar sua atuação de intervenção econômica de acordo com comportamentos ecológicos e ambientalmente desejáveis.

Mais recentemente, em um contexto de crise dos preços dos combustíveis, foi promulgada a Emenda Constitucional n.º 123/2022, que inseriu o inciso VIII no artigo 225 da Constituição Federal, para prever como dever do Poder Público a manutenção de um regime fiscal favorecido para biocombustíveis, *verbis*:

> "Art. 225. Todos têm direito ao meio ambiente ecologicamente equilibrado, bem de uso comum do povo e essencial à sadia qualidade de

> vida, impondo-se ao Poder Público e à coletividade o dever de defendê-lo e preservá- lo para as presentes e futuras gerações. [...]
>
> VIII - manter regime fiscal favorecido para os biocombustíveis destinados ao consumo final, na forma de lei complementar, a fim de assegurar-lhes tributação inferior à incidente sobre os combustíveis fósseis, capaz de garantir diferencial competitivo em relação a estes, especialmente em relação às contribuições de que tratam a alínea "b" do inciso I e o inciso IV do caput do art. 195 e o art. 239 e ao imposto a que se refere o inciso II do caput do art. 155 desta Constituição".

A despeito da importância de dispositivos constitucionais estabelecendo o dever estatal de proteção ambiental, inclusive mediante intervenções fiscais para incentivar bens e serviços de produção e prestação sustentáveis (FENSTERSEIFER; SARLET, 2022), a existência de benefícios fiscais ambientais não é nova no ordenamento jurídico brasileiro (PEREIRA; SCABORA, 2022).

A Lei n.º 5.106/96, em seu artigo 1º, estabelece incentivos fiscais para as pessoas físicas e jurídicas que empregarem recursos no reflorestamento ou uso de maquinários contra a poluição, *verbis*:

> "Art. 1º As importâncias empregadas em florestamento e reflorestamento poderão ser abatidas ou descontadas nas declarações de rendimento das pessoas físicas e jurídicas, residentes ou domiciliados no Brasil, atendidas as condições estabelecidas na presente lei."

De forma mais ampla, o artigo 8º, V, da Lei n.º 6.938/81 (Lei da Política Nacional do Meio Ambiente), trata da perda de incentivos fiscais na hipótese de atividades poluidoras em dissonância com a política ambiental estabelecida no mesmo diploma legal, *verbis*:

> "Art. 8º Compete ao Conama: [...]
>
> V – determinar, mediante representação do Ibama, a perda ou restrição de benefícios fiscais concedidos pelo Poder Público, em

> caráter geral ou condicional, e a perda ou suspensão de participação em linhas de financiamento em estabelecimentos oficiais de crédito."

No que diz respeito à extrafiscalidade na tributação do uso da terra no meio rural, o ITR, previsto no artigo 153, VI, da Constituição Federal, possui uma nítida função extrafiscal, muito mais do que arrecadatória. Os dispositivos constitucionais que disciplinam a sua incidência preveem que ele deverá ser progressivo em razão da extensão da área produtiva, e que haverá isenção para as pequenas glebas rurais, quando o proprietário que as explorar não possuir outro imóvel, *verbis*:

> "§ 4º O imposto previsto no inciso VI do caput
> I - será progressivo e terá suas alíquotas fixadas de forma a desestimular a manutenção de propriedades improdutivas;
> II - não incidirá sobre pequenas glebas rurais, definidas em lei, quando as explore o proprietário que não possua outro imóvel;"

De forma complementar, o artigo 186 da Constituição Federal estabelece como critérios para o cumprimento da função social da propriedade rural: (i) o seu aproveitamento racional e adequado; (ii) a utilização adequada dos recursos naturais; (iii) a preservação do meio ambiente; (iv) a observância das disposições relacionadas às relações de trabalho; e, (v) o bem-estar de proprietários e trabalhadores.

Os dispositivos constitucionais acima elencados evidenciam a natureza extrafiscal do ITR: menos arrecadatória e mais voltada para a preservação ambiental e para o estímulo do uso produtivo da propriedade rural. A doutrina especializada trata tais desígnios constitucionais como a função socioambiental da propriedade (SANTILLI, 2005) na medida em que não apenas a terra deve ser usada de forma produtiva – e ser tributada de acordo –, como também o meio ambiente e os recursos naturais devem ser preservados e utilizados adequadamente.

A Lei n.º 9.393/96, por seu turno, disciplina o ITR e define as condições de imunidade e isenção para as pequenas glebas rurais previstas

no dispositivo acima, bem como estabelece alíquotas progressivas em função da área e do grau de utilização do imóvel. Em outras palavras, quanto maior e menos produtiva a gleba rural, maior a alíquota, podendo chegar a 20% (vinte por cento) ao passo em que, na situação inversa, a menor alíquota é de 0,03% (três centésimos por cento).

Desde já, surge o questionamento de como é aferido – ou como deveria ser– o índice de produtividade das propriedades rurais. Antes, contudo, necessário esclarecer acerca da base de cálculo do ITR, qual seja, o Valor da Terra Nua Tributável (VTNt).

O imposto (ITR) devido será apurado por meio da multiplicação do VTNt pelas alíquotas previstas no artigo 11, da Lei n.º 9.393/96. Assim, tem-se a seguinte expressão matemática:

$$ITR = VTNt \times \text{alíquota}$$

O VTNt, por sua vez, será obtido por meio da multiplicação do Valor da Terra Nua (VTN) – que difere, portanto, do Valor da Terra Nua Tributável – pela razão entre a área total do imóvel e a área tributável. A equação é assim descrita:

$$VTNt = VTN \times \text{Área Total do Imóvel} / \text{Área Tributável}$$

Nos termos do artigo 10, §1º, I, da Lei n.º 9.393/96, o VTN corresponde ao valor da propriedade, excluídas desse cômputo as construções, instalações, benfeitorias, culturas permanentes e temporárias, pastagens cultivadas e melhoradas, e florestas plantadas no terreno. Em síntese, o VTN considera o valor de mercado total do imóvel, sendo feitas algumas exclusões com determinadas *facilities*.

A área tributável (inciso II), por sua vez, corresponde à área total do imóvel, excluídas as áreas (i) de preservação permanente e de reserva legal previstas no Código Florestal; (ii) de interesse ecológico; (iii) sob regime de servidão ambiental; (iv) cobertas por florestas nativas, primárias ou secundárias, em estágio médio ou avançado de regeneração; (v) alagadas para fins de constituição de reservatório de usinas

hidroelétricas; e, (vi) comprovadamente imprestáveis para exploração rural.

Por fim, o valor do imposto a ser recolhido será apurado aplicando-se sobre o VTNt a alíquota correspondente, estabelecida no anexo da Lei n.º 9.393/1996, as quais podem variar de 0,03% (três centésimos por cento) – paras as propriedades menores e mais produtivas – até 20% (vinte por cento) – para aquelas maiores e menos produtivas. A síntese da apuração do ITR é ilustrada abaixo:

ITR = (VTN x [Área Total do Imóvel / Área Tributável]) x alíquota

A leitura do artigo 10, §1º, I, II e III permite concluir que a carga tributária do ITR depende não apenas do tamanho da propriedade e do grau de produtividade do terreno, mas também das áreas de interesse ambiental existentes, as quais são excluídas do cálculo da área tributável, e das áreas florestadas, que não são computadas no VTN. Em outras palavras, incentiva-se o proprietário a preservar a existência de áreas florestadas e da proteção às áreas de interesse ambiental por meio da exclusão dessas superfícies do índice que formará a base de cálculo do ITR.

O Decreto n.º 4.832/02, ao regulamentar a fiscalização, arrecadação e administração do ITR, define alguns dos institutos excluídos da área tributável para fins de incidência do imposto, estabelecendo parâmetros para que as áreas de preservação permanente, reserva legal e de servidão florestal, por exemplo, não sejam incluídas na área tributável.

Importante destacar que os territórios de comunidades quilombolas[1] também são isentos do pagamento de ITR, conforme redação do artigo 3º-A, da Lei n.º 9.393/96, o que também indica a intenção do

1. A isenção tem caráter social-reparatório: as comunidades quilombolas foram formadas por pessoas escravizadas ou por seus descendentes, que, escapando do regime de escravidão mantido no Brasil até 1888, formaram grupos aglomerados em determinados locais, como forma de preservar suas tradições e seu modo de vida. Segundo o Censo de 2022, mais de 62 mil pessoas residiam em 147 (cento e quarenta e sete) territórios quilombolas oficialmente delimitados e titulados no Brasil (IBGE, 2022).

legislador infraconstitucional de proteger tais comunidades, reforçando a ótica socioambiental do tributo.

A despeito deste panorama jurídico-constitucional inclinado para a função extrafiscal do ITR, o imposto possui deficiências normativas que o impedem de alcançar o seu pleno potencial socioambiental. Em particular, a natureza autodeclaratória da sua base de cálculo, dificuldades de fiscalização, e limitações de sistemas de cadastro de imóveis georreferenciados são obstáculos para que a função outorgada pela Constituição Federal ao ITR possa ser cumprida em sua plenitude.

3. Deficiências e Limitações Extrafiscais do ITR como Tributo Socioambiental: Diagnósticos e Perspectivas

Em 2022, o ITR foi responsável pela arrecadação de R$ 2,743 bilhões em receitas públicas, o que equivale a 0,12% (doze décimos por cento) do total da arrecadação federal[2]. Isso torna o ITR o segundo tributo mais irrelevante em termos de arrecadação federal, à frente apenas do Imposto de Exportação (IE), este beneficiado por um amplo conjunto de imunidades que buscam estimular o setor exportador brasileiro e, portanto, naturalmente de baixa arrecadação.

Esse resultado, em um país de dimensões continentais como o Brasil, e na qual o setor agropecuário representa parcela significativa da economia, leva a algumas reflexões, quais sejam: (i) o ITR está atingindo suas funções extrafiscais, de modo que a arrecadação baixa é resultado das exclusões previstas para o cálculo do VTN, como as áreas de preservação ambiental, em conjunto com altos níveis de produtividade das propriedades rurais?; ou, (ii) a arrecadação do ITR é baixa não porque ele atinge seus objetivos extrafiscais, e sim porque há deficiências normativas para a fiscalização e cobrança do imposto,

2. Dados obtidos a partir das informações disponibilizadas pela Secretaria da Receita Federal do Brasil, na ferramenta “Recursos”; e “Arrecadação por Natureza Jurídica e Tributo”: Disponível em: < https://dados.gov.br/dados/conjuntos-dados/resultado-da-arrecadacao>. Acesso em: 24 jun. 2023.

o que acarreta em uma menor arrecadação e no descumprimento dos objetivos extrafiscais do ITR?.

A literatura especializada costuma relacionar os empreendimentos rurais de grande proporção com o desmatamento na Amazônia e no Cerrado (RAJÃO, *et al*, 2020). Segundo estudo publicado na revista estadunidense *Science*, apesar de a maior parte da produção agrícola brasileira ser livre do desmatamento, 2% (dois por cento) das propriedades rurais na Amazônia e no Cerrado são responsáveis por 62% (sessenta e dois por cento) de todo o desmatamento destes biomas.

Os dados são confirmados pelo Relatório Anual do Desmatamento do Brasil, que apontam que 90,1% da área desmatada em 2022 no Brasil foi detectada na Amazônia e no Cerrado, e que 50 (cinquenta) municípios respondem por mais da metade do desmatamento no Brasil, sendo que a agropecuária foi o principal vetor de desmatamento, com 95% de supressão da vegetação nativa (MAPBIOMAS, 2023).

Assim, grande parte do desmatamento no Brasil decorre de uma pequena porcentagem de imóveis rurais, supostamente "produtivos".

Contudo, a ideia de produtividade, *de per si*, é um conceito que deve ser observado sob um viés crítico. O signo "produtividade" é termo de tessitura ampla, sujeito a polissemias e a interpretações diversas e abertas. Assim, cabe questionar: produtivo para quem? Produtivo de que forma? O que considerar para medir tal "produtividade"?

No que concerne ao Direito, a "produtividade" do imóvel rural é chamada de Grau de Utilização (GU) e é obtida em função da razão entre a área total do imóvel e a área aproveitável:

$$GU = \text{área efetivamente utilizada} / \text{área aproveitável}$$

A área aproveitável do imóvel corresponde à área tributável, excluídas as áreas ocupadas por benfeitorias úteis e necessárias. Em suma, a área aproveitável, é aquela em que é possível a exploração agropecuária (art. 10, VI, da Lei n.º 9.393/96).

A área efetivamente utilizada, por sua vez, é aquela que, no ano anterior ao fato gerador do ITR, tenha sido aproveitada para plantio

com produtos vegetais, pastagem (nativa ou plantada), exploração extrativista, servido de exploração aquícola ou granjeira, ou objeto de implantação de projeto técnico (artigo 18, do Decreto n.º 4.382/02).

Tal definição, por si só, pode ser objeto de críticas. Condicionar a produtividade de um imóvel rural à extensão da área voltada à agropecuária ignora que a Constituição Federal determina que a propriedade rural cumprirá sua função não apenas com atividades extrativistas, mas também promovendo a preservação do meio ambiente e de seus recursos naturais.

A inclusão de áreas preservadas no cálculo do grau de utilização, aumentando o dividendo do GU, implicaria em uma área produtiva maior para fins fiscais e, portanto, em uma alíquota menor do ITR, o que confirma a vocação extrafiscal do imposto em matéria ambiental.

Na realidade, especificamente no caso das áreas destinadas à pastagem e exploração extrativista, a Instrução Especial n.º 19/80, do Instituto Nacional de Colonização e Reforma Agrária (INCRA) e os anexos da Instrução Normativa da Secretaria da Receita Federal do Brasil (RFB) n.º 256/02, estabelecem índices mínimos de produtividade fixados para cada município de país e definem a área máxima na pecuária que pode ser considerada como área efetivamente utilizada.

Atividades extrativistas também gozam de índices mínimos de rendimento, ao passo em que as pastagens em formação e atividades agrícolas não estão sujeitas a quaisquer controles de produtividade, ainda que sejam parte relevante da atividade agropecuária (LACERDA; SILVA, 2014).

Ademais, os índices de lotação adotados como referência para as atividades agropecuárias estão drasticamente defasados, não tendo sido atualizados pelo INCRA desde 1980, ainda que o artigo 11, da Lei n.º 8.629/93, estabeleça que a atualização será periódica.

Portanto, a baixa arrecadação do ITR não parece decorrer de altos níveis de produtividade e/ou de grandes parcelas de áreas excluídas da área tributável dos imóveis rurais em função da existência de áreas de preservação ambiental. Ao revés, a literatura especializada credita a

baixa arrecadação às deficiências da legislação, fiscalização e cobrança do tributo.

Bernard Appy (2015) atribui a diminuta arrecadação do ITR à uma baixa alíquota média e à regressividade do VTNt (em R$/ha). Em outras palavras, embora a alíquota do imposto seja progressiva, quanto maior o imóvel, menor é o valor da VTNt.

Outro problema apontado por Appy e por outros autores (ANDRADE; BACH, 2020) é a natureza autodeclaratória do ITR, uma vez a Declaração do Imposto Territorial Rural (DITR), utilizada pela fiscalização, é preenchida pelos próprios contribuintes, o que pode dar margem para declarações inexatas, como: (i) subavaliação do valor de mercado da terra nua; (ii) superestimação da área não tributável (de interesse ambiental); e, (iii) superestimação do GU da área aproveitável (APPY, 2015).

Por vezes, o VTN declarado é muito inferior ao valor efetivo de mercado da região, ou o desmatamento real é muito superior ao informado pelo contribuinte, o que acarreta um valor do ITR recolhido mais baixo do que aquele seria devido (SILVA; BARRETO, 2014). A fiscalização ineficiente da União (e dos Municípios, quando da existência de convênio que municipaliza a cobrança) implica, assim, não apenas em uma subarrecadação, mas também no esvaziamento do potencial extrafiscal socioambiental do ITR e, portanto, de todo o arcabouço teleológico do tributo.

Ademais, a limitação de sistemas de cadastros de imóveis georreferenciados agrava a precariedade da fiscalização do ITR. Embora a RFB adote o Cadastro de Imóveis Rurais (CAFIR) para a fiscalização dos imóveis que sofrem a incidência do ITR, trata-se de uma obrigação acessória preenchida exclusivamente pelo contribuinte e, sem a contraprova obtida com a fiscalização da administração pública, torna-se suscetível a declarações inexatas.

É importante observar que existem cadastros de imóveis georreferenciados no Brasil com capacidade para fiscalizar de forma mais eficiente os imóveis rurais. O Cadastro Ambiental Rural (CAR), instituído pelo Código Florestal de 2012 (Lei n.º 12.651/12), é um registro

público eletrônico que integra informações sobre os imóveis rurais como a existência de extensão de áreas de preservação permanente, de reserva legal, de reflorestamento e demais formas de vegetação, além de dados georreferenciais do perímetro do imóvel, áreas de interesse social e de utilidade pública. Embora seja um cadastro obrigatório para todos os imóveis rurais, não é adotado pela fiscalização do ITR.

Appy (2015) afirma, ainda, que dados como a área de interesse ambiental não tributável e o GU também estão drasticamente subestimados, o que é atribuído ao baixo retorno de deslocar um contingente expressivo de funcionários para realizar um trabalho de fiscalização árduo, em função de um imposto de baixo potencial arrecadatório.

Contudo, conforme já afirmado nas seções anteriores, o objetivo constitucional do ITR não é apenas ou precipuamente o de angariar receitas públicas, mas, sim estimular a produtividade no meio rural e promover a proteção ambiental, ambições que deveriam chamar mais a atenção dos fiscos federal e municipal.

Outra limitação do ITR é o fato de que o descumprimento da legislação ambiental não acarreta majoração de alíquotas do imposto. Nesse caso, se uma propriedade rural promover desmatamento irregular para ocupá-la de forma "produtiva", não haverá penalidades na apuração do imposto.

Isso também se dá porque a majoração do tributo em razão do descumprimento da legislação ambiental violaria o artigo 3° do Código Tributário Nacional (CTN), que conceitua tributo como "*(...) toda prestação pecuniária compulsória (...) que não constitua sanção de ato ilícito*".

Em outras palavras, o tributo não pode ser utilizado como objeto de sanção. Nesse caso, a extrafiscalidade, embora possa estimular ou desestimular comportamentos, apenas pode fazê-lo com relação às condutas permitidas, nunca, com relação àquelas proibidas. Guilherme Adolfo dos Santos Mendes (2009) assim aborda a questão, *verbis*:

> "O tributo pode exercer a função sancionatória, exceto a relativa à sanção negativa pela prática de conduta proibida. A regra tributária

pode premiar condutas obrigatórias e permitidas, bem como igualmente desestimular comportamentos permitidos, mas não os proibidos. O tributo só pode ser empregado com função extrafiscal negativa para desestimular condutas permitidas, jamais as proibidas".

Existe, ainda, a problemática quanto à progressividade do ITR, calculada unicamente em função da área total do imóvel e não da área tributável. Isso significa que imóveis maiores, e cuja extensão seja recoberta, em larga escala, por áreas de interesse ambiental (não tributáveis), e por uma proporção menor de áreas tributáveis, pagarão alíquotas maiores, se comparados a imóveis com menores áreas de interesse ambiental e mais áreas tributáveis.

A aparente contradição é ilustrada no seguinte cálculo do ITR, em imóveis com o mesmo GU:

	Imóvel A	Imóvel B
Extensão total (ha)	10.000	1.000
Áreas de Preservação Permanente	900	200
Áreas tributáveis	100	800
Grau de Utilização	80%	80%
Alíquota Incidente	0,45%	0,15%

Observe-se que o "Imóvel A", embora tenha uma extensão 4,5x mais recoberta por APPs do que o "Imóvel B", recolhe uma alíquota de ITR 3x maior, ainda que ambos os imóveis tenham o mesmo grau de utilização.

O exemplo ilustra a escolha do legislador em privilegiar uma lógica extrativista para a cobrança do ITR, em detrimento às premissas socioambientais, o que é ressoado para grande parte do complexo normativo do imposto.

4. Modelos Agroecológicos de Produção e o ITR

A agroecologia sugere a adoção de práticas sustentáveis de cultivo e produção no ambiente rural, abrangendo elementos sociais, econômicos, culturais e ambientais das comunidades locais em que estão inseridos, tendo por princípio a equidade na produção (ALTIERI, 1987). Trata-se de um contraponto aos modelos de produção voltados unicamente para o acúmulo de capital e de expansão agropecuária (LEFF, 2002).

Não se trata apenas de adotar práticas ecologicamente corretas na produção agropecuária, mas também de adaptar-se e ser adaptada às identidades, práticas e culturas locais, para a concretização de equidade e melhores condições aos trabalhadores rurais (LEFF, 2002).

A agroecologia também se opõe à utilização de componentes químicos e biológicos no manejo de plantas e animais, o que não significa a abdicação de tecnologias e maquinários desenvolvidos no curso da modernidade (LEFF, 2002).

A despeito desse cenário, Francisco Roberto Caporal e José Antônio Costabeber (2002), apontam deficiências no uso do termo "agroecologia", ora como se fosse um modelo de agricultura, ora um produto ecológico, ou mesmo uma prática, uma tecnologia agrícola ou mesmo uma política pública. Os autores defendem a agroecologia como uma ciência ou disciplina científica de natureza multidisciplinar, com uma série de princípios, conceitos e metodologias, com o fito de avaliar agroecossistemas.

Os agroecossistemas são considerados unidades fundamentais de estudo das intervenções humanas no que tange ao desenvolvimento rural sustentável, porquanto abrigam uma série de ciclos biológicos, energéticos e relações socioeconômicas, nos quais busca-se uma análise sistêmica e holística interrelacionada deste conjunto de ações.

Os objetivos da agroecologia não são o aumento da produção, mas sim a otimização do equilíbrio do agroecossistema, o que implica em uma análise multidisciplinar das relações existentes entre pessoas, cultivos, solo, água, fauna e flora. O enfoque agroecológico depende da

aplicação de conceitos de uma série de outras disciplinas científicas, como a Ecologia, a Agronomia, a Sociologia, a Antropologia e a Economia, entre outras.

Ao tratar das bases epistemológicas da agroecologia, Norgard (1989) explica que a natureza do potencial dos sistemas social e biológico pode ser mais bem compreendida por meio de conhecimentos de culturas tradicionais, o conhecimento formal, social e biológico, das ciências agrárias. Em outras palavras, trata-se de comungar os saberes tradicionais de comunidades e culturas locais, com a práxis da ciência ambiental.

Roberto Caporal chama a atenção de que deve-se distinguir agriculturas de base ecológica, baseada em princípios da agroecologia, das agriculturas alternativas, que, embora apresentem técnicas, práticas e procedimentos cujas conotações indicam objetivos sociais e ambientais, não necessariamente valem-se das dimensões da agroecologia (2009).

Como exemplo, Caporal cita a agricultura orgânica, que o autor vê como "*o resultado da aplicação de técnicas e métodos diferenciados dos pacotes convencionais (...)*", mas que "*não necessariamente precisam estar seguindo as premissas básicas e os ensinamentos fundamentais da Agroecologia*" (2009).

Nesse contexto, o ITR pode alcançar sua finalidade socioambiental ao induzir e estimular comportamentos e condutas voltados para práticas agroecológicas, no que se incluem não apenas modelos de produção sustentáveis, mas também a preocupação com os direitos à vida, dignidade e preservação dos trabalhadores rurais e de comunidades tradicionais indígenas e quilombolas, adaptados aos hábitos e costumes locais.

5. Considerações Finais: Sugestões de Alterações Normativas para o Desenvolvimento do ITR Enquanto Tributo Socioambiental

Como se pretendeu demonstrar, o ITR é um tributo extrafiscal por excelência, e cujos objetivos extra arrecadatórios convergem para a efetivação da função socioambiental da propriedade rural. Esta função pode ser observada sob dois paradigmas intrinsecamente relacionados: (i) a dimensão dos direitos socioambientais dos habitantes e trabalhadores do campo, como os direitos à vida, à dignidade, ao trabalho, à liberdade, à alimentação, à moradia e a um meio ambiente, limpo, seguro e saudável e (ii) a dimensão ecológico-sustentável, baseada na preservação ambiental da fauna e da flora.

A despeito desse panorama jurídico-constitucional, que torna o ITR uma exação propriamente socioambiental, o diagnóstico normativo da sua estrutura aponta diversas deficiências na sua efetividade em alcançar tais desígnios constitucionais, em razão, principalmente: (i) da natureza autodeclaratória do tributo; (ii) das limitações e não integração de sistemas de cadastro de imóveis georreferenciados já existentes e em uso por outros órgãos fiscais; (iii) das dificuldades de fiscalização; (iv) da progressividade das alíquotas do imposto unicamente em função da área tributável; (v) da inexistência de mecanismos de redução da base de cálculo para proprietários rurais com policulturas e com imóveis com grandes áreas de interesse ambiental que excedam o mínimo legal; e, (vi) da necessidade de atualização periódica dos índices de produtividade pecuário e agrícola.

Como contribuição para este debate, e a partir de soluções sugeridas por Bernard Appy (2015) e Stenio Lacerda e Joana Alves (2014), são apresentadas as seguintes considerações:

Entre as soluções partilhadas entre vários estudos, sugere-se que o VTN deixe de ser autodeclaratório. Nesse caso, o VTN seria calculado com base em pesquisas de preços de imóveis da região, que multiplicaria o VTN por hectare, a fim de obter o VTNt. Com isso,

diminuem-se as chances de prestação de informações inexatas, ou mesmo fraudulentas, por parte dos contribuintes.

A problemática desta solução reside na exclusividade de o fisco arbitrar o VTN com base em critérios próprios e sem a possibilidade de contestação dos contribuintes. Embora a administração pública defina alguns índices utilizados no cálculo dos tributos, a exemplo da Margem / Índice de Valor Agregado adotado no cálculo do ICMS na modalidade de substituição tributária[3], a apuração do VTN impacta diretamente na base de cálculo do ITR.

Em caso semelhante, o Superior Tribunal de Justiça (STJ) fixou o entendimento vinculante de que o valor da transação da alienação de bem imóvel informado pelo contribuinte, utilizado como base de cálculo do Imposto sobre a Transmissão de Bens Imóveis (ITBI), goza de presunção de legitimidade, apenas podendo ser afastado pelo fisco mediante regular instauração de processo administrativo próprio (STJ, 2022). Solução semelhante pode ser adequada também para o ITR, caso adote-se o modelo de arbitramento do VTN pelo fisco federal/municipal.

Outro ponto compartilhado entre os especialistas quanto à necessidade de adequações na legislação do ITR diz respeito à adoção do CAR para fins de fiscalização. Appy (2015) sugere que a razão entre as áreas de interesse ambiental (não tributáveis) e a área total do imóvel utilizada para apuração do ITR, corresponda à razão entre as áreas de interesse ambiental declaradas e à área total declarada no CAR. Em outras palavras, trata-se de adotar o CAR como mecanismo de fiscalização das áreas protegidas das propriedades rurais, o que não apenas facilitaria a fiscalização do imposto, mas também evitaria declarações inexatas e fraudulentas, dificultando a superestimação de áreas de preservação ambiental.

3. Índice percentual definido pela legislação que serve de parâmetro para o pagamento antecipado do ICMS por meio da Substituição Tributária (ST), em que o pagamento do imposto é deslocado (antecipado ou postergado) entre os diversos contribuintes de uma mesma cadeia produtiva, como técnica de arrecadação.

O Instituto Brasileiro do Meio Ambiente e dos Recursos Naturais Renováveis (IBAMA) já conta com sistemas de acompanhamento de desmatamento de áreas de preservação permanente por meio de imagens de satélite (GALVÃO, 2023) e cuja integração com sistemas de fiscalização da RFB possibilitaria um maior controle das áreas declaradas como de interesse ambiental pelos contribuintes na apuração do ITR.

De forma semelhante, é um consenso lógico que os índices mínimos de produtividade da legislação do ITR sejam revistos, uma vez que a defasagem dos parâmetros passa dos 40 (quarenta) anos, com a primeira e única sistematização tendo ocorrido em 1980, por meio da Instrução Especial nº 19/80, do INCRA. É certo que os parâmetros atuais de produtividade agropecuária são muito superiores aos de quarenta anos atrás.

Ainda sobre os índices mínimos de produtividade, aponta-se a necessidade de que eles sejam estabelecidos para outros segmentos das atividades produtivo-econômicas do campo, como a agricultura, e com a diferenciação de parâmetros para cada tipo de cultura.

De forma geral, é importante que tais modificações da legislação do ITR não o tornem excessivamente complexo, seja para os contribuintes, seja para a fiscalização. A literatura aponta que a complexidade da legislação eleva os custos de conformidade, aumentando o contencioso judicial e administrativo, e criando um ambiente de desconfiança entre fisco e contribuinte e, portanto, entre o Estado e o cidadão (PIMENTA; SCABORA, 2023).

Lacerda e Silva (2014), por sua vez, sugerem que apenas as áreas do imóvel cujo uso seja autorizado pelo Código Florestal possam ser consideradas como efetivamente utilizadas, o que impacta no grau de utilização. Dessa forma, as áreas do imóvel que excederem os limites legislativos não serão consideradas utilizadas, o que reduzirá o GU do imóvel e, portanto, elevará a alíquota.

A proposta dos autores, embora interessante, pode esbarrar nos limites da conceituação de tributo do artigo 3º do CTN, que veda a adoção da exação como método sancionatório. Assim, o descumprimento

da legislação ambiental pelos proprietários rurais acarretaria, indiretamente, na elevação da carga tributária. Retomando as ideias de Guilherme Adolfo dos Santos Mendes (2009), a dimensão extrafiscal de elevação da carga tributária apenas pode ser adotada para desestimular comportamentos permitidos.

Por fim, Lacerda (2011) ainda propõe que a progressividade das alíquotas do ITR seja em função da área tributável e não da área total, a fim de evitar que imóveis maiores e com grandes proporções de áreas de preservação permanente paguem uma alíquota de ITR superior ao de imóveis menores, com baixas proporções de áreas de preservação, ainda que com o mesmo GU.

O confronto destes problemas e a busca por soluções não implica, naturalmente, em um imposto mais efetivo em termos sociais e ambientais, diante da complexidade das relações econômicas, sociais e jurídicas da questão. Contudo, tratam-se de questões que devem ser enfrentadas a fim de que o ITR alcance seu pleno potencial socioambiental.

Referências

ADAMY, P. **Origens Teóricas da Extrafiscalidade**. Revista Direito Tributário Atual, [S. l.], n. 39, p. 352–360, 2021. Disponível em: https://revista.ibdt.org.br/index.php/RDTA/article/view/451. Acesso em: 8 jun. 2023.

APPY, B. **O Imposto Territorial Rural como forma de induzir boas práticas ambientais**. Instituto de Pesquisa Ambiental da Amazônia (IPAM), 2015. https://ipam.org.br/bibliotecas/o-imposto-territorial-rural-como-forma-de-induzir-boas-praticas-ambientais/. Acesso em: 1 jul. 2023.

ALTIERI, M.A. **Agroecology: the scientific basis of alternative agriculture**. Colorado: Westview Press, Boulder, 1987

BACH, G. H. E. G.; DE ANDRADE, T. S. **Inefetividade Fiscal e Extrafiscal do Imposto sobre a Propriedade Territorial Rural: Possíveis Causas e as Respostas Legislativas**. Caderno PAIC, [S. l.], v. 21, n. 1, p. 737–762, 2020. Disponível em: https://cadernopaic.fae.emnuvens.com.br/cadernopaic/article/view/409. Acesso em: 6 jul. 2023.

BRASIL. Superior Tribunal de Justiça. **Recurso Especial n.º 1.937.821/SP (Tema 1.113/STJ)**. Relator: Gurgel de Faria, Primeira Seção. Brasília, 24 fev. 2022.

________. Instituto Brasileiro de Geografia e Estatística. **Censo Demográfico**. 2022. Disponível em < https://www.ibge.gov.br/estatisticas/sociais/trabalho/22827-censo-demografico-2022.html> Acesso em 22 jan. 2024.

CAPORAL; F. R.; COSTABEBER, J. A. **Agroecologia. Enfoque científico e estratégico**. Agroecologia e Desenvolvimento Rural Sustentável. Porto Alegre, v.3, n.2, abr./jun.2002.

CARRAZZA, R. A. **Curso de direito constitucional tributário**. 25. ed. São Paulo: Malheiros, 2009, p. 58-60.

GALVÃO, R. M. O. **A Questão do Aquecimento Global e Preservação da Amazônia**. In: BORGES, Caio; VASQUES, Pedro Henrique (orgs.). **STF e as Mudanças Climáticas: contribuições para o debate sobre o Fundo Clima (ADPF 708)** [recurso digital]. Rio de Janeiro: Telha, 2021. p. 241-254.

GRUPO DE TRABALHO DA REFORMA TRIBUTÁRIA. Relatório do grupo de trabalho destinado a analisar e debater a PEC n.º 45/2019. Brasília/DF, 2023. p. 63.

LACERDA, S. M. **A progressividade no imposto territorial rural: uma análise da Tabela de Alíquotas sob a ótica da Justiça Fiscal**. RECONES – Revista de Contabilidade e Negócios do Sertão, Ano 1, Vol. 1, p. 28-36, abr. 2011.

__________, S. M.; SILVA, M. J. A. **O Imposto sobre a Propriedade Territorial Rural (ITR): a busca pela extrafiscalidade ambiental promocional**. Trabalho contemplado com menção honrosa no I Prêmio Florestal Brasileiro. Brasília: ESAF, 2014. Disponível em: http://www.esaf.fazenda.gov.br/premios/premios-1/i-premio-florestal-brasileiro/trabalhos-remiados. Acesso em 01 jul. 2023.

LAKATOS, E. M.; MARCONI., M. A. de. **Fundamentos de Metodologia Científica**. São Paulo: Atlas, 2003.

LEEF, E. **Agroecologia e saber ambiental**. Agroecologia e Desenvolvimento Rural Sustentável. Porto Alegre, v.3, n.1, jan./mar.2002.

MAPBIOMAS, A. **Relatório Anual de Desmatamento do Brasil - 2022**. 2023. Disponível em https://alerta.mapbiomas.org/relatorio. Acesso em 06 jun. 2023.

MENDES, G. A. S. **Extrafiscalidade: análise semiótica. 2009**. Tese (Doutorado em Direito Econômico e Financeiro) - Faculdade de Direito, Universidade de São Paulo, São Paulo, 2009. doi:10.11606/T.2.2009.tde-18112009-090938. Acesso em: 2023-07-06.

NORGAARD, R. B. **A base epistemológica da Agroecologia**. In: ALTIERI, M. A. (ed.). Agroecologia: as bases científicas da agricultura alternativa. Rio de Janeiro: PTA/FASE, 1989. p.42-48.

PIGNATARI, L. T. **O "Sugar Tax" deve ser Servido no Cardápio Tributário Brasileiro?.** Revista Direito Tributário Atual, [S. l.], n. 51, p. 225–250, 2022. DOI: 10.46801/2595-6280.51.9.2022.1258. Disponível em: https://revista.ibdt.org.br/index.php/RDTA/article/view/1258. Acesso em: 8 jun. 2023. pp. 6-7.

PIMENTA, B. R., SCABORA, F. C. **Conformidade Fiscal e Moral Tributária: uma Via de Mão Dupla?**. Revista Direito Tributário Atual, (53), 100–119, 2023. https://doi.org/10.46801/2595-6280.53.4.2023.2307.

PEREIRA, F. F. V. S. **Eficiência dos benefícios fiscais e neutralidade fiscal**. Revista de Direito e Atualidades, [S. l.], v. 1, n. 3, 2022. Disponível em: https://www.portaldeperiodicos.idp.edu.br/rda/article/view/6233. Acesso em: 8 jun. 2023

________, F. F. V. S; SCABORA, F. C. **Tributação Ambiental e Extrafiscalidade no Brasil: Incentivos Fiscais e Regressividade da Tributação Verde**. Revista Direito Tributário Atual, n. 52, p. 144–161, 2022. DOI: 10.46801/2595-6280.52.5.2022.2216. Disponível em: https://revista.ibdt.org.br/index.php/RDTA/article/view/2216. Acesso em: 8 jun. 2023.

PRADO, C. J. **A questão agrária**. São Paulo: Brasiliense, 1978.

RAJÃO, R., SOARES-FILHO, B., NUNES, F., BÖRNER, J., MACHADO, L., ASSIS, D., ... & GIBBS, H. (2020). **The rotten apples of Brazil's agribusiness**. Science, 369(6501), 246-248.

SANTILLI, J. **Socioambientalismo e novos direitos: proteção jurídica à diversidade biológica e cultural**. São Paulo: Peirópolis, 2005.

SARLET, I. W.; FENSTERSEIFER, T. **Direitos Fundamentais e Deveres de Proteção Climática na Constituição Brasileira de 1988**. Revista de Direito Ambiental, v. 108/2022, p. 77-108, outubro-dezembro/2022.

WAGNER, A. **Finanzwissenschaft – Theorie d. Besteuerung, Gebührenlehre u. allgemeine Steuerlehre**. 2.ed. Leipzig: Winter, 1890. v. II, p. 288.

Ethics, Tax Avoidance, and ESG: Making sense of it all… The future of tax planning

Pedro Vidal Matos

Abstract: The ESG agenda has reached the tax field, calling for a fresh look at tax planning, superimposing an ethical analysis over the traditionally followed legal approach. This requires examining the interplay between Law and Morality – placing focus on actions that, although legally compliant, may nevertheless be ethically questionable – and acknowledging the existence of a mismatch between the two normative systems. Such mismatch is to a large extent unavoidable and, what is more, it should be taken as perfectly natural and sound. If nothing else, it is the result of two inherent traits of any properly functioning legal order: the fundamental values of legal certainty – entailing that statutes must be laid down *ex-ante* – and of equality – demanding issues to be addressed in general and abstract terms.

Although taxes are a creation of Law, with legal statutes dictating what the right amount of tax is, this does not mean there is no room for choice. Taxpayers may alter their behaviour to modulate how tax law applies. Moreover, when required to self-assess taxes, taxpayers have first-say on how tax law is to be construed and applied. Indeed, the existence of choice is at the starting point of any tax minimisation activity.

An ethical approach to the exercise of such freedom demands a conscientious attitude towards taxes, ascertaining the different values at stake to discern where to place the ethical divide between right or wrong when it comes to tax minimisation activities.

Sustainability lays at the absolute heart of such analysis, providing precious guidance as to how to manage one's tax affairs ethically, beyond simply doing what is legal, to satisfactorily meet ESG requirements. Such is the future of tax planning: to grasp the difference between doing nothing legally wrong and doing something morally right!

Keywords: Tax Avoidance, Law, Morality, Conscientiousness, Sustainability, ESG, Tax Planning

1. Introduction

The purpose of this work is to address the subject of *tax minimisation activities*[1], superimposing an ethical analysis over the traditionally followed legal approach. Focus is especially placed on actions that, although legally compliant, may nevertheless be ethically questionable. Ethics is taken as the practical discipline engaged in the philosophical study of *Morality*[2].

An ethical analysis seeks to rationally identify and explain the standards dictated by *Morality*, establishing conclusions of what are good or bad ends to pursue in life and what is right and wrong to do in the conduct of life.

Moral rules are therefore a tool in the search for individual life fulfilment. But, perhaps more significantly, moral rules provide an environment of successful social cooperation and peaceful coexistence between different people, securing a safe space for individual choice

1. The concept of *tax minimisation activities*, as used herein, encompasses any human action thought of and implemented with the intent of saving taxes, irrespective of the corresponding legality.

2. The ideal of *Morality* referred to herein is not that of conventional morality – a "set of norms of a particular society that are generally accepted and followed by the society's members", as defined by Deigh (2010, p. 8) –, but, instead, that of an universal ideal grounded in reason, comprising standards "found, not by observing and analyzing the complex social life of a particular society, but rather by reasoning and argument from elementary facts about human existence taken abstractly" (Deigh 2010, p.10).

and free-will, which in turn is a precondition to leading one's life in accordance with one's aims and beliefs. Highlighting the importance of moral rules Nowell-Smith (1954, pp. 228-229) states:

> "Moral rules are necessary for two main reasons. In the first place every man has a great variety of aims which cannot all be fully achieved because they conflict with each other. (…) But the achievement of co-ordination between a man's own aims is clearly an unimportant reason for having moral rules when compared with the need for co-ordinating the aims of different people. Indeed, until we mention this, we hardly seem to have touched on *moral* rules at all; for, although we do sometimes talk about duties to ourselves, most of our duties are duties to others. There are two main reasons for having social rules. (a) To enable people to co-operate successfully in activities which, either logically or in practice, they could not carry individually; (…) (b) The aims of different people conflict, and if there were no rules for settling disputes the resulting anarchy would be such that no one would achieve his aims".

It is worth noting that the purpose of moral rules bears some resemblance with the goals sought by legal rules. Law forms a binding normative order which makes coordination of efforts possible and, of course, it provides for the settlement of disputes between members of the community[3], governing the use of violence and outlining the limits to individual freedom.

However, unlike moral rules, legal rules are specifically designed by the governing bodies of the community and can be changed to meet the corresponding will or needs[4]. Moreover, mainly because of the adverse consequences attached to their breach – but also to allow

3. The *Law* as a concept is regarded as an "institutional normative order (...). An elaborate set of patterns for human conduct (…which…) is taken to be binding on all persons within the ordered domain (...and...) amounting to a rationally intelligible totality" (MacCormick 2007, p. 11).

4. Within the present analysis, *Law* shall mostly be referred-to having in mind its positive facet: as a compendium of provisions, "laid down through intentional human acts aimed at regulating human conduct" (MacCormick 2007, p. 243).

for widespread compliance –, legal certainty is needed, and, to that effect, rules are typically laid down prior to their application and their content and meaning publicly advertised as clear as possible. Law can certainly provide a minimum standard of requirements, rules, and regulations, as well as mechanisms for enforcement, accountability, and redress. It can also provide incentives, guidance, and support for morally correct choices. But legality is no substitute for morality.

The field of *Business Ethics*, a subdivision of general *Ethics*, specifically addresses the behaviour of organizations, acknowledging their impact on Society as a whole (Donham 1929). It is from that field that concepts such as *Corporate Social Responsibility*, *Corporate Sustainability* and, more recently, *Environmental Social Governance* (or "*ESG*") have stemmed, attempting to provide a framework that can be used by investors, corporations, and other stakeholders to evaluate the performance and impact of organizations on the communities which they are a part of.

As such, ESG can be seen as the consequence of a moral approach to business activities, in the sense that it reflects a commitment to contribute to the common good, respect human dignity, protect the environment, and uphold ethical principles and norms.

2. The interplay between Law and Morality

Given the specific subject of this analysis, taxes being legally created, levied, and collected, it is suitable to start by clarifying the differences and similarities between *Morality* and *Law*.

The interplay between *Law* and *Morality* has been the subject of an endless debate. Over the ages, many of Mankind's greatest legal and philosophic minds have devoted themselves to ascertaining just how moral rules and legal rules are to interact. The fact that no consensus has been reached among them in answering such seemingly simple question is blatant proof of the intricacy of the problem[5].

5. Most of such debate has been centred on the dependency of *Law* from *Morality*, with authors taking sides sustaining either the absence (Hart 1958) or the existence (Fuller

Nonetheless, it would be safe to state that *Morality* and *Law* each dictate a separate normative system aiming at influencing human behaviour. Even if their commands may sometimes coincide – as they often do –, one should not mistake similarity for identity.

One may satisfactorily distinguish Law and Morality on the grounds of their respective concerns. Law is primarily focused on attaining peace, liberty, and justice. It therefore merely imposes those basic moral rules indispensable for the accomplishment of such goals. In addition, Law is not concerned with the inner motives behind individual actions. Simple and accurate compliance with legal rules is what is sought, to be secured using force if necessary. Quite differently, Morality focuses on the improvement of mankind, calling for an inner adherence to its rules, a conscious voluntary acceptance without which an action is of no real moral value (Machado 1982, p. 59).

Of course, one could take the view that for a statute to be legally binding it must ultimately conform to moral standards or even that the only relevant morality, at least as far as normative systems are concerned, is that which is enshrined in legal statutes. Those extreme views, however, would only avert the issue. It is not hard to think of morally questionable legal statutes, just like it seems unrealistic to argue that there can be no moral obligations unless they are backed-up by legal statutes. It follows, therefore, that one's actions may be separately tested against both legal and moral standards.

1958) of such nexus. From such debate, one gathers that "law and morality are conceptually distinct. Yet they interact most intimately" (MacCormick 2007, p. 263). Each plays a different role and acts in a different way: "law is addressed to external freedom, and morality to internal freedom. Law speaks to the relations between people in society; morality speaks to the struggle within each person between reason and desire" (Fletcher 1996, p. 141). Notwithstanding, one should not seek to shed light on the issue by simply comparing Law and Morality as two separate, unrelated, normative systems. The two mutually influence each other: "the institutions of the law are among the factors of environment which shape the individual moral attitudes. The latter, for their part, are among the practical factors which through moral legal consciousness, go to shape the evolution of the law" (Ross 1959, p. 63).

The existence of non-coinciding legal and moral standards opens the way for a mismatch between the border of legality and that of morality. Graphically, such mismatch may be illustrated as follows:

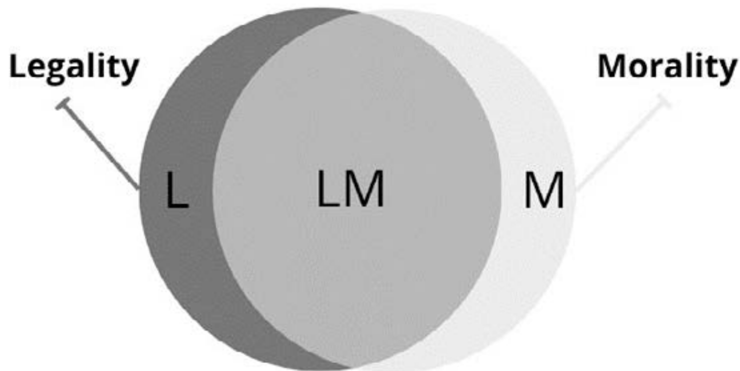


Fig. 1 - The Law and Morality mismatch - by the author

Thus, from a theoretical point of view, the existence of two separate standards entails that there are bound to be ethically wrong actions that are nonetheless legally acceptable (L above), as well as legally prohibited deeds that would be acceptable on strictly moral grounds (M above).

Nevertheless, given that, at least at large, laws are grounded in reason and tend to reflect legitimate choices of the relevant political community, the legality of an action is likely to bear some weight in the determination of the corresponding morality. Although the moral value of legality is not unconditional[6], if legality in itself is held as morally relevant, to morally justify behaviour contrary to a legal statute (M above) becomes correspondingly harder. In any case, more

6. Quoting Higgins, one should not forget that "Law is instrumentally valuable; it is good only because it can be good to people, who possess final value. It lacks the intrinsic value that other goods not ends-in-themselves may possess. Great artistic achievements are intrinsically good though not ends-in-themselves. Law and legal systems are instruments, capable of realizing both great good and great harm. The procedural aspects of the rule of law are law's internal check on this ambivalent potential" (2004, p. 53). On the debate over the moral value of *Law*, see Raz (2009, p. 250-261).

often than not, an ethical analysis will prove the most useful in a scenario of legality, when considering between two equally legal courses of action. The right ethical conduct will tend to be both morally and legally acceptable (LM above). In other words, ascertaining the ethical divide between right or wrong becomes more relevant, in practice, whenever it happens to fall within the legality space (L vs. LM above).

3. Tax Law and Tax Morality

As far as tax minimisation strategies are concerned, the fundamental legal divide is that between *tax evasion* and *tax avoidance*[7]. *Tax evasion* is illegal. It entails non-compliance with legal statutes. Moreover, given the gamut of compliance obligations typically in place, ancillary to the actual payment of taxes, such evasion will characteristically involve the misrepresentation of reality to the tax authorities[8]. Actions or situations legally attracting undesired tax consequences have come into existence but are concealed to minimise the payment of tax.

By contrast, *tax avoidance* may be defined as the legal pre-arrangement of actions or situations to either prevent the occurrence of taxable events or to cause a legal statute containing an exemption or a similar tax benefit to apply. In any case, a more favourable tax treatment

7. One has chosen the expressions *tax evasion* and *tax avoidance* to mark the legal divide between illegal and legal tax minimisation strategies or activities, refraining from further division of those two areas, for which one sees no real useful purpose, at least within the scope of this analysis. Expressions like *tax planning* or *tax mitigation* are consequently not used to that effect. On the subject-matter of legal and illegal tax minimisation there is a massive amount of literature, this being an area of research favoured by many scholars (Afschrift 2003; Courinha 2004; Sanches 2006; Torres 2008; Da Rocha 2023). On the increasingly pervasive use of the term tax avoidance, especially in legislation, to cover very different realities, to some extent at the expense of accuracy, see Gammie (2020, p. 135-153).

8. Nonetheless, a plain and simple choice not to pay a tax legally due, without any misrepresentation of facts, must also be qualified as a form of tax evasion, rudimental as it may be. It is what typically occurs in cases of tax resistance, a form of civil disobedience, which may be define as the refusal to pay tax because of opposition to the government, its policy, or simply to taxation in itself – on tax resistance, see Caínzos (1986, p. 9).

than that which would otherwise apply is attained. Tax triggering events foreseen by law do not occur and as a result, even after full and accurate disclosure, undesired tax consequences are avoided[9]. Legality of conduct is therefore a concern, and it is secured thanks to prior knowledge of the potentially applicable legal statutes, pondered upon the process of deciding between different possible courses of action.

An important remark to be made regarding the legal divide between *tax evasion* and *tax avoidance* concerns *substance over form doctrines* such as *abuse of law*, *frau legis*, *sham*, or *economic substance*. Irrespective of being expressly foreseen in legal statutes or simply being the result of judicial activity, those doctrines all share the purpose of providing a last resort to counter unacceptable legal outcomes, having regard to the situation under analysis and the purpose of the legislation at stake. Grounded in reason, they deny the legal effects typically attached to a given fact or situation, either by expressly refusing such effects considering the intolerability of its existence, or by construing the legal provisions applicable to such facts or situations in such a way that they do not bring about such intolerable legal consequences.

What must be stressed herein is that applying *substance over form doctrines* amounts nonetheless to making a legal judgement, ascertaining the legal divide between illegal evasion and legal avoidance. Even if they tend to come into play *post facto*, they are still *Law*. Adjusting what would otherwise be the outcome of legal provisions, these doctrines form part of the legal system and therefore still work to draw the line between legality and illegality[10]. In short, *substance over form doctrines* amount to legal tools which, under a criterion of reasonability,

9. Afschrift interestingly breakdowns *tax avoidance* strategies according to their level of sophistication, ranging from simply *abstaining* from any action *to legally eroding* the tax base, comprising in-between actions such as the *replacement* of the adversely taxed action by another with a comparable economic result, the *refusal to formalise* actions avoiding rendering them legal effect, and the *physical evasion* from the legal order to engage in the economic activity concerned elsewhere (2003, p. 17-28).

10. Hence, for any *tax avoidance* conduct to retain such qualification it will have to be capable of surmounting an examination under such constraints. If it does not, it will be illegal and therefore amount to no more than *tax evasion*. For this reason, *general anti-avoidance*

aim at preventing the occurrence of legal outcomes seen as unacceptable by reference to the legal system in force as a whole. Indeed, such doctrines preserve the consistency of the legal order in extreme cases, quenching the appetite for justice and preventing a direct application of *Morality* which, if it was to occur, could helplessly erode the authority of *Law* and jeopardize legally protected values such as freedom and justice.

Whenever *substance over form doctrines* form part of the existing legal order, it seems hard to explain the existence of tax minimisation activities that are legal – therefore passing such doctrines' tests and meeting their corresponding thresholds – but are nevertheless deemed as morally unacceptable. Indeed, one would expect that under a reasonable legal order, any behaviour suitable to be legally upheld and capable of remaining undeterred by *substance over form doctrines* would be morally unassailable.

Unfortunate as it may be things are not that straightforward. *Substance over form doctrines* are insufficient to make *Law* and *Morality* coincide. This is to some extent unavoidable and inherent to the coexistence of both concepts but, what is more, such mismatch should in fact be taken as perfectly natural and sound.

In the real world, legal statutes have multiple flaws. It is true that they reflect political choices, but they are also typically the result of political compromise. From the onset, one should therefore never forget that the context in which statutes are drafted is one not entirely governed by reason and reason alone. Generally speaking, legal rules need not be reasonable to exist as such. Of course, one expects legal rules to be logical and coherent, but reasonability is *prima facie* not a requirement of legality.

In addition to this somewhat mundane observation, analysing the reason behind the *Law* and *Morality* mismatch, one must above all bear in mind the shortcomings inherent to the workings of any properly functioning legal order. First and foremost, the fundamental value

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rules are actually wrongfully (or euphemistically) named. They should more adequately be regarded as *general anti-evasion rules* or *general anti-abuse rules*.

of legal certainty entails that statutes must be drafted and laid down *ex-ante*, prior to their entry into force. The importance of certainty should not be neglected or disregarded[11]. It is a crucial requirement of any properly functioning legal order. It is certainty as to the application of legal rules which permits Law to be viewed as securing liberty and not just an ordered, disciplined society. On the other hand, concerns for equal treatment of all those under law, dictate the need to address issues in general and abstract terms[12].

These traits, inherent to the *rule of Law*, all seem perfectly valid and reasonable in themselves. However, the need to expressly state the applicable legal rules beforehand, in abstract terms, does entail that, when legal statutes are actually applied to real life situations, the *Law* may fall short of rendering the desirable outcome in terms of reasonability. For instance, a statute may fail to attach legal effects to actions or situations with no relevant difference from others to which such effects were expressly appended, quite simply because the possible occurrence of the former was not contemplated when the legislation was drafted. On the other hand, legal consequences dictated by a statute may prove intolerable on the face of an expressly foreseen action or situation because such consequences were not thoroughly considered upon the drafting of the law.

It is not hard to see how certainty and equality under the *Law* would not survive in a world where legal rules were held as having to coincide with moral rules or had their meaning directly dictated by the latter. Although they sometimes may ultimately render similar results, what is important to remark is that legal analysis and moral reasoning differ profoundly in their workings. Legal analysis concerns the interpretation of previously established abstract rules which purportedly reflect a political choice as to the best way to achieve a desired balance between peace, justice, and freedom. Ethical reasoning is different: it is made in the face of either real or imaginary situations,

11. Identifying the need for legal certainty as an impediment to an absolute coincidence between legal and ethical rules, see C. Perelman (1990, p. 364-365).

12. Describing this characteristic of legal systems, see Fletcher (1996, p. 28-32).

the relevant details of which are open to be determined – even if only hypothetically – prior to reaching a conclusion. Each and every possible consequence of a given act may be weighted and considered before ascertaining which action is morally good.

Finally, it should be stressed that the possibility of a legal order generating incongruous or contradictory outcomes grows exponentially whenever it is called to interact with other legal orders of equal standing or value, as it is typically the case in international situations. A legal order is expected to work as a coherent and rational whole – and it supposedly does, at least most of the time. But it is pretty much though-of and devised as a system closed within itself. Despite by and large acknowledging foreign legal orders as equally legitimate within their corresponding scopes of application – taking them as facets of other States' respective sovereignties –, each legal order is developed separately, with its legislative bodies generally paying little or no regard to the outcome of its likely interaction with all other legal systems. Inevitable as this may be, few would argue that the coexistence of independently developed legal orders, simultaneously applying to a given situation, carries with it an element of unpredictability that may cause legality to further stray from reasonability.

In short, *Law* may not cover all the relevant issues, may vary across jurisdictions, may be subject to loopholes, ambiguities, or inconsistencies, and may not keep pace with the evolving expectations and demands of society. As remarked by Conrad (2022, pp. 250-251):

> "Social morality, good behaviour and politeness are additional prerequisites for societal processes to run smoothly. The state as an organisation cannot control, monitor and implement everything. Even if one were to attempt to do so, the expense would be enormous. On the other hand, if social rules were not adhered to by anyone the social system would collapse. (…) Good manners, morality or more generally, behaviour in conformance with the community, is mostly transmitted through social education. This basis for behaviour is another good needed for the society to survive, and

> which the people themselves must produce. It is not just a question of rules and control. (…) Laws are a necessary prerequisite for the functioning of an economic and social system but not sufficient. Without morality it does not work. Laws can be ignored because either control is incomplete or the punishment is not dissuasive".

All this explains why, when tax planning decisions are made, the search for a morally sound choice should not rely solely on how contemplated alternatives are dealt with by the legal order concerned. One should not victoriously call off the quest for a morally right conduct at the mere face of legality[13].

4. The right ethical decision

Those wishing to adopt an ethical stance regarding taxes ought to still reflect on what is right or wrong from a moral point of view, even when facing two equally legal alternatives. It seems only adequate that such a task should start by considering the nature and purpose of taxes.

Taxes are vital to the development and maintenance of the physical, human, and legal infrastructure that enables the existence of effective political communities, boosting the overall development of mankind and underpinning values such as liberty and solidarity. In modern day societies at least, taxes are also a creation of *Law*. Legal statutes typically dictate under what circumstances someone is required to pay a tax and how much the corresponding amount is. As such, payment of taxes is mandatory, not voluntary. Consequently, there should be no doubt as to what the right amount of tax is. In short: there should be no room for choice.

13. Such is, in fact, an inevitable consequence of conceiving *Law* and *Morality* as two separate non-coinciding normative systems. The view that the moral line is different from the legal line "allows that it may be true that many or all instances of tax avoidance are morally permissible. But this view at the same time holds that the bald statement that 'taxpayers are morally entitled to avoid taxes because it is not illegal' is not necessarily true" (Prebble & Prebble 2010, p. 128).

However, as any tax advisor will agree, choice is all around us when it comes to taxes. It may be that a single taxpayer is unable to alter legal statutes[14], but taxpayers may certainly choose their actions, altering behaviours so that a certain statute applies or so that it applies in a certain way. Moreover, in an era in which taxpayers are, increasingly more often, called to self-assess their own taxes – and even taxes formally assessed by tax authorities are, more often than not, levied on the basis of tax returns presented by taxpayers and automatically treated with virtually no human intervention –, taxpayers actually have first-say on how tax law is to be construed and applied.

In fact, the existence of choices is at the starting point of any tax minimisation activity. What is more, there is a widespread culture of *tax avoidance*, to a certain extent induced by tax systems themselves[15]. On this very issue Freedman (2008, pp. 87-88) states:

> "Governments are ambiguous about what they are trying to do with the tax system. They want to raise revenue, of course, but they also want to redistribute income and wealth to a greater or lesser degree, and they wish to use taxation to mould behaviour and influence the economy. Sometimes these multiple aims conflict and cause confusion. They also create complexity in the tax system. Ministers and officials make statements castigating tax avoidance, but they also encourage it by virtue of the structure of the systems they create. They offer tax breaks as incentives to behave in certain ways, and these special provisions and incentives create a culture

14. Although some do succeed in negotiating a special status, for instance undertaking investment agreements with governments which entail tailor-made tax benefits. While acknowledging this to be a form of *sanctioned tax avoidance* which does raises issues of equality, one will abstain from specifically addressing them herein. On such topic, see Nabais (1994).

15. Portraying complexity as a threat to the tax system, Payne (2002, p. 173) states: "Tax complexity (...) represents a triple threat to the tax system. First, it increases compliance burdens, adding to waste and frustration. Second, it makes for an increasingly subjective tax system, a system where right or wrong lose their meaning. Third, complexity encourages cheating – which undermines public trust and confidence in the system. In the long run, a complex tax system loses support of all segments of society: rich and poor, right and left".

> in which tax planning is encouraged and actions are tax driven. (…) In this way, the prize for behaving 'well' is often seen to be a reduction in taxation. This sits uneasily with the idea that tax is the fair price to be paid for participating in a civilised society. Further, the creation of an environment in which tax is associated with tax planning and there is active encouragement to take tax considerations into account when making everyday decisions tends to reduce the stigma that might otherwise attach to the use of artificial constructions entered into for tax purposes, since it appears to the taxpayer to be a normal part of the way our rather incomprehensible tax system operates. (...) Underlying all these forms of [tax avoiding] behaviour and the entire psychology of tax avoidance is the belief inculcated by the factors above: that tax avoidance is legal and, moreover, 'normal' (and therefore not 'wrong' or 'unfair')".

Be that as it may, regardless of all the difficulties and predicaments attached to the task at hand, they are not such as to render it impossible to determine what is morally right or wrong when tax minimisation activities are concerned. As remarked by Weston (2002, p. 28-29):

> "Whether we admit it or not, we *do* make our own decisions. We cannot pretend we are simply obeying some rules (or authorities) that settle matters – ours only to obey. (…) Choosing is inescapable. The only thing we accomplish by denying our own responsibility is to make it easier for other to manipulate us (…) Let me say it one last time: think for yourself!".

How we are then to determine what is morally right or wrong? Such is a task for which we must rely on our rationality as human beings. Although the workings of our minds are to a large extent inextricable, a morally right action is typically explainable and understandable by most people[16].

16. On the process of decision-making based on ethical theories, see Dathe et al. (2022, p.102-105).

The possibility of explaining and understanding implies that morally right actions are justifiable under commonly shared references of our ability to reason. To justify an action as reasonable entails, not only explaining the motives behind such an action, but also to sustain the validity of such motives under the common rules of logical reasoning. In a successful explanation, the addressee will agree with the reasonability of the action, thus socially sanctioning the decision made by the agent.

More significantly, an action deemed morally right will merit praise by those who analyse it. The reason for such praise will be rooted, not so much in the actual consequences of the action itself, but instead in an approbation of the way of reasoning shown by the agent. A good decision, from a moral point of view, will be one grounded in good reasoning. Sound reasoning by someone will evidence the agent's capability of accurately perceiving and pondering the relevant values at stake, denoting awareness of all the relevant consequences of any contemplated action. Finally, a decision to act in accordance with such reasoning will indicate the agent himself to be someone who values reason, reassuring others that future actions, whatever they may be, will be equally thought trough and sound.

Conversely, morally wrong actions will denote a failure on the part of the agent in adequately taking into account the relevant values at stake, evidencing poor reasoning. Such poor reasoning will show itself first and foremost in the form of unsustainability, if hypothetically the reasoning concerned was to be followed by all members of the relevant community. With all likelihood, extending theoretically the number of agents following the line of reasoning proposed will unequivocally show the irrationality attached to it, signalised by the social unacceptance of the foreseeable consequences of the contemplated action.

It follows that *conscientiousness*, as an awareness of one's own self and one's surroundings, is the key to consistently succeed in making good moral decisions. As observed by Nowell-Smith (1954, p. 257-258):

> "To be conscientious is not to conform to an accepted moral code, but to conform to rules to which the agent himself thinks he ought to conform. (...) There is a good reason for allowing conscientiousness a special place on the scale of moral virtues. A man who displays some other virtue, for example courage or honesty or generosity, can be relied on to do just those things that belong to his special virtuous disposition; and these virtues can only be exercised in comparatively narrow ranges of situations. But conscientiousness is a substitute for all other virtues, and its unique value lies in this fact. The so-called 'natural virtues' are dispositions to do certain sorts of things towards which we have, in general, a pro-attitude; and moral rules are rules enjoying these same things. Hence the conscientious man will do exactly the same thing that a man who has all the natural virtues will do. He does not do them for the same reason; and he is not brave or honest or kindly, since he acts for the sake of doing his duty, not for the sake of doing the brave, honest, or kindly thing. But he will do what the brave, honest, and kindly man does".

And if *conscientiousness* is the method, *sustainability* is indeed the yardstick against which to measure the contribution and impact of the actions taken by both individuals and companies to the community they form part of. *Sustainability* entails embracing a long-term, strategic perspective, integrating the multiple facets involved in one's activity, with a view of striking a suitable balance between different goals and values, in a way which permits them to be met and abided by, continuously and consistently, over time.

It is this *sustainability* approach that in recent years has taken front stage, with the concept of ESG becoming a key framework for assessing and managing environmental, social and governance factors[17]. ESG

17. In 2015, seeking to design a new global development framework, the General Assembly of the United Nations adopted a resolution, entitled "Transforming our world: the 2030 Agenda for Sustainable Development" (A/RES/70/1), establishing a set of 17 Sustainable Development Goals ("SDGs"). Those SDGs emphasize the interconnected environmental,

calls for voluntary, proactive, and continuous efforts from companies and individuals to go beyond compliance and adopt best practices, standards, and principles that reflect their values, goals, and strategies. ESG criteria can include factors such as:

- Environmental: how to minimize negative impacts and enhance positive contributions to the natural environment, reducing greenhouse gas emissions, managing waste and water use, preserving biodiversity and natural resources, and adapting to climate change;
- Social: how to treat employees, customers, suppliers, communities, and other stakeholders, including, of course, the State – and in it the Treasury –, ensuring fair labour practices, human rights, diversity and inclusion, health and safety, customer satisfaction, product quality and social responsibility;
- Governance: How to lead, govern, and control organizations, ensuring ethical conduct, accountability, transparency, stakeholder engagement, board independence and diversity, executive compensation, and anti-corruption policies.

Taxes are no exception, and they must not be excluded from ESG analyses. Therefore, the approach taken by businesses regarding taxes and tax avoidance inevitable bears an impact on the corresponding ESG information and ratings, affecting an organization's reputation, profitability, risk profile, and long-term value creation potential.

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social, and economic aspects of sustainable development by putting *Sustainability* at their core. The 17 SDGs are: No poverty (SDG 1), Zero hunger (SDG 2), Good health and well-being (SDG 3), Quality education (SDG 4), Gender equality (SDG 5), Clean water and sanitation (SDG 6), Affordable and clean energy (SDG 7), Decent work and economic growth (SDG 8), Industry, innovation and infrastructure (SDG 9), Reduced inequalities (SDG 10), Sustainable cities and communities (SDG 11), Responsible consumption and production (SDG 12), Climate action (SDG 13), Life below water (SDG 14), Life on land (SDG 15), Peace, justice, and strong institutions (SDG 16), and Partnerships for the goals (SDG 17).

5. The ethical approach to Tax Avoidance

Bearing in mind the knowledge of what taxes are and having at least a rational idea of how to identify good decisions from a moral point of view, one should be able to reach some conclusion on what is morally right as far as tax avoiding activities are concerned.

As aforementioned, taxes are a creation of *Law*. They exist to ensure the gathering of the economic resources needed for the existence and proper functioning of a given community's common government. Tax law therefore serves a primary social function pertaining to the provision of public services and redistribution of goods among the relevant community, in accordance with the corresponding political choices (Raz 2009, p. 171-172). Moreover, tax law also serves an important secondary function, as the resources it generates render viable the very existence and functioning of law-creating and law-applying organs (Raz 2009, p. 175). The existence of taxes may therefore be seen as intimately linked with the very maintenance of a functioning legal order.

Hence, payment of taxes or, more accurately putting-it, compliance with tax law by those enjoying the benefits of the functioning of government and the existence of a legal order, seems quite reasonably justified. What is more, such compliance, if it corresponds to a substantiated adherence to the underlying objective of the statute concerned, will typically merit social approval in the sense that it denotes awareness for socially significant values like solidarity and responsibility, which are intrinsic to the concept of taxes. If this is so, complying with tax law will accordingly correspond to the morally right thing to do. Tax compliance, in the sense of paying the right amount of tax, in the right place, at the right time, is then tantamount to a morally right action.

The issue then becomes to a large extent one of sound statutory interpretation. To ascertain whether a tax avoiding action is morally right one ought to adopt a conscientious attitude towards taxes and tax law. Attention must be paid to the shortcomings of legal

statutes, looking beyond the literal interpretation to grasp the spirit of the legislation. To take advantage of benefits deliberately put in place by the legislator will easily be considered as morally right, as such action will most likely serve a prevailing social purpose, politically valued higher than the foregone tax revenue.

Things are slightly different when advantage is taken of an absence of legislation creating loopholes or a field of non-taxation. Unless there are reasonable grounds to sustain that such was the intention of the legislator, purposive interpretation of existing statutes ought to be resorted to in order to ensure that there really is a void in the legislation. Notwithstanding, if at the end of the day the economic reality corresponds to a situation indeed not attracting taxation, the action ought to be deemed morally right.

In other words, taxpayers are not ethically required to alter their non-taxed genuine economic activities into one that is subject to taxation. The opposite scenario will, on the other hand, raise ethical concerns. If a taxpayer engages in substance in an activity that is subject to tax but changes it in such a way that advantage is taken of a field of non-taxation not intended by the legislator there is every reason to sustain such to be a morally unacceptable conduct.

When in an international setting, the employment of a teleological or purposive interpretation to construe legal statutes as a way of assessing the envisaged taxation of a given situation may be insufficient to account for the legislation's shortcomings. In such a scenario another legal order comes into play and the situation will, at least to some extent, escape the scope of application of the legal order that would otherwise govern it entirely. This partial application renders it unreliable to take purposively interpretation of the statutes of one legal order as a mean to morally assess the situation. What one is left with is the concept of taxes as an apportionment of economic wealth to pay for the functioning of government, as an institutionalisation of the obligation to share the burden derived from the existence of the political community (Menéndez 2001, p. 120).

Accordingly, tax avoiding actions that entail benefiting from the existence of other legal orders will only be ethically acceptable if there is an economic attachment therein justifying their application – as well as the limited or total disengagement from the legal order by comparison to which the advantage is measured. In those situations, the advantage secured will have risen simply from the exercise of an economic activity within a more favourable, equally legitimate, tax system. By contrast, the resort to other legal orders without a matching economic activity capable of reasonably justifying it will be morally questionable. Even if not entirely artificial, such an action will amount to no more than a circumvention of the legal order under which the tax advantage is obtained.

All the above, however, are only general guidelines. To morally hold an action as right or wrong calls unequivocally for a case-by-case approach, albeit not losing sight of the fundamentals of ethical reasoning. If nothing else, however, one should act based on transparency and full disclosure.

To follow an ethical approach is challenging in every facet of life but it is particularly demanding in taxes, given the complexity of the matter and variety of the values involved. It entails thinking-through actions much harder than what one would otherwise do. Moreover, one's mind may often self deceivingly argue against the hard demands of *Morality*, favouring a more comfortable road. Such arguments may entail justifications like condemning governments themselves as behaving unethically or assigning poorly made laws the blame for unethical *tax avoidance*. They may simply point-out that most taxpayers do not worry about ethical considerations but only look to legality.

6. ESG & the future of Tax Planning

None of the challenges which come with adopting an ethical stance regarding tax planning should of course prevent one from trying to do what is right and taking responsibility for one's owns actions. This is

equally valid regarding businesses, their goals and impact within the community. As remarked by Murphy (2008, p. 127-129):

> "There is a strain of thought that dismisses ethics as irrelevant to the hard, ruthless world of business, where tough competition is as much a reality as cooperation, and where the metaphor of business as war comes easily to mind. Maybe individuals can be virtuous – but only in the non-business part of their lives. In the actual world of business, and particularly in today's world where open markets, free trade, competition, breakup of monopolies and privatization are the order of the day, the pressure to survive is enormous. Little wonder that many high-minded idealists dismiss the heartless world of business, like the world of war, as almost inherently immoral. (…) It is easy to show that the position expressed in the last sentence is mistaken, since there are obvious ethical qualities prized in business and war: business requires trust in certain key relationships, just as soldiers prize loyalty to comrades, and both find that virtue is the one thing they can hold on to as matters get difficult. (…) I close by suggesting the need for dialogue between businesspeople and ethicists on the kind of ethic that would emerge from, that would be natural to, the business world. An ethic of law-observance is not enough, and takes no imagination. The drawing-out or explication of an ethic that would be in some way admirable to both people in business and those in other walks of life, yet clearly grounded in business experience, should be the goal of that ongoing dialogue".

An ethical approach to tax planning is fully aligned with the concerns of the ESG agenda. By aligning their tax policies and practices with their ESG commitments, businesses demonstrate their social responsibility and accountability, enhance their reputation and trustworthiness, and signal respect for the rule of law, and their contribution to public goods and services.

On the other hand, expanding ESG concerns into the tax field may mitigate risks and costs associated with aggressive or non-compliant

tax strategies, reducing the exposure to tax uncertainty, litigation, and controversy, as well as compliance and reporting burdens. Additionally, integrating ESG considerations into their tax planning, businesses and investors can also identify and pursue value-creating and opportunity-enhancing tax strategies that align with their ESG goals and strategies.

It seems clear than ESG demands an ethical approach to tax planning, as a valid way of seeking responsible, long-term, growth and ensuring business competitiveness and resilience.

In any case, as a final remark, one should recall that an ethical analysis is different from a legal examination. It would go without saying, but one should not be tempted to derive legal consequences from ethical considerations. As shown, there is no identity between *Morality* and *Law*, and there is good reason to believe that fundamental traits of the *rule of Law* would be jeopardized if that difference is not adequately perceived.

Some may then ask what is the point of such analysis? Why should one be interested in knowing what is morally right, let alone what an ESG approach to tax planning would be? Well, significance of such knowledge will of course vary according to the goals one sets to pursue in live. Those interested in pursuing a good life will not need an answer. For the rest, the answer is plain and simple: because you ought to. Such is the future of tax planning: to grasp the difference between doing nothing legally wrong and doing something morally right!

References

AFSCHRIFT, T. (2003). *L'évitement licite de l'impôt et la réalité juridique*. De Boeck & Larcier.

CAÍNZOS, J. F. (1986). La resistencia fiscal: un capítulo de la sociologia financiera. In J. F. Caínzos (Ed.), *Estado y los Contribuyentes: la Resistencia Fiscal*. Instituto de Estudios Fiscales.

CONRAD, C. A. (2022). *Business Ethics - A Philosophical and Behavioral Approach*. Springer.

COURINHA, G. L. (2004). *A cláusula geral anti-abuso no direito tributário*. Almedina.

DA ROCHA, J. F. (2023). *Introdução ao Planeamento Fiscal*. Almedina.

DATHE, T., DATHE, R., DATHE, I., & HELMOLD, M. (2022). *Corporate Social Responsibility (CSR), Sustainability and Environmental Social Governance (ESG)*. Springer.

DEIGH, J. (2010). *An Introduction to Ethics*. Cambridge University Press.

DONHAM, W. B. (1929). Business Ethics – A general survey. *Harvard Business Review*, 7(4).

FLETCHER, G. P. (1996). *Basic Concepts of Legal Thought*. Oxford University Press.

FREEDMAN, J. (2008). Is tax avoidance 'fair'? In C. Wales (Ed.), *Fair Tax: Towards a modern tax system*. Smith Institute.

FULLER, L. L. (1958). Positivism and Fidelity to Law: A Reply to Professor Hart. *Harvard Law Review*, 71(4).

GAMMIE, M. (2020). Tackling Tax Avoidance: the use and growth of statutory 'avoidance' language. In G. Loutzenhiser & R. De la Feria (Eds.), *The Dynamics of Taxation*. Hart Publishing.

HART, H. L. A. (1958). Positivism and the Separation of Law and Morals. *Harvard Law Review*, 71(4).

HIGGINS, R. C. A. (2004). *The Moral Limits of Law*. Oxford University Press.

MACCORMICK, N. (2007). *Institutions of Law*. Oxford University Press.

MACHADO, J. B. (1982). *Introdução ao Estudo do Direito e ao Discurso Legitimador*. Almedina.

MENÉNDEZ, A. J. (2001). *Justifying Taxes*. Springer.

MURPHY, J. G. (2008). People in Business: Context and Character. In G. Flynn (Ed.), *Leadership and Business Ethics*. Springer.

NABAIS, J. C. (1994). *Contratos Fiscais*. Coimbra Editora.

NOWELL-SMITH, P. H. (1954). *Ethics*. Penguin Books.

PAYNE, J. L. (2002). Explaining the persistent growth in Tax Complexity. In D. P. Racheter & R. E. Wagner (Eds.), *Politics, Taxation, and the Rule of Law*. Kluwer Academic Publishers.

PERELMAN, C. (1990). *Éthique et Droit*. Éditions de l'Université de Bruxelles.

PREBBLE, Z., & PREBBLE, J. (2010). The Morality of Tax Avoidance. *Creighton Law Review*, 43(3).

RAZ, J. (2009). *The Authority of Law*. Oxford University Press.
ROSS, A. (1959). *On Law and Justice*. University of California Press.
SANCHES, J. L. S. (2006). *Os Limites do Planeamento Fiscal*. Coimbra Editora.
TORRES, H. T. (2008). *Derecho tributario y Derecho privado*. Marcial Pons.
WESTON, A. (2002). *A Practical Companion to Ethics*. Oxford University Pres

International maritime transport taxation: From sustainability to value creation

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Abstract: Our contribution proposes a study into the hypothesis that recent developments, at the level of the international tax system, might aid in driving the international community towards more sustainable tax policies in the future. In this context, we set to demonstrate that contemporary shifts in theoretical reasoning, particularly regarding the principles that permeate international allocation rules (e.g., value creation principle), can better foster the creation of sustainable tax policies when compared to more traditional approaches. As such, striving to attain an up-to-date view on the matter, we commence by analyzing what conclusions have been drawn so far regarding the effects of international tax law on the development of sustainable tax policies by contracting states. Furthermore, we look into the sustainability consequences of specific international tax regimes, such as (but not limited to) the allocation rules applicable to the Maritime Shipping and Air Transportation sectors. In this regard, our main goal is to determine the type of allocation formula – residence-based vs. source-based – that best aligns with three vectors: (i) attainment of sustainability goals, (ii) practicality of implementation and (iii) theoretical support (under said principles). Finally, our analysis focuses on the provisions adopted for such sectors among Portugal's own double tax treaty network. In this exercise, not only do we undertake an overview of the elected allocation rules, but we also privilege the use of a comparative approach, thus creating valuable insights for future tax policy decisions.

Keywords: Maritime Shipping; Air Transportation; Sustainability; International Tax Law; Principle of value creation; Benefit Principle.

1. Declaration of intent

Our contribution proposes a study into the hypothesis that recent developments, namely at the level of the international tax system, might aid to steer the international community towards the creation of more sustainable tax policies for the international transport industry.

Before all else, in order to draw a clear picture on the workings of such industry sector, we will endeavour to present an empirical analysis of its importance in the global economy as well as the most common environmental impacts associated with maritime transport activities.

Moreover, striving to attain an up-to-date view on the topics at hand, we shall then present the current state of affairs regarding the taxation of international maritime transport profits. In this effort, we will start by showcasing the motives for the apparent consensus around exclusive residence state taxation (Article 8.º OECD Model[1] / Alternative A UN[2] Model), as this will allow us to explain why some developing nations continue to push for the introduction of source allocation rules into their double tax treaty networks (Article 8.º Alternative B UN Model).

Throughout our study, in keeping with a comparative approach, we expect to outline relevant lessons taken from other countries' recent experiences in regards to the taxation of maritime shipping profits. It is our hope that our insights might help to inform the decisions of our own national lawmakers, reason why we will also draw comparisons to the tax policy options endorsed in this domain by the Portuguese authorities so far, both on the international and domestic level.

1. OECD Model Tax Convention on Income and on Capital.

2. Twenty-foot Equivalent Unit.

In this context, we will then set to demonstrate that contemporary shifts in theoretical reasoning, regarding the principles that permeate international allocation rules (e.g., value creation, benefit, and neutrality principles), offer support for the adoption of source-oriented allocation rules for maritime transport profits.

At the same time, we shall aim to identify if an increase in the alignment of double tax agreements with such rationales would better foster the creation of more sustainable tax policies, by developing source countries, when compared to traditional approaches.

As a proof of concept, we shall look into the sustainability consequences of the various tax policy options available to contracting states when creating the international tax regimes that govern the taxation of profits arising from the maritime transport industry.

In this regard, we must also focus on potential repercussions that might stem from the interdependent relation that exists between the international tax policy decisions, enacted in the context above, and the creation of domestic environmental taxes.

As such, one of our main goals will be to determine the type of allocation formula – residence-based vs. source-based – that best aligns with three policy vectors: (i) attainment of sustainability goals, (ii) theoretical support (under said principles) and iii) practicality of implementation.

Therefore, considering the above, our contribution aims to provide negotiating states with guidance on the sustainability benefits that might, directly or indirectly, arise from the adoption of source-based solutions for the allocation of tax rights over maritime transport profits, under the dispositions of double tax treaties.

2. International maritime transport: a brief industry review

2.1. International maritime transport in numbers

Although somewhat ignored by the general public, the international maritime transport industry is a vital part of the globalized world economy of today. In fact, some estimates even claim that the industry transports almost 90% of the world's trade.[3]

In this context, one must comprehend that the term "maritime transport" is very broad and normally alludes to all services that involve the carriage of passengers or goods by sea.[4] Within this already specialized industry, it is equally possible to divide its members into further categories based on the type of service provided such as, for example, the shipping companies (transport of goods) and the cruise companies (transport / entertainment of passengers).

Even so, there is little doubt that between them the shipping industry takes the leading role as the "backbone of world trade", both in regards to profitability and sheer capacity. Unbeknownst to most consumers, this invisible industry operates in the background to make global trade a reality, the products delivered by its ships range from raw materials, food supplies and machinery parts to end of the line consumer goods, like clothes, utensils, and electronics.[5]

Cargo set for transport by sea is carried aboard liner ships – either through container or roll-on-roll-off vessels – which operate on a pre-determined schedule on fixed routes, with several calls to port in between to complete freight related (e.g., loading, unloading, etc.) or maintenance operations (e.g., repairs, refuelling, etc.).

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3. See International Chamber of Shipping (2022), *ICS Trade Policy Review 2022*, pp. 26.

4. See Article 1.°, n.° 4 of Regulation (EEC) n.° 4055/86 of 22 December 1986 and Article 2.°, n.° 1 of Regulation (EEC) n.° 3577/92 of 7 December 1992, which apply the principle of freedom to provide services to maritime transport within / between Member States and between Member States and third countries.

5. See Rose George (2013), *Ninety Percent of Everything: Inside Shipping, the Invisible Industry That Puts Clothes on Your Back*, Metropolitan Books, pp. 13-20.

According to the World Shipping Council, today there are over 7.000 ships operating in liner services across the globe, each of them with capacity rivalling that of several warehouses' worth of goods.[6] As it happens, that same organization reports that since the mid of the last century the container carrying capacity of the largest ships has increased more than 1.200 percent, with the largest ones boasting an impressive carrying capacity of 24.000 twenty-foot containers (or TEU).

Furthermore, it is interesting to underline that the shipping industry presents a somewhat global distribution, as the routes used to transport freight usually extend to all continents and make use of international waters that connect most of the coastal states.

This may be better observed by analysing the most popular routes, from 2008 to 2022, as we can see that the trending biggest figures in containerized trade in the last decades belong consistently to the East Asia to North America route, with 26.1 million TEU and to the East Asia to Northern Europe and Mediterranean route, with 19.6 million TEU. Thus, practically covering the majority of coastal countries of the world and allowing for wide range of connections with various ports of call along the way.[7]

Unsurprisingly, the shipping industry harbours many business titans in its midst. In 2021, not only did the ten leading liners presented operating profit margins that reached a 56% average ratio, the industry's full-year operating profits (EBIT[8]) also soared to a staggering amount of 240 billion USD.[9][10] [11] As an example, the most profitable maritime

6. See World Shipping Council (2021), *Liner Shipping - The backbone of world trade*, available at , pp. 4-5.

7. See UNCTAD (2022), *Review of Maritime Transport 2022*, United Nations Publications, pp. 10-11.

8. Earnings Before Interests and Taxes.

9. United States Dollar.

10. See Alphaliner (2021), *Profit margins accelerate as 2021 EBIT set to beat all records*, Alphaliner Weekly Newsletter, pp. 48.

11. See UNCTAD (2022), *Idem*, pp. 64-65.

transport group AP Moller-Maersk, between 2020 and 2021, saw a steep increase of its revenues from 39.7 billion USD to 61.8 billion USD.[12]

For context, according to the data made available by the World Bank, there are 128 countries worldwide whose GDP[13] values (USD), in 2021, were unable to the reach the revenues produced by the most profitable shipping group.[14]

Since the results, under the GDP assessment, amount to the measure of the value added created through the production of goods and services in a country during a certain period,[15] it is no small feat to outcompete the majority of the world's countries under such standard. Moreover, it should be noted that from the abovementioned list only five countries are classified as developed nations by the UN, with the remainder either falling into the category of in transition or developing nations.[16]

As for the cruise industry, there is little doubt that the sub-sector is smaller in scale, as its total revenue worldwide is estimated to have reached 18.62 billion USD in 2022.[17] Although, reports would suggest that the cruise market was more strongly affected by the Covid-19 pandemic than is shipping counterpart and is currently going through a recuperation phase.

At the height of its growth, in 2019, the cruise industry's biggest group (Carnival Corporation) reported consolidated revenues as high

12. *Ibidem*.

13. Gross Domestic Product.

14. See World Bank, GDP (current US dollars) - All Countries and Economies data, available at www.data.worldbank.org, last consulted on August 9, 2023.

15. See OECD (2023), Gross domestic product (GDP) (indicator), available at www.data.oecd.org, accessed on 10th August 2023.

16. See UN DESA (2023), *World Economic Situation and Prospects Report 2023*, United Nations Publications, pp. 118-121. Note: at least 16 territories in the list were not included since their sovereignty is either contested or dependent on others.

17. See Statista (2023), *Revenue of the cruises market worldwide from 2018 to 2027*, available at www.statista.com, published on 8 August 2023 and consulted on 12 August 2023.

as 20.8 billion USD (OPM[18] at 15.73%), unfortunately such number dwindled to only 12.2 billion USD in 2022 and operating profit margins were not even positive.[19]

Nonetheless, it is still impressive to note that the cruise industry, during 2022, recorded 20.4 million ocean-going cruise passengers, with total cruise capacity for the same year being report around 625 thousand passengers.[20]

On the other hand, the cruise industry seems to be geographically more concentrated, at least based on the destination of the trips, as the Caribbean / Bahamas / Bermuda territories alone saw the arrival of circa 11.9 million passengers in 2022, over half of the total amount of passengers recorded in that period.[21]

2.2. Environmental impacts associated with maritime transport

The study of the environmental impacts of maritime transport, although more advanced today than in the past, is still viewed as an on-going task by the scientific community, with new research papers on the ecological damages caused by ships being published every year.

Until now, researchers have linked this industry to the most varied types of pollution, such as the emission of air pollutants (including greenhouse gases), the release of ballast water containing aquatic invasive species, the release of bilge water containing pollutants, the use of antifoulants, oil / chemical spills, dry bulk cargo releases, garbage, underwater noise pollution, ship-strikes on marine megafauna, risk of

18. Operating Profit Margin Ratio.

19. See Carnival PLC, Annual Report Year 2022, available at www.carnivalcorp.com. See Lin, Li-Ying et al., *A Study on the Trends of the Global Cruise Tourism Industry, Sustainable Development, and the Impacts of the COVID-19 Pandemic*, Sustainability 2022, pp. 12-14.

20. See CLIA (2023), *State of the Cruise Industry 2023*, available at www.cruising.org, pp. 6-9.

21. *Ibidem*, pp. 29.

ship groundings or sinkings, and widespread sediment contamination of ports during transshipment or ship breaking activities.[22]

Some of these forms of pollution, like the emission of air pollutants, the spilling of oil / chemicals or incorrect disposal of garbage, are well-known and common to other commercial and industrial activities. While others, such as the release of ballast / bilge water, the use of antifoulants or the risk of sediment contamination are less discussed outside of the naval realm and therefore merit a brief explanation.

In this sense, regarding the first topic, we must clarify that the term "ballast water" refers to water with all its suspended matter taken on board a ship to control trim, list, draught, stability, or other stresses of the vessel.[23] As for the term "bilge water", it refers to the oily waste-water originating from leakages of pipers and pumps or the condensation of vapour, which contains not only a mixture of diesel oil, grease, and cleaning agents but also seawater, organic compounds, suspended solids and even heavy metals.[24]

In terms of environmental risks, the main concern with ballast water is connected with the unintended transport and introduction of aquatic invasive species, which if left unchecked can threaten the conservation and sustainability of local biological diversity.[25] Although in a different manner, the release of bilge water is equally concerning due to the exposure of marine habitats (flora and fauna) to the mixture of polluting components found in these waters, with some studies

22. See Tony Walker et al. (2019), Environmental Effects of Marine Transportation, World Seas: An Environmental Evaluation, Volume III: Ecological Issues and Environmental Impacts, pp. 505-530.

23. See Article 1 (Definitions), n. ° 2, of the International Convention for the Control and Management of Ships' Ballast Water and Sediments, as adopted by the IMO, on the 13 February 2004.

24. See V., Uma and R., Gandhimathi (2019), *Organic removal and synthesis of biopolymer from synthetic oily bilge water using the novel mixed bacterial consortium*, Bioresource Technology, Volume 273, pp. 169-176.

25. See M. Yang (2011), *Shipping and Maritime Transport*, Encyclopedia of Environmental Health, pp. 33-40.

even claiming that these practices can cause long-term environmental problems for a wide range of birds and other marine organisms.[26]

On the other hand, the use of antifoulants corresponds to an old naval practice, where ship-owners apply specific types of coatings to the hulls of their vessels in order to prevent biofouling (e.g., latching of algae, barnacles, and other organisms). In this instance, the ecological concerns are related to the fact that such coatings are based on metals like copper or zinc that, after erosion by seawater, might end up contaminating the marine ecosystem.[27]

Likewise, the pollution of marine ecosystems via sediment contamination - meaning the erosion and resuspension of sediments caused by shipping vessels upon the seafloor - is also very particular to this sector, usually arising from auxiliary activities such as transshipment and / or ship breaking and can lead to the increase in turbidity and toxicity levels for marine organisms.[28]

In spite of sharing the same seafaring context, it must be stated that not all ship-related pollution is identical, several categories might in fact be drawn and the study of such classifications might prove invaluable to future policy creation proceedings.

First off, it should be said that certain types of ship-related pollution are still viewed as a necessary cost of keeping the international transport business running, a clear example of this can be seen in the use of ships that release air pollutants, since to outright prohibit such emissions would halt the global supply lines immediately.

However, this is not always the case as certain environmental costs are not necessary to the core business of maritime transport, even if they do prop up profits by allowing significant savings in recycling

26. See W.A., Montevecchi (2019), *Seabirds as Indicators of Ocean Pollution*, Encyclopedia of Ocean Sciences, pp. 104-108.

27. See Maria Bighiu (2017), *Use and environmental impact of antifouling paints in the Baltic Sea*, Academic Thesis PhD, pp. 12-13.

28. See Pitacco Valentina et al. (2021), *Sediment Contamination by Heavy Metals and PAH in the Piombino Channel (Tyrrhenian Sea)*, Water Journal n.º 13, Special Issue Pollution in Estuaries and Coastal Marine Waters, pp. 1487.

fees for the industry's titans. We are mainly referring to unauthorized releases of pollutants into the high seas (i.e., ballast water, oil, chemicals, bulk cargo, etc.).

Secondly, ship-related pollution acts can also be grouped based on the intent demonstrated by the polluting agents. This allows us to distinguish between cases where maritime pollution is intentionally caused, consider for example the abovementioned releases of pollutants in the high seas and cases where there was either no intent or only mere negligence, e.g., ship groundings, sinkings or collisions with megafauna and subsequent spills of polluting materials transported aboard the vessels.

Lastly, we may also divide the multiple forms of ship-related pollution according to our current ability, as a global society, to control their unwanted presence and identify their authors. As such, we can distinguish certain forms of maritime pollution that are easily detectable or even predictable from other forms that are hard or nearly impossible to detect.

This is the case of the emission of air pollutants, since we know for certain that they occur whenever a ship leaves the harbour, as internal combustion engines are used to complete any voyage at sea. The same can be said about ship groundings or sinkings with associated oil / chemical spills, as in most cases the vessels will be left marooned or otherwise stationary after such incidents occur and it is possible to trace the pollution back to the source.

Not all forms of ship-related pollution are as easy to control or predict, since a lot of times the agents involved strive to take advantage of external factors such as the high mobility of ships, the remoteness of the locations they traverse along their route and even the presence of meteorological events (e.g., storms), to better hide the evidence of their illegal activities.

The prime example of "hard to detect" pollution practices, amongst the maritime transport industry, are the releases of bilge / ballast water in the high seas by shipping companies, which remains a fairly common practice despite the use of sophisticated satellite technology by

many countries around the globe to prevent and control such releases.[29]

As it happens, just recently an investigation report by a non-profit organization estimated that annually there are around 3.000 discharges of mineral oil solutions from vessels, into European waters, that are not caught by the competent authorities, these numbers would mean an average of eight releases per day and each dump would reach a size of about 750 football fields.[30]

In addition, through the collection of testimonies from whistle-blowers inside the shipping industry, the abovementioned investigation also uncovered that ships have developed special tactics to avoid detection, such as the deployment of easily disassembled pumps to dump bilge or ballast water, the use of the cover of night or even the timing of the dumping with rough seas to render satellites less effective.[31]

Even when the satellites manage to detect a potential unauthorized release of bilge / ballast water, confirmation must always come by means of an onsite verification, in which the nearest coastal state sends a vessel or airplane to the suspected location. This method of control is quite onerous for the public treasury of the concern country and might not always be successful, as the collection of samples needs to be as immediate as possible to the illegal dump in order to guarantee a successful identification of the pollutants present.[32]

In sum, one must keep in mind that the shipping industry, despite being an important linchpin to global trade, also represents a sector that can create environmental liabilities that although profitable for the agents involved are avoidable and, above all, difficult to control.

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29. See The Guardian (2022), *Revealed: ships may dump oil up to 3.000 times a year in Europe's waters*, available at www.theguardian.com.

30. See Lighthouse Reports (2022), *Europe's Black Seas*, available at www.lighthousereports.com, published March 22nd, pp. 1-2.

31. *Ibidem*.

32. See EMSA / EEA (2021), *European Maritime Transport Environmental Report 2021*, pp. 53.

Such risks should never be ignored when creating policies to regulate the shipping industry and in fact, as we will see, there is a strong case for such liabilities to be brought to the forefront even in the design of new tax policy measures going forward.

3. Taxation of International Maritime Transport Profits: an overview

Until this point, our focus was aimed at the context of the maritime transport industry, in a bid to ensure that we comprehend the economic, financial, and environmental importance of the companies that operate the ships that roam the high seas.

From this point onwards, our intent is to present an up-to-date analysis on how countries around the world choose to levy taxation over the profits that arise from the maritime transport industry, maintaining a critical view over their tax policy decisions.

During our study, in adopting an international tax law perspective, we shall begin by introducing the ever-present debate over the manner in which tax rights should be allocated between countries under the negotiated rules set forth in their DTA's[33].

As such, we shall address the theoretical consequences of the choice between the traditional model of allocation (i.e., exclusive residence state taxation) versus the more alternative model that supports a more source-friendly tax solution, implemented on a concurrent basis with the residence state. Subsequently, we will attempt to draw general lessons from recent tax treaty practice regarding both paths, using concrete case studies.

Afterwards, we will showcase how countries deal with the taxation of the maritime transport industry from an internal perspective and thus explain the reasons why national lawmakers adapt their corporate tax systems to suit this particular industry. Our work will also

33. Double Tax Agreements

incorporate case study examples from the Portuguese Tonnage Tax rules, contrasting them whenever possible with general Portuguese CIT[34] rules.

Before proceeding, we must offer an additional clarification regarding the scope of our work, by underlining that our selected topic will only encompass the direct taxation of the maritime transport industry.

This is an assumption of our work since, although we do not ignore the growing interest of the global community in indirect tax solutions (e.g., Carbon Taxes, Cross-border Adjustments, etc.), our main concern at the moment will be aiding in the creation of tax policies that tackle forms of pollution that are hard to detect or control by competent authorities worldwide.[35]

In this context, given that most indirect tax solutions of the day are designed to tackle easily detectable operations, in which the degree of pollution is normally computable within an approximate value, it is our opinion that direct tax solutions deserve to be reanalysed in light of the modern workings of the maritime transport industry.

3.1. Exclusive Residence State Taxation (Article 8.º OECD MC / Alt. A UN MC)

In contemporary times, whenever the question at hand concerns the allocation of taxing rights over the profits earned by the maritime transport industry in international traffic operations, the answer under most tax treaties will likely entail the imposition of taxation in one single state (exclusive taxation).[36]

Logically, the adoption of such a solution has the indirect effect of precluding the source state from imposing any direct taxation over

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34. Corporate Income Tax

35. See Tatiana Falcão (2020), *Taxing carbon emission on the high seas*, Tax Notes International, p. 1199. See Francesco Clora et al. (2023), *Alternative carbon border adjustment mechanisms in the European Union and international responses: aggregate and within-coalition results*, Energy Policy n. º 174, article n. º 113454, available at www.sciencedirect.com.

36. See Jonathan Schwarz (2021), *Schwarz on Tax Treaties*, Wolters Kluwer, pp. 290-291.

foreign international maritime transport groups, no matter the degree of connection found between their activity and the territory of said state.[37]

As for the allocation criteria, the conditions that determine which state shall wield exclusive jurisdiction to tax, we should note that over time countries have created various connecting factors, based on what best suited their own national interests at a given time.

For instance, some older treaties still yield tax jurisdiction to the state that corresponds to the port of registry of the ship in question, an archaic rule similar to other "flag of convenience" practices that allows private operators to have complete flexibility to choose their tax framework, through the bureaucratic manipulation of the registration of their vessels.[38]

Notwithstanding, the most common choices amongst tax treaties for such allocation criteria vary today between (i) the place of effective management ("POEM") of the enterprise operating the ships and (ii) the state of residence of the ship operator.

In regards to the POEM option, its lingering presence in modern tax treaties occurs in many cases both due to historical reasons coupled with the lack of new negotiations to update the existing agreements.

This particular provision has a deep-rooted history within the framework of the modern international tax order. Its origins trace back to 1928, when it was initially incorporated into a tax treaty model under the auspices of the Geneva Model Convention. However, it was not until the inception of the first OECD Double Taxation Convention, in 1963, that its significance truly began to flourish. From then on,

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37. See Klaus Vogel (2022), *Klaus Vogel on Double Taxation Conventions*, Wolters Kluwer, pp. 550-552, in particular when stating that "[*b*]*eing a special provision, Article 8 OECD and UN MC takes precedence over Article 7 OECD and UN MC (…). Hence, the non-POEM state may not tax profits from the operation of ships or aircraft covered by Article 8 OECD and UN MC, even if the ships or aircraft are operated by a PE in that State*".

38. See Convention between the Government of the United Kingdom of Great Britain and Northen Ireland and the Government of the Kingdom of Greece for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income Convention of 25 June 1953, Article V.

this standard gained popularity, evolving into a consensual practice in the allocation of taxing rights over maritime transport profits.

On the other hand, the residence-based provision was introduced rather recently by the 2017 version of the OECD MC, through the new wording of Article 8 (2 and 3).[39] In simple terms, the substitution of the long-recommended POEM rule occurred due the verification of a new tendency in the tax treaty practices of the majority of OECD and non-OECD countries, which showed a preference for the state of residence rule as the relevant allocation standard.[40]

Be that as it may, in essence, both options end up corresponding to variations of the same international tax policy, since the immediate objective appears to be the same: to guarantee that the only state authorized to tax the profits arising from maritime transport activities is the state where the maritime operator places the "brains" of the enterprise. In regular cases, this should match with the registry of tax residence, made in compliance with the internal rules of one of the contracting states (state of residence).[41]

Only in special cases, where that registry does not correspond to the business reality, meaning that in substance the key management and commercial decisions are being made elsewhere, will the exclusive tax jurisdiction shift to another state (the POEM state). Even then, we are solely witnessing the application of a special rule that may or may not modify the application of the normal allocation standard, granting it a type of failsafe mechanism meant to obviate artificial constructions and avoid the "cherry picking" of tax treaties rules.

Therefore, considering that the residence state standard has been incorporated in the vast majority of bilateral tax treaties currently

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39. See OECD (2017), *The 2017 Update to the OECD Model Tax Convention*, pp. 2-4. With the same wording, see also Article 8 (Alternative A) of the UN (2017), *Model Double Taxation Convention between Developed and Developing Countries*, pp. 17-18.

40. See OECD (2013), *Proposed changes to the OECD Model Tax Convention dealing with the operation of ships and aircraft in international traffic*, pp. 2-8.

41. See OECD (2017), *Commentary on Article 3: Concerning General Definitions*, Model Tax Convention on Income and on Capital 2017, pp. 1-2.

in force, one may conclude that the general consensus so far leans towards exclusive residence state taxation, with the limited exception of cases where the POEM standard might still be in effect and the result of its test may deviate from the declared residence country.[42]

Furthermore, we must note that in its current form Article 8 (1) OECD MC and UN MC (Alternative A) is applicable within specific objective and subjective scopes.[43] Under the provision's subjective scope, the allocation standard will only apply to enterprises of the contracting states, that are devoted to services such as the maritime transportation of passengers or cargo, irrespective of the ships being self-owned, leased or otherwise placed at their disposal.[44]

At the same time, the provisions at hand demand that the profits, obtain by said enterprises, must be derived from the operation of ships in international traffic (objective scope). The term "international traffic", according to the definition laid out by Article 3 (1)(e) OECD MC and Article 3(1)(d) UN MC (Alternative A), is understood to mean any transport by ship, except when said ship is operated solely between places in a contracting state and the enterprise that operates the ship is not an enterprise of that State.

In other words, the mechanics set forth by these provisions wish to preserve for the State of the enterprise (residence state) the right to tax in multiple scenarios: (i) in voyages connected with purely domestic traffic inside its own territory, even if operated by foreign enterprises and (ii) in international traffic with / between third States,

42. See OECD (2020), *Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint: Inclusive Framework on BEPS*, OECD / G20 Base Erosion and Profit Shifting Project, pp. 59-60.

43. See Georg Kofler (2017), *Chapter 7 - Article 8 OECD Model: Time for a Change?*, in Taxation of Shipping and Air Transport in Domestic Law, EU Law and Tax Treaties, pp. 129-146.

44. See OECD (2017), *Commentary on Article 8: Concerning the Taxation of Profits from International Shipping and Air Transport*, Model Tax Convention on Income and on Capital 2017, pp. 1-2.

meaning any voyage that connects to the territory of more than one country.[45]

On the contrary, as for the other State (source state) the indirect effect of these provisions will no doubt be the limitation of his tax jurisdiction, since at source there can only be taxation in cases of purely domestic traffic, meaning any voyage that only presents points of connection with the territory of the source state and no other (i.e., inland waterways transport).[46]

This perspective is also recent, having been introduced by the 2017 version of the OECD MC as well, as once more it was verified to be the popular option for most countries.[47] In this regard, it is curious to verify that although the allocation design seems to indicate that the only standard that matters is the location of the "brains" of the enterprise (i.e., registered tax residence), this update shows that states still maintain an attachment to their territorial limits and that allowing inland waterways transportation to be taxed at residence would be too much.

As an example, showcasing the value of territorial limits in this context, we can underline a recent decision on the interpretation of Article 8 of the UK-US Income Tax Treaty, that follows the 2017 OECD MC wording. In this decision, known as *Adams Challenge (UK) Ltd. v. CIR*, the tax court was faced with a charter agreement over a support vessel with specialized equipment for decommissioning activity, to be perform in oilfields in US territory.[48]

Within this framework, the tax court valued the fact that the vessel was operated solely within US territorial waters, in US ports, or on

45. See OECD (2017), *Commentary on Article 3: Concerning General Definitions*, Model Tax Convention on Income and on Capital 2017, pp. 2-4.

46. *Ibidem*, pp. 3, particularly the part that clarifies that "[*a*] *ship or aircraft is operated solely between places in a State in relation to a particular voyage if the place of departure and the place of arrival of the ship or aircraft are both in that State*".

47. See OECD (2017), *The 2017 Update to the OECD Model Tax Convention*, pp. 4-5. See Article 8 (2) of the OECD Model Tax Convention (2014 version).

48. See *Adams Challenge (UK) Limited v. Commissioner of Internal Revenue, 154 T.C. No. 3, Docket 4816-15 (8 January 2020).*

the US Outer Continental Shelf, thus concluding that such vessel could not be considered to be engaged in international traffic for the purposes of Article 8 of the UK-US Income Tax Treaty and, therefore, the matter should be analysed exclusively from the perspective of US domestic tax law.

Additionally, in regards to the extension of the objective scope, we must underline that besides the main maritime activities found in the transportation of goods and people, ancillary activities pursued by maritime transport companies are also considered to be under the scope of Article 8 OECD MC.

According to the OECD MC commentaries, this provision shall cover all profits deriving from activities that are directly or indirectly connected with international traffic operations, such as those arising from the charter of fully equipped, crewed, and supplied ships, meaning that only the leasing of ships on "bare boat" basis is considered to be outside the scope of Article 8.[49]

Having browsed the mechanics of Article 8 OECD MC, an additional note should be made to explain the reasons that justified the creation of such a special set of international tax rules for maritime activities. Naturally, one may wonder why should this particular industry be taxed exclusively at the residence state (or POEM) for profits obtain from international traffic, when other business activities are liable to tax at source through the general permanent establishment ("PE") rules, under Article 7 OECD MC.

As a matter of fact, under the abovementioned PE rules, all it takes to trigger taxation at source of business profits is the presence therein of a fixed place of business through which the business of an enterprise is wholly or partially carried on (Article 5 OECD MC), with relevant examples ranging from the installation of a place of management to a simple branch or office.

49. See OECD (2017), *Commentary on Article 8: Concerning the Taxation of Profits from International Shipping and Air Transport*, Model Tax Convention on Income and on Capital 2017, pp. 2.

This special treatment of the maritime transport industry originated, in sum, from a combination of historical, technological, and political factors that long ago helped to convince most countries that such allocation standard was the only practical option in the beginnings of the international tax order.

Initially, following the Report on Double Taxation (1923) by the four economists, the general recommendation on grounds of enforceability was that for seagoing tramps (i.e., high seas vessels) the country of registry of the ship (i.e., the flag state) should possess the chief claim to economic allegiance, while for vessels plying navigable internal waters, the origin of the income should prevail.[50]

According to a subsequent report, submitted to the League of Nations (1925) by technical experts, the initial concern at the time seemed to be the creation of a system that would follow the principle of division, in proportion to the profits originating in a particular country, dependant on the verification therein of a genuine organisation (office, agency or branch) in which the business would be carried on and, as such, it would not be merely a case of ships calling to port.[51]

Unsurprisingly, given the absence of global cooperation in the interwar period, the technical experts considered that the particular nature of maritime transport industry would make it difficult to apportion its profits, particularly in the case of companies operating in several countries.[52] Henceforth, such experts in their recommendation for the case of maritime navigation undertakings ended up proposing an exception to the principle above in which taxation should, subject

50. See League of Nations (1923), *Economic and Financial Commission, Report on Double Taxation Submitted to the Financial Committee by Professors Bruins, Einaudi, Seligman and Sir Josiah Stamp*, pp. 34.

51. See League of Nations (1925), *Double Taxation and Tax Evasion - Report and Resolutions submitted by the technical experts to the Financial Committee of the League of Nations*, pp. 31.

52. *Ibidem*.

to reciprocity, be imposed only by the country in which the real centre of management and control was located.[53]

From this point forward, the support argumentation for the special taxation of profits arising from the maritime transport industry has consistently been the same, current residence leaning solutions are presented as being the lesser of two evils: either we allow the state that is home to the "brains" of the enterprise (formally or materially) to have exclusive tax powers over all the profits obtained by the maritime transport companies on an worldwide basis or the industry with its immense mobility will create an administrative / monitoring nightmare to all countries involved.

Recently, we witnessed the use by the OECD of the same support argumentation during the discussion on the reform of the international tax order, that was quick-started by the digital economy debate. From the first moment, the OECD was keen to make clear that any source-based solutions for the digital sector could not apply to maritime industry profits.

The justification, as stated in the Report on the Pillar One Blueprint (2020), for such industry specific carve-out was precisely based on the fact that current exclusive residence allocation rules are highly enforceable, since they "[*remove*] *compliance and administrative burdens (and associated prospect of disputes) that would otherwise arise, especially over the attribution of profits*".[54]

Naturally, it is undeniable that the international maritime business does not fit in a debate centred on the challenges of remote digital activities, as vessels have a very clear physical presence in source states. Even so, we consider it noteworthy to point out that the OECD appears resolute to this day in maintaining the exclusive

53. See Jacques Sasseville (2017), *Chapter 5 - Historical Background of Proposed Changes to Articles 8 and 15(3) OECD Model*, in Taxation of Shipping and Air Transport in Domestic Law, EU Law and Tax Treaties, IBFD, pp. 84-85.

54. See OECD (2020), *Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint: Inclusive Framework on BEPS*, OECD / G20 Base Erosion and Profit Shifting Project, pp. 59-60.

residence-based taxation of international traffic and does not show signs of wanting source-based discussions to flourish amongst its members.

In similar terms, following the publication of the Global Anti-base Erosion Model Rules (Pillar Two), the OECD reinforced its position of non-action towards the international maritime industry by way of creating an extremely broad exclusion rule (article 3.3) from the minimum tax rate initiative.[55]

In fact, according to that special exclusion rule, the OECD went as far as to qualify the net income obtained from the leasing of a ship on a "bare boat" charter basis as (excluded) International Shipping Income, as long as the operation was recorded between two Constituent Entities of the same MNE Group. Such policy option was unexpected, as up until now the 2017 Commentaries to the Model Tax Treaty seemed to disassociate these specific "bare boat" charter operations from the ones included in the concept of international traffic.[56]

Therefore, in regards to the state of the art on the international taxation of the maritime transport industry, we would underline the following points: (i) exclusive residence state taxation is the most used allocation standard in the majority of tax treaties nowadays, (ii) the scope of current OECD rules encompasses maritime transport companies that operate beyond the territorial boundaries of a single state, purely domestic traffic is off-bounds and (iii) the OECD still defends that an exclusive residence-based taxation is the best policy going forward, based on century-old ideas that argue that the nature of the activity renders any other propositions unenforceable.

55. See OECD (2021), *Tax Challenges Arising from Digitalisation of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two)*, Inclusive Framework on BEPS, pp. 18-19.

56. See OECD (2017), Commentary on Article 8: Concerning the Taxation of Profits from International Shipping and Air Transport, Model Tax Convention on Income and on Capital 2017, pp. 2.

3.2. Source Taxation as an alternative (Article 8.º Alt. B UN MC)

Although, at present moment, the majority of countries favour exclusive residence-based regimes in their double tax treaties, such solution is far from being a universal or absolute practice among states worldwide.

As stated before, from the first steps of the international tax order, under the cover of the League of Nations, experts have also debated proposals that focused on the so-called "principle of division". Meaning, in short, the envisioning of a type of standard that would allocate profits following a proportional rationale between the residence state and the different source states along maritime routes.[57]

Such proposals, as we saw in the previous chapter, would however end up being discarded by most members during the turbulent lifespan of that organization, on grounds of unenforceability. As such, eventual disgruntled voices could only be heard again during the debates that surrounded the development works of the UN Model Tax Convention.

Before all else, it is worth underlining that with the creation, by the Secretary-General of the UN, of the Ad Hoc Group of Experts on Tax Treaties between Developed and Developing Countries (1967), the focus of the debate shifted to address complaints made by developing states regarding the one-way flow of investment and the risk of revenue losses, under the double tax treaties signed with developed states at that date.[58]

In the course of that debate, several members from developing countries protested that they were not in favour of exclusive residence state taxation clauses, since such solution would prevent them from obtaining tax revenue from international maritime transport activities.

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57. See League of Nations (1925), *Double Taxation and Tax Evasion - Report and Resolutions submitted by the technical experts to the Financial Committee of the League of Nations*, pp. 31.

58. See United Nations (1969), *Tax Treaties Between Developed and Developing Countries – First Report*, pp. 5-6.

As for the main supporting arguments, representatives from developing states claimed that their nations are not in a position to relinquish tax revenue that would otherwise flow from the taxation of foreign maritime transport enterprises, particularly while their own national industries are not yet fully developed, as that could imbed an imbalance *ex ante* in the allocation system.[59]

Moreover, developing nations also stated that residence-based models, like Article 8 of the OECD Model Convention, actually constitute a deterrent obstacle for developing countries when signing tax treaties, as the allocation mechanics blindly favour industrialized countries.[60] In the same breath, representatives for developing countries also reminded the fact that exclusive residence taxation does not take into consideration the substantial expenses incurred by these countries with the construction of harbour facilities, that are essential to allow calls to port.[61]

In summary, the representatives of several developing countries ended up rallying behind the baseline idea of creating a sourced-based solution. Consequentially, by 1979, the work developed by the Ad Hoc Group of Experts would lead to the creation of the *Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries*, which in itself inspired the later creation of Article 8 (Alternative B) of the UN Model (1980) and respective commentaries. Both model provision and commentaries remain unaltered to this day.

In essence, Article 8 (Alternative B) of the UN Model states that profits of an enterprise of a Contracting State, that arise from the operation of ships in international traffic, shall be taxable only in that State (Residence), unless the shipping activities arising from such operation in the other State (Source) are more than casual. If such activities are deemed to be more than casual, such profits may be taxed to some degree in the Source State.

59. *Idem*, pp. 15; 58.

60. See United Nations (1972), *Tax Treaties Between Developed and Developing Countries – Third Report*, pp. 7.

61. *Ibidem*.

More, the profits to be taxed at source shall be determined on the basis of an appropriate allocation of the overall net profits obtained by the enterprise from its maritime transport operations and the tax computed in accordance with such allocation shall then be reduced by a percentage to be established through bilateral negotiations.

Immediately, focusing on the subjective scope of the provision, we see that much like the OECD Model Article 8 (Alternative B) of the UN Model only targets specific enterprises, of either contracting state, that render maritime transportation services targeting passengers or cargo, with the commentaries also clarifying that the enterprise may be the owner, the lessee or otherwise the simple possessor of the vessels used in such activities.[62]

Although beyond our scope, it is interesting to point out that Article 8 (Alternative B) creates two separate standards for entities that explore aircraft transportation and for entities that explore maritime transportation, determining that the first will be subject to exclusive residence-base taxation in agreement with the rules of the OECD Model.

No explanation is given for such differentiation, but likely at its base were concerns about triggering potential market distortions in the air transport market, since experience has proven that the presence of source taxation in the aircraft sector will rapidly influence the business decisions made by international airlines, e.g., leading to the rescheduling of certain flight routes and hubs to avoid the extraordinary costs.[63]

Furthermore, in what now concerns the objective scope of the norm, we must notice that Article 8 (Alternative B) of the UN Model elects to target profits derived from the operation of ships in international traffic, much like the OECD Model. In fact, even the inner workings of the "international traffic" concept are the same, as the

62. *Idem*, pp. 289.

63. See Michael Keen and Jon Strand (2006), *Indirect Taxes on International Aviation*, IMF Working Paper, pp. 29.

UN Model commentaries just redirect us to the rationales developed by the OECD.[64]

A similar option, also linked to the use of OECD-based concepts, can be found in the selection of profits that considered to be derived from the operation of ships in international traffic. As the UN Model commentaries encompass profits directly obtained from the carriage of passengers or cargo in international traffic, as well as profits from activities to permit, facilitate or support such operation, even going so far as to clarify that the second category includes both profits from directly connected and ancillary activities.[65]

However, although convergence between the models can be found in parts of the terminology, the allocation standard set forth by Article 8 (Alternative B) of the UN Model differs from the traditional path by creating a built-in general / exception mechanism. Thus, the general rule of the provision dictates that maritime transport profits shall be taxable only at the Residence State, unless the activities arising from such operations in the Source State are "more than casual".

According to the commentaries, provided by the UN Model, the expression "more than casual" means a scheduled or planned visit of a ship to a particular country to pick up freight or passengers. As a result, this alternative standard has a much broader objective scope than the OECD approach, covering both regular and frequent maritime visits to source countries, as well as irregular or isolated visits, provided that the latter were planned ahead and not the result of a fortuitous event (e.g., adverse weather conditions, emergency repairs, etc.).[66]

Consequently, unlike what happens with the OECD Model, with this alternative provision the boundaries of the Source State's tax jurisdiction correspond to the territorial limits set by that nation in its fundamental law. In other words, while the classic standard dictates that Source States must limit their tax jurisdiction to resident enterprises

64. See United Nations (2021), *Model Double Taxation Convention Between Developed and Developing Countries*, pp. 151-152.

65. *Idem*, pp. 290-293.

66. *Idem*, pp. 246.

engaged in international traffic, only allowing them to impose taxation in cases where the connection to their territory is overwhelming (e.g., inland waterways transports), the alternative standard considers most territorial contacts as relevant to establish economic allegiance at source.

Within this frame of reference, it is relevant to note that the UN Model creators were careful to input an escape clause against unfair results into their provision, namely by introducing a type of volitional or cognitive component into their legal hypothesis, selecting only the cases where the maritime operator had prior intention to enter the territory of another state, as there needs to be evidence of planning before leaving the port of departure.

As for the allocation standard, we are compelled to notice that the alternative mechanics created by the UN Model grant cumulative taxing rights to both the Residence State and the Source State. Unsurprisingly, much like what happens with other double treaty articles (e.g., Article 10 - Dividends), the use of the expression "may" cannot be interpreted to mean the application of exclusive taxation in either state.[67]

Notwithstanding, the design of this alternative standard proposed by Article 8 (Alternative B) does not contain any apportionment formula between the profits obtained by the enterprise at source and the ones that should be allocated to the residence / POEM state. Instead, the UN Model recommends that contracting states should reach an agreement, through bilateral negotiations, on what constitutes an appropriate allocation of the overall net profits obtained by the maritime transport industry, as determined by the authorities of the state of the enterprise.

This recommendation, through its non-compromise strategy, has managed to gather a lot of criticism from developing nations over time. Since, for starters, not all countries agree that the overall net profits as determined at residence should be the basis for the allocation, as some

67. See United Nations (2021), *Model Double Taxation Convention Between Developed and Developing Countries*, pp. 306-307.

nations prefer to tax foreign maritime transport profits on a gross basis and according to their own national adjustments.[68]

In addition, the absence of a model formula to attain the correct division in the apportionment of profits means that countries are left to their own designs, which are usually selected to favor their own economic interests. This void has a particular negative impact during the course of negotiations and may even produce undesired stalemates, due to the difficulty associated with valuating the contribution of the source country to the operations at hand, e.g., the temporary use of source infrastructures by foreign vessels (i.e., maritime ports), among other benefits.

Despite such absence, it should be noted that air transport associations have already identified several income apportionment formulas (i.e., Maritime formula, Calcutta formula and Massachusetts formula), that could also be used by countries as a practical solution to divide maritime profits between residence and source states.[69] Even so, it seems that the UN Committee of Experts has not yet decided to review such topics, still preferring a non-compromise approach in which countries have to negotiate and assemble the appropriate formula on their own, leading to greater uncertainty in the course of treaty negotiations.

When compared with the OECD Model, this alternative approach undoubtedly places a greater value on the interests of source developing states, granting them an opening to levy taxation over the international conglomerates that control the maritime transport industry. Even so, recent voices have argued that the UN Model's approach was never bold enough in the defence of the economic strategic interests of developing nations.

Even if a state has a high percentage of signed treaties following the UN Model Article 8 (Alternative B) wording, the act of relinquishing

68. *Idem*, pp. 294, the commentaries even refer that any special items (e.g., special allowances, incentives not assimilated to depreciation, subsidies, and prior year losses) might be added or deducted from the relevant net maritime profits.

69. See IATA (2015), *Guidelines for Taxation of International Air Transport Profits*, pp. 16-18.

source-based taxing rights on maritime transport income is still claimed by some to be linked to the stunting of the growth of national maritime industries, in certain developing countries.[70]

According to one expert, within the study of his own country (i.e., Pakistan), negotiations to include Article 8 (Alternative B) have always depended on a sacrifice by the source state, in which the latter agrees to forgo some agreed proportional factor of its taxing rights in order to access the other provisions of the treaty. Since, without the presence of a DTA, such nation could theoretically levy direct corporate taxation freely over any portion of the profits it deemed appropriate.[71]

In this context, although such claims have not been proven to be false, we must note that there is no empirical evidence confirming the existence of a direct connection between (cumulative) source taxation and the decline of domestic maritime industries in developing countries.

Moreover, in line with the opinions syndicated by other commentators, we consider that a case-by-case analysis must always be performed by source countries before adopting source-based models, namely to determine if domestic providers are readily available to fill in the gap left by foreign providers that might circumvent the market.[72] As otherwise, the initial impacts of implementing source taxation rules are said to hinder a country's ability to establish global connections and, thus, end up increasing the cost of transport for local businesses.[73]

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70. See Muhammad Ahmed (2020), *UN MTC Article 8: Was the Source Rule Surrender on Article 8 a Blunder? The Case Study of Pakistan*, Intertax Volume 48, Issue 1, pp. 118.

71. *Idem*, pp. 111-112, particular the section that states "*It may be added that despite the fact that Pakistan has done reasonably well by signing the UN MTC Article 8 (Alternative B) into a substantial number of its DTAs, yet even those DTAs are costing it dearly – nearly 50% of the taxing rights*".

72. See Bob Michel and Tatiana Falcão (2021), *Taxing Profits from International Maritime Shipping in Africa: Past, Present and Future of UN Model Article 8 (Alternative B)*, ICTD Working Paper 133, Institute of Development Studies, pp. 45.

73. *Ibidem*, particular when exemplifying as follows "(…) *the Philippines is said to have lost all direct long haul flight connections to Europe by European airlines because of source tax, without domestic providers being able to offer similar connections* (…)".

So, in the end, the approach proposed by Article 8 (Alternative B) of the UN Model presents positive advantages for developing countries located along maritime routes, such as (i) better correspondence between the limits of their tax jurisdiction and their territorial boundaries, since the provision values most territorial contacts as relevant to establish economic allegiance at source; (ii) an escape clause against unfair results, as the provision only values cases where the maritime operator had prior intention to enter the source territory and (iii) an opening to collect tax revenue from maritime industry operators calling at source ports.

On the other hand, the development so far of this alternative allocation standard (or the lack thereof) also presents challenges for developing source countries, as follows (i) the design of the provision obliges source countries to forgo an agreed proportional factor of their taxing rights, as the norm grants cumulative tax rights to both residence and source; (ii) the need to foster domestic providers that can fill the gap left by foreign providers that might initially circumvent the market due to new source taxation and (iii) the absence of a model apportionment formula in the UN Model, a void that might have a negative impact during the course of negotiations or even produce stalemates, due to the difficulty associated with valuating the contribution of the source country to the operations at hand.

3.3. Lessons learnt from global tax practice

After the analyses made in the previous chapters, namely on the inner workings of the maritime transport industry and on how states allocate their taxing rights over such sector, this section will focus on practical lessons that can be surmised by the tax policy options adopted by source countries around the world.

As an introductory note, it should be noticed that certain developing nations were always very outspoken about preserving their tax jurisdiction over foreign vessels calling to their ports, with some managing to introduce and maintain source-based solutions in their

domestic corporate tax systems. These are, in our opinion, the practical examples that other nations should look to when pondering their own international tax policies.

Thereon, after completing the aforementioned evaluation, we must analyse the tax policy options undertaken by Portuguese lawmakers, in the hopes of creating an informed contribution to the evolution of our national tax law and the manner in which it handles the maritime transport industry.

3.3.1. From special tax regimes to international tax competition

Starting from the basics, one must remember that the currently favoured allocation standard found in exclusive residence-based taxation grants tax jurisdiction to a single state, the state of residence of the enterprise. Of course, as we know for an enterprise to be a resident of a contracting state it must be liable to tax therein by reason of its domicile, residence, place of management or any other criterion of similar nature.[74]

The link of residence, as the ultimate connective factor between an enterprise and a certain state, shall be determined according to the domestic tax law of the state in question and in most countries the condition to obtain it will either correspond to the place of incorporation or to a formulation similar to the POEM.[75]

At the same time, the maritime transport sector is characterized by a high degree of mobility due to the very nature of the activities it develops, within the industry it is commonplace to have multiple shoreside office locations spread around the globe, these business units and

74. See OECD (2017), Commentary on Article 4: Concerning the Definition of Resident, Model Tax Convention on Income and on Capital 2017, pp. 1-2. See United Nations (2021), *Model Double Taxation Convention Between Developed and Developing Countries*, pp. 164-165.

75. See Victoria Perry and Alexander Klemm (2021), *Chapter 12 - Residence-Based Taxation: is there a way forward?*, Corporate Income Taxes under Pressure - Why Reform is Need and How It Could Be Designed, International Monetary Fund, pp. 256. See David Elkins (2017), *The Myth of Corporate Tax Residence*, Columbia Journal of Tax Law, pp. 219.

their staff are usually devoted to the ship-shore interface management systems and other centralized planning activities (e.g., marketing services, human resources, etc.).[76]

Consequently, even under normal market conditions, residence states are naturally wary of losing their national shipping industries to other coastal states, especially ones that can offer more favourable conditions in terms of taxation, regulation, and local infrastructures.

Such concern, however, has been exponentially amplified over the years by the appearance of shipping havens offering very low effective tax rates in exchange for a place of incorporation, while little or none of the actual maritime transport operations are based there.[77] These locations, at times, have turned out to be countries without tax treaty networks and with little regulatory frameworks that are taking advantage of the fact the exclusive residence test has little capacity to detect substance, particularly when compared to PE-type tests.[78]

As a result, many developed countries seem to have given up on taxing maritime transport income under their normal corporate tax regimes, for fear that their national shipping companies will simply relocate overseas. Instead, most states that host resident maritime transport enterprises opted for the creation of domestic special tax regimes for the sector, usually known as tonnage taxes, that grant very competitive effective tax rates.

Henceforth, incentivized by reasons of international tax competition, countries have progressively lowered corporate income taxes over the maritime transport industry in the hopes of retaining their national fleets and such trend, if allowed to continue, could lead to a race-to-the-bottom scenario for this particular sector.[79]

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76. See Carnival PLC, *Annual Report Year 2022*, available at www.carnivalcorp.com, pp. 11 and 40.

77. See Richard Vann (2014), *Current Trends in Balancing Residence and Source Taxation*, Legal Studies Research Paper n. 14/107, pp. 9-10.

78. *Ibidem*.

79. See Bob Michel and Tatiana Falcão (2021), *Time to reinforce the UN Model for taxing international shipping profits*, available at www.ictd.ac/blog, pp. 2.

In fact, according to recent statistical reports, based on data extracted from 157 shipping companies over the period between 2005 and 2019, the maritime transport industry reported paying an effective tax rate of around 7%, with the cruise sub-sector only paying the mindboggling percentage of around 0% effective tax rate.[80]

Such race-to-the-bottom can prove challenging for all parties involved, even for the maritime transport sector itself, as granting excessive tax benefits will artificially increase the liquidity of shipping enterprises allowing some of them to renew or explain their fleets, which in turn leads to overcapacity risks, making it harder for the sector as whole to generate stable profits.[81]

Surprisingly, although the negative impacts of this under taxation seem evident, the response by the international community has been tepid at best. Under the supervision of the OECD, several beneficial tonnage tax regimes are being monitored under the Inclusive Framework on BEPS[82] Action 5 (Harmful Tax Practices), which generally deems them compliant and non-harmful.[83]

Even so, it should be noted that the focus of Action 5 (Harmful Tax Practices) was more geared towards preventing harmful practiced from mobile activities that are generally dematerialized, such as the provision of financial and other service activities, including the ones connected with intangible assets.[84] As such, when faced with criteria like the substantial activity requirement, that tests if the taxpayer was *de facto* involved in the income generating activities being targeted, it

80. See Olaf Merk (2020), *Quantifying tax subsidies to shipping*, Maritime Economic & Logistics n.º 22, pp. 526-527.

81. See Bob Michel and Tatiana Falcão (2021), *Taxing Profits from International Maritime Shipping in Africa: Past, Present and Future of UN Model Article 8 (Alternative B)*, ICTD Working Paper 133, Institute of Development Studies, pp. 14.

82. Base Erosion and Profit Shipping

83. See OECD (2023), Harmful Tax Practices - 2018 Progress Report on Preferential Regimes (2023 update), pp. 13-14.

84. See OECD (2015), *Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance, Action 5 - 2015 Final Report*, pp. 23-25.

is only natural that the maritime transport industry passes with flying colours.[85]

Additionally, the tonnage tax regimes created by EU[86] Member States are subject to previous control by the EU Commission when such tax benefits are subsumed to the legal concept of state aid.[87] However, up until now, special tonnage tax regimes have been usually approved by the EU Commission, at least to the extent that states grant such benefits to vessels flying the flag of any EU Member State.[88]

Nonetheless, recently the OECD's International Transport Forum (ITF) seemed to recognize the need for a change by recommending a systematic review of maritime subsidies to stop the abovementioned race-to-bottom effect, namely by advising states to make any maritime-related tax benefits conditional on the verification of other positive impacts (e.g., environmental objectives).[89]

As an intermediate conclusion, one may state that what started as a defensive position by coastal states to protect their national maritime transport industries, meaning the creation of special tax regimes with low effective rates (i.e., tax tonnage regimes), has slowly evolved to a race-to-the-bottom with shipping havens that ultimately can have a detrimental effect to the net sum of collected tax revenue on worldwide basis.

3.3.2. Source-based taxation: novelties from the Asian Continent

After understanding the context, as provided by the last subchapter, one's perspective on the residence versus source debate might shift in favour of the latter. In reality, switching to a cumulative

85. *Idem*, pp. 9.

86. European Union.

87. See Article 107.° of the Treaty on the Functioning of the European Union (TFUE), published 13th December 2007. See

88. See European Commission (2020), *State aid: Commission approves Italian tax measures for maritime transport*, Press Release, pp. 1-2. See European Commission (2004), *Community guidelines on State aid to maritime*, communication C (2004) 43, pp. 6.

89. See ITF (2019), *Maritime Subsidies – Do They Provide Value for Money?*, International Transport Forum Policy Papers n.° 70, pp. 7-8.

tax allocation might help to neutralize the appeal of relocating to shipping havens for the enterprises involved, as any tax savings permitted at residence could (theoretically) be offset by tax increases at source, thus potentially halting the effective tax rate's race-to-the bottom.

Therefore, it is especially important to understand how to correctly implement a source-based tax model in a practical setting, in order to anticipate eventual shortcomings and identify potential tax policy opportunities. Such knowledge, naturally, rests only with countries that have successfully adopted source taxation systems targeting foreign maritime transport operators and can prove invaluable to both developing and developed countries going forward.

According to recent empirical studies, incidence of source taxation over maritime / air transport profits in bilateral tax treaties is still fairly low, with the reported percentage of source endorsing agreements only amounting to about 14% of the total amount of treaties in-scope, i.e., 247 source-influenced treaties out of the total of 1.781 tested treaties currently in force.[90]

Equally noteworthy is the fact that, in subsequent analyses based on such studies, tax policy experts detected a clear concentration of source-based solutions whenever the results were filtered by signing party. Meaning that, of the overall treaties that contained source taxation clauses over maritime / air transport enterprises, a high number of treaties were signed by only a handful of countries.[91]

For reference, those countries correspond to the nations of Bangladesh, India, Indonesia, Myanmar, Pakistan, the Philippines, Sri Lanka, and Thailand. These select states, all located in South / South East

90. See Martin Hearson (2021), *Tax Treaties Explorer (Online database)*, International Centre for Tax and Development (ICTD), available at www.treaties.tax (last accessed on the 23rd September 2023), search criteria equal to treaties celebrated between all countries available, filtered by "in force" and Article "8(2)", we excluded treaties that did not provide such information.

91. See Bob Michel and Tatiana Falcão (2021), *Taxing Profits from International Maritime Shipping in Africa: Past, Present and Future of UN Model Article 8 (Alternative B)*, ICTD Working Paper 133, Institute of Development Studies, pp. 26.

Asia, seem to have a high incidence of Article 8 (Alternative B) UN Model in their tax treaty networks, to the point that it is fairly reasonable to claim that source taxation is (or was) part of their external tax policy on a regular basis.

In this context, if we are to learn important practical lessons about implementing source taxation models, we must carefully analyse the tax practices of these few nations. As such, focusing on the taxation of the maritime transport industry, we must ask ourselves what popular trends might exist among the direct tax regimes crafted by these source states for this particular industry, without forgetting to identify the presence of any particular options rarely followed.

As for popular trends, guided towards the source taxation of maritime transport activities, we can point out the following ones: (i) tax imposed at source over maritime transport profits is to be levied on a gross basis (versus the net basis as computed at residence option), (ii) most treaties do not contain an activity threshold clause (e.g., the "more than casual" clause of Article 8B of the UN Model) and (iii) the absence of a tax treaty with a powerful shipping nation can represent a strategic choice by a source country.

The first trend, present in most of the treaties signed by the abovementioned countries, pertains to the fact that taxation at source for maritime transport operations is being levied over the gross receipts paid to the non-resident enterprises. Generally, such result will be achieved by imposing a withholding obligation over any person responsible for making a payment for maritime transport to a non-resident taxpayer.

Differentiation, between the enacted withholding rules, can be made through the types of maritime transport operations that are covered by the objective scope of the provisions. Some source states prefer to only target profits arising from the transportation of people or goods from a national port to an overseas port (outbound transport), while other countries also tax the income from the transportation of people or goods that are bound to a national port (inbound transport), as long as they are received in their territory.

Such practice, when compared to the general rules of direct corporate taxation, seems to be somewhat unorthodox since most systems tax corporate taxpayers on their net profits, even if some posterior tax adjustments to their computation needs to be made. Be that as it may, whenever implementing source-based solutions to tax maritime transport profits, the main concern at source is to avoid losing the ability to control the operations at hand.

This objective, given maritime transport operators may not have a stable presence at source, is more easily attained by creating accessory tax obligations over resident corporate taxpayers, thus allowing for the creation of a local paper trail for further inspection, if needed. When dealing with source-based tax policies for maritime activities, it is advisable to remember that unlike with Article 7 OECD Model there is no PE structure located at source, meaning that without having a significant economic presence operators will never welcome the prospect of organizing their accountancy records at a local level.

Furthermore, it should be noted that the majority of the studied tax treaties also apply some form of presumptive taxation in conjunction with the gross profits rule, meaning that although the real costs incurred by the enterprise will not be considered, the source country still allows for a deduction of a fixed percentage to the gross profits (usually between 40% and 50%).

This method, which is based on a legal estimation of the real costs, is normally only used for smaller and simpler enterprises, with the goal of simplifying their tax compliance burdens and, therefore, its exceptional use here for the maritime transport industry seems to be in line with the practicality concerns.

In addition, we must recall that although currently the commentaries to the UN Model still recommend that maritime transport enterprises be taxed on their net profits, computed following the rules of the residence state, such option was never consensual amongst all nations and its adoption is left to each individual negotiation.[92]

92. See United Nations (2021), *Model Double Taxation Convention Between Developed and Developing Countries*, pp. 294.

Truth be told, it is no wonder that states looking to implement a practical tax system end up favouring other solutions (e.g., gross receipts), since to forego control over the rules of computation / adjustment needed to achieve the taxable profit to the residence state could mean a loss of control for the source state over the amount of tax revenue that could be collected, as the residence state would dictate the rules over important tax deductions such as tax losses, depreciation rules, allowances, incentives, subsidies, etc.

As for the second trend, verified among the practice of source states that tax foreign maritime operators, we have the clear reluctance to include an activity threshold clause ("more than casual") in any source-based provisions included in double tax treaties.

Although not explained, at least not in the public domain, we tend to believe by simple logical deduction that source countries mainly did not wish to include hard to prove rules into their tax treaties, as that could increase their own administrative workload.

Due to the mobile nature of their activity, maritime operators have ample reason to claim that their calls to port in the source state were unplanned whenever they are few in number. This is especially true if the burden of proof lies with the tax authorities at source, which is normally the case in the absence of a special legal presumption.[93]

Even worse, considering that most enterprises might have their main headquarters, personnel, and documentation outside of the territorial jurisdiction of the source country, the gathering of proof process will inevitably depend on international cooperation upon request, a procedure that in practice tends to suffer from significant delays.

For all these reasons, the introduction of activity threshold clauses for the taxation of maritime transport profits should be approached with special caution during negotiations, as their inclusion with the exact wording of the UN Model might be immediately rejected.

A potential remedy, although untested, might be to propose an activity threshold clause where the burden of proof is inverted, for

93. See India's Income Tax Appellate Tribunal (ITAT), Mumbai, 28 May 2004, *James Mackintosh & Co. (P.) Ltd. v. ACIT*, available at https://indiankanoon.org/doc/350781/.

example a rule that allocates taxing rights to the source state whenever a ship calls to a port therein, unless the operator is able to sufficiently prove that the voyage was unplanned and due to unforeseeable or unavoidable events.

Another important trend can be found, not in the positive actions of these source supporting states, but in their strategic absence of action. From the analyses of their options, we have noticed that many of them prefer to avoid entering into double tax treaties all together with nations that have an overpowering fleet of merchant ships.

At first glance, such behaviour might seem counterintuitive since without a tax treaty local enterprises are more susceptible to face the cost of double taxation in their cross-border dealings. However, it is more than likely that the risk was duly predicted, since given the absence of a double tax treaty, especially one that follows the OECD wording, means that the source state is free to impose local source taxation by use of its own sourcing criteria inscribed into its national tax law.

This is the exact manner, for example, in which many of these Asian nations choose to deal with Greece, the second most powerful nation in the world when it comes to ownership of merchant fleets.[94] In reality, it is possible that these nations figured out that avoiding an unfavourable treaty in respect to maritime transport outweighed the negative effect of not having all other provisions, as long as their domestic tax system was prepared to capture the tax revenue from passing ships.

Therefore, in the midst of a treaty negotiation, one must bear in mind the full context of the economic relations between the nations at hand, while also considering the way that international and national tax systems work together towards the objectives of both states.

On the other hand, regarding more unique source-based options worth mentioning, we can single out the following ones: (i) the absence of a special rule covering maritime transport profits in the

94. See UNCTAD, UNCTAD stats on merchant fleets, available at https://hbs.unctad.org/merchant-fleet/#Ref_62WR64FA (accessed 2nd Oct. 2023).

allocation rules of double tax agreements, with the express exclusion of such activities from the business profits article, (ii) the inclusion of maximum limits for effective tax rates at source of maritime transport activities, usually corresponding to a small percentage (1-6%) and (iii) the differentiation in tax rates at source, depending on whether the maritime transport enterprise has appointed a local representative agent or not.

As for the first policy option, it has been mainly used by Bangladesh and only in a handful of select double tax treaties. In summary, it can be described by two concurring factors: the first being that the scope of the international transport article (i.e., Article 8) will not cover profits arising from the rendering of maritime transport services and the second being that such activities will also be expressly excluded from the business profits article (i.e., Article 7).

Under such combination, source states achieve unlimited taxing rights on the profits arising from the calls to port made by foreign maritime enterprises, since the exclusion from treaty rules means that taxation solely depends on the sourcing rules established by domestic law.

Even so, in our opinion, contracting states should keep in mind that such option, in practical terms, is the same as having no bilateral tax treaty to avoid double taxation for that particular income stream. Meaning that, in those cases where the domestic law of a contracting state does not include special provisions to avoid the taxation of the same income stream at home and abroad, there is a serious risk for international double taxation, which will negatively affect local operators in the sector.

Moreover, amongst the less common but still interesting practices, we can also reference the inclusion of maximum taxation clauses in modified versions of Article 8-B, these usually correspond to the application of a small percentage (usually 1-6%) over the gross receipts, that acts as an absolute limit to the tax rate that can be imposed by the source state.

Such clauses, also recommended by the UN Model, can be criticized for being difficult to harmonize with local tax systems, since some of

them tax corporate taxpayers based on their net income (including tax adjustments). Although this divergence in treatment does not affect countries that tax maritime operators on their gross receipts, for countries that wish to allow for cost deductions or tax benefits, it can be cumbersome to make sure that the local net tax rate corresponds to the maximum gross tax rate inscribed in the tax treaties.

In these cases, aiming at a more flexible regime, it seems more advisable to use another common method of taxation that provides that any amount of tax, charged in the source state, will be reduced by a pre-negotiated percentage (usually 50%). This specific method, in comparison with the obligation to comply with a fixed maximum tax rate, does not present any challenges in its application both to gross or net-based taxation systems nor will it create an increase in bureaucratic processes at source.

Nonetheless, we must be plain that such method will result in a greater surrender of control to the source state over the effective tax rate to be levied over the maritime transport sector, but such concern can also be raised regarding any other type of income stream covered by double tax treaties today and still countries subscribe to them in great numbers.

Finally, we must mention the particular tax policy design in which the source country enacts a differentiation in tax rates, supported in its domestic law, depending whether maritime transport operators have appointed a local representative agent or not.

According to Indonesian tax rules, resident taxpayers are obliged to withhold tax at a rate of 20% on payments for the provision of services by non-residents, however such rate will be reduced to 2.4% whenever the non-resident corresponds to a maritime transport operator that is deemed to have a PE in-country in the form of a representative agent that must be a local shipping company.[95]

95. See Articles 15 and 26 of the Indonesian Income Tax Law (1986), available at https://www.pajak.go.id/id/pph-pasal-15 and https://pajak.go.id/id/pemotongan-pajak-penghasilan-pasal-26.

This curious domestic design, in all its simplicity, offers advantages when the goal is to implement source taxation over foreign maritime operators by grounding the operators in the source territory. As we have discussed extensively before, maritime transport enterprises have long been considered a challenge to tax due to their high mobility that leads to hardships in terms of control / inspection, by forcing foreign operators to appoint a local representative that is equally responsible for the delivery of the tax owed source countries reinforce their guarantees for effective collection of the tax revenue.

In this framework, it is clear that the more common use of source taxation in certain Asian states gives them unique knowledge on the design of such special regimes. In our opinion, all maritime countries can benefit from the study of such experiences, as with the increase of global tax competition it is likely that more source countries will adhere to similar taxation regimes in the near future.

3.3.3. Portuguese double tax treaty network: signs of change?

In general terms, at least from the documents available, Portugal's position regarding the residence v. source debate has always been one of quiet support of the positions defended by the OECD, an expected choice as the country was one of the founding members.[96]

Such support is easy to identify, namely by the country's acceptance of the traditional wording given to Article 8 (POEM / residence taxation), as proposed by the OECD Tax Model and the UN Model Alternative A, in most of its signed double tax treaties currently in force. This support, by all accounts, holds historical roots as the oldest tax treaty still in force contains a provision granting exclusive taxing rights to the residence state over maritime and aerial navigation profits.[97]

96. See Convention on the Organization for Economic Co-operation and Development, signed on the 14th December 1960.

97. See Convention between Portugal and the United Kingdom of Great Britain and Northern Ireland to Avoid Double Taxation and Prevent Tax Evasion in Direct Taxation (1968), published on the 24th of July.

Notwithstanding, it should be noted that Portugal on occasion has entered into double tax agreements that contained source-based provisions specifically targeting the profits obtained by the maritime transport industry. In fact, a consultation of the country's current tax treaty network shows us that around 4% of the country's double tax agreements endorse source taxation of maritime transport profits (3 treaties out of 81 in total).

A small figure on its own, no doubt, but at the same time a potential sign of change towards allowing an increase of taxing rights at source. Supporting this perspective, is the fact that all of the abovementioned treaties were published in the last three decades, this might be an indicator of openness towards the argumentation presented by source countries, as before exclusive residence taxation was all-encompassing.

In this context, we consider it a useful lesson to exact a comparison between the source-based tax treaties accepted by Portugal and the agreements analysed in the last subchapter, looking for commonalities and / or discrepancies in their formulation. As such, we may start by identifying such source-based agreement as the tax treaties signed by Portugal with Kenya (2020), Pakistan (2003), and Venezuela (1997).

Immediately, we can spot that Pakistan is one the nations that belong to the successful source Asian countries studied in the last subchapter. According to the agreement with this nation, under the rule present in Article 8 (2), profits earned by a resident of a Contracting State from the exploration of ships in international traffic, that come from sources within the other Contracting State, can only be taxed in that other state.

This is an interesting approach, since in basic terms we are looking at an inversion of the exclusive residence taxation clause, this is not a common approach and its use means that in practice the source country has both exclusive right to tax and no boundaries in the degree of taxation it can impose, so long as the income falls into its domestic source rules.

Such wording, when compared with other tax treaties, lacks certain common elements like the indication of whether taxation should

be levied over gross or net amounts, the absence of a deduction to account for estimated costs related to the activity or even an allocation formula that clarifies the amount of profits that are taxable at source.

Instead, it is very curious to see that both countries allow for these fundamental elements to be defined solely by the domestic tax laws of the source country, thus making the local corporate tax rules the single most important piece of legislation to determine the tax burden over foreign maritime transport enterprises.

Moreover, as for the Portugal - Venezuela double tax treaty, the baseline rule inscribed into its Article 8 (1) defends the route of exclusive residence taxation for most forms of international traffic by ship or by airplane. However, according to the exception present in Article 8 (4), all profits earned by a resident of a Contracting State from the exploration of ships used in the transport of hydrocarbons may be taxed in the source state.

Evidently, such exceptional rule has a much more defined objective scope that is much narrower than other source-based provisions, since it is aimed at a specific range of goods that are being transported by sea, namely the ones that have hydrocarbons in their composition. These goods correspond mainly to fuels and other subproducts, such as gasoline, kerosene, natural gas, lamp oils, lubricants, etc. and are one of the main exports in Venezuela.[98]

Therefore, we must underline that this product-focused source taxation is very different at its core to the general source taxation we have been discussing so far. Since, in the first case, it is possible to establish a pre-conditional relation between the right to tax and the origin a certain product, e.g., source taxation shall only be levied over hydrocarbons extracted from the state's territory.

In itself, this type of measure is typically present in protectionist agendas, that one would expect from states that are not fully integrated in the global market and its terms make little sense outside of that particular economical context.

98. See Larry B. Pascal (2009), *Developments in the Venezuelan Hydrocarbon Sector*, Law and Business Review of the Americas Vol. 15 n. 3, pp. 531-532.

Finally, we shall place our attention upon the tax treaty signed between Portugal and Kenya, the most recent of the source-based treaties in analysis and perhaps the most innovative as well, since it holds a specific take on the wording of Article 8.

According to that provision, when an enterprise of a Contracting State obtains profits from the exploration of ships in international traffic in the other Contracting State: (i) those profits will be deemed to be no more than 5% of the total amount received by the enterprise for the transportation of passengers or cargo that embarked in that other Contracting and (ii) the tax that can be imposed by the other Contracting State will be reduced by a ratio of 50%.

This particular wording, in the context of source taxation, is rare because it outright allocates 5% of the foreign maritime transport profits to be taxed by the source country, when such core elements are usually defined by domestic tax law. In short, this approach means that both states were able to agree that such percentage represented an accurate estimation of the source state's contribution to the development of the economic operation.

Even so, we can still notice a hint of an imbalance towards the residence state, as in conjunction with the allocation of a small percentage of the overall profits, we also have a tax rate reduction by half, which ultimately means that the effective tax rate that imposed by the source country will be extremely limited.

All things considered, we may conclude that Portugal is not completely against source-based solutions for the taxation of the maritime transport industry, but there is still a clear preference towards exclusive residence taxation. As for the specific source regimes being used, we verified that Portugal's tax treaty practice usually deviates from the most popular trends amongst source countries, perhaps due to the lack of experience in the application of such regimes.

From our analysis, it is our opinion that Portugal should refrain from leaving the computation of the tax base for the domestic law at source to avoid unpredictable results. Namely, by opting to clarify in the treaty's wording, if the basis of taxation should be the gross or the

net profits, by determining the degree of deduction needed to attain the deemed profits and, whenever possible, by establishing a clear allocation of the gross profits to be taxed by the source country.

3.3.4. An analysis into Portugal's domestic tax policy options

As we explained before, in several parts of our study, many source states end up relying on the rules of their own domestic tax laws to define the taxation that will be levied over foreign maritime transport enterprises.

In summary, such scenario can be brought forth by two factors: (i) due to the absence of a tax treaty with a certain state, either because no agreement was possible or because economic relations with said state are rare, and / or (ii) due to the silence of the existing tax treaty, as it might allow for source taxation, but does not provide any instructions regarding the terms in which the source state is to exercise its right to tax over this specific sector.

From our study of the Portuguese tax treaty network, as presented in the last subchapter, we have seen that Portugal has signed at least two tax treaties that fit the second factor, leaving the conditions of taxation to be determined by the domestic tax rules at source.

Furthermore, it is also true that Portugal has a relatively small tax treaty network, only covering 81 nations in the world (out of a total of about 206), meaning that with all non-treaty countries Portugal's position as a source country is exclusively protected by the quality of its own domestic tax rules. As such, it is relevant to conduct a study of how Portugal enacts source taxation in this domain from the perspective of its internal tax regimes.

Among those domestic tax rules, the most relevant ones for our study will be the corporate tax rules that define the source of the income streams arising from maritime transport activities (sourcing rules), as well as the ones that define the computation of the taxable profits received therein (computation rules).

First of all, in what concerns the Portuguese CIT sourcing rules, we know that resident taxpayers, that either have their headquarters

or their place of effective management in our national territory, are subject to tax on all of their income streams regardless of where they were sourced (worldwide income).

Meanwhile, non-resident taxpayers (without a PE) are only subject to CIT on income streams obtained from sources deemed to be located in the Portuguese territory. To this end, our national legislator created a closed list of scenarios where a sufficiently strong link between the income and the country can be found.

According to the referred list, income received by a non-resident taxpayer due to the rendering of services not specified in that closed list is subject to CIT in Portugal, as long as a resident taxpayer is making the payment. However, such sourcing rule admits one important exception: it is not applicable to services connected to transport, communication, and financial activities.[99]

Henceforth, under the domestic tax rules enacted by Portugal, profits perceived by non-resident enterprises from the transportation of goods and passengers are not subject to CIT. Which means that, at least for now, Portugal abstains from imposing any source taxation on foreign maritime transport operators even in cases where the double tax treaties allow for it or there is no treaty in place that prevents it.[100]

This conclusion, regarding the exclusion of maritime transport profits from our national CIT sourcing rules, has been confirmed in several case law decisions by the Portuguese tax arbitral court. Just recently, that same tax arbitral court issued a ruling that, among other topics, clarifies the motives behind the exception that is the non-taxation at source of this particular sector.

According to the ruling, published in 2022, there is little doubt that the lawmaker – in the midst of its desire to tax other services

99. See Article 4, n.º 3, subparagraph c), n.º 7 of the Portuguese CIT Code, published by Decree n.º 442-B/88, 30th Nov.

100. In addition, we should also note that Article 13 of the Portuguese CIT Code also creates a special exemption for maritime transport operators whenever there is a similar exemption in the other state, as long as the Finance Minister has recognized this reciprocity, by decree published in the Official Gazette.

– created such an exception to better deal with the characteristics of the industry, namely the fact that the main activities are developed in many different locations and, also, the significant difference between its gross income and its net income (a fact that is not common among sectors that are subject to definitive withholding taxation). Moreover, the court even claimed that these reasons point to complex problems that would arise if Portugal chose to impose a source-based taxation system.

Regarding such exclusion from taxation, without disagreeing with the court regarding the motivations that drove the lawmaker in its creation, we must express our astonishment at the potential negative effects that such choice might have when mingled with the external tax policies that are currently being pursued by Portugal.

From a practical view, excluding all foreign maritime operators from source taxation in its domestic tax law as a policy makes sense for a nation that is fully committed to the idea of exclusive residence taxation. In this scenario, assuming that the country has a functioning tax treaty network, all maritime transport taxation will correspond to domestic taxation over resident taxpayers.

Notwithstanding, whenever a state makes the conscious decision to allow for provisions in its tax treaties that to some degree endorse source-based taxation of foreign maritime operators, it makes little sense to exclude foreign operators from your domestic sourcing rules all together, particularly when you are aware that your national operators are liable to endure source taxation in the other country.

Naturally, the absence of domestic sourcing rules presents an immediate problem in the disproportionate loss of tax revenue for Portugal, but it also represents a shortcoming in the sense that it favours the position of foreign maritime transport operators over national operators competing in the same industry. This beneficial treatment of foreign operators, that exists by the inaction of the Portuguese lawmaker, does not seem to have a valid justification since, as far as we know, Portugal never expressed a desire to limit its taxing rights to favour one or more states like with tax sparing clauses.

On the other hand, in what concerns the applicable internal computation rules, we should mention that resident maritime operators have the option to access a very favourable special regime to calculate their taxable profits – the tonnage tax regime.

This special regime, created by Annex I of the Decree n.º 98/2018, was published on the 13th of November and differs from the general CIT rules by allowing for a simplified method of determining the taxable income of maritime transport activities. In practical terms, such method relies on a regressive table that takes into account the net tonnage of each of the vessels at the disposal of the operators, as well as the number of days that the ships are available for use, excluding the days under repair.

In simple terms, such method expresses the deemed profits per day and per 100 net tons, with the reference values ranging from 0,75 Euro for ships under 1000 net tons to 0,20 Euro for ships over 25.001 net tons. The income estimated this way, actually decreases the more net tonnage capacity the ship presents, meaning that the use of bigger vessels actually leads to the computation of smaller taxable profits.

As with other simplified methods, operators cannot deduct any other costs with the exception of taxpayers that render out-of-scope services, were a proportional deduction ("pro rata") based on the weight of such activities over the general turnover may apply.

From a more generic perspective, one cannot help but notice that like many other nations Portugal uses a tonnage tax regime to achieve a low effective tax rate, namely by shrinking the taxable profits before applying the normal corporate tax rate (i.e., 21%). As we stated before, this practice is rooted in international tax competition objectives and can lead to a race-to-the-bottom, especially when coupled with the absence of source taxation.

Nonetheless, our research did uncover a positive side of the Portuguese tonnage tax regime, one that actually has been highly commended by the foreign reviewers for its sustainable outlook on the taxation of this specific sector. We are referring to an additional reduction (upon request) of 10% to 20% of the taxable profits, for vessels

over 50.000 net tons, that invest in special mechanisms devoted to the conservation of marine ecosystems and to the reduction of the effects of climate change.

These special environmental mechanisms, according to the Ministerial Ordinance n.º 72-B/2019, published on the 4 of March, correspond to any equipment that can minimize the effects of atmospheric, sound and water pollution caused by hydrocarbons, ballast water, sewage water, packaged prejudicial substances, other toxic liquids, and general waste. Such investments, which must be beyond the minimum requirements imposed by EU and national law, may be accepted if they were completed in the 5 years prior to the presentation of the request.

Considering the above, one may conclude that Portugal's tax policy options showcase, at the very least, that the country has not seriously pondered the question of whether or not it should be imposing taxation at source for foreign maritime operators.

Although the country seems concerned with protecting its own national operators, namely by ensuring them a low effective tax rate, the aggregate of its internal and external tax policy options reveals that officials are so far willing to ignore additional tax revenues despite having an international framework that could easily support them. Even worse, the current discussion is still revolving around the idea that source taxation cannot be implemented, when other countries are already executing it successfully.

4. New routes for the taxation of international maritime transport profits

In our previous chapter, we focused on the issues at hand from the view of the state-of-the-art, acquiring knowledge on how states around the globe are dealing with the taxation of international maritime transport profits.

For this chapter, we intend to draw from the lessons learnt so far in order to propose a new theoretical model for the international

taxation of such industry. Our proposition, in this context, is meant to disrupt the current discussions between residence v. source solutions by pointing to a new direction, guided by the fulfilment of shared objectives between developed and developing contracting nations.

4.1. Inside the residence v. source debate: proposing a holistic approach

First and foremost, one must recall that the residence v. source debate around the taxation of maritime transport profits is mainly being fuelled by the clash between antagonistic interests between states, in the hopes of conserving the maximum amount possible of tax revenue for their own treasuries.

In fact, the race-to-the-bottom scenario that can be observed through the low effective tax rates practiced worldwide is a good indicator of the disregard showed by the international community about these matters, since most countries prefer to collect modest amounts of tax receipts over guaranteeing that the sector pays a fair share of taxes on a global basis.

From our perspective, not only are the current terms in which the debate is held likely to hamper new developments, but the objectives of the parties involved are also ill-chosen from the start. In other words, similar to what we saw happening with the taxation of multinational entities operating on a global basis, we consider that each state should cast aside their individualised goals in favour of assuring collective interests, such as the integrity of the entire global corporate taxation system.

Notwithstanding, we do recognize that a sector dedicated to more corporeal activities, such as the maritime transport industry, poses different challenges when compared to immaterial or digital services and may warrant a different approach. From our study, beyond economic concerns, coastal states have to tackle other challenges related to maritime transport such as: (i) infrastructural requirements, mainly the heavy public investment that their installation and maintenance

require and (ii) environmental costs, namely due to the several forms of pollution that high sea vessels can produce at source.

From the perspective of the funds needed to overcome such burdens, we know that for the first set of challenges states can easily adopt bilateral and indirect forms of taxation. For the most part, such taxation is obtained through the levy of several types of port fees, these usually are designed to directly compensate states for the use of public facilities and / or auxiliary services by private entities.

However, when dealing with the second type of challenges mentioned above, states are faced with increased difficulties due to the nature of the environmental costs at hand, as in most instances maritime transport related pollution is virtually unpredictable, undetectable, and ultimately hard to control. As we have seen before, maritime transport operators use several technics that can aid them in escaping basic controls and thus allowing them to pollute, these practices create a hidden cost for society as a whole that is impossible to accurately calculate, making any attempt of an exact repercussion an illusion.

Therefore, in the midst of the discussion on how should we tax the international maritime sector, we defend that the international community should adopt a more holistic approach to the problem. In other words, countries should shift their focus from maintaining their tax revenues to other equally important common values present when dealing with such specific sector, namely the need to protect the environment by ensuring the sustainable development of such activities on the long term.

4.2. Sustainability as the new international tax policy driver

According to the work developed by the WCED[101] (1987), per request of the UN General Assembly, the concept of sustainable development is rather broad corresponding in essence to any type of "(…)

101. World Commission on Environment and Development.

development that meets the needs of the present without compromising the ability of future generations to meet their own needs".[102]

More recently, through the adoption of the 2030 Agenda for Sustainable Development, all UN-member countries recognized that the pursue of important global goals like ending world poverty and other deprivations must go hand-in-hand with strategies that improve health and education, reduce inequality, and spur economic growth – all while tackling climate change and working to preserve our oceans and forests. At the heart of this initiative, we can find the 17 Sustainable Development Goals (SDGs) that constitute palpable objectives to shape the future.

Among them, worthy of mention for its relevancy to our study, we can find SDG 17 that calls for the strengthening of the means of implementation as well as the revitalization of the global partnership for sustainable development. Under SDG 17.1, nations are advised to "*strengthen domestic resource mobilization, including through international support to developing countries, to improve domestic capacity for tax and other revenue collection*".

In the same document, one can find indirect connections between the taxation of maritime transport activities and at least three other goals – SDG 9 Industry, innovation and infrastructure, SDG 13 Climate action and SDG 14 Life below water – since this industry ends up exerting some degree of impact over all of them.

Furthermore, shouldered by the concept of sustainable development, states around the world have been steadily creating regimes that amount to structured environmental tax laws. Meaning, that the main principles of environmental law are seen to be having an increased projection into the domestic tax systems of most countries, albeit with varying degrees.

In this framework, for us none other example of this projection is clearer than with the polluter-pays principle. This environmental protection standard, at its core, is inspired by the economic theory

102. See WCED (1987), *Report of the World Commission on Environment and Development: Our Common Future*, pp. 42-44.

according to which the external costs that accompany industrial production (including the costs resulting from pollution) must be internalized at the level of the economic agents as effective production costs.[103]

Such external costs are quite distinct from regular internal business costs, in the sense that they do not affect only the economy of the producer but their burdening effects extend beyond into society in general. Due to this fact, they are sometimes referred as social costs – the loss or expense that one agent causes to all others, as a direct consequence of its economic activity.[104]

From a tax perspective, those social costs are the main underpinning for the development of environmental tax laws and, as such, in this light taxation is converted into the most suitable instrument to ensure that the polluting agent supports the imbalance caused by its activity, the right to tax becomes the internalising mechanism of those social costs.[105]

In this context, and although no one will deny its important role in the construction of internal regimes, we believe that the ideal of sustainable development acting through environmental principles, such as the polluter-pays principle, should also influence the policy creation in other areas of taxation, namely in the development of a new international tax order with positive effects.

First and foremost, since consensus are more easily obtainable between parties suffering from the negative effects of the same event (i.e., climate change), the adoption of an outlook on source taxation based on sustainability as the new international tax policy driver may prove to be an effective approach to bring both sides together around the same interests.

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103. See Benoît Jadot (1994), *Fiscalité de L'environnement*, Bruylant Bruxelles, pp. 21.

104. See Pérez de Ayala (1967), *Introducción a una teoria económica del coste social como fundamento de responsabilidades jurídico-privadas y de obligaciones tributarias*, Revista de Derecho Financeiro y Hacienda Pública, n. 72, pp. 1030.

105. See Gracia Luchena Mozo (2013), Instrumentos fiscales para la protección del medio ambiente, published in Tratado de Derecho Ambiental, Tirant lo Blanch, pp. 355.

In addition, the application of our proposal as a means to prop up source taxation models of maritime transport profits would bring about positive factors that could improve the efficiency of tax collection over polluters. Such factors would be: (i) greater proximity between the source state and the negative externalities caused by the industry's pollution, (ii) greater alignment between territorial jurisdiction of the source state and the location of the negative externalities and (iii) greater availability amongst source states to develop cooperative scenarios for control / inspection of polluting activities.

From our perspective, all these factors speak to the harsh reality in which the inability to use direct source taxation as a "green tax" tool would mean that coastal source states cannot be expected to promote an effective combat against maritime transport pollution. As we made abundantly clear, the diffuse nature of the pollution techniques available to the sector call for a direct tax solution, that is not dependant on the exact computation of the environmental damages.

Undoubtedly, by force of their attachment to exclusive residence taxation certain states are preventing the international community as whole from achieving the SDGs as established by the UN, in particular by weakening the domestic resource mobilization in source countries and by preventing the correct application of the polluter-pays principle.

On the other hand, the current international tax consensus alternatively chooses to allocate the right to levy direct taxation to states that are removed from the negative effects caused by the actions of the polluters, that have no direct territorial jurisdiction over the place of the misconduct and that ultimately will not have to bear the costs in terms of clean-up operations or public health. In brief terms, provided that maritime transport operators are careful in the selection of their polluting grounds, residence states have little motivation to levy the extraordinary tax revenues needed to support worldwide proper control.

Our position, in its essence, is not entirely new as tax researchers have long identified that international tax law, in particular exclusive

residence taxation in DTAs, can bring about legal limitations to the adoption and implementation of domestic environmental taxes.[106] In fact, such limitations were already flagged as a potential cause for the lack of consistency between domestic taxation and environmental policies.

Moreover, in what concerns a more practical view over the implementation of such ideas, we are of the opinion that contracting states should consider the possibility of establishing global or regional environmental tax agreements, with a bilateral or multilateral reach. These instruments, that can either be integrated in current DTAs or be autonomous, could extend the rights of coastal states to levy taxation at source in exchange for guarantees that the additional tax revenues would be wholly or partially earmarked for the fight against maritime pollution.

For example, contracting states could bestow reinforced taxation rights to the source state over foreign maritime enterprises dependant on the additional tax revenue being wholly or partially earmarked towards the following: (i) domestic investments in security / inspection teams, (ii) acquisition of new surveillance and control technologies and (iii) public revenue losses due to any adjustments to the environmental and / or regulatory policies at source.

Henceforth, by accepting our proposal both states would be faithfully pursuing their own interests in a balanced manner. The source state would receive an influx of tax revenue that would strengthen his means of implementation of the desired SDGs, while the residence state would receive appropriate guarantees that the surrender of his taxing rights contributed towards obtaining a more sustainable environment on a global scale.

106. See Alice Pirlot (2020), *International Taxation and Environmental Protection*, published in Research Handbook on International Taxation, pp. 258-277.

4.3. Integration with the Benefit, Neutrality and Value Creation Principles

In addition to the above, we are of the opinion that the adoption of sustainability ideals as new international tax policy drivers not only brings practical benefits, but is also theoretically supported by well-known allocation principles (benefit, neutrality, and value creation).

These allocation principles, as they are described in modern tax research, are theoretical proposals on the guiding material principles at the heart of the international tax system and, as such, they are not always found coexisting in a particular international tax regime.

First of all, regarding the alignment of our proposal with the benefit principle, we must note that such principle provides that taxpayers should be obliged to pay taxes in proportion to the benefits obtained from their government. In general terms, in the realm of international taxation, this principle is ever present as it allows for the awarding of taxing rights to the state(s) that contributed the most to the generation of income.

In this setting, we must also take notice of the fact that the role of the benefit principle in international tax law has shrunken over time, mainly due to market valuation differences between developed and developing nations. It is now seen as little more than a justification-to-tax principle, a simple command directed at States to refrain from taxing certain income streams created exclusively by using public benefits obtained abroad.[107]

This ideal would be achieved by our proposal, as source taxation of maritime transport profits is justified under the benefit principle as public benefits are clearly being granted to enterprises both at residence and at source. Undoubtedly, without the presence of large public infrastructures promoted by coastal source states international traffic between nations would not be a reality.

107. See Pistone, P. and Hongler, P. (2015), *Blueprints for a New PE Nexus to Tax Business Income in the Era of the Digital Economy*, WU International Taxation Research Paper Series No. 15, pp. 33.

Furthermore, in what regards the alignment of our proposal with the neutrality principle, we must recall that this ideal seeks to achieve worldwide efficiency by avoiding market distortions created due to unjustified tax measures. As such, we must underline the partiality of the current solution of exclusive residence taxation and compare it to our proposal on source-related taxation.

In this framework, in what matters for our analysis, the neutrality principle operates thought the concept of Market Neutrality, this proposal to achieve economic efficiency argues that if two enterprises compete in the same market then they should face the same effective tax rates or at least similar.[108]

As we discussed before, we know that the maritime transport sector today is prone to unruly tax competition and that many fear a race-to-the-bottom is already in full effect, this necessarily means that exclusive residence taxation is not a neutral allocation regime.

In this sense, the adoption of intermediate source-related tax solutions across the globe can help to mitigate this unruly tax competition by raising effective tax rates around the world and making relocation virtually ineffective. At the same time, the sustainable objectives added in our proposals can help to ensure that pollution hotspots are not solely created near developing coastal states and this may lead to a more neutral redistribution of external costs between markets.

Finally, in what concerns the alignment of our proposal with the value creation principle, we must clarify that this principle encases the idea that income should be taxed where value is effectively created.

The value creation principle has been in the centre of the international tax agenda for the past few years. This ideal was directly cited, by both the G20 and the OECD, as a guiding principle for the pivotal BEPS project and more recently for the Inclusive Framework on BEPS initiative, being referred to as the basic paradigm for the taxation of

108. See Alan J. Auerbach, Michael P. Devereux & Helen Simpson (2008), Taxing Corporate Income, pp. 44-45.

cross-border profits, in both action 1 (digital economy) and actions 8-10 (transfer pricing).[109]

Once again, source taxation over maritime transport profits embodies in our opinion a classic case of several source jurisdictions pleading for taxation to occur in the place where value is effectively created, as it is undeniable that operators derive economic value directly from the territory of the source country.

Remembering the operations at hand, one cannot forget that unlike with the digital economy in maritime transport there is a physical connection with the land of the source state, as vessels might need to dock for load and unload activities, occasional repairs, and refuelling. Even worse, under current rules enterprises are free to establish warehouses, strategic offices and hire personnel, all without being subject to the taxation at source on their main activity that a normal corporate taxpayer with a PE would pay.

In our opinion, the matter only gets more imbalanced when we consider that the global value chain of maritime transport enterprise might contain hidden difficulties to calculate environmental costs (negative externalities) that should be accounted towards the value created at source.[110]

Our proposal, in our view, not only calls for taxation following the value being generated by source countries, it also has the merit of allowing for some consideration of those hidden costs, bringing them to the negotiating table and allowing for at least an approximate form of compensation to occur.

In conclusion, it seems to us that any and all argumentation designed to promote the implementation of taxation at source of maritime transport profits, particularly with an environmental add-on, complies perfectly with the most recent ideas defended regarding the main allocation principles that should guide the international tax

109. See OECD (2015), *Aligning Transfer Pricing Outcomes with Value Creation – Actions 8-10: 2015 Final Reports*, OECD/G20 Base Erosion and Profit Shifting Project, p. 3.

110. See Christians, A. (2021), *Designing a More Sustainable Global Tax System*, Dalhousie Law Journal, n. 44(1), pp. 19.

order. So much so, that we wonder why the discussions on international tax reform have so easily ignored the generalized beneficial tax treatment that is given to one particular industry in detriment of all other forms of business.

5. Conclusion

During the course of our research, we have displayed that the maritime transport industry, despite being an important linchpin to global trade, also represents a sector that creates environmental liabilities that due to their own nature are unpredictable, undetectable, and ultimately hard to control by governments worldwide.

In this context, at present the debate between developed and developing nations regarding the cross-border taxation of the sector still seems to revolve around the merits of residence-based taxation versus source-based solutions, with the first (coupled with POEM clauses) being the default choice for most states.

According to our research, this preference for residence-based taxation in this particular sector is often complemented by the creation of special tax regimes with low effective rates (i.e., tax tonnage regimes). These practices, in the grand scheme of things, have slowly evolved to a race-to-the-bottom with shipping havens that can have detrimental effects on the net sum of collected tax revenue worldwide.

Notwithstanding, a select group of Asian coastal states have been struggling to take a stand towards source-based taxation, with (incipient) results even showing up in the Portuguese tax treaty network. In our study, by going beyond economic concerns, we demonstrated the presence of a direct link between that struggle and the environmental costs borne by coastal states with the maritime transport sector.

Considering the rekindling of the debate, we propose a more holistic approach to the matter in which the concept of sustainable development acting through environmental principles, such as the

polluter-pays principle, bears influence in the process of policy creation in the international tax order going forward.

The application of our proposal, as a means to prop up source taxation models of maritime transport profits, would bring about positive factors that could improve the efficiency of tax collection over polluters by coastal states. Such factors would be the: (i) greater proximity between the source state and the negative externalities caused by the industry, (ii) greater alignment between territorial jurisdiction of the source state and the location of the externalities and (iii) greater availability amongst source states to develop cooperative scenarios for controlling maritime pollution.

From our perspective, without direct source taxation coastal states cannot be expected to promote an effective combat against maritime transport pollution. Since, as we made abundantly clear during our exposition, the diffuse nature of the pollution techniques available to the sector calls for a direct tax solution, that is not dependant on the exact computation of the environmental damages caused.

Regarding the implementation of such ideas, we are of the opinion that contracting states should consider establishing global or regional environmental tax agreements, with bilateral or multilateral reach. These instruments, that can either be integrated in current DTAs or be autonomous, would extend the rights of coastal states to levy taxation at source in exchange for guarantees that the additional tax revenues would be wholly or partially earmarked for the fight against maritime pollution.

Finally, through our analyses, we concluded that such holistic approach offers a greater degree of compatibility with contemporary principles that permeate the international allocation rules (i.e., value creation, benefit, and neutrality principles), particularly when compared with traditional residence-based solutions currently followed.

An all-encompassing conclusion, considering the entirety of our research, may be found in the assertion that current solutions for the international taxation of the maritime transport industry are outdated,

misaligned and fail to reflect the new sustainable development global agenda and, as such, impeding reform might be inevitable.

Bibliography

Alice Pirlot (2020), International Taxation and Environmental Protection, published in Research Handbook on International Taxation, pp. 258-277.

Alphaliner (2021), “Profit margins accelerate as 2021 EBIT set to beat all records”, Alphaliner Weekly Newsletter, pp. 48.

International Chamber of Shipping (2022), “ICS Trade Policy Review 2022”, Marisec Publications, pp. 26.

Rose George (2013), “Ninety Percent of Everything: Inside Shipping, the Invisible Industry That Puts Clothes on Your Back”, Metropolitan Books, pp. 13-20.

World Shipping Council (2021), “Liner Shipping - The backbone of world trade”, available at www.worldshipping.org, pp. 4-5.

UNCTAD (2022), “Review of Maritime Transport 2022”, United Nations Publications, pp. 10-11.

UN DESA (2023), “World Economic Situation and Prospects Report 2023”, United Nations Publications, pp. 118-121.

Statista (2023), “Revenue of the cruises market worldwide from 2018 to 2027”, available at www.statista.com, published on 8 August 2023.

CLIA (2023), “State of the Cruise Industry 2023”, available at www.cruising.org, pp. 6-9.

Tony Walker et al. (2019), “Environmental Effects of Marine Transportation”, World Seas: An Environmental Evaluation, Volume III: Ecological Issues and Environmental Impacts, pp. 505-530.

V., Uma and R., Gandhimathi (2019), “Organic removal and synthesis of biopolymer from synthetic oily bilge water using the novel mixed bacterial consortium”, Bioresource Technology, Volume 273, pp. 169-176.

M. Yang (2011), “Shipping and Maritime Transport”, Encyclopedia of Environmental Health, pp. 33-40.

W.A., Montevecchi (2019), “Seabirds as Indicators of Ocean Pollution”, Encyclopedia of Ocean Sciences, pp. 104-108.

Maria Bighiu (2017), "Use and environmental impact of antifouling paints in the Baltic Sea", Academic Thesis PhD, pp. 12-13.

Pitacco Valentina et al. (2021), "Sediment Contamination by Heavy Metals and PAH in the Piombino Channel (Tyrrhenian Sea)", Water Journal n.º 13, Special Issue Pollution in Estuaries and Coastal Marine Waters, pp. 1487.

Lighthouse Reports (2022), "Europe's Black Seas", available at www.lighthousereports.com, published March 22nd, pp. 1-2.

EMSA / EEA (2021), "European Maritime Transport Environmental Report 2021", pp. 53.

Tatiana Falcão (2020), "Taxing carbon emission on the high seas", Tax Notes International, p. 1199.

Francesco Clora et al. (2023), "Alternative carbon border adjustment mechanisms in the European Union and international responses: aggregate and within-coalition results", Energy Policy n. º 174, article n. º 113454, available at www.sciencedirect.com.

Jonathan Schwarz (2021), "Schwarz on Tax Treaties", Wolters Kluwer, pp. 290-291.

Klaus Vogel (2022), "Klaus Vogel on Double Taxation Conventions", Wolters Kluwer, pp. 550-552.

OECD (2017), "The 2017 Update to the OECD Model Tax Convention", OECD Publications, pp. 2-4.

OECD (2013), "Proposed changes to the OECD Model Tax Convention dealing with the operation of ships and aircraft in international traffic", OECD Publication, pp. 2-8.

OECD (2017), "Commentary on Article 3: Concerning General Definitions", Model Tax Convention on Income and on Capital 2017, OECD Publications, pp. 1-2.

OECD (2020), "Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint: Inclusive Framework on BEPS", OECD / G20 Base Erosion and Profit Shifting Project, OECD Publications, pp. 59-60.

Georg Kofler (2017), "Chapter 7 - Article 8 OECD Model: Time for a Change?", in Taxation of Shipping and Air Transport in Domestic Law, EU Law and Tax Treaties, IBFD, pp. 129-146.

OECD (2017), "Commentary on Article 8: Concerning the Taxation of Profits from International Shipping and Air Transport", Model Tax Convention on Income and on Capital 2017, OECD Publications, pp. 1-2.

OECD (2017), “Commentary on Article 4: Concerning the Definition of Resident”, Model Tax Convention on Income and on Capital 2017, OECD Publications, pp. 1-2.

OECD (2015), “Aligning Transfer Pricing Outcomes with Value Creation – Actions 8-10: 2015 Final Reports”, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publications, p. 3.

OECD (2023), “Harmful Tax Practices - 2018 Progress Report on Preferential Regimes” (2023 update), pp. 13-14.

OECD (2015), “Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance”, Action 5 - 2015 Final Report, pp. 23-25.

League of Nations (1923), “Economic and Financial Commission, Report on Double Taxation Submitted to the Financial Committee by Professors Bruins, Einaudi, Seligman and Sir Josiah Stamp”, pp. 34.

Jacques Sasseville (2017), “Chapter 5 - Historical Background of Proposed Changes to Articles 8 and 15(3) OECD Model”, in Taxation of Shipping and Air Transport in Domestic Law, EU Law and Tax Treaties, IBFD, pp. 84-85.

League of Nations (1925), “Double Taxation and Tax Evasion - Report and Resolutions submitted by the technical experts to the Financial Committee of the League of Nations”, pp. 31.

United Nations (1969), “Tax Treaties Between Developed and Developing Countries – First Report”, United Nations Publications, pp. 5-6.

United Nations (1972), “Tax Treaties Between Developed and Developing Countries – Third Report”, United Nations Publications, pp. 7.

Michael Keen and Jon Strand (2006), “Indirect Taxes on International Aviation”, IMF Working Paper, pp. 29.

United Nations (2021), “Model Double Taxation Convention Between Developed and Developing Countries”, pp. 151-152.

IATA (2015), “Guidelines for Taxation of International Air Transport Profits”, IATA Publications, pp. 16-18.

Muhammad Ahmed (2020), “UN MTC Article 8: Was the Source Rule Surrender on Article 8 a Blunder? The Case Study of Pakistan”, Intertax Volume 48, Issue 1, pp. 118.

Bob Michel and Tatiana Falcão (2021), “Taxing Profits from International Maritime Shipping in Africa: Past, Present and Future of UN Model

Article 8 (Alternative B)", ICTD Working Paper 133, Institute of Development Studies, pp. 45.
Victoria Perry and Alexander Klemm (2021), "Chapter 12 - Residence-Based Taxation: is there a way forward?", Corporate Income Taxes under Pressure - Why Reform is Need and How It Could Be Designed, International Monetary Fund, pp. 256.
David Elkins (2017), "The Myth of Corporate Tax Residence", Columbia Journal of Tax Law, pp. 219.
Richard Vann (2014), "Current Trends in Balancing Residence and Source Taxation", Legal Studies Research Paper n. 14/107, pp. 9-10.
Bob Michel and Tatiana Falcão (2021), "Time to reinforce the UN Model for taxing international shipping profits", available at www.ictd.ac/blog, pp. 2.
Olaf Merk (2020), "Quantifying tax subsidies to shipping", Maritime Economic & Logistics n.º 22, pp. 526-527.
ITF (2019), "Maritime Subsidies – Do They Provide Value for Money?", International Transport Forum Policy Papers n.º 70, pp. 7-8.
Martin Hearson (2021), Tax Treaties Explorer (Online database), International Centre for Tax and Development (ICTD), available at www.treaties.tax.
Larry B. Pascal (2009), "Developments in the Venezuelan Hydrocarbon Sector", Law and Business Review of the Americas Vol. 15 n. 3, pp. 531-532.
WCED (1987), "Report of the World Commission on Environment and Development: Our Common Future", pp. 42-44.
Benoît Jadot (1994), "Fiscalité de L'environnement, Bruylant Bruxelles", pp. 21.
Pérez de Ayala (1967), "Introducción a una teoria económica del coste social como fundamento de responsabilidades jurídico-privadas y de obligaciones tributarias", Revista de Derecho Financeiro y Hacienda Pública, n. 72, pp. 1030.
Gracia Luchena Mozo (2013), "Instrumentos fiscales para la protección del medio ambiente", published in Tratado de Derecho Ambiental, Tirant lo Blanch, pp. 355.
Pistone, P. and Hongler, P. (2015), "Blueprints for a New PE Nexus to Tax Business Income in the Era of the Digital Economy", WU International Taxation Research Paper Series No. 15, pp. 33.

Alan J. Auerbach, Michael P. Devereux & Helen Simpson (2008), "Taxing Corporate Income", The Mirrlees Review, Reforming the Tax System for the 21st Century, pp. 44-45.
Christians, A. (2021), "Designing a More Sustainable Global Tax System", Dalhousie Law Journal, n. 44(1), pp. 19.

Os novos nortes das normas tributárias extrafiscais. Um alinhamento aos anseios de sustentabilidade e desenvolvimento racional

Ubiratan Baga dos Reis

O presente artigo tem por objetivo analisar a evolução do uso das normas tributárias extrafiscais mormente em relação à atuação estatal na tutela da sustentabilidade ambiental. Como objetivo geral, adota a premissa da extrafiscalidade como um instrumento apto ao dever constitucional de proteção do meio ambiente se investigando a legislação tributária infraconstitucional, enveredando para a análise das normas emanadas dos Entes federativos. No primeiro capítulo se tem a explanação acerca da utilização das normas tributárias extrafiscais, correlacionando com os conceitos de sustentabilidade, desenvolvimento sustentável, preservação do meio ambiente etc, e as interações inerentes ao uso dos princípios constitucionais tributários e da ordem econômica. Após, dentro de uma evolução temporal, aborda o uso das normas tributárias extrafiscais na legislação infraconstitucional, como por exemplo, como instrumento de incentivos de produção de biocombustíveis que afetam em menor intensidade o meio-ambiente, prevista na Lei nº 13.576/2017. No terceiro capítulo, se aborda a evolução (alinhamento) do Sistema Constitucional Tributário especialmente com o advento da Emenda Constitucional nº 123, de 14.07.2022, que inseriu o inciso VIII, no § 1º, do artigo 225, com o objetivo de assegurar o diferencial competitivo em relação biocombustíveis e combustíveis fósseis, no Título VIII, da Ordem Social, Capítulo VI, do Meio Ambiente a demonstrar que, por opção do legislador, o

regime fiscal de biocombustíveis e combustíveis fósseis apresenta uma relevância muito mais voltada ao meio ambiente do que ao sistema tributário constitucional. Como resultado a ser alcançado, aponta-se o alinhamento das normas constitucionais com a ideia de utilização das normas tributárias extrafiscais como instrumento de tutela do meio ambiente sustentável e desenvolvimento econômico. O trabalho será pautado no método dedutivo, pesquisa qualitativa de obras e artigos científicos sobre o tema em questão.

Palavras chaves: Normas tributárias extrafiscais. Sustentabilidade. Desenvolvimento econômico.

This article aims to analyze the evolution of the use of extrafiscal tax norms, particularly in relation to the government's role in protecting environmental sustainability. As a general objective, it adopts the premise of extrafiscality as a suitable instrument for the constitutional duty to protect the environment, investigating infranational tax legislation and analyzing the norms issued by the federal entities. In the first chapter, there is an explanation of the use of extrafiscal tax norms, correlating them with concepts of sustainability, sustainable development, environmental preservation, etc., and the interactions inherent in the use of constitutional tax principles and economic order. Subsequently, in a temporal evolution, it discusses the use of extrafiscal tax norms in infranational legislation, such as an instrument to incentivize the production of biofuels, which have a lower impact on the environment, as provided in Law No. 13,576/2017. In the third chapter, it addresses the evolution (alignment) of the Constitutional Tax System, especially with the advent of Constitutional Amendment No. 123, dated July 14, 2022, which inserted paragraph VIII into Article 225, paragraph 1, with the aim of ensuring a competitive advantage for biofuels over fossil fuels, in Title VIII of the Social Order, Chapter VI of the Environment, demonstrating that, by the legislator's choice, the tax regime for biofuels and fossil fuels is more focused on the environment than on the constitutional tax system.

The expected outcome is the alignment of constitutional norms with the idea of using extrafiscal tax norms as an instrument to protect sustainable environmental and economic development. The work will be based on deductive methodology and qualitative research of works and scientific articles on the topic in question.

Keywords: Extrafiscal tax norms. Sustainability. Economic development.

1. Introdução

Se apresenta cada vez mais relevante os estudos sobre a tributação incidente sobre os atos econômicos, especialmente àqueles que, dentre da cadeia produtiva, apresentam direta ligação com o meio ambiente e a busca pelo meio ambiente equilibrado.

Como direito e garantia fundamental, o princípio da igualdade é um dos pilares do Estado Democrático de Direito, com destaque à concessão dos incentivos fiscais ambientais e o atendimento ao princípio da igualdade tributária, sendo papel fundamental do Estado, na elaboração de leis, a fiel e inquestionável observância dos princípios constitucionais tributários e os da ordem econômica.

As alterações normativas passaram para patamar constitucional, sendo de salutar importância a investigação sobre os reflexos que tais alterações repercutem não só no sistema constitucional tributário, mas também por todos os demais sistemas do direito, como o ambiental.

A sustentabilidade e tributação se interligam, mormente com a possibilidade de intervenção no Estado por meio indução, estimulando comportamento que tendem a proteger o meio ambiente e fontes renováveis de energia, inclusive, os combustíveis, com a ideia de substituição dos combustíveis fósseis pelos biocombustíveis.

O direito ao desenvolvimento deve ser exercido, de modo a permitir que sejam atendidas, equitativamente, as necessidades de desenvolvimento e de medidas protetivas ambientais, seja para as gerações

presentes, como para as futuras, tendo o Brasil anuído a Acordos Internacionais para proteção ao meio ambiente. Nesse contexto, se aborda o tratamento tributário a ser aplicado na receita das pessoas jurídicas qualificadas como emissor primário, sob a ótica dos constitucionais tributários, econômicos e ambientais, previsto na Lei RenovaBios.

A Constituição Federal é minuciosa ao dispor sobre o Sistema Tributário Nacional, cujas disposições repercutem nas ações de ordem econômica. Isto porque , entre os tributos existentes, nenhum prevê, qualquer forma de tributação mais expressiva sobre atividades destruidoras do meio ambiente ou, ainda, agressivas aos recursos naturais não-renováveis.

Neste contexto, de maneira inovadora, a Emenda Constitucional nº 123, inserida no artigo 225, eleva a um novo patamar a proteção constitucional ao meio ambiente, se utilizando da tributação como indução de condutas para produção de combustível mais adequado ao objetivo de desenvolvimento sustentável. No decorrer dos estudos, pelo método dedutivo, se utiliza de pesquisa qualitativa e obras, artigos científicos sobre as normas tributária.

2. Normas tributárias extrafiscais e meio ambiente

Invariavelmente, os incentivos fiscais tendem a estimular condutas dos agentes econômicos, isto porquanto, se apresenta como uma forma de diminuir os riscos assumidos nos investimentos e aumentar os lucros no caso de êxito do empreendimento, o que nos remete a análise comportamental do empresário investidor.

Essa primeira premissa se faz necessária, para que se possa mostrar que, em regra, as normas tributárias extrafiscais não foram idealizadas para preservação do meio ambiente, mas para estimular ou desestimular condutas no mercado e nas atividades econômicas de forma geral.

Os incentivos estão no campo da extrafiscalidade (SCHOUERI, 2005, p. 27-28) (SILVEIRA, 2016, p. 199), evoluindo para serem instrumento de proteção ao meio ambiente ecologicamente equilibrado

(ALEXANDRINO; BUFFON, 2015). Através dos incentivos fiscais, a pessoa política tributante estimula os *players* a fazerem algo que a ordem jurídica considera conveniente, interessante ou oportuno. Algumas vezes, os incentivos fiscais se manifestam através de tratamentos tributários diferenciados.

Para ilustração do quanto a legislação tem direcionado o investimento deste segmentos, na seara tributária, tem-se que Análise Econômica do Direito deve ser vista como instrumento para “encontrar elementos econômicos que participam da regras de formação da teoria jurídica” (SILVEIRA, 2009, p.15), ou seja, a eficácia da norma indutora pressupõe a concordância com o destinatário da mesma, sem a necessidade de aplicação de meios coercitivos (sanção), no caso a produção de produtos e serviços mais benéficos ao meio ambiente.

Cita-se, por exemplo, que a descarbonização tem sido considerada como verdadeiro instrumento para se atingir o equilíbrio ambiental, mediante o emprego de fontes energéticas limpas (MAIDANA; BOGGI, 2009, p. 195).

O direito ao desenvolvimento deve ser exercido, de modo a permitir que sejam atendidas equitativamente as necessidades de desenvolvimento e ambientais de gerações presentes e futuras, tendo o Brasil anuído a Acordos Internacionais para proteção ao meio ambiente.

Assim, dentro de um subsistema de tributos ambientais, o objetivo pode e deve ser buscado, na exata medida em que a tributação ambiental pode ser entendida como o emprego de instrumentos tributários com duas finalidades, quais sejam: (i) a geração de recursos para o custeio de serviços públicos de natureza ambiental (natureza arrecadatória) e; (ii) a orientação do comportamento dos contribuintes para a preservação do meio ambiente (natureza extrafiscal ou regulatório).

A Análise Econômica do Direito tem contribuído substancialmente para avançar nos estudos sobre o comportamento do indivíduo (Behavioral Law and Economics), em especial, neste estudo, para contribuir na análise do comportamento dos players quando se trata de negócios, ou melhor, produção de bens e serviços, com rigorosa ponderação da racionalidade humana.

Desde de 1871, em sua obra pioneira, Grundsätze der Volkswirtschaftslehre (MENGER, 2017, p.4), Princípios de Economia Política, Carl Merger desenvolvia os alicerces do seu pensamento defendendo a concepção da necessidade de abandono do objetivismo da escola clássica da Economia, devendo os estudos sobre a economia partir do ser humano, considerado por ele como ator criativo dos processos sociais.

Com efeito, Carl Merger e outros integrantes da Escola Austríaca tendem a considerar que os agentes econômicos podem cometer erros empresariais puros, evitáveis à medida que se incorporam o conhecimento, em um processo dinâmico de empreendedorismo criativo.

O comportamento humano passa a ser estudado cientificamente não só pela Sociologia, Antropologia, para também, pela Economia e Direito. Tem-se, assim, a análise econômica comportamental no Direito, que em certa medida, tende a enriquecer o entendimento acerca da tomada da decisão humana frente a assunção do risco do negócio, devendo a norma jurídica se adequar a realidade fenomênica, ou seja, de nada adianta a introdução de normas jurídicas divorciadas da realidade dos negócios, em quaisquer de seus segmentos.

Há de ponderar o homo sapiens e homo economicus:

> Essa nova abordagem decorre do reconhecimento, no âmbito da própria ciência econômica, de que as pessoas reais (*homo sapiens*) são diferentes de criaturas ficcionais (*homo economicus*) que habitavam os modelos econômicos clássicos, nos quais se partia da presunção de que a escolha humana ocorria por otimização, de forma racional, imparcial e desprovida de crenças particulares.[15] Afinal, é o *homo sapiens* que comanda empresas, que é funcionário e consumidor, bem como é para o *homo sapiens* que o ordenamento jurídico é direcionado; sendo assim, é de extrema relevância uma compreensão mais profunda do comportamento efetivamente humano[16] que abranja também nossas "previsíveis irracionalidades". (NADAL)

Posta esta singela dialeticidade, segundo De Soto, a função do empresário para Escola Austríaca consiste em criar e descobrir informação

que antes não existia (DE SOTO, 2010, p. 19), sendo que, o conhecimento na vertente da escola austríaca coincide com a própria ação humana (DE SOTO, 2010, p. 33-45), daí o questionamento acerca do que levaria um ser racional optar pelo investimento em energia limpa?

Pela teoria da ação humana (praxeologia), a principal característica da Escola Austríaca, as atividades de cada indivíduo, em suas ações derivam da razão, a mesma fonte de onde se originam nossas teorias (MISES, 2017, p. 45), se assim o é, faz crer que o conceito de empresa socioambiental tem valor, assim como aquela que apresenta distribuição de vultosos dividendos.

A Escola Austríaca adota o paradigma de conceber a informação com elementos subjetivos, dispersos e constantemente modificáveis. A teoria da ação humana, explica Jesus Huerta de Soto (2010, p 17-18), é além de conjuntos de teoria sobre escolha e decisão, é um corpo de disciplina processos de interação social, onde o homem, mais do que aloca meios e fins, mas, também, procura novos fins e meios, aprendendo com o passado e usando a sua imaginação para descobrir e criar (mediante a ação) o futuro.

Se a ação humana é intencional como afirma MISES (2020, p. 27), então temos um dilema empresarial a ser ponderado pelo Direito, acerca do comportamento humano, em especial daqueles que pretendem estimular a produção de energia limpa e renovável pois, se a assimetria de informação não se apresenta tão relevante assim para tomada de decisão, então, o que realmente importa, seria a próprias informações disponíveis sobre a filosofia da empresa e não aquilo que realmente pode surgir lucro.

A busca pela *rational choice* não é ditada apenas em interesses diretos e de interação nos mercados, mas, pode ser influenciada por outros ambientes que podem trazer benefícios diretos e indiretos.

Sobre a escolha racional:

> Esse modelo tem sido utilizado como principal parâmetro para a compreensão dos processos que levam às escolhas dos agentes em ambiente de mercado e é fundamentado em algumas premissas. A

> primeira dessas premissas é a de que a escolha racional se baseia na maximização de utilidade, de modo que o agente pautará suas ações na medida em que possa colher os melhores benefícios para si, em um processo que leva a que o agente promova o seu próprio interesse e responda a incentivos em razão desse objetivo. O comportamento que maximiza utilidade é adaptado ao ambiente no qual está inserido o agente, com a finalidade de aumentar as satisfações individuais.

Há possibilidade então de adotar a conduta como diferencial de alteração de comportamento com guinada para visão mais coletiva, no sentido de proteger o meio ambiente. Não se olvida da necessidade de desenvolvimento, mas um desenvolvimento racional no sentido de sustentabilidade.

Desenvolvimento sustentável, segundo Relatório de Brundtland de 1987:

> O desenvolvimento que procura satisfazer as necessidades da geração atual, sem comprometer a capacidade das gerações futuras de satisfazerem as suas próprias necessidades, significa possibilitar que as pessoas, agora e no futuro, atinjam um nível satisfatório de desenvolvimento social, econômico e de realização humana e cultural, fazendo, ao mesmo tempo, um uso razoável dos recursos da terra e preservando as espécies e os habitats naturais.

Mariana Ribeiro Santiago e Pedro Antonio de Oliveira Machado explicam a amplitude da ideia de desenvolvimento sustentável:

> O Relatório Brundtland trabalha com a ideia de que desenvolvimento sustentável é aquele que satisfaz as necessidades do presente sem comprometer a capacidade das gerações futuras satisfazerem as suas próprias necessidades, impondo ainda dois conceitos-chave: o de necessidades, em particular as necessidades essenciais dos pobres do mundo, a que deve ser dada prioridade absoluta; e o

> reconhecimento da existência de limitações que o estágio da tecnologia e da organização social impõem ao meio ambiente, impedindo-o de atender às necessidades presentes e futuras.

Observa-se que, em território brasileiro foi instituído o Programa Nacional do Álcool ou Proálcool, em 14 de novembro de 1975, pelo decreto n° 76.593, que em seu art. 1° traçava o objetivo de atender as necessidades do mercado interno e externo e da política de combustíveis automotivos. Já o artigo 2° preconiza que a produção do álcool oriundo da cana-de-açúcar, da mandioca ou de qualquer outro insumo será incentivada através da expansão da oferta de matérias-primas, com especial ênfase no aumento da produção agrícola, da modernização e ampliação das destilarias existentes e da instalação de novas unidades produtoras, anexas a usinas ou autônomas, e de unidades armazenadoras.

A decisão de produção de etanol a partir de cana-de-açúcar, embora em um primeiro momento fosse econômica e política, atualmente tem alta capacidade de atender os aos conceitos de sustentabilidade sustentável.

3. Evolução do uso das normas tributárias indutoras como incentivos de produção de biocombustíveis

A Emenda Constitucional n° 42, de 19 de dezembro de 2.003, alterou o Sistema Tributário Nacional inserindo dentro do ordenamento jurídico a possibilidade de estabelecer critérios especiais de tributação, com o objetivo de prevenir desequilíbrios da concorrência, sem prejuízo da competência da União, por lei, estabelecer normas de igual objetivo.

Ao analisar o dispositivo legal observa-se a preocupação do legislador em enfatizar a positivação da possibilidade de adoção de critérios especiais de tributação . Este aspecto da norma pode ser, sem prejuízo de outras, analisado sob duas vertentes.

A primeira é a sob a perspectiva do princípio da neutralidade. O tributo deve interferir o quanto menos possível no mercado e nas atividades desenvolvidas por seus participantes. Deve ser neutro, cabendo o sucesso ou fracasso de cada um dos *players* resultado do seu comportamento.

Em primazia à livre concorrência, o Estado somente deverá intervir na e sobre a atividade econômica quando houver a necessidade de equalizar e afastar eventuais distorções. A livre competição é um elemento de observância imperativa pelo Estado, mormente quando se tratar da tributação, já que, pragmaticamente, é um fator que influencia diretamente no preço de bens e serviços, sendo certo também que a interferência estatal inadequada ensejaria uma avalanche de desequilíbrios concorrenciais, às vezes, incontornáveis.

É óbvio que não se está defendendo a total e absoluta inexistência do Estado, até porque, o próprio artigo 146-A da Constituição Federal prevê a possibilidade de interferência. Estar-se-á a ponderar que, nos limites da interpretação da norma, há uma limitação que deve ser observada quando da adoção de critérios especiais.

Estes critérios especiais de tributação configuram uma exceção ao princípio da neutralidade já que, necessariamente para afastar o desequilíbrio da concorrência, o tributo deverá ser não neutro.

Os critérios gerais de tributação remetem sempre ao tratamento harmonioso e isonômico entre os contribuintes que estiverem em situação equivalente, proibida qualquer distinção em razão de ocupação profissional ou função por eles exercidas, independentemente da denominação jurídica dos rendimentos, títulos ou direitos (art. 150, II, CF/88).

De igual forma, se apresenta equivocado o entendimento de que a livre concorrência seja intocável, absoluta. Isto porquanto não é possível sustentar a liberdade econômica plena ou a intervenção totalitária do Estado já que estes extremos são insuficientes e indesejáveis, distantes de um termo ideal entre a economia de mercado saudável e a intervenção do Estado no domínio econômico.

Há outros valores constitucionais de igual importância que devem ser prestigiados, como a valorização do trabalho humano, a livre

iniciativa, a dignidade da pessoa humana, a soberania nacional, a propriedade privada, a defesa do meio ambiente, a redução das desigualdades regionais e sociais (Art. 170, CF/88).

Ensina Juliana Domingues e Eduardo Gaban sobre o tema:

> A Constituição de 1998 adotou o principio da livre-iniciativa como alicerce de sua ordem econômica. Explorando o significado de “livre-iniciativa”, o sujeito é livre para a realização de qualquer negócio ou exercício de qualquer profissão, sendo, contudo obrigado a se munir previamente de uma “patente” (imposto direto), a pagar as taxas exigíveis e a se sujeitar aos regulamentos de policia aplicáveis, em atenção à Constituição, referido princípio foi incorporado no art. 1°, tanto da Lei da Lei n. 8.884/94 quanto da Lei n.° 12.529/2011 (2.016, pág. 54).
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> ...
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> Torna-se oportuno tecer considerações acerca da distinção entre o principio da livre-iniciativa e o princípio da livre concorrência. A livre iniciativa e a livre concorrência são conceitos distintos, porem, complementares, sendo o primeiro a projeção da liberdade individual no plano da produção, circulação e distribuição de riquezas, significando a síntese da liberdade de escolha, o livre acesso às atividades econômicas, ao passo que o segundo representa uma limitação e uma instrumentalização do exercício do primeiro. (2016, pág. 56)
>
> ...
>
> Em outras palavras, o princípio da livre concorrência limita a expressão absoluta do principio da livre-iniciativa por parte de um agente econômico ou um grupo de agentes econômicos em busca da aplicação universal da livre-iniciativa, i.e ., a todos os agentes do mercado.(pág. 57)

No Capítulo I, dos princípios gerais da atividade econômica, do Título VII Da Ordem e Financeira, da Constituição Federal, o princípio da concorrência é prestigiado assim como os supramencionados , sendo coerente afirmar que a Carta Magna deve ser interpretada como um todo, integrando-se às normas tributárias a fim de possibilitar que, de um lado a tributação seja neutra quando a lealdade e igualdade esteja presente sobre o mercado e, por outro lado , seja não neutra quando haver falhas no mercados.

Não é recomendável que a tributação seja um desestimulante da atividade econômica, como fator discriminatório entre contribuintes que estejam em situação semelhante. Maria de Fátima Ribeiro assevera que:

> A relação entre a tributação e a ordem econômica cada vez mais exige um exame da relação jurídica, não apenas quanto aos critérios da incidência da norma tributária, mas também dos efeitos da tributação sobre o mercado e sobre o sistema econômico. Desta forma, os princípios constitucionais tributários e os princípios da ordem econômica se encontram em constante interação e comunicação (2014).

Enfatiza-se que a Constituição Federal de 1988 prevê no § único, do art. 145, que sempre que possível os impostos serão graduados segundo a capacidade econômica do contribuinte, facultado à administração tributária, especialmente para conferir efetividade a esses objetivos, identificar, respeitados os direitos individuais e nos termos da lei, o patrimônio, os rendimentos e as atividades econômicas do contribuinte.

> A capacidade contributiva é "princípio geral" do sistema constitucional tributário brasileiro (CF, art. 145, § 1°). Deve ter algo a dizer em relação ao direito tributário como um todo, inclusive no âmbito extrafiscal – o extrafiscal, embora a expressão pudesse induzir a entendimento diverso, é ainda tributário, sujeito ao regime jurídico tributário (SCHOUERI, 2005, p. 34). A doutrina cogita

> da capacidade contributiva como capaz de impor limites à tributação extrafiscal. Esse princípio protegeria o mínimo existencial da tributação baseada em extrafiscalidade e vedaria o confisco.2 Para além disso, a capacidade contributiva tem voz nos tributos extrafiscais, por outros motivos racional e juridicamente válidos: levá-la em consideração, sob um ponto de vista, contribuirá com a eficiência da tributação extrafiscal e, de outro lado, contribuirá para que se evite situações de desrespeito à isonomia (FOLLONI, 2014, p. 210)

Ressalta-se que as normas tributárias indutoras são eficazes a fim de desestimular aqueles que mantêm postura afrontosa a lealdade na atividade econômica, bem como estimulantes para aqueles que necessitam de pontual e temporário incentivo para reequilibrar eventuais situações injustas.

Os critérios especiais assim são desejáveis como medidas preventivas para evitar que haja desequilíbrio concorrencial. A Lei 12.529/2.011 que regulamenta a defesa da concorrência deve ser invocada ao se debruçar na análise do artigo 146–A:

> E, se a política tributária, não estiver harmonizada com outros objetivos da política econômica, pode acarretar desequilíbrios concorrenciais. A relação entre tributação e concorrência também é mostrada na Lei nº 12.529/2011 (que regulamenta a defesa da concorrência), quando ela prevê que o CADE (Conselho Administrativo de Defesa da Concorrência), além de tratar das penas por infrações econômicas, poderá determinar que não sejam efetuados parcelamentos de tributos federais aos infratores bem como cancelar os incentivos fiscais ou subsídios concedidos (art. 37). (RIBEIRO, 2014)

Observa-se, neste contexto, que as diretrizes constitucionais envoltas no artigo 146-A estão bem delineadas e sob o quais os critérios especiais devem ser pautados para se evitar desequilíbrios das concorrências. Pode-se afirmar, com a prudência necessária, que os critérios

especiais de tributação devem socorrer ao Direito Regulatório e Direito Econômico para fins de potencializar a indução pretendida quando da edição de normas tributárias indutoras.

Eis o cenário constitucional posto, sendo que, qualquer tipo de benefícios fiscal deve guarda noções gerais de não intervenção do Estado no mercado, inclusive os combustíveis, ou seja, todo e qualquer estudo sobre indução de conduta, por lei infraconstitucional deve guarda correlação com as normas envoltas a neutralidade tributária.

A Lei 13.576, de 26 de dezembro de 2017, dispõe sobre a Política Nacional de Biocombustíveis - RenovaBio, parte integrante da política energética nacional, tendo como objetivos: (i) contribuir com a adequada relação de eficiência energética e de redução de emissões de gases causadores do efeito estufa na produção, na comercialização e no uso de biocombustíveis, inclusive com mecanismos de avaliação de ciclo de vida; (ii) promover a adequada expansão da produção e do uso de biocombustíveis na matriz energética nacional, com ênfase na regularidade do abastecimento de combustíveis; e (iii) contribuir com previsibilidade para a participação competitiva dos diversos biocombustíveis no mercado nacional de combustíveis.

No artigo 13, da Lei da RenovaBio há previsão de emissão primária de Créditos de Descarbonização CBIO, mediante solicitação do emissor primário, em quantidade proporcional ao volume de biocombustível produzido, importado e comercializado, com a possibilidade de pessoa jurídica auferir receita, decorrente da negociação dos CBIO em mercados organizados, inclusive em leilões, nos termos do artigo 15.

Com relação a combustíveis, normas constitucionais que preveem que às atividades de importação ou comercialização de petróleo e seus derivados, gás natural e seus derivados e álcool combustível deverão ter alíquota da contribuição diferenciada por produto ou uso e/ou reduzida e restabelecida por ato do Poder Executivo, não se lhe aplicando o disposto no art. 150, III, b.

Quanto aos recursos, serão destinados ao pagamento de subsídios a preços ou transporte de álcool combustível, gás natural e seus derivados e derivados de petróleo, ao financiamento de projetos ambientais

relacionados com a indústria do petróleo e do gás e ao financiamento de programas de infra-estrutura de transportes (art. 178, § 4º, CF/88)

A gestão ambiental é, nos termos do artigo 225, da Constituição Federal, uma atribuição conjunta da União, dos Estados, do Distrito Federal e dos Municípios, devendo ser interpretado em conjunto com o art. 170, que trata dos princípios da Ordem Econômica, ressaltando, por oportuno, que a intervenção do Estado nas atividades econômicas que possam gerar impactos ambientais, almejando compatibilizar o desenvolvimento econômico com a proteção ambiental e a adequação dos propósitos, meios e fins dos conteúdos jurídicos, plenamente aplicável ao setor sucroalcooleiro nacional.

Adentrando especificamente a tributação de combustíveis, remete-se ao artigo 151, da Constituição Federal, que veda a instituição de tributo que não seja uniforme em todo território nacional, admitindo a concessão de incentivos fiscais destinados a promover o equilíbrio do desenvolvimento sócio-econômico entre as diferentes regiões do país. Em outras palavras, uma tributação diferenciada somente poderá ser concedida por lei específica (art. 150, § 6º, da CF), sem que isso, obedecidos os nortes republicanos, importe em violação ao princípio da igualdade (CARRAZA, 1993, p. 53-55).

A extrafiscalidade se manifesta pelos estímulos fiscais, direcionados o que a Lei define como emissor primário. Para efeitos jurídicos, emissor primário é o produtor ou importador de biocombustível, autorizado pela ANP, habilitado a solicitar a emissão de CBIOS em quantidade proporcional ao volume de biocombustível produzido ou importado e comercializado, relativamente à Nota de Eficiência Energético-Ambiental constante do Certificado da Produção Eficiente de Biocombustíveis, nos termos definidos em regulamento.

A emissão primária de CBIOS deve ser efetuada, sob a forma escritural, nos livros ou registros do escriturador, mediante solicitação do emissor primário, em quantidade proporcional ao volume de biocombustível produzido, importado e comercializado, sendo que a negociação dos CBIOS deve feita em mercados organizados, inclusive em leilões.

A receita das pessoas jurídicas qualificadas como emissor primário, nas vendas de CBIOS fica sujeita à incidência do imposto sobre a renda exclusivamente na fonte à alíquota de 15% (quinze por cento) (Art. 15-A, caput), aplicáveis por igual a todas as demais pessoas físicas ou jurídicas que realizem, sucessivamente, operações de aquisição e alienação, salvo quando aquelas pessoas se caracterizarem legalmente como "distribuidor de combustíveis".

A receita da venda de CBIOS será excluída na determinação do lucro real ou presumido e no valor do resultado do exercício, mas as eventuais perdas apuradas naquelas operações não serão dedutíveis na apuração do lucro real.

A lei salienta ainda que, não configura causa de impedimento, o regular aproveitamento, na apuração do lucro real das pessoas jurídicas emissoras primários, das despesas administrativas ou financeiras necessárias à emissão, ao registro e à negociação dos CBIOS, inclusive àqueles referentes à certificação ou às atividades do escriturador.

A Constituição Federal legitima a adoção de normas fiscais extrafiscais para incentivos de produção de biocombustíveis que atendam aos princípios norteadores de proteção ao meio ambiente.

A utilização de tributação diferenciada se apresenta legítima, mormente quando analisada sob ponto de vista de incentivos fiscais que estimulam ao emissor primário de CBIOS, sem que tal fato consubstancie em tratamento privilegiado que afronte os princípios tributários constitucionais.

A Lei nº 13.576/2017 apresenta, em seu artigo 15-A, tributação diferenciada que encontram respaldos e harmonia nos princípios constitucionais tributários, econômicos e ambientais, se tratando de norma extrafiscal, cuja indução importa no incentivo de biocombustíveis que afetam em menor intensidade o meio-ambiente.

Observa-se, portanto, um nítido escopo de incentivo à produção de biocombustível produzido ou importado e comercializado, inclusive com a Nota de Eficiência Energético-Ambiental constante do Certificado da Produção Eficiente de Biocombustíveis, gerando receita da venda de CBIOS.

4. Emenda constitucional nº 123, de 14.07.2022 e o regime fiscal constitucional de biocombustíveis e combustíveis

O setor de produção de biocombustível apresenta uma variada, ampla e complexa gama de normas tributárias que regulamentam as obrigações principais e acessórias. Não se pode ignorar que o preço final do álcool hidratado tem seu nascedouro desde a aquisição de insumos, percorrendo várias fases até desaguar no tanque dos veículos nos postos de gasolina.

As relações dos princípios tributários e econômicos ensejam uma visão sobre o caráter extrafiscal da norma tributária, que pode ser utilizada para estimular ou desestimular condutas por parte dos *players*, já observando que o objetivo da norma é proteger a concorrência. Ao editar a norma tributária indutora, o Estado não ignora o mercado, o pressupõe, com estímulos e desestímulos, que por vontade, opta por qual conduta adotar.

Reitera-se, por oportuno, que o tributo deve interferir o quanto menos possível no mercado e nas atividades desenvolvidas por seus participantes, a problemática se apresenta quando é o próprio Estado que causa o desequilíbrio, como na hipótese ocorrida pela desoneração dos combustíveis fósseis ocorrida em 2022.

O artigo 9º, da Lei Complementar 192, de 11.03.2022, previu que as alíquotas da Contribuição para o PIS/Pasep, da COFINS e da Contribuição de Intervenção no Domínio Econômico (CIDE) incidentes sobre as operações que envolvam gasolina e suas correntes, exceto de aviação, ficariam reduzidas a 0 (zero) até 31.12.2022.

O parágrafo único, do mesmo dispositivo legal, estabeleceu que as alíquotas da Contribuição para os Programas de Integração Social e de Formação do Patrimônio do Servidor Público incidente na Importação de Produtos Estrangeiros ou Serviços (Contribuição para o PIS/Pasep-Importação) e da Contribuição Social para o Financiamento da Seguridade Social devida pelo Importador de Bens Estrangeiros ou Serviços do Exterior (COFINS-Importação) incidentes na importação de gasolina e suas correntes, exceto de

aviação, ficam reduzidas a 0 (zero) no prazo estabelecido do caput deste artigo.

A redução à alíquota zero propiciou o desequilíbrio concorrencial entre as espécies de combustíveis, mormente por se tratar de setor econômico que interfere diretamente nos preços de produtos e serviços. Ao passo que a desoneração da tributação federal de combustíveis fósseis fez com que o preço final ficasse em patamar de desequilíbrio com o biocombustível, a adoção de contramedidas se apresenta como remédio necessário para equilíbrio competitivo, ainda que mercado extremamente fechado.

Com efeito, na formação do preço do produto ou do serviço, relevante a análise (planejamento) da incidência tributária, face seus imediatos reflexos sobre o preço, ou seja, relevante o cômputo da incidência tributária, já que parte da receita obtida com a venda deles será destinada ao governo, na forma de tributos que incidirão sobre a venda (indiretos) ou sobre o lucro/resultado (diretos).

Critérios especiais de tributação e tratamentos favorecidos configuram uma exceção ao princípio da neutralidade já que, necessariamente, configuram desequilíbrio da concorrência, olvidando da premissa constitucional de que o tributo deve ser neutro.

A tributação remete sempre ao tratamento harmonioso e isonômico entre os contribuintes que estiverem em situação equivalente, proibida qualquer distinção em razão de ocupação profissional ou função por eles exercida, independentemente da denominação jurídica dos rendimentos, títulos ou direitos (art. 150, II, CF/88).

A Emenda Constitucional alterou o inciso VIII, do artigo 225:

> CAPÍTULO VI
> DO MEIO AMBIENTE
> Art. 225. Todos têm direito ao meio ambiente ecologicamente equilibrado, bem de uso comum do povo e essencial à sadia qualidade de vida, impondo-se ao Poder Público e à coletividade o dever de defendê-lo e preservá-lo para as presentes e futuras gerações.

> ...
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> VIII - manter regime fiscal favorecido para os biocombustíveis destinados ao consumo final, na forma de lei complementar, a fim de assegurar-lhes tributação inferior à incidente sobre os combustíveis fósseis, capaz de garantir diferencial competitivo em relação a estes, especialmente em relação às contribuições de que tratam a alínea "b" do inciso I e o inciso IV do caput do art. 195 e o art. 239 e ao imposto a que se refere o inciso II do caput do art. 155 desta Constituição.

Com a redação do inciso VIII, do artigo 225, da Constituição Federal, adotou a normatização da exceção, prevendo um regime fiscal favorecido para os biocombustíveis destinados ao consumo final, com tratamento diferenciado em relação aos tributos em geral, mas, em especial, às contribuições de que tratam a alínea "b", do inciso I e o inciso IV, do caput, do art. 195 (COFINS) e o art. 239 (PIS) e ao imposto a que se refere o inciso II do caput do art. 155 (ICMS) da Constituição Federal.

A Lei 9.718, de 27.11.1998, prevê no artigo 5° que a Contribuição para o PIS/Pasep e a COFINS incidentes sobre a receita bruta auferida na venda de álcool, inclusive para fins carburantes, serão calculadas com base nas alíquotas, respectivamente, de 1,5% (um inteiro e cinco décimos por cento) e 6,9% (seis inteiros e nove décimos por cento), no caso de produtor ou importador. Porém, o § 1° estabelece que ficam reduzidas a 0% (zero por cento) as alíquotas da Contribuição para o PIS/PASEP e da COFINS incidentes sobre a receita bruta de venda de álcool, inclusive para fins carburantes, quando auferida por comerciante varejista, exceto na hipótese prevista no inciso II, do § 4°-B, deste artigo e nas operações realizadas em bolsa de mercadorias e futuros.

O produtor, o importador e o distribuidor de que trata o caput deste artigo poderão optar por regime especial de apuração e pagamento da Contribuição para o PIS/PASEP e da COFINS, no qual as alíquotas

específicas das contribuições são fixadas, respectivamente, em R$ 23,38 (vinte e três reais e trinta e oito centavos) e R$ 107,52 (cento e sete reais e cinquenta e dois centavos) por metro cúbico de álcool, no caso de venda realizada por produtor ou importador.

Observa-se, sob a ótica de vista sobre custos, importantíssimo para análise de estímulo à produção de biocombustível, adoção deste tipo de regime especial se assemelha ao regime do simples nacional, tal como previsto na Lei Complementar nº 123. Adotar formas mais simples de apuração diminui os custos e riscos de não conformidades tributárias, propiciando segurança na transmissão de dados e informações contábeis e fiscais aos órgãos públicos.

A Emenda Constitucional nº 123 prevê no inciso V, do art. 5º, que observado o disposto no art. 120 do Ato das Disposições Constitucionais Transitórias, a União entregará, na forma de auxílio financeiro, o valor de até R$ 3.800.000.000,00 (três bilhões e oitocentos milhões de reais), em 5 (cinco) parcelas mensais no valor de até R$ 760.000.000,00 (setecentos e sessenta milhões de reais) cada uma, de agosto a dezembro de 2022, exclusivamente para os Estados e o Distrito Federal que outorgarem créditos tributários do Imposto sobre Operações relativas à Circulação de Mercadorias e sobre Prestações de Serviços de Transporte Interestadual e Intermunicipal e de Comunicação (ICMS) aos produtores ou distribuidores de etanol hidratado em seu território, em montante equivalente ao valor recebido.

No Estado de São Paulo, o Decreto nº 67.121, de 26.09.2022 previu a concessão de crédito outorgado do Imposto sobre Operações Relativas à Circulação de Mercadorias e sobre Prestações de Serviços de Transporte Interestadual e Intermunicipal e de Comunicação - ICMS a produtores ou distribuidores de etanol hidratado combustível.

O crédito concedido provisionado de R$ 1.917.974.800,78 (um bilhão, novecentos e dezessete milhões, novecentos e setenta e quatro mil e oitocentos reais e setenta e oito centavos), a produtores ou distribuidores de etanol hidratado combustível localizados em território paulista, nas operações internas por eles promovidas, no período de 1º

de agosto de 2022 a 31 de dezembro de 2022, devendo ser lançado na escrituração fiscal dessas referências mensais.

Por ato da Secretaria da Fazenda e Planejamento seriam divulgados o valor mensal do crédito outorgado a ser concedido e o percentual a ser aplicado, pelos contribuintes beneficiados, ao valor adicionado de suas operações internas de etanol hidratado combustível para efeito de apuração do crédito outorgado.

As empresas produtoras de álcool hidratado apuram todos os seus custos de transação, com a perspectiva de serem supridas com a alienação do produto. O ato federal fez com que seu preço, ainda que regulamentado, ficasse incompatível com o mercado concorrencial com combustível fóssil, sendo necessária intervenção para correção do desequilíbrio provocado pela não incidência tributária.

A venda a preço menor, sem qualquer contrapartida enseja um déficit nas contas das usinas produtoras que não apresentam maneira de suprir a queda de faturamento, observando, por inerente ao agronegócio, que o setor sucroalcooleiro produz por safra, o que importa em dizer que, não há como modificar quaisquer outras circunstâncias pretéritas, como por exemplo, o preço acordado em contratos arrendamento e parceria rural, na aquisição de matéria prima (cana-de-açúcar).

O custo de produção corresponde aos materiais diretos, como matéria-prima, embalagens, mão-de-obra, consubstanciando nos fatores de produção aplicados diretamente no processo de fabricação do produto.

O biocombustível apresenta uma complexidade da atividade de produção, mormente em relação ao agente biológico, desencadeando reflexos econômicos nos contratos de parceria existentes, que, invariavelmente, utilizam um preço indexado, denominado valor ATR Consecana mensal, que assegura ao parceiro, uma "contraprestação" mínima da produção.

Essa consequência maléfica do ato estatal propiciando a adoção de contramedida, na outorga de crédito a ser dispensado ao produtor de álcool hidratado, com o escopo somente de aliviar os prejuízos daí decorrentes, com potencialidade de provocar desequilíbrio não só no setor energético, como também em outros setores da economia.

O biocombustível apresenta peculiaridades benéficas e maléficas. Se do ponto de vista socioambiental a produção de biocombustível se apresentar um norte a ser seguido para produção de energia renovável, de outro lado, há um diferencial de competitividade com o combustível fóssil, erroneamente acentuado com a intervenção estatal no preço final, com a alteração da tributação federal.

A legislação e a doutrina reconhecem explicitamente que para diminuir os custos de transação (tratamento diferenciado) a norma com função simplificadora se apresenta eficaz. A expressão "tratamento diferenciado" não está necessariamente ligada a ideia de menor tributação, mas pode ser compreendida como menor custos de transação, como na hipótese do regime de micro e pequena empresa.

O ATR é uma sigla utilizada para significação de Açúcar Total Recuperável, cuja indicação representa a qualidade da matéria prima (custo de produção), ou seja, a capacidade da cana-de-açúcar em caule de ser transformada em açúcar ou álcool.

Através do cálculo da produção, os produtores de cana-de-açúcar auferem ao pagamento mediante a aplicação de índice, com supedâneo em amostras realizadas por coletas na colheita, potencializando a melhor produtividade de açúcar e álcool por tonelada.

A oferta de combustíveis fósseis e biocombustíveis se apresenta homogênea, com muita pouca diferença na eficiência de rendimento de uma bandeira de distribuição para outra. Não há, portanto, diferença na oferta de combustíveis com mais ou menos eficiência a ponto de determinar uma qualidade extraordinária a sujeitar e possibilitar o domínio de mercado de venda, não se podendo confundir o rendimento com adulteração (inserção de outros componentes).

O diferencial competitivo pela utilização de combustível fóssil e biocombustível se resume ao preço final do produto. Produtos semelhantes como combustíveis fósseis e biocombustíveis apresentam uma concorrência diferenciada, não nos moldes tradicionais de livre concorrência, que servem de norte para entender que a tributação é custo e como tal, não pode ser ignorado, na cadeia produtiva.

A Constituição Federal de 1988 apresenta, com a emenda nº 123, normas tributárias que apresentam estão ontologicamente voltadas para proteção do meio ambiente, sendo certo que, doravante, as normas tributárias passarão a adotar novas naturezas, além daquelas já estudadas.

5. Conclusão

A Constituição Federal legitima a adoção de normas fiscais extrafiscais para incentivos de produção de biocombustíveis que atendam aos princípios norteadores de proteção ao meio ambiente.

A utilização de tributação diferenciada se apresenta legítima, mormente quando analisada sob ponto de vista de incentivos fiscais que estimulam ao emissor primário de CBIOS, sem que tal fato consubstancie em tratamento privilegiado que afronte os princípios tributários constitucionais.

A Lei nº 13.576/2017 apresenta, em seu artigo 15-A, tributação diferenciada que encontram respaldos e harmonia nos princípios constitucionais tributários, econômicos e ambientais, se tratando de norma extrafiscal, cuja indução importa no incentivo de biocombustíveis que afetam em menor intensidade o meio-ambiente.

A Emenda Constitucional 123 alterou a redação do inciso VIII, do artigo 225, da Constituição Federal, preconizando um regime fiscal favorecido para os biocombustíveis destinados ao consumo final, com tratamento diferenciado em relação aos tributos em geral, mas, em especial, às contribuições de que tratam a alínea “b”, do inciso I e o inciso IV, do caput, do art. 195 (COFINS) e o art. 239 (PIS) e ao imposto a que se refere o inciso II do caput do art. 155 (ICMS) da Constituição Federal.

Observa-se, portanto, que a Constituição passou a adotar uma nova forma de utilização das normas tributárias, voltada para proteção de meio ambiente equilibrado e desenvolvimento sustentável.

Referências

BOMFIM, Diego. **Tributação e livre concorrência.** São Paulo: Saraiva, 2011.

BERDADINO, Diogo. Fundos de Venture Capital e Private Equity - Breve análise sobre sua evolução, características e importância. **Revista de Direito Bancário e do Mercado de Capitais** | vol. 61/2013 | p. 45 - 78 | Jul - Set / 2013\DTR\2013\8474

BEZERRO, Eduardo Buzetti Eustachio; SANTIAGO, Mariana Ribeiro. Relações de consumo na pós-modernidade: o consumo colaborativo como instrumento de sustentabilidade / Consumer relations in post-modernity: collaborative consumption as a sustainability instrument. **Revista de Direito da Cidade**, [S.l.], v. 9, n. 2, p. 463-481, abr. 2017. ISSN 2317-7721. Disponível em: <**https://www.e-publicacoes.uerj.br/index.php/rdc/article/view/26970/20432**>. Acesso em: 13 ago. 2023. doi:**https://doi.org/10.12957/rdc.2017.26970**.

DE SOTO, Jesús Huerta. **A Escola Austríaca:** mercado e criativa empresarial. São Paulo: Instituto Ludwing von Mises, 2010.

DOMINGUES, Juliana Oliveira. GABAN, Eduardo Molan. **Direito Antitruste**. 4ª ed. São Paulo: Saraiva, 2016.

JUNIOR, Arno Dal Ri; LIMA, Renata Albuquerque. Reflexos do conceito de workable competition na doutrina e nos julgamentos do CADE. **Revista de Direito Econômico e Socioambiental**, Curitiba, v. 8, n. 3, p. 433-456, set./dez. 2017. doi: 10.7213/rev.dir.econ.soc.v8i3.8708. Disponível em; <https://periodicos.pucpr.br/index.php/direitoeconomico/article/view/8708>. Acesso em: 15 abr. 2019.

MAIDANA, Ana Paula Duarte Ferreira, BOGGI. Descabonização: relevância ambiental e aspectos tributários. **Revista Argumentum.** Marília. n.10. p. 179-197, 2009. Disponível em: http://ojs.unimar.br/index.php/revistaargumentum/article/view/1039/631. Acesso em: 17 out 2020.

MENGER, Carl. **Princípios de Economia Política**. 2ª ed. LeBooks: 2017.

METRICK, Andrew; YASUDA, Ayako. Venture Capital and the Finance of Innovation (March 1, 2021). **Venture Capital And The Finance Of Innovation**, 3rd Edition, Andrew Metrick and Ayako Yasuda, eds., John Wiley and Sons, Inc., 2021, Available at SSRN: https://ssrn.com/abstract=929145

MISES, Ludwing von. **O livre mercado e seus inimigos: pseudo-ciência, socialismo e inflação**. Tradução de Flavio Quintela. Campinas: VIDE editorial, 2017.

MISES, Ludwing von. **A ação humana: um tratado de economia**. Tradução de Ana Parreira. Campinas. São Paulo: Vide Editorial, 2ª ed. 2020, p. 27.

NADAL,Victoria Werner de Nadal. The rise of Behavioral Law and Economics and its importance for tax conformity. **Revista de Análise Econômica do Direito** | vol. 2/2021 | Jul - Dez / 2021 DTR\2021\46890.

NUSDEO, Fábio. **Curso de Economia.** 9ª ed. rev. atual. e ampl. – São Paulo: Revista dos Tribunais, 2015.

SCHAPIRO, Mario Gomes; BACHI, Fabiana Mesquita. 2 Análise dos atos de concentração no Brasil: forma, função e o incrementalismo reformista do CADE. In SCHAPIRO, Mario Gomes; CARVALHO, Vinícius Marques de Carvalho; CORDOVIL, Leonor Cordovil (Coord). **Direito econômico concorrencial.** São Paulo: Saraiva, 2013. – (Série GVlaw: Direito econômico).

SCHOUERI, Luís Eduardo. **Direito Tributário**. 7ª ed. – São Paulo: Saraiva, 2017.

SCHOUERI, Luís Eduardo. **Normas tributárias indutoras e intervenção no domínio econômico**. Rio de Janeiro: Forense, 2005.

VIEGAS, Cláudia Assunção dos Santos; ALMEIDA, Sílvia Fagá de. 1 Economia da concorrência: estruturas de mercado. In SCHAPIRO, Mario Gomes; CARVALHO, Vinícius Marques de Carvalho; CORDOVIL, Leonor Cordovil (Coord). **Direito econômico concorrencial.** São Paulo: Saraiva, 2013. – (Série GVlaw: Direito econômico).

Taxation and sustainable development: *doing things right* and *doing the right things*

José Avilez Ogando, Sara Neto

> "(…) *as countries have come to discover, sustainable development cannot be solved by using first world thinking to address third world problems*."

Abstract: Sustainable development has become a global priority as countries strive to meet the Sustainable Development Goals (SDGs) established in the United Nations' 2030 Agenda. While various measures have been proposed and implemented to achieve these goals, the sustainability of tax systems themselves remains a crucial yet overlooked component to this framework.

This paper begins by outlining the concept of SDGs and the role taxes can have in their financing and implementation. It argues the best way to have SDGs implemented is by reinforcing state capacity in developing countries, a goal that can only be achieved by assisting them to jumpstart efficient and effective tax systems. In this view, the sustainable tax system should be considered an implicit SDG – the one that makes other SDGs possible. We then go on to argue several key aspects that make up a sustainable tax system, such as its operational efficiency, transparency, accountability, citizen participation and fairness.

Instead of adopting an external perspective in emphasizing the effects taxation can directly have in achieving socially valuable goals, this paper proposes rather an internal point of view – that a sound tax

system should be regarded as an SDG in its own right. Through this perspective, we recognize the first link between taxes and sustainable development lies in assisting in the creation of tax systems able to allow governments in implementing the emancipatory goals set out in the 2030 agenda. Only on this assumption, can we finally make the necessary coordination efforts to preserve the balance of our planet for future generations and advance in building just, equitable and inclusive societies.

Keywords: sustainability, development, cosmopolitan turn, tax capacity, domestic resource mobilization.

Resumo: O desenvolvimento sustentável tornou-se uma prioridade global enquanto os países se esforçam para atingir os Objetivos de Desenvolvimento Sustentável (ODS) estabelecidos na Agenda 2030 da Organização das Nações Unidas. Embora tenham sido propostas e implementadas várias medidas para alcançar esses objetivos, a sustentabilidade dos próprios sistemas fiscais permanece neste quadro um componente crucial, embora negligenciado.

Este artigo começa por apresentar o conceito de ODS e o papel que os impostos podem ter no seu financiamento e implementação. Argumenta-se que a melhor forma de implementar os ODS é reforçando a capacidade estatal nos países em desenvolvimento, um objetivo que só pode ser alcançado ajudando-os a criar sistemas fiscais eficientes e eficazes. Nesta visão, o sistema fiscal sustentável deve ser considerado um ODS implícito – aquele que torna os outros ODS possíveis. Passamos de seguida a elencar os vários aspetos-chave que compõem um sistema fiscal sustentável, tais como a sua eficiência operacional, transparência, responsabilidade, participação dos cidadãos e equidade.

Em vez de adotar uma perspetiva externa ao enfatizar os efeitos que a fiscalidade pode ter diretamente na realização de objetivos socialmente valiosos, este artigo propõe antes uma perspetiva interna sobre o tema – a de que um sistema fiscal sólido deve ser considerado um

ODS em si mesmo. Através desta perspetiva, seremos capazes de reconhecer que o primeiro elo entre impostos e desenvolvimento sustentável reside na assistência à criação de sistemas fiscais aptos a capacitar governos a implementar os objetivos emancipatórios estabelecidos na agenda 2030. E com base nesse pressuposto, possamos então tornar possível a coordenação de esforços necessária a restabelecer o equilíbrio do nosso planeta para gerações futuras e avançar na construção de sociedades justas, equitativas e inclusivas.

Palavras-chave: sustentabilidade, desenvolvimento, viragem cosmopolita, capacidade fiscal, mobilização de recursos domésticos.

1. The metamorphosis of the world

2015 was the year Ulrich Beck died, one of the most prominent sociologists of our time. To him, "*nature can no longer be understood outside of society, or society outside of nature*"[1]. Beck offered a profound and wide-ranging account of the effects of common risks humanity faces and the ensuing ecological conscience of a shared fate that can reshape contemporary societies and institutions. In his last book, *The metamorphosis of the world*, published after his death, he argues that the many whose ideas are still rooted in the previous paradigm of social change continue to be unable to address the issues presented by the global risks we face. This is because those paradigms lock the observer into existing institutional frameworks, which are not only unable to adequately deal with those risks, but rather have been shown to reproduce and foster them[2].

In his book, whose main arguments will be remembered in the course of this paper, Beck emphasizes that, "*much more than changing, we are facing a world that is metamorphosing*"[3]. Metamorphosis is a the-

1. Ulrich Beck, *Risk Society: Towards a New Modernity*, Sage, Londres, 1992, p. 80.

2. Ulrich Beck, *A metamorfose do mundo*, edições 70, 2017, p. 148.

3. Ulrich Beck, *A metamorfose do mundo*, edições 70, 2017, p. 15.

ory that goes beyond world risk society theory as it is about the positive side effects of global risks that affect us all. The anticipation of catastrophe is now seen as a force that motivates and mobilizes us in a way that makes risk society become a powerful actor of the metamorphosis of our shared world, which includes our political institutions[4]. These prospects of catastrophe are potentially emancipatory as they produce normative horizons of common goods and replace the existing units of research in the social sciences, with a new cosmopolitan paradigm[5].

Climate change points to the mistakes of industrialization and consumer society and calls for the acknowledgement and correction of those mistakes. These bring back a repressed collective memory, wherein the self-assurance of industrial capitalism and organized states are now confronted with consequences of their own actions that objectively threat their own existence[6]. The global risks we face have two sides: our common vulnerability and our collective responsibility for our own survival[7]. They require us to take the problems of justice and equality from the national agenda and transfer them to the cosmopolitan agenda of international politics, and practice new forms of transnational responsibility. Climate change induces new cooperation patterns between countries, private organizations, governments and activists that would otherwise ignore or consider each other enemies[8]. This global risk can therefore be seen, not as a global catastrophe but rather the anticipation of it, the perception

4. Ulrich Beck, A *metamorfose do mundo*, edições 70, 2017, p. 89.

5. Ulrich Beck, A *metamorfose do mundo*, edições 70, 2017, p. 148.

6. Ulrich Beck, A *metamorfose do mundo*, edições 70, 2017, p. 52.

7. They force us to "*remind ourselves of the ways in that the human race jeopardizes its own existence. Consciousness of humanity thus acts as a fixed point. The risk of climate change generates an Umwertung der Werte (a revaluation of values) (Nietzsche), turning the system of value orientation upside down – e.g., from postmodern cultural relativism to a historical new fixed star by which to mobilize solidarities and actions. This is the case because the global climate risk contains a sort of navigation system in the otherwise storm-tossed seas of cultural relativism.*" Ulrich Beck, A metamorfose do mundo, edições 70, 2017, p. 61.

8. Ulrich Beck, A *metamorfose do mundo*, edições 70, 2017, pp. 64-65.

that it is upon us, telling us it is time to act – time "*to drag people out of their routines and pull politicians from the "constraints" that allegedly surround them*"[9]. Problematizing climate injustice by pointing at those individuals, communities and nations who have suffered and continue to suffer on the wrong side of colonial history is in itself a sign that global climate risk is conducive to the common discovery of new and previously obscured normative horizons. The cosmopolitan view required by the pending crisis brings to light the theme of reforming institutions such as law, politics, economy, technology, consumption and lifestyles. A reform that is not only urgent, but also morally imperative and politically possible, even if absent from conferences and politics[10].

The idea of metamorphosis at the same time explains the new ways of thinking required by these crises that shape our future, while also calling for us to fully embrace them. Something that is necessary if we are to effectively address the insufficiencies of previous approaches by existing institutions and build new coordinated efforts, adequate to the common challenges we face. As Ulrich Beck has put it, climate change is not climate change: it is at once much more and something very different from that. It is a reformation of modes of thought, of lifestyles, consumer habits, of law, economy, science and politics. The dramatic power of global risks and their unseen emancipatory side effects need to broaden our horizons, alter our being in the world and the ways of thinking that allow us to address the inescapable truth of our shared fates[11].

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9. Ulrich Beck, *A metamorfose do mundo*, edições 70, 2017, p. 60.

10. Ulrich Beck, *A metamorfose do mundo*, edições 70, 2017, p. 158.

11. Ulrich Beck, *A metamorfose do mundo*, edições 70, 2017, p. 149.

2. Our common goals

The concept of sustainable development has evolved significantly over the past several decades, marked by a series of landmark documents that have shaped public policies and global priorities. In 1972 with the first United Nations Conference on the Human Environment in Stockholm,[12] a call for action was made for a coordinated agenda of development and environment protection, leading to the creation of the United Nations Environment Programme Secretariat, established to promote international environmental cooperation. The 1987 Brundtland Commission report[13], laid the groundwork by defining sustainable development as meeting the needs of the present without compromising the ability of future generations to meet their own needs. This document also went further by suggesting that environmental issues are an integral part of all development policies and therefore argued that creating separately environmental institutions was not the appropriate approach, as they should be integrated as part of all other areas of policy decisions[14].

Building on this foundation, at the 1992 Earth Summit, the Rio Declaration on Environment and Development[15] and Agenda 21[16]

12. And the simultaneous publication of the report by Donella H. Meadows, Dennis L. Meadows, Jørgen Randers, William W. Behrens III, of the landmark report "The Limits to Growth: A Report for the Club of Rome's Project on the Predicament of Mankind", Potomac Associates, 1972, that concluded that if the present growth trends in world population, industrialisation, pollution, food production and resource depletion continue unchanged, sometime within the next one hundred years we will reach the limits to growth on this planet.

13. United Nations, *Report of the World Commission on Environment and Development, Our Common Future*, General Assembly, 1987, document A/42/427, a report that was coordinated by then Prime Minister of Norway, Gro Harlem Brundtland.

14. Peter P. Rogers, Kazi F. Jalal, Jogn A. Boyd, *An Introduction to Sustainable Development*, Earthscan, 2008, p. 9.

15. United Nations, *Rio Declaration on Environment and Development*, United Nations Conference on Environment and Development, Rio de Janeiro, 1992.

16. United Nations, Agenda 21, *United Nations Conference on Environment & Development*. Rio de Janeiro, 1992.

were approved, emphasizing the integration of environmental, social, and economic dimensions in development policy and practices, calling for global cooperation to address the pressing global challenges of the time: poverty, environmental degradation and resource depletion. In 2000 the United Nations issued the Millennium Declaration[17] further solidifying the commitment of the international community to sustainable development by establishing the Millennium Development Goals (MDGs), a set of eight time-bound targets aimed at addressing poverty, health, education, and environmental sustainability. In June 2012, on the twentieth anniversary of the Rio Earth Summit, the world once again met at the UN Conference on Sustainable Development, known informally as the Rio+20 Summit. Here, a review was made on the progress of forty years of international environmentalism, reaching to the unsettling conclusion that the diagnosis first made back in 1972 was fundamentally correct and that the challenges of combining economic growth, social inclusion and environmental sustainability were still unmet and indeed were intensifying[18].

These and other initiatives[19] have brought sustainable development into the mainstream and promoted discussions and partnerships involving public and private sectors. In 2015, building on the MDGs and incorporating lessons learned, the Heads of State, Government, and High Representatives adopted in New York the 2030 Agenda for Sustainable Development[20]. It outlines a global plan for achieving 17 Sustainable Development Goals (SDGs) and 169 targets[21] to

17. United Nations, *Millennium Declaration*, Resolution Adopted by the General Assembly, 18 September 2000, A/RES/55/2.

18. Jeffrey Sachs, *The age of sustainable development*, New York, Columbia University Press, 2015, p. 481 -482.

19. Such as the Accra Agenda for Action, adopted in September 2008, organized by OECD and the Second International Conference on Financing for Development, which took place in Doha, Qatar, in also in 2008.

20. United Nations General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 2015, A/RES/70/1.

21. The 17 SDGs are: 1. No Poverty; 2. Zero Hunger; 3. Good Health and Well-being; 4. Quality Education; 5. Gender Equality; 6. Clean Water and Sanitation; 7. Affordable and

guide global efforts in achieving a more just, inclusive, and sustainable world by 2030.

SDGs are a collective call to action to end poverty, protect the planet and ensure peace and prosperity for present and future generations. These goals are integrated and indivisible, global in nature and universally applicable[22], under the principle of common but differentiated responsibilities[23]. This approach implies solidarity between countries and taking into account different national realities, capacities and levels of development. It also involves both a coordinated approach – between states – and an individual one, directed towards their citizens, in a way that universally recognizes their dignity, consequently treating individuals with equal concern and respect[24]. The SDGs are certainly an ambitious endeavor, as these self-evident truths are still far from being a given in all areas of the world.

Clean Energy; 8. Decent Work and Economic Growth; 9. Industry, Innovation and Infrastructure; 10. Reduced Inequalities; 11. Sustainable Cities and Communities; 12. Responsible Consumption and Production; 13. Climate Action; 14. Life Below Water; 15. Life on Land; 16. Peace, Justice and Strong Institutions; 17. Partnerships for the Goals. Each of these goals is associated with specific targets and indicators designed to measure progress towards achieving them. The SDGs are intended to be integrated and indivisible, meaning that progress on one goal should contribute to progress on the others, and that *no one should be left behind in the pursuit of sustainable development*.

22. Cf. paragraph 55 of the 2030 Agenda.

23. Cf. paragraph 12 of the 2030 Agenda, mentioning principle 7 of the Rio Declaration, which states that: "(…) *In view of the different contributions* (…), *States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.*".

24. As Ronald Dworkin puts it, taking into account "*the basic understanding that dignity requires equal concern for the fate of all and full respect for personal responsibility— is not relative. It is genuinely universal.*" (cf. Justice for Hedgehogs, The Belknap Press of Harvard University Press, 2011, p. 338). "*As we embark on this great collective journey, we pledge that no one will be left behind. Recognizing that the dignity of the human person is fundamental, we wish to see the Goals and targets met for all nations and peoples and for all segments of society. And we will endeavour to reach the furthest behind first.*", cf. paragraph 4 of the United Nations General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 2015, A/RES/70/1.

The case for goals-based success was brilliantly put by John F. Kennedy in his famous peace speech in June 1963: "*By defining our goal more clearly, by making it seem more manageable and less remote, we can help all people to see it, to draw hope from it and to move irresistibly towards it*"[25]. Ulrich Beck writes that the widespread belief that climate change is a fundamental threat to all of humankind and nature has the potential to bring a form of mobilization and coordination until now unknown, one that can change the national analytical lens. The notion of impending catastrophe could gradually mobilize many actors, with the confrontation between the existing institutions of law and politics and these new normative horizons leading to a permanent process of reformation and counter-reformation – non-linear and open-ended[26].

The truth is however, as previous experiences have showed, we have consistently failed to meet these commonly agreed targets and expectations. To effectively address the collective challenges we face, a new approach is needed. Such approach needs to involve a new form of thinking about development that necessarily involves the concept of sustainability[27]. A concept that embodies the only way of thinking that takes into consideration the long-term effects of our choices[28].

As we will see in the next pages, a new approach is underway in the sustainable development discourse. One which can be characterized as a "*constructive political turn*"[29] in the way we address these issues or a "*cosmopolitan turn into our contemporary life*"[30]. A shift that may have

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25. As pointed out by Jeffrey Sachs, *The age of sustainable development*, New York, Columbia University Press, 2015, p. 491.

26. Ulrich Beck, *A metamorfose do mundo*, edições 70, 2017, p. 150.

27. United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1, paragraph 13.

28. And therefore recognizes that eradicating poverty in all its forms and dimensions, combating inequality within and among countries, creating sustained, inclusive and sustainable economic growth and fostering social inclusion are inextricably linked to each other.

29. Ulrich Beck, *A metamorfose do mundo*, edições 70, 2017, p. 211.

30. Ulrich Beck, *A metamorfose do mundo*, edições 70, 2017, p. 51. Beck sees three main implications of methodological cosmopolitanism. First, it implies that other potential victims of global risks become co-implicated individuals. Second, the unit of research and political

the ability of finally making a difference in a number of ways that address and can even go beyond achieving SDGs.

3. Leveraging taxation in achieving SDGs and targets

Taxes take the crucial part in mobilizing the necessary resources for funding public services, investments and social programs that contribute to sustainable development. As countries strive to achieve SDGs, tax systems emerge as powerful tools to finance these initiatives and address economic, social, and environmental challenges.

It is easy to think of how taxes can be used to facilitate effective progress towards these goals. Tax laws can be used essentially in three ways: generate revenue, redistribute income and wealth and achieve non-fiscal, regulative purposes such as coordinating actions, by penalizing or favouring certain behaviours[31]. In analysing the effects tax measures can have on SDGs, Alice Pirlot[32] mentions that tax measures can indirectly support their achievement, by providing governments with the necessary revenue to fund its sustainable development policies. They can also directly and positively interact with the goals of the 2030 Agenda by incentivizing or penalizing certain behaviours in accordance the SDGs. And they can have a direct but negative effect on the SDGs when they encourage behaviours that undermine the achievement of the 2030 Agenda.

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action is no longer predefined as geographically defined risk areas inside the borders of individual states. And third, global risks are *socially constructed in knowledge* turning the politics of global to a politics of knowledge, which brings up questions such as "*who determines compensations?*", "*who is responsible?*" "*what should be seen as sufficient proof?*" cf. Ulrich Beck, *A metamorfose do mundo*, edições 70, 2017, pp. 121-123.

31. For a detailed Review on the goals of taxation, see Avi-Yonah, "*The Three Goals of Taxation*" (2006) 60(1) Tax Law Review, at pp. 1-28, available at https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1039&context=articles.

32. Alice Pirlot, "*A legal analysis of the mutual interactions between the UN Sustainable Developments Goals (SDGs) & taxation*", Tax Sustainability in an EU and International Context, Cécile Brokelind, Servaas van Thiel (Eds.), IBFD, 2020. Also available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3467544 (p. 3).

Consider, for example to the goal of ending poverty and hunger (SDGs 1 and 2), governments should adopt progressive taxation which at lower levels of income helps to alleviate poverty and at higher levels reduces the gap between rich and poor. They can also provide tax incentives to farmers who adopt sustainable agriculture practices, and even to other businesses that benefit local communities by creating jobs, improving local infrastructure, etc.. In financing health and education through taxes (SDGs 3 and 4), governments can commit tax revenue from specific taxes created with non-fiscal purposes, such as tobacco, gambling and alcohol taxes (also known as sin taxes), to specifically fund public health and education programs and even lower taxes on consumption of vegetables and other healthy foods. Also in promoting gender equality through tax policies (SDG 5), aside from obviously removing any gender biases in tax laws, governments can implement tax credits or exemptions for childcare and other care responsibilities to recognize the unpaid care work predominantly performed by women. Tax policies can also incentivize the adoption of clean and renewable energy sources, contributing to a more sustainable future (SDG 7), not only creating tax incentives to encourage the development and deployment of renewable energy technologies, but also to promote the phasing out of fossil fuel industries and increasing production and use of clean energy. Governments can also promote job creation, stimulate economic growth, and foster innovation (SDG 8 and 9), by reducing the tax burden of low-income earners, to reduce inequality and encourage employment, and implement targeted tax incentives for businesses that create jobs, invest in research and development and workforce training and skills development, and that adopt environmentally sustainable practices. Tax policies can help shape the development of sustainable cities and communities (SDG 11), namely through implementing property taxes to discourage speculative land holding and promote efficient land and infrastructure use and through using tax incentives to encourage the development of affordable housing and promote social cohesion where needed. Taxes can also play a

central role in encouraging certain environmental sustainability practices (SDGs 12, 13, 14 and 15) by way of implementing carbon taxes to limit resource extraction and internalizing the environmental costs generated by polluting activities. And also by way of creating green taxes that promote the production and use clean energy, incentivizing businesses and individuals to adopt environmentally sustainable practices.

In the economy of this paper, the above description serves to highlight how these goals can be directly promoted through the tax system. In this sense, taxes can be used to internalize the environmental costs generated by polluting activities in a way which is more cost-efficient than what might be achieved by means of non-market-based instruments[33]. The description above also serves to paint the view of the fundamental ambivalence of the tax system: while tax measures can focus on the specific pursuit of each of the goals, many of the proposed mechanisms are in fact conflicting with the tax system's most fundamental purpose, which is to capture the necessary resources for governments to pursue the development goals of their own communities. The resources needed to provide the basic public goods those communities need and that are also SDGs, and frequently overlap – particularly in developing countries – with sustainable development policies.

In fact, a state cannot rely its revenues on taxes solely aimed at regulating behaviours, and this is for several reasons that because of the scope this paper we can only touch upon: (i) first, because all of the above-mentioned measures are parasitic to the preexisting *tax mix*: the combination of income taxation, taxes on consumption and on property, each having a complementary effect in the overall distribution of the tax burden, being each individual taxed according to their specific overall circumstances; (ii) second, because in order

33. Alice Pirlot, "*A legal analysis of the mutual interactions between the UN Sustainable Developments Goals (SDGs) & taxation*", Tax Sustainability in an EU and International Context, Cécile Brokelind, Servaas van Thiel (Eds.), IBFD, 2020. Also available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3467544 (p. 5).

to be itself sustainable[34], a tax system must be based on the ability of taxpayers to pay, therefore rejecting any solutions that lead to taxing those who have little or no means or to imposing little or no taxes on those with an abundance of the means; (iii) third, because such tax measures would never have enough collecting power on their own to satisfy the needs of a modern state and even less the fulfilment of its development goals; (iv) fourth, because the effectiveness of taxes that regulate behaviours has challenges of their own, as such behaviours are often contingent and subject to the emergence of unanticipated alternative behaviours[35]; and (v) fifth, because of the logic imposed by the principle of subsidiarity, which, by requiring that decisions made and actions taken are as close as possible to the individuals affected by them – and therefore best placed to intervene – brings an element of rationality, allowing for greater legitimacy through more participation, increased accountability and more efficient outcomes[36].

Social development, the eradication of poverty, and other such goals presuppose the existence of social coordination, participation

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34. Any system can only be sustainable if it is able to adequately fulfil its functions in a way that assures the continuance of its operations over time.

35. Alice Pirlot, "A *legal analysis of the mutual interactions between the UN Sustainable Developments Goals (SDGs) & taxation*", Tax Sustainability in an EU and International Context, Cécile Brokelind, Servaas van Thiel (Eds.), IBFD, 2020, p. 6, mentions on the subject that "*It is hard to anticipate whether an environmental tax will effectively encourage polluters to change their behaviour. Therefore, when the polluting behaviour can be replaced by a non-polluting behaviour, a ban might be a more reliable instrument to reduce pollution. Moreover, since environmental taxes are traditionally imposed with no consideration for taxpayers' ability-to-pay, they could lead to discriminatory effects. Those with no or low ability-to pay will be obliged to modify their behaviour whereas those able to cover the costs of the tax will not. Where the polluting behaviour cannot be avoided, all taxpayers will be required to pay, regardless of their ability-to-pay, which means that the environmental tax will have negative distributional effects. Finally, from an international perspective, environmental taxes can lead to pollution leakage if they encourage taxpayers to relocate to jurisdictions with lower environmental standards. Ultimately, the overall level of pollution could even become higher than before the adoption of the tax. All these contradictory effects should be considered carefully before introducing environmental tax measures to support the SDGs aimed at fostering environmental protection.*".

36. On this topic see Margarida Salema d'Oliveira Martins, O *principio da subsidariedade em perspectiva jurídico-política*, Coimbra Editora, 2003.

and accountability, aspects that simply are not present in countries without a fully functioning, sustainable and equitable tax system. In these cases, what happens is that the decision-making processes and their consequences are assigned to completely different groups: those who decide on the aid given by developed countries and the individuals who receive it in developing countries. We should therefore recognize the limitations of past solutions that are after all the result of methodological nationalism, and imagine solutions of a cosmopolitan nature, even if the proposed solutions in some way seem a return to the national context. Aid should pivot from the "*me*" and "*you*" of the loans and wire transfer of funds it has been reduced to, to a matter that concerns "us". As rightly put by Ulrich Beck, "*when we talk about risk, we have to relate it to decision-making and decision-makers, and we have to make a fundamental distinction between those who generate risk and those who are affected by it*"[37]. This is true in the case of climate change, as it is also the case of most other SDGs, as those who are able to make decisions on the fate of those in need of development remain categorically separated and are therefore not accountable to the individuals potentially affected by such decisions. Because insisting in any solution that affects a group of individuals without acknowledging some level of participation in the decision-making process over their own future is to deny those individuals the dignity they deserve.

So in a risk society that is now also global and therefore embedded in a world that is metamorphizing, the decision makers must be placed as close as possible to those who are affected by public policy decisions. A cosmopolitan approach would be to sharply increase cooperation in creating strong tax administrations and build tax capacity in developing countries, not only as a way to reinforce state capacity, but also because in fully functioning, sustainable and equitable tax systems, if everyone pays their fair share, everyone ends up paying less. This in turn would create the conditions of generating normative horizons of equality and justice, thereby generating pressure for inclusive change

37. Ulrich Beck, A *metamorfose do mundo*, edições 70, 2017, p. 55.

on the existing structures and institutions[38]. While a modern administration and a functional tax system are necessary for state building, the implementation of standards of fairness and equality can create an experience of justice in taxation, and with it, a sense of accountability in the process of achieving collective outcomes.

A cosmopolitan turn in the means to implement SDGs would require us to recognize that many of the Agenda 2030 goals involve some measure of the type of modern state responsible for the progress that developed countries have enjoyed during the last century. One of the main insights of the new approach is that no state can cope alone with the global risks posed by climate change and lack of development and so countries need to cooperate in sharing knowledge in building state capacity and infrastructure. Another one is that we all need accountable states. We need them as international partners, and we need them as private citizens. Therefore, more emphasis should be given to cooperation and accountability[39]. So instead of dependency – which is what we have been getting from passively accepting the distinction between first and third world countries – we need to envision actions that can deliver a greater level of autonomy.

Therefore, in addition to the above examples of the direct uses of taxation in promoting SDGs, the most substantial effect taxation can have in this regard is in providing governments with the means they need for development policies, making them accountable for their level of SDG implementation. For this, developed countries should consider investing in levelling the playing field in state capacity. Providing developing countries with increased levels of technical assistance to enhance tax capacity – both in terms of the tax system's architecture and the settlement and collection of taxes – seems a good place to start.

38. Ulrich Beck, A *metamorfose do mundo*, edições 70, 2017, p. 79.

39. Ulrich Beck, A *metamorfose do mundo*, edições 70, 2017, p. 55. "*In a world of risk society, cooperation between foes is not about self-sacrifice but about self-interest, self-survival. Metamorphosis thus requires the redefinition of national interest*", cf. Ulrich Beck, A *metamorfose do mundo*, edições 70, 2017, p. 62.

4. From official development assistance (ODA) to domestic resource mobilization (DRM)

Achieving SDGs will require significant investments in various sectors, both in infrastructure, such as water, energy, transportation, and in public services, such as social security, education and healthcare. Until the beginning of this century, the financial requirements used for promoting sustainable development depended mostly on official development assistance (ODA) funnelled from developed countries and multilateral financing institutions (such as the World Bank and the International Monetary Fund - IMF), in the form of grants and loans, to developing countries. This mostly implied that the resources needed for development policies originated from the contributions of high-income taxpayers in developed countries while the remaining financial resources came from the credit capacity of developing countries, usually funded by weak tax systems that lack an adequate tax base to meet their own needs. Private sector funding is insufficient especially in providing public goods and will not reach significant levels in the right areas in countries with high levels of poverty, corruption and without a functional tax system[40].

The problem of obtaining the necessary resources for the adoption of development policies is not new. During the seventies Nobel Laureate James Tobin suggested the creation of a special tax designed to close the financial gap between developed and developing countries. It followed the observation that since over $1.5 trillion exchanged through transactions occurring every day on global currency markets, of which 95% appear to consist of currency speculation, a tax could be imposed on those exchanges at a rate of 0.1% to 0.25%, generating about $150 billion per year. Although the Canadian parliament approved the idea of a Tobin Tax in March 1999, this showed to be

40. Jeffrey Sachs, *The age of sustainable development*, New York, Columbia University Press, 2015, p. 499-502.

an infeasible idea[41], as taxing capital without the worldwide political support of all other countries, only causes it to spill over to jurisdictions where such taxes do not exist. Another proposed solution was the reduction of military expenditures by 10%, a solution that could generate a significant amount of yearly revenue that could be diverted towards sustainable development policies. This was never seriously considered as global security has become an increasing problem[42].

American economist Larry Summers translated the problem perfectly when he said that "*economic history has provided a clear, natural experiment regarding the efficacy of finance without conditions. Again and again, natural resources windfalls have financed presidential planes and palaces and entrenched official corruption, while producing very little in the way of lasting economic benefits.*"[43]. For many decades the persistent challenge was to find ways to assist developing countries in the most efficient way possible, mostly by conditioning aid and loans to the adoption of good governance and anticorruption policies by recipient countries[44].

In the traditional solution of ODA through grants and loans, there is also the problem of the simultaneous absence of the right incentives with a perverse alignment between developed and developing countries in expectations towards good outcomes. In practical terms, the exclusive support of developing countries through ODA means the system in place is not only vulnerable, as the recent crisis has shown,

41. Peter P. Rogers, Kazi F. Jalal, Jogn A. Boyd, *An Introduction to Sustainable Development*, Earthscan, 2008, p. 364.

42. Peter P. Rogers, Kazi F. Jalal, Jogn A. Boyd, *An Introduction to Sustainable Development*, Earthscan, 2008, p. 364.

43. Larry Summers was then US Treasury Secretary and later President of Harvard University. The quote is from his speech March 20, 1999 speech "A *New Framework for Multilateral Development Policy*". Cf. Peter P. Rogers, Kazi F. Jalal, Jogn A. Boyd, an Introduction to Sustainable Development, Earthscan, 2008, p. 366.

44. Adebimpe Lincoln, Oluwatofunmi Adedoyin and Jane Croad, "*Goal 16 of the UN Sustainable Development Agenda and Its Implications for Effective Governance and Sustainability in the Nigerian Banking Sector*", The Future of the UN Sustainable Development Goals – Business Perspectives for Global Development in 2030, Samuel O. Idowu, René Schmidpeter, Liangrong Zu (Eds.), Springer, 2020, pp. 103-105.

but also keeps things as they are[45]. According to J. Brian Atwood, Chair of the OECD Development Assistance Committee (DAC), "*In 2010, the DAC announced the highest volume of official development assistance (ODA) in history: almost USD 130 billion. (…) The increases during this period were in part an effort to sustain the economies of developing nations in the face of the global financial crisis. For them, access to ODA helped bridge the gap. The use of ODA as stimulus or "gap" funding, however, has only increased attacks that sustain that ODA tends to create dependency. Of course, it is easier to sell critical books that call for the elimination of aid than ones that argue the benefits of development co-operation. But we cannot ignore the critics: we know that not all programs supported by ODA are producing results, catalysing policy reform and promoting institution-building. And while dependency is indeed a problem, it has two effective antidotes: mutual accountability for the results that aid delivers – or the lack of them – and* domestic resource mobilization."[46].

There have been many criticisms towards ODA[47], which is and will certainly continue to be in some measure necessary. The problem however runs deeper and, as countries have come to discover, sustainable development cannot be solved by using *first world thinking to address third world problems*. We agree with Ulrich Beck that the main source

45. Vítor Gaspar, Laura Jaramillo and Philippe Wingender, "*Tax Capacity and Growth: Is there a Tipping Point?*", IMF Working Paper No. WP/16/234 (2015), p. 6, found that "*access to forms of revenue other than taxes has been associated with lower taxation. Jensen (2011) finds that a 1 percent increase in the share of natural resource rents in total government income is associated with a 1.4 percent lower share of taxation in GDP. Benedek et al. (2014) find a negative association between foreign aid and domestic tax revenues, particularly in low-income countries and in countries with relatively weak institutions.*".

46. J. Brian Atwood, "*Fuelling the future of development*", OECD (2011), Development Co-operation Report 2011: 50th Anniversary Edition, OECD Publishing. http://dx.doi.org/10.1787/dcr-2011-en, p. 21.

47. There is an ongoing and intense debate about ODA, as briefly outlined by Jeffrey Sachs, *The age of sustainable development*, New York, Columbia University Press, 2015, pp. 499-502. Gilles Carbonnier, "*Official development assistance once more under fire from critics*", International Development Policy, Revue internationale de politique de développement, 1, 2010, 137-142 outlines a number of criticisms levelled at ODA, coming from opposing ends of the ideological spectrum, such as the neo-marxist, the populist and the neo-liberal critic, among others.

of climate pessimism lies in a generalized incapacity and unwillingness, to rethink fundamental questions of social and political order[48] and discover or establish alternative institutions capable of addressing the global challenges we face in an ever more interdependent world[49]. For this, we must abandon the widespread assumption in the social sciences that community building is possible only on the basis of *positive integration*[50], which refers to *common rules being provided by a higher authority to level out inequalities* between countries. As an alternative, pathways of *negative integration* should be considered, conducive to *the gradual removal of barriers* between countries. This latter form of community-building integration should be further explored, allowing for the emergence of deep connections during the operational efforts of cooperation, necessary for of state capacity building[51].

To this point, the 2002 First International Conference on Financing for Development in Monterrey, Mexico[52], marked a significant turning point in the development discourse, culminating with the adoption of the Monterrey Consensus. It first emphasized the importance of mobilizing domestic financial resources for development and called for efforts to strengthen tax systems, improve tax administration and fight tax evasion[53]. Driven by the recognition that a stable revenue base is essential to fund public services, reduce inequality

48. Ulrich Beck, *A metamorfose do mundo*, edições 70, 2017, p. 54.

49. Ulrich Beck, *A metamorfose do mundo*, edições 70, 2017, p. 227.

50. Ulrich Beck, *A metamorfose do mundo*, edições 70, 2017, p. 212-213.

51. Jean-Michel Severino, "*The resurrection of aid*", OECD (2011), Development Co-operation Report 2011: 50th Anniversary Edition, OECD Publishing, p. 131: "*These global policies on environmental, economic and social issues involve costs and these must rest on the shoulders of the world's wealthiest citizens. In the world of the future, the wealthy will not live only in OECD countries; they will live all around the world, including in the poorest countries.*".

52. This first and further conferences on this matter were led by the United Nations in collaboration with several other international organizations, such as the International Monetary Fund, the World Bank, the World Trade Organization, and the United Nations Conference on Trade and Development. They aim at discussions on measures to improve the mobilization and effective use of financial resources for development.

53. United Nations, *Monterrey Consensus of the International Conference on Financing for Development*, Monterrey, Mexico, 2002, paragraphs 15-16.

and promote economic growth, the focus of development assistance then started to gradually shift – at least nominally – from ODA to the idea of building state capacity for *domestic resource mobilization* (DRM). This new paradigm has been gaining momentum ever since the Monterrey Consensus[54]. In the following years, several capacity-building initiatives were launched to help countries strengthen their tax systems and increase revenue generation, through technical assistance, training and advice to countries in areas such as tax administration, tax policy design and international taxation. In 2010, the United Nations Resolution of the General Assembly no. 65/1[55] specifically called for modernized tax systems, more efficient tax collection, broadening the tax base and effectively fighting tax evasion and fiscal migration: "*While each country is responsible for its tax system, it is important to support national efforts in these areas by strengthening technical assistance and enhancing international cooperation and participation in addressing international tax matters.*"[56].

The global financial crisis of 2007-2008 also exposed several fragilities in the financial system and the ensuing response in turn exposed the inadequacies of the international tax system and the need for global reform and coordinated action. The G20 leaders reacted by emphasizing the importance of a fair and transparent international tax system. This led to the BEPS Project, launched by the OECD in 2013[57], a significant step in effectively addressing the challenges of

54. In the 2005 Second High-Level Forum on Aid Effectiveness, held in Paris, and facilitated by the OECD, the ministers of over a hundred countries and other stakeholders recognized that despite significant amounts of aid being provided to developing countries, its effectiveness in achieving development goals was still limited. Citing concerns such as aid fragmentation, lack of country ownership, weak coordination among donors and inefficient use of resources, principles for effective development cooperation were outlined, supporting the normative shift towards helping countries build their own capacity to generate revenues. Cf. OECD, *Paris Declaration on Aid Effectiveness*, 2005.

55. United Nations, *Keeping the promise: united to achieve the Millennium Development Goals*, 2010, A/RES/65/1.

56. United Nations, *Keeping the promise: united to achieve the Millennium Development Goals*, 2010, A/RES/65/1, p. 27, number 78 paragraph (i).

57. OECD, *Action Plan on Base Erosion and Profit Shifting*, 2013.

taxation in a globalized world. Although the Project initially focused on developed countries, it quickly became apparent that the issues addressed by base erosion and profit shifting demanded broad international coordination which necessarily needed to include developing countries. It's not just that these countries are disproportionately affected by tax avoidance strategies of multinational corporations and tax evasion through undeclared offshore accounts[58], but that the global BEPS Program is only as strong as its weakest link. Developing countries face challenges of their own in tax capacity: are more vulnerable to corruption and profit shifting practices, lack the ability to generate stable and broad-based public revenues, and are often unable to constructively coordinate at the international level in the collective effort against tax evasion[59].

In the following years, all United Nations members adopted the current 2030 Agenda for Sustainable Development, specifically emphasizing the importance of DRM as a central aspect in achieving sustainable development. Goal 17 targets the implementation and revitalizing of global partnerships for sustainable development, mostly through the enhancement of DRM, improving tax collection and preventing tax evasion[60]. This initiative was closely followed by the Addis Ababa Action Agenda, adopted at the Third International Conference on Financing for Development, considering a much broader and comprehensive approach, now centred around three pillars: tax, investment and international public finance. It called for international cooperation in building the capacity of countries to generate their own revenues through tax reform, combating tax evasion, and

58. Sathi Meyer-Nandi, "*Taxation, Policy Coherence for Sustainable Development in International Tax Matters: A Way Forward for Donor Countries?*", International Cooperation and the 2030 Sustainable Development Agenda, United Nations University Series on Regionalism 19, J. Mosquera Valderrama et al. (Eds.), Springer, 2021.

59. OECD, *Part 2 of a Report to G20 Development Working Group on the Impact of BEPS in Low Income Countries*, 2014.

60. United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, 2015, A/RES/70/1, target 17.1.

strengthening tax administrations[61]. It also encouraged the adoption of tax reforms at different levels, including those pertaining to the exemption ODA from taxation[62], a practice that although with the objective of encouraging aid, only adds complexity and undermines domestic resource mobilisation[63].

Despite all these initiatives, substantial investment is still needed to achieve the SDGs in low and middle-income countries. According to a January 2023 World Bank report on Global Economic Prospects[64], between 2015 and 2030 those countries will require, on average, $1.5-$2.7 trillion per year, the equivalent to 4.5-8.2% of their combined annual GDP. Also according to a recent OECD preliminary report[65], the amount of total ODA in 2022 has surpassed its record levels, rising by 13.6% in real terms and totalling $204 billion which "*included USD 201.4 billion in the form of grants, loans to sovereign entities, debt relief and contributions to multilateral institutions*".

Therefore, based on our calculations, the resource gap is of at least $1.3 trillion per year.

So what essentially came out of the learning curve of these last five decades in tackling climate change and reaching sustainable development is the need for us to consider – in addition to the three existing pillars of sustainable development – a fourth pillar; and that is good

61. United Nations, *Addis Ababa Action Agenda of the Third International Conference on Financing for Development*, 2015, paragraphs 20-29.

62. United Nations, *Addis Ababa Action Agenda*, paragraph 58: "(…) *We will also consider not requesting tax exemptions on goods and services delivered as government-to-government aid, beginning with renouncing repayments of value-added taxes and import levies*".

63. As a result of discussions started in the period between the Paris Declaration and the BEPS Project, in the course of this conference the Addis Tax Initiative (ATI) was also launched, aimed at supporting partner countries in their efforts to enhance DRM, by facilitating policy dialogue, technical assistance, and tax capacity-building. This further solidified the normative shift in the development agenda towards DRM and building tax capacity in developing countries.

64. World Bank, 2023 *Global Economic Prospects*, January 2023. Washington, DC: World Bank pp. 41, 112, available at http://hdl.handle.net/10986/38030.

65. OECD, *ODA Levels in 2022 – preliminary data*, Paris, 12 April 2023, available at https://www.oecd.org/dac/financing-sustainable-development/ODA-2022-summary.pdf.

governance[66]. The successive failures in approach are introducing in sustainability discussions a kind of a realistic worldview that addresses the inescapable truth that without strong institutions, the agreed development goals will continue to be elusive. And what is more, the kinds of aid being provided are not helping countries end their dependency, sustainably develop and coordinate at the international level.

The consensus now seems to be on supporting state-building through the strengthening of tax systems non-overly reliant on natural resources and with functional, modern tax administrations[67], able to meet their governments own financing needs[68]. A more recent sign of this shift came in the form of the 2018 international conference on "*Taxation and the Sustainable Development Goals*" organised by major international organisations, such as the IMF, OECD, the UN and the World Bank, under the lead of the then recently incorporated Platform for Collaboration on Tax (PCT). The conference report concludes: "*The stakes are high. Taxation is a significant factor in 10 of the 17 SDGs. Making progress on taxation is therefore vital for achieving the*

66. As pointed out by Jeffrey Sachs, *The age of sustainable development*, New York, Columbia University Press, 2015, p. 502.

67. OECD, *Tax Policy Reforms 2021: Special Edition on Tax Policy during the COVID-19 Pandemic*, OECD Publishing, Paris, 2021, pp. 71-72 touches directly on the increased demands for fair burden sharing: "*Rethinking countries' public finance strategies will involve a combination of measures to support sustainable tax revenues and improve the quality of public spending, including through improved public finance governance. (…) Tax revenues can be supported and enhanced with measures within the tax system and other structural reforms that support long-term economic growth and, in turn, growing tax bases. The options to restore public finances will depend heavily on country-specific circumstances that can vary widely across countries, including the country's starting point in terms of growth, development, its current levels and structures of taxation and spending, among others. Countries will also need to address the challenges and seize the opportunities arising from digitalisation.*".

68. In the words of the Inter-agency Task Force on Financing for Development, Financing for Sustainable Development Report 2019, p. 23, "*In addition to realigning public spending, many countries will need to mobilize additional tax revenue, and will hence require substantial reforms in revenue policy and administration. The success of revenue reform benefits from a medium-term perspective, which can anchor reform in a broader vision of where the tax system should be heading (…)*".

SGDs. The connection between taxes and SDGs follows four broad pathways: (1) taxes generate the funds that finance government activities in support of the SDGs; (2) taxation affects equity and economic growth; (3) taxes influence people's behavior and choices, with implications for health outcomes, gender equity, and the environment; and (4) fair and equitable taxation promotes taxpayer trust in government and strengthens social contracts that underpin development."[69].

5. Building tax capacity as a necessary step for development

Ulrich Beck predicted that the "*problematic of the metamorphosis of inequality is the key issue of the future*", as the principle of equality, legally construed at the national level, can no longer help us deal with global inequality[70]. Existing inequalities are stripped of their legitimacy and have become a political scandal, together with the inequality between countries, that not only reveals the ineffectiveness of decades of aid provided to developing countries, but also the failure to address pervasive problems that require a global approach, such as base erosion and profit shifting. At the same time, rights have the financial costs necessary for governments to provide essential services like security, healthcare, education, social protection, a judicial system to uphold the rights of their citizens, infrastructure development, human resources, among others. All of these require massive amounts of public spending. States are now called to do *the extra mile* and promote development that fulfils the sustainability and also invest in renewable energy, public transportation, ecosystem restoration, among others[71], which can also prove costly.

69. IMF, OECD, UN, World Bank Group, "*Taxation & SDGs. First Global Conference of the Platform for Collaboration on tax*", Conference Report, 14-16 February 2018, available at: https://www.tax-platform.org/sites/pct/files/publications/130559-WP-ReportFinalMar.pdf.

70. Ulrich Beck, A *metamorfose do mundo*, edições 70, 2017, p. 243.

71. Casalta Nabais, *Por um Estado fiscal suportável*, Vol. III, 2010, Almedina, pp. 112-122.

In a 2015 paper, Vítor Gaspar, Laura Jaramillo and Philippe Wingender, citing literature concerning the influence of the tax system on the economy and drawing from a historical database for 30 countries, going back to 1800, conclude that: (i) the economy can be made more productive when tax revenues are spent on public goods and investments; (ii) well-designed tax systems can maximize the efficiency of taxes and can even be conducive to raises in GDP growth rate; (iii) the instability of tax revenue leads to the instability in public investment and also reduces the level of public investment; (iv) stricter tax enforcement forces corrupt officials to reduce bribe demands, thus facilitating market entry by private firms[72]; and (v) tax capacity is positively correlated to government transparency and accountability, stronger protection of property rights and negatively correlated to corruption[73]. This study further suggests that, when a country exceeds the threshold of approximately 13% of tax to GDP, its real GDP per capita increases sharply in a sustained manner over several years[74], finding an average annual growth rate higher by about 0.75% over 10 years compared to countries that remain below that tipping point [75].

The same study notes that that tax capacity depends on compliance of social norms, and that the more effective and reliable a state is, the greater legitimacy it will have among its citizens, resulting in minimal levels of monitoring or punitive action. According to their research, high levels of voluntary compliance in taxation is driven by a combination of strategic and normative considerations. While strategic considerations refer to the perception of the efficiency of the administration to enforce the law, normative considerations essentially

72. Vítor Gaspar, Laura Jaramillo and Philippe Wingender, "*Tax Capacity and Growth: Is there a Tipping Point?*", IMF Working Paper No. WP/16/234 (2015), p. 7.

73. Vítor Gaspar, Laura Jaramillo and Philippe Wingender, "*Tax Capacity and Growth: Is there a Tipping Point?*", IMF Working Paper No. WP/16/234 (2015), p. 11-12.

74. Vítor Gaspar, Laura Jaramillo and Philippe Wingender, "*Tax Capacity and Growth: Is there a Tipping Point?*", IMF Working Paper No. WP/16/234 (2015), p. 29-30.

75. Vítor Gaspar, Laura Jaramillo and Philippe Wingender, "*Tax Capacity and Growth: Is there a Tipping Point?*", IMF Working Paper No. WP/16/234 (2015), pp. 8-9.

refer to a sense of fairness – the perception of the effectiveness with which taxation is enforced, i.e. that it is made according to a set of minimal legal standards of protection of taxpayer's rights and that the taxes paid are in accordance to the public goods provided in return by the state[76].

Therefore, sustained improvements in tax capacity – the ability to create and enforce broad-based taxes – require investments in legal capacity – the ability to create and enforce norms that ensure freedom of enterprise and the protection of private property. These two (tax capacity and legal capacity), combined with the availability of a public administration – thus the ability to efficiently and effectively make use of public resources – together incorporate state capacity. In the interplay between these elements, "[i] *Tax capacity provides a stable and elastic source of revenue for the government to finance its operations, but a government with a larger stake in the economy through a developed tax system also has stronger motives to play a productive role in the economy.* [ii] *Public administration capacity* (…) *impacts the ability of governments to implement policy and deliver public services, which in turn influences citizens' trust in government.* [iii] *Legal capacity* (…) *includes legal infrastructure such as building the court system and registering property.*"[77].

As is frequently suggested in the literature[78], enhanced tax capacity could trigger virtuous cycles such as between tax capacity and

76. Vítor Gaspar, Laura Jaramillo and Philippe Wingender, "*Tax Capacity and Growth: Is there a Tipping Point?*", IMF Working Paper No. WP/16/234 (2015), p. 8.

77. Vítor Gaspar, Laura Jaramillo and Philippe Wingender, "*Tax Capacity and Growth: Is there a Tipping Point?*", IMF Working Paper No. WP/16/234 (2015), p. 7. The authors note that tax capacity, legal capacity, and public administration capacity are complements and are positively correlated with one another.

78. Timothy Besley and Torsten Persson, *Pillars of prosperity: the political economics of development clusters*, Princeton University Press, 2011, p. 165; Jorge Martinez-Vazquez and Richard M. Bird, "*Sustainable development requires a good tax system*", Taxation and Development: The Weakest Link? Essays in Honor of Roy Bahl Richard M. Bird and Jorge Martinez-Vazquez (Eds.), Edward Elgar, 2014, p. 15; Alma Pekmezovic, "*The New Framework for Financing the 2030 Agenda for Sustainable Development and the SDGs*", Sustainable Development Goals: Harnessing Business to Achieve the SDGs through Finance, Technology, and Law Reform, Julia Walker, Alma Pekmezovic, and Gordon Walker (Eds.), John

economic growth, to be reinforced in a number of ways: greater tax compliance enlarges the tax base, which can reduce the marginal cost of public goods and the need for higher tax rates, making it possible to redistribute income by lowering tax rates of poor families. This increase of available income enables greater spending which increases revenues from consumption and corporate taxes, allowing for greater spending by the government on state capacity building.

These effects are in themselves SDGs, essentially addressing goals 10, 16 and 17 of the 2030 Agenda. The first aims to reduce inequality among countries through tax policies (SDG 10) while also reducing income and wealth inequalities, promoting social cohesion and inclusive growth. Strategies to achieve this include implementing progressive personal income tax rates and adopting taxes on wealth and property that ensure greater contribution from individuals with higher financial means, reducing wealth concentration and balancing the regressive effects of other fiscal policies. A robust tax system serves as an indicator of good governance will be essential in ensuring fiscal sustainability and revenue mobilization (SDG 16). It will also ensure that multinational corporations pay their fair share of taxes by curbing profit-shifting and base erosion practices. This implies increasing the efficiency by equipping administrations with technology, promoting information sharing between tax authorities and implementing effective mechanisms to combat tax evasion. It also includes investments in public safety, the judicial system, and granting access for all. Transparency is also needed to foster trust between citizens and public institutions. This can be achieved by simplifying tax codes, opening communication channels between administration and taxpayers and ensuring that tax collection and administration processes are clear, accessible, and corruption-free. Finally, international cooperation in strengthening the means of implementation of SDGs (SDG 17).

Wiley & Sons Ltd, 2019, p. 92; OECD, *Tax Morale: What Drives People and Businesses to Pay Tax?*, OECD Publishing, Paris, 2019, pp. 12, 22, Inter-agency Task Force on Financing for Development, *Financing for Sustainable Development Report 2023: Financing Sustainable Transformations*, New York: United Nations, 2023, pp. 2, 35.

These include the enhancement of policy cooperation in addressing tax competition, base erosion and profit shifting and other challenges, such as the taxation of the digital economy. This also involves coordination in exchange of information and technical assistance not just to fight tax evasion, but also to enhance capacity-building efforts in developing countries.

Beyond the tax measures that can be implemented to directly leverage taxation for the achievement of SDGs and targets, special focus must be further mobilized towards other – not least important –crucial measures in making up resilient and sustainable tax systems, able to support theses common policy goals. The primary link between taxation and sustainable development, is therefore an internal one. Access to a self-sustaining, efficient and effective tax system not only allows countries to integrate on an international level but also seems to be an essential catalyst for development. As we have seen, this depends on some level of legal and administrative capacity, but also on the ability of a tax system to treat taxpayers with some level of consideration and respect that feeds political systems with an added sense of legitimacy, promoting accountability and voluntary compliance. And if a tax system is able to tax all realities it intends to tax, every taxpayer ends up paying less.

As has been pointed out[79], a significant case-study is Georgia, that introduced a number of key reforms that substantially improved their tax system. In 2003, the tax-to-GDP ratio stood at 12%. Following the "*Rose Revolution*" the government introduced significant reforms to eliminate corruption and attract investment. A single administrative organization was created, merging tax and customs. By 2009, the total number of taxes was decreased from twenty-one to a total of six. Both corporate and personal income tax rates were consolidated into a single rate. Most processes were automated and electronic invoicing

79. Benjamin Walker, "*Facilitating SDGs by Tax System Reform*", Sustainable Development Goals: Harnessing Business to Achieve the SDGs through Finance, Technology, and Law Reform, First Edition. Julia Walker, Alma Pekmezovic, Gordon Walker (Eds.), Wiley, 2019. 312.

was implemented. Additionally, electronic information exchange was introduced. Cameras were installed to oversee interactions between taxpayers and tax officials. By 2012, tax revenue had quadrupled in nominal terms, and the tax-to-GDP ratio reached 25%. Georgia serves as a valuable example for developing countries and also demonstrates the potential error in considering tax rates as the primary factor for tax collection.

We will now look more closely into the factors that make up this first link. First by analysing in broad strokes what the United Nations Inter-agency Task Force on Financing for Development, in its most recent Financing for Sustainable Development Report 2023, understands to be necessary in building more resilient tax systems and tax administrations. And afterwards, by pointing out certain aspects that can and should also be called out as structural pillars in the construction of effective tax systems, making them able to withstand the test of time.

6. What will it take? Policies for a resilient tax system

In Ulrich Beck's view, within the turmoil of the present something else is emerging, shaping new normative horizons and creating new beginnings[80]. The hidden emancipatory side effects of the global risks we face take us beyond the national frame towards a cosmopolitan outlook of the world, challenging old certainties of modern society and imposing on us radical transformations. We can only observe these transformations if we step outside our state perspective and take "*a cosmopolitan view, where the unit of research is a community of risk that includes what is excluded in the national perspective: the decision-makers and the consequences of their decisions for others across space and time*"[81].

The Addis Ababa Action Agenda, which as mentioned above intends to offer a framework aimed at mobilizing the financial resources

80. Ulrich Beck, *A metamorfose do mundo*, edições 70, 2017, p. 16.

81. Ulrich Beck, *A metamorfose do mundo*, edições 70, 2017, p. 56.

to support the achievement of the 2030 Agenda Goals, boldly emphasized the need to "*finish the unfinished business of the Millennium Development Goals*", and to "*commit to a new social compact*"[82]. Following this endorsement, the United Nations Secretary-General convened an Inter-agency Task Force on Financing for Development, to monitor and report on the implementation of financing for development commitments, provide policy guidance and promote the sharing of best practices. In its 2023 annual report, the Inter-agency Task Force underscored that the well-being and living conditions of all individuals are linked to each state's capacity to generate revenue from domestic taxation and effectively allocate those funds[83], echoing Amartya Sen's thesis that development expands freedoms enjoyed by individuals, and the resulting enhanced capabilities in turn allow for societies to flourish[84]. The report goes on to consider the fiscal system as an essential tool for sustainable structural transformation in contributing directly to the achievement of the SDGs, "*through the financing of public goods and services (…) by reducing inequality via redistribution, changing the behaviours of households and businesses by setting incentives, and smoothing the macroeconomic cycle through countercyclical policy*"[85].

Tax systems are now therefore credited to strengthen the social contract. This is true not only because (i) by paying taxes, taxpayers contribute to society, not just because (ii) by mobilizing those domestic resources, governments are given the means with which to provide valuable public goods and services, but also because, (iii) through the periodical assessment and payment of taxes, the institutionalized structure of society is effectively reinforced. The idea of a social

82. United Nations, *Addis Ababa Action Agenda*, 2015, p. 6, paragraph 12.

83. United Nations Inter-agency Task Force on Financing for Development, *Financing for Sustainable Development Report 2023: Financing Sustainable Transformations*, United Nations, 2023.

84. Amartya Sen, *Development as Freedom*, 1999, 1st ed., p. 297.

85. United Nations Inter-agency Task Force on Financing for Development, *Financing for Sustainable Development Report 2023: Financing Sustainable Transformations*, United Nations, 2023, p. 35.

contract or "*compact*" serves as a model for legitimation[86] by way of the idea of a meta-contract, under which we all participate through the innumerable agreements we daily enter into with each other. By doing so, we take part in the collection of shared norms, re-legitimizing the reproductive structures of society. Like most[87], we have not signed this meta-arrangement; we simply adhered to the framework put in place by virtue of the social contract, discursively and through recurring social practices[88] and of norm-accepting: we exercise political rights, participate in decision-making procedures, benefit from public services, deliver tax returns, pay taxes.

We cannot therefore agree with Alice Pirlot's statement that the idea to use taxation to achieve the 2030 Agenda is just a proposal to use taxation to foster certain goals, comparing that use to its alignment in other times to religious beliefs or other particular world views[89]. First, because (i) this view ignores the fact that SDGs do not correspond to a particular world view: they are generalizable and universal and have been agreed and accepted by all UN member countries[90].

86. Jurgen Habermas, *Between facts and norms: contributions to a discourse theory of law and democracy*, the MIT Press, 1996, pp. 92-93.

87. All of those who did not swear the constitution in its enactment or by obtaining nationality.

88. Jurgen Habermas, *Between facts and norms: contributions to a discourse theory of law and democracy*, the MIT Press, 1996, p. 449.

89. Alice Pirlot, "A *legal analysis of the mutual interactions between the UN Sustainable Developments Goals (SDGs) & taxation*", Tax Sustainability in an EU and International Context, Cécile Brokelind, Servaas van Thiel (Eds.), IBFD, 2020, p. 10. Also available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3467544.

90. Alice Pirlot, "A *legal analysis of the mutual interactions between the UN Sustainable Developments Goals (SDGs) & taxation*", Tax Sustainability in an EU and International Context, Cécile Brokelind, Servaas van Thiel (Eds.), IBFD, 2020, p. 10, seems to acknowledge this as in the following lines mentions that "*Nevertheless, the SDGs differ from regulatory goals and values that only reflect individual preferences and lack recognition at the UN level. UN members have approved the SDGs in a UN resolution, which gives them a moral and universal character, which goes beyond mere national preferences and ambitious political slogans. The Sustainable Development Solutions Network, which gathers sustainable development experts under the auspice of the UN Secretary-General to facilitate the implementation of the SDGs and the Paris Climate Agreement, describes the SDGs as "complementary to the tools of international law (…), by*

Second, because (ii) the use of taxation for the achievement the 2030 Agenda goals is not just an idea: it is a way forward, proven by trial and error. It is a goal unto itself, which should be integrated with other approaches, as relying solely on these has consistently proven to be chronically insufficient. And third, because (iii) as we have seen, building tax capacity is a necessary step for development and can be a way to activate some of the benefits arising from the positive interactions outlined above between states and the individuals that inhabit them.

The Inter-agency Task Force annual 2023 report calls for a new approach in building tax capacity creating efficient tax systems and increasing the ability of developing countries to effectively collect tax revenue, through assistance in increased policy, institutional and technical abilities. This recasting of the social contract intends to generate a virtuous circle whereby investment in tax capacity supports increased spending on public goods and improved services, which in turn contribute to voluntary compliance by taxpayers, and so forth[91]. It underlines the need to implement a global approach cooperate in strengthening the institutional structure of tax administrations, improving tax management activities and the services provided to taxpayers and balancing preventive, detective and corrective actions. For this, countries are encouraged to have at their disposal well-staffed tax administration, information sources and broad powers to compel the providing of information from taxpayers and third parties, such as financial institutions, e-commerce platforms, private companies, to assist in the determination of tax liability, as well as its collection[92]. The Task Force also highlights opportunities the digital transition has

providing a shared normative framework that fosters collaboration across countries, mobilizes all stakeholders, and inspires action"."

91. United Nations Inter-agency Task Force on Financing for Development, *Financing for Sustainable Development Report 2023: Financing Sustainable Transformations*, United Nations, 2023, p. 35.

92. United Nations Inter-agency Task Force on Financing for Development, *Financing for Sustainable Development Report 2023: Financing Sustainable Transformations*, United Nations, 2023, p. 38.

created in many areas for tax administrations, most notably in assisting in the effective use of data, in speedier and easier detection of tax evasion and misreporting through cross-checking all kinds of tax statements and accounting but also making it more resilient and able to face negative events such as Covid-19.

Another important point in the report is the importance of fostering taxpayer's trust, as their perception of the tax authority's legitimacy considerably affects readiness for voluntary compliance[93]. This trust can be shaped by several factors, including simplicity of tax norms, the quality of taxpayer services, the likelihood of audits and enforcement actions, taxpayers' perceptions on whether others are paying their fair share, the effective governance of public expenditure and transparency[94]. Tax administrations can be active in building positive relationships with taxpayers, by education and public awareness campaigns and improving communication, creating perceptions of fairness, equity, accountability and reciprocity, leading to better outcomes. These educational initiatives include events to celebrate compliance, teaching students about the importance of paying taxes and the concept of the social contract, and initiatives to explain how participation in the tax system can facilitate access to support and benefits from the State. Relations between businesses and tax administrations could also significantly benefit from implementing direct channels of communication, the use of guidelines for setting expectations for different types of behaviour and introducing compliance and audit strategies such as cooperative compliance and risk-based approaches to auditing[95].

The report also suggests that registration and other aspects of compliance such as the filing of tax returns should be simple and universally

93. This point is also underscored in the OECD report, *Tax Morale – what drives people and businesses to pay tax?*, OECD, 2019, p. 22.

94. United Nations Inter-agency Task Force on Financing for Development, *Financing for Sustainable Development Report 2023: Financing Sustainable Transformations*, United Nations, 2023, p. 38.

95. United Nations Inter-agency Task Force on Financing for Development, *Financing for Sustainable Development Report 2023: Financing Sustainable Transformations*, United Nations, 2023, p. 38.

usable making compliance largely effortless for the taxpayer. Automatic compliance should be built into the taxation system through "*compliance-by-design*" approaches and electronic service channels, particularly electronic filing and payment, thereby minimizing administration intervention, while reducing the compliance burden with the associated improvement of voluntary compliance[96]. While greater standardization can increase efficiency, a tiered approach such as the use of dedicated units for large taxpayers, can also mitigate tax compliance risks.

The shift in focus towards taxation and specifically, towards assistance on building tax capacity in developing countries has been remarkable. The message seems to have shifted from a primary focus on financing and incidentally on taxation to a primary focus on the latter. This means more skills, technology[97] and legal tools for administrations, more education for taxpayers and higher ability to coordinate internationally. These concerted efforts can boost the virtuous cycle, create the conditions for wealth redistribution, more active taxpayers in demanding accountability and increased resources at the disposal of governments to meet SDGs.

However, for the tax lawyer there are essential parameters missing. Parameters without which all of the above factors could underperform. This is the subject for our next and final reflection.

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96. United Nations Inter-agency Task Force on Financing for Development, *Financing for Sustainable Development Report 2023: Financing Sustainable Transformations*, United Nations, 2023, p. 38.

97. Technology can make all the difference in improving the tax systems of developing countries as it could solve several problems that tax administrations face, in reducing operational costs, accessing accurate and up to date information, improving tax fraud control and international tax compliance. Current technology exists that could also improve certain areas of taxation such as indirect taxes, payroll taxes, transfer pricing, and exchange of information between tax administrations. Cf. Benjamin Walker, "*Facilitating SDGs by Tax System Reform*", Sustainable Development Goals: Harnessing Business to Achieve the SDGs through Finance, Technology, and Law Reform, First Edition. Julia Walker, Alma Pekmezovic, Gordon Walker (Eds.), Wiley, 2019, p. 313.

7. What has been left out? Rights that build trust

As we have seen throughout this text, Sustainability is more than a buzzword: it is an interdisciplinary analytical concept which entails three traditional dimensions – economic development, social inclusion, and environmental sustainability – to which we can add a fourth one – good governance. As an analytical concept it must be absorbed by the legal system, precisely in order to guarantee its effectiveness at all levels[98].

Although until here we have at times been fairly descriptive and referring to ideas mostly implicit in the 2030 and the Adis Ababa Agendas, its objective is mainly a normative one, only suggested by the Inter-agency Task Force annual 2023 report, with the simple but inconsequential statement that "*Among other elements, tax and customs administration requires appropriate legislation on administration and procedures*"[99]. This refers mostly to a legal meta-structure comprised by a set of tax law-specific principles that tax lawyers already know well, and that – for one reason or another which we can only imagine – the reports on SDGs implementation seem to overlook. These are crucial standards to be in place if a tax system is to be essentially effective, making up what would be considered as "*appropriate legislation*" on taxes, as well as on tax "*administration and procedures*". Even though there is no "*one size fits all*" solution on implementing these standards, in the current context of implementing SDGs through cooperation for the enhancement of tax capacity, the truth is, sooner or later countries will have to face them.

Naturally, a deep dive into these standards is beyond the scope of this paper. However, having set the stage we can and should provide

98. Wolfgang Kahl "*Nachhaltigkeit als Verbundsbergriff*", Nachhaltigkeit als Verbundsbergriff, Mohr Siebeck, Tubingen, 2008, apud Suzana Tavares da Silva, "*Sustentabilidade e solidariedade em tempos de crise*", Sustentabilidade fiscal em tempos de crise, José Casalta Nabais e Suzana Tavares da Silva (Eds.), Almedina, 2011, pp. 72-73.

99. United Nations Inter-agency Task Force on Financing for Development, *Financing for Sustainable Development Report 2023: Financing Sustainable Transformations*, United Nations, 2023, p. 38.

a brief overview of what has been left out of most DRM discourses. In this regard we propose the use of the concepts of *efficiency* and *effectiveness* as criteria for evaluating performance and sustainability. We here argue that although those concepts may and sometimes are used interchangeably, they have undeniable heuristic value when used to refer to separate but complementary aspects of performance and sustainability:

1. efficiency is mainly quantitative and relates the means used with the obtained results. It focuses on the ability to use the least amount of resources, time or effort in achieving a desired outcome. In other words, it is about the *quantity* of the output and a measure of how well a process, system or individual can convert inputs into *outputs*;
2. effectiveness, on the other hand, is mainly qualitative, and relates the proposed objectives with the achieved outcomes. It refers to the degree to which a process achieves the necessary standards for a desired outcome or effect, regardless of the resources used. It is about the *quality* of the output and a measure on how well a process, system or individual can *check all the boxes* in accomplishing the target outcome.

While efficiency focuses on the end result, targeting the best possible outcome with optimal use of resources, effectiveness focuses on the path to get there, fulfilling the best standards in the achievement of the overall objectives. In simple terms, while efficiency means *doing things right*, effectiveness means *doing the right things*.

Consequently, tax efficiency refers to the degree to which a tax system can raise revenue for public spending, redistribute income or incentivizing certain behaviours – promoting investments, discouraging harmful consumption and encouraging sustainable practices – spending minimal associated administrative costs. This involves first and foremost a highly qualified and informed administration, duly equipped with information and technology, but also educated and

informed taxpayers, with high levels of convenience, trust and spontaneous compliance. It also involves efficient procedures that take into account taxpayers' participation and judicial decisions without unjustified levels of litigation.

Tax effectiveness, on the other hand, means the ability to accomplish its intended goals, while observing the minimum standards required to establish a perception of trust among taxpayers and fostering voluntary compliance. These include, among others, a rules-based order, proportionality, equality and the right to be heard[100]. For a tax system to elicit trust from taxpayers and adequately function with high levels of voluntary compliance, it must consider that the right to levy and collect taxes does not justify the violation of taxpayers' fundamental rights, nor the imposing of disproportionate sacrifices in securing payment of taxes[101].

One can argue that in setting up a tax system the first aspect to consider is effectiveness as the first concern will be that the tax system fulfils all its objective goals. Once that aspect is assured, the priority becomes the aspect of efficiency, through fine-tuning the tax apparatus so that that the least amount of resources are used in the process of achieving its goals[102]. There is no doubt however, that the tax system can only be considered fully functional and sustainable if the right balance is found between efficiency and effectiveness.

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100. José Casalta Nabais, *O dever fundamental de pagar impostos*, Almedina, Coimbra, 2004, pp. 374 (note 557), Luciano Gomes Filippo, "*Consentimento, eficiencia e eficácia nos sistemas fiscais*", Lições de Fiscalidade, João Ricardo Catarino, Vasco Branco Guimarães (Eds.), 6th edition, Almedina, Coimbra 2018, pp. 153-176. Efficiency and effectiveness used as a criterion or parameter for action and decision-making by administrative entities, can be controlled through the principle of proportionality, which is the dimension that informs the overall rationality of public intervention. In this sense, efficiency can be assessed through the necessity test and effectiveness through the adequacy test. Cf. Suzana Tavares da Silva, "*O princípio (fundamental) da eficiência*", Revista da FDUP, 7 (2010), pp. 519-544.

101. Juliane Kokott and Pasquale Pistone, *Taxpayers in International Law: International Minimum Standards for the Protection of Taxpayers' Rights*, Hart Publishing, 2022, p. 513.

102. Although in ancient Rome this exact sequence does not appear to have been followed. Cf. Diogo Leite de Campos e Mónica Horta Neves Leite de Campos, *Direito Tributário*, Almedina, Coimbra, 1996, pp. 73-76.

In this regard, it is important to point out that the legal configuration of tax systems should be based on a set of specific normative assumptions[103] that ensure their intra-systematic integrity, essentially solving three problems[104]. The first is (i) the legitimization of tax law, which arises at the moment of the creation of tax norms, requiring some level of consent from those to whom the obligations pertain. Second, (ii) the problem of keeping the integrity of tax laws, when applying them to specific cases, conditioning the exercise of taxing powers by the administration. And third, (iii) the problem of the intrinsic material criteria of justice in the distribution of tax burdens, which concerns the content of tax law.

Since taxes are restrictions on taxpayers' ability to freely dispose of their assets, it becomes first and foremost necessary to ensure the legitimization of the tax rule, which is done through the idea – older than the rule of law itself – of consent in taxation[105], which traditionally is mediated by democratically elected parliaments. It is therefore necessary that some level of consent is present in the creation of tax laws, as the substitution of private needs for collective needs involves a passive assurance the collection of taxes will take place peacefully and without social unrest.

Secondly, there is the problem of the exercise of taxing power by the administration. This issue is crucial because discretion in the exercise of taxing power threatens the effectiveness of tax systems and affect the legitimization basis of government. The solution to this problem

103. Adam Smith in his work Inquiry into the Nature and Causes of the Wealth of Nations, identified four desirable qualities of tax systems: certainty (the taxes that individuals must pay, as well as the times and forms of payment must be certain and not arbitrary for taxpayers and other obligated subjects), equality (taxpayers must contribute to the maintenance of government, as far as possible in proportion to their abilities), neutrality (they must be levied at the most convenient times and methods of payment for the taxpayers obligated to them), and efficiency (they must also be configured in terms of maximizing results for the public treasury with the minimum possible sacrifices for taxpayers).

104. José Avilez Ogando, *A nulidade do ato tributário*, Almedina, 2022, pp. 63-66.

105. Alberto Xavier, *Conceito e Natureza do Acto Tributário*, 1972, Almedina, pp. 275 e segs..

lies in subjecting administrative activity to precise commands, only making decisions on the application of legal criteria specifically guided by clear and evident rules, thus ensuring reasonable predictability of tax obligations. The densification of tax law enables the law itself to become the main instrument of taxation so that at any given moment everyone can find, not only the assumptions of their own taxation, but also the criteria that inform tax claims.

Finally, the third problem, related to the content of tax rules, refers to the presence of an intrinsic material criteria of taxation that ensures the rationality of the decisions contained in the tax system[106]. This question is both related to the creation of tax laws and the exercise of taxing power by the administration, which may find itself faced with the application of tax laws informed by material criteria of taxation that does not take into consideration the ability to pay of the taxed individuals[107]. If we imagine a tax collection entirely disconnected from the ability to pay principle, situations could easily arise in which, due to a total absence of ability to pay, uncollectable taxes are required from taxpayers. Even the collection of taxes loosely linked to taxpayers' the ability to pay can lead to injustices and to inefficiencies conducive to the emergence of parallel economies[108].

As mentioned above, there is no single recipe that will apply equally to all jurisdictions. All we can point to is the existence of common principles of effectiveness that, in one way or another, are being applied in most modern tax systems. Principles that not only represent

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106. Sérgio Vasques, *Manual, de Direito Fiscal*, 2ª ed., 2018, p. 76.

107. The internal structure of tax rules also requires the resolution of other problems addressed by economists, and the solution can only be found in the way the tax system architecture is structured. We are referring to the economic issues of fiscal neutrality, which relates to the quality of taxes that do not interfere with nor disturb the optimal distribution of resources in the economy, and the issue of fiscal efficiency that requires taxes suitable for the pursuit of their socio-economic objectives. Cf. Sousa Franco, *Finanças Públicas e Direito Financeiro*, 1980, Almedina, pp. 198-199 e 289-291.

108. The ability to pay principle is imposed both by the need to keep the consent granted by taxpayers intact and by the requirement of system neutrality imposed by the separation between the state and the economy, allowing taxation not to affect any of the conditions on which the taxed manifestations of wealth are based.

tried-and-true measures to achieve tax justice, but also bring with them a greater sense of legitimacy in taxation. A perception that is essential to reduce the operational costs, and therefore achieve the efficiency of the legal and administrative apparatus, that are therefore crucial sustainability requirements of any tax system.

In a recent publication[109], Julian Kokott and Pasquale Pistone have made an in-depth comparative analysis of several national constitutions from all over the world, as well as international agreements and taxpayers' charters, concluding on the emergence of a set of common foundational principles of taxation across the world. These principles affect the treatment of taxpayers and condition taxation over multiple jurisdictions, and can be considered as universalizable cornerstones of effective taxation, operating as an external limit to the exercise of fiscal sovereignty peacefully enforced and accepted by its recipients. According to their research, compliance with these internationally accepted standards should be a policy priority of all tax systems. To this we add that it is certainly a feature of sustainable tax systems – those that *do the right things* and that do them for their own sake. These foundational minimum standards are essentially: (i) general principles for taxpayers' rights protection (rule of law, proportionality, fairness), (ii) substantive rights (ability to pay, data protection, protection of private property), (iii) procedural rights (access to documents, to be heard, judicial protection), and (iv) rights related to sanctions.

As previously touched upon regarding the *three problems* that the legal configuration of a tax system should solve, taxation must be based on the law, which means that taxes need to be specifically imposed, modified, and repealed by acts passed by the legislative power. This means that taxpayers should be able to predict their current and future tax liabilities, just by reference to the content of the law, with a reasonable degree of accuracy. Clear and stable tax laws ensure consistency, predictability, and fairness in the administration of taxes and enables taxpayers to adequately plan their affairs. The rule of

109. Juliane Kokott and Pasquale Pistone, *Taxpayers in International Law: International Minimum Standards for the Protection of Taxpayers' Rights*, Hart Publishing, 2022.

law principle has multiple functions in protecting taxpayers: it ensures legal certainty by preventing the arbitrary exercise of tax powers, including the imposition of retroactive taxes; guarantees some level of legitimacy of tax laws, imposing from the outset a separation of powers; and demands that taxation be consistent with criteria corresponding to the value of justice[110], which means respect for the fundamental rights of taxpayers.

The rule of law principle also implies as corollary the principle of proportionality. This is a supplementary instrument that establishes a certain relationship between each measure and the goal it pursues, monitoring the adequacy to achieve such a goal, and taking into account the potential side repercussions. It also helps reach the overall goals of fairness of the tax system by serving as criteria to solve collisions between potentially applicable norms, essentially between prescriptive taxing norms and norms that establish fundamental rights in favour of taxpayers. Proportionality does not constitute an absolute legal value, but rather an adjudication principle that assists in establishing checks and balances in the exercise of taxing sovereignty[111].

Fairness connects taxation to several substantive principles such as equality and neutrality[112]. All individuals are treated equally under the law, regardless of their social or economic status and are therefore subject to the same tax norms, without the possibility of there being different categories of taxpayers. This principle is closely related to the concepts of horizontal equity (*all taxpayers are subject to taxation*) and vertical equity (*all taxpayers are subject to taxation according to the same criteria*). This principle ensures that the tax system is, as much as possible, fair and neutral, without artificially distorting the behaviours of economically free agents or burdening disproportionately certain

110. Juliane Kokott and Pasquale Pistone, *Taxpayers in International Law: International Minimum Standards for the Protection of Taxpayers' Rights*, Hart Publishing, 2022, p. 492.

111. Juliane Kokott and Pasquale Pistone, *Taxpayers in International Law: International Minimum Standards for the Protection of Taxpayers' Rights*, Hart Publishing, 2022, p. 493.

112. Juliane Kokott and Pasquale Pistone, *Taxpayers in International Law: International Minimum Standards for the Protection of Taxpayers' Rights*, Hart Publishing, 2022, p. 494.

sectors of the economy or segments of the population, by abstaining from conditioning the behaviours of some agents in relation to others.

Substantive rights of taxpayers refer to universal standards that emanate from an attitude of consideration and respect for the intrinsic value of each individual. This means both equal treatment and the granting of the necessary autonomy in making the decisions of how to conduct each person's own life. Equality, which as we have seen is a corollary of the rule of law principle, also appeals to a third dimension of positive discrimination, through which all taxpayers, not only must be subject to taxation according to the same criteria, but also that that criteria should be each taxpayer's ability to pay. This implies, not only that each taxpayer should be treated as any other individual, not only that the law should apply to all in such a way as to exclude privileges and separate categories of taxpayers, but also that when taxing individuals, tax authorities must take into account as much as practicable, each taxpayer's ability to pay. Other substantive rights are the right to protection of private property, a corollary of general autonomy, and increasingly, with the impact of new technologies in taxation, data and privacy protection rights.

To these we should add procedural rights which are instrumental for the effective implementation of the above mentioned foundational general principles and substantive rights that should inform all taxation. These essentially are: the right to access documents, the right to be heard in all types of proceedings, and the right to judicial protection in challenging or appealing administrative decisions[113]. Most notably, procedural rights provide the checks and balances that allow for taxation to take into consideration not only each taxpayer's individual rights, but also their particular circumstances. And these play a crucial role in the rule of law principle, as laws are meant to be applied and correspond to certain observable facts, and so depend on correctness in ascertaining of those facts. By allowing judicial oversight on the activities of the administration, these rights provide the system

113. Juliane Kokott and Pasquale Pistone, *Taxpayers in International Law: International Minimum Standards for the Protection of Taxpayers' Rights*, Hart Publishing, 2022, p. 495.

with the necessary mechanisms for self-control, so that the rule of law imposes itself, separation of powers is applied and individual rights become real.

Finally, a set of rights related to sanctions should be also noted[114]. In this respect, the imposing nature of taxes implies a delicate balance with the concurrent imposing of sanctions by the authorities. Taxes should not be levied as sanctions and so, taxable events should not be foreseen and imposed as sanctions to infractions. Sanctions for criminal or administrative infractions should be imposed separately from taxes, according to a specific procedure and taking into account its specific ends and the seriousness of the offense. Only one sanction should be applied to each violation and within the scope of a single procedure. These principles together with the proportionality requirement of the applied sanctions and the privilege against self-incrimination, should be also considered necessary foundational guarantees to secure adequate levels of taxpayer's trust in a healthy tax system.

A well-structured, efficient and effective tax system can over time generate the three pillars of good governance: (i) transparency, which is essential for promoting trust, openness and accountability and implies making information about policies, processes and decisions available and accessible to the public; (ii) accountability, which requires checks and balances, audits and oversight, making public officials responsible for their actions and decisions, causing them to act in the best interests of the people they serve; and (iii) participation, which requires governments to allow its citizens to engage in meaningful public consultation, addressing citizen complaints, and making adjustments to policies and practices based on feedback from the public[115].

The journey towards a more efficient, fair, and transparent tax system is an ongoing process that must respect the specificities of each

114. Juliane Kokott and Pasquale Pistone, *Taxpayers in International Law: International Minimum Standards for the Protection of Taxpayers' Rights*, Hart Publishing, 2022, pp. 497-498.

115. Jeffrey Sachs, *The age of sustainable development*, New York, Columbia University Press, 2015, p. 503.

country. One that, just by itself, has the capacity to lead to many of the objectives of the 2030 Agenda, and may even go further in the long term. By embracing some of our requirements for efficiency such as new technologies, fostering trust and a culture of compliance, enhancing international cooperation and by focusing other requirements for effectiveness, such as fairness, equitable and transparent tax systems, governments can make decisive steps in achieving the structural transformations required to achieve the SDGs. This collective effort will ultimately contribute to the development of societies everywhere, benefiting all individuals and promoting a more equitable and inclusive global community. In the rightful words of Ulrich Beck,

> "*The world city is a site of experimentation of new forms of climate citizenship, new ways of inhabiting the world and new ways of reinventing democracy*"[116].

This is the challenge we face today.

116. Ulrich Beck, *A metamorfose do mundo*, edições 70, 2017, p. 226-227.

Taxation, gender equality and the agenda development Agenda 2030

Mariana Passos Beraldo, Iara Alfaiate Maçarico

Abstract: Despite economic growth, income distribution in many countries has become more unequal over the past 40 years. This issue is even more delicate when considering the gender inequality that has occurred despite the notable growth in women's participation in the labour market. The universal struggle to promote gender equality has advanced significantly in recent decades with the adoption of more defensive legal frameworks. However, latent differences persist, meaning that the road to achieving equality is still long and faces substantial obstacles. The wage gap, vertical inequality at work, and the concentration of women in informal jobs, often without access to benefits and decent working conditions, intensify this gender inequality. In this context, tax policies have different impacts on women and men and are generally more harmful to women. However, how tax systems are designed is controllable, so governments can adopt policies to reduce inequality. Through the 2030 Agenda, nations across the globe have renewed their commitment to gender equality and the preservation of human rights to make Sustainable Development possible. It is crucial to mention Sustainable Development Goal (SDG) 10, which includes tax issues in target 10.4 by adopting tax and social protection policies to achieve greater equality, and also especially SDG 5 - which aims to promote gender equality. This research aims to verify the current public tax policies adopted by Portugal and Brazil and their impact on promoting gender equality. The research is

exploratory and uses bibliographical research and documentary analysis. This study can contribute to theoretical discussions on taxation and gender equality and to the formalisation of public tax policies aimed at equality and fiscal morality.

Keywords: gender equality; taxation; sustainable development; tax justice.

1. Introduction

Globalisation, economic restructuring, the downsizing of the welfare state, and the transformation of labour markets have radically changed employment opportunities worldwide (LANGEVANG, GOUGH, 2012, p. 242) and have started to promote debates about inequalities of opportunity between genders. The dynamics depicted above exacerbate gender inequality because women are among the poorest populations (TAHIR et al., 2018, p. 1) with precarious or poorly paid jobs. Thus, women occupy a privileged place during this process since promoting entrepreneurship and female empowerment is viable in reducing poverty (MCGOWAN et al., 2012, p. 53-55; TAHIR et al., 2018, p. 2). In fact, according to the OECD (2023, p. 13), reducing disparities in labour force participation and the number of hours worked (with women typically working fewer hours) could result in an average 9.2% increase in GDP in OECD countries by 2060, adding approximately 0.23 percentage points to average annual growth.

Tax justice issues have gained increasing prominence in recent years within the discussion of gender equality since tax policies can mitigate or reinforce asymmetrical gender relations (TALLADA, 2017, p. 12). By way of example, in 2014, Christian Aid produced a report on the importance of gender for a fair tax system (CAPRARO; CHRISTIAN AID, 2014) and, in 2016, ActionAid published a report realising women's rights through tax, entitled "Making tax

work for women's rights".[1] In the European context, in January 2019, the European Parliament adopted the EU Resolution (2018/2095) on gender equality and tax policies in the EU, covering issues related to direct and indirect taxation, the impact of tax avoidance and evasion policies on gender equality and the integration of gender equality into tax policies. The OECD published "Joining Forces for Gender Equality: What is Holding us Back?" in 2023, which monitored progress and made policy recommendations to promote gender equality, including in the tax sphere (OECD, 2023).

Essential to keep in mind that tax is not only an important source of public revenue but also a significant instrument of social transformation, which can guarantee and maximise social wellbeing, as well as change behaviour and mentalities, thus acquiring an extra-fiscal scope. Also, tax systems have an impact on the various socio-economic contexts of members of civil society, which differ significantly, for example, in the quantity and quality of income, career choices, financial and non-financial contributions to families, consumption of goods and services, and the impact of tax fraud and evasion. Tax policies are, therefore, a strategic tool for states to guarantee human rights and promote social welfare.

However, the design of public policies is highly complex regarding their delimitation, and it is necessary to consider various socio-economic factors and their impact on citizens. Overall, this alienation by tax systems represents a missed opportunity to employ an instrument capable of promoting gender equality and ensuring women's rights. On the other hand, governments are still adopting tax policies that maintain or worsen the status quo of inequality - consciously or unconsciously - making them incompatible with European and/or international commitments that prioritise the urgent response of states to promote gender equality. Given the current situation, it seems necessary to evaluate and rethink the scope of the state's response to promoting gender equality.

1. The report is available at: https://actionaid.org/publications/2016/making-tax-work-womens-rights#downloads.

In this context, nations worldwide have renewed their commitment to gender equality and the guarantee of human rights through the 2030 Agenda to enable and promote Sustainable Development. In this regard, it is essential to mention SDG 10 - reducing inequalities, which includes tax issues in target 10.4 on adopting social protection policies and policies to achieve greater equality, and also SDG 5 on gender equality.

In this context, this research is part of the theme of public tax policies aimed at promoting gender equality and enabling a fair society, based on a comparative analysis of the measures already adopted by the Portuguese and Brazilian states in the tax sphere, aimed at protecting women's fundamental rights and promoting gender equality. The article proposes a reflection on the state's financial activity, focusing on analysing the role of distributive justice and taxation in institutionalizing citizenship principles.

As can be seen, this research seeks to contribute to theoretical discussions on taxation and gender equality. The study also makes a practical contribution to formalising public tax policies for equality and fiscal morality.

2. Gender inequality and the role of tax in realising the 2030 Agenda

In recent decades, changes resulting from globalisation, economic restructuring, a reduction in the role of the state, social welfare, and the transformation of labour markets have radically altered employment opportunities around the world (LANGEVANG; GOUGH, 2012, p. p. 242), giving rise to and intensifying the debate on unequal opportunities between the sexes. It is necessary to emphasise that women also have a particular position in this process since promoting female entrepreneurship and empowerment has proved essential in reducing poverty (MCGOWAN et al., 2012, p. 53-55).

Women per se face significant challenges in life in society, which are intensified by the existence of legal and/or social discrimination.

These include a lack of access to financial capital, training, work experience, and education.[2] Other obstacles, such as family obligations, gender differences and discrimination, and social norms, also make it difficult for women to act in the different social spheres and public, private, and political spaces.[3] The condition of women's vulnerability can become more serious when it intersects with other *characteristics that imply social exclusion, such as poverty, statelessness, or belonging to an ethnic-racial and/or religious class* (COUTINHO; OLIVEIRA; CARAPÊTO, 2020, p. 5).

All these issues can result in public policies, including in the fiscal sphere, with different approaches (MAZZARDO; AQUINO, 2014, p 2-3). State action and implemented public policies can transform women's socio-cultural and financial conditions regarding mutual respect, shared decision-making, reducing domestic violence incidents, and financial autonomy (TAHIR et al., 2018, p. 2).

Regarding taxation, national tax systems are not gender neutral (TALLADA, 2017, p. 12). Due to the diverse and unequal positions that women and men occupy in the labour force, as consumers, as producers, as owners, and as those responsible for activities included in the *care economy*, women and men experience the impact of tax policies in different ways (SERAFINI, 2017, p. 14; CARMONA, 2018, p. 4).

In this context, it is crucial to assess the impact of public spending and taxation on promoting equality (CARMO, 2020, p. 58). Precisely in the discussion on gender equality, tax justice issues have been increasingly emphasised in recent years, giving rise to a global social movement in this regard.

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2. According to UNICEF, around 129 million girls are not in school, and only 49 per cent of countries have achieved gender equality in primary education, with the percentage dropping to 24 per cent in higher education (https://www.unicef.org/education/girls-education).

3. It should be noted, on the one hand, that in 2023 and in the OECD (OECD, 2023, p. 184), the percentage of women in parliamentary bodies is, on average, 33.8 per cent and, on the other hand, that in the executive sphere, this percentage rises slightly to 35.7 per cent.

Emblematic examples of gender-biased taxation in Latin America are the tax deductions for minor or disabled children found in Ecuador, Uruguay, and Argentina. In the latter, there is also a tax deduction for hiring paid domestic workers or care workers (VIECELI, 2021, p. 4).

In the same vein, at the European level, in January 2019, the European Parliament approved the EU Resolution (2018/2095) on gender equality and tax policies in the EU, covering issues related to direct and indirect taxation, as well as analysing the impact of evasion on gender equality and the integration of gender equality into tax policies.

Regarding the impact of evasion on the promotion of gender equality, the constant reduction in the tax burden and the lack of efficient mechanisms to reduce evasive practices, therefore, lead to a shortage of public resources, which ends up hindering the funding of the policies needed to improve wellbeing and reduce disparities, including gender disparities (SERAFINI, 2017, p. 17).

Thus, analysing the impact of tax policies on promoting gender equality includes issues related to taxation on income and consumption, as well as the adoption of mechanisms that guarantee the fight against evasion and effective compliance with the *fair share*[4], such mechanisms being essential for states to ensure sufficient revenue to finance the public policies needed to improve women's conditions and reduce their inequalities to men (SERAFINI, 2017, p. 17).

2.1. The role of taxation in realising the 2030 Agenda

Sustainable development has been promoted and highlighted in International Agendas and Forums, where they are called upon to adopt development strategies *constantly and generally* and implement international programmes aimed at sustainable development. As repeatedly highlighted by the World Trade Organization - WTO arbitration awards, sustainable development emphasises integrating economic

4. Also understood as the ability to pay principle.

and social development with environmental protection.[5] In these terms, the design and implementation of comprehensive development policies to incorporate the desired economic and social development combined with environmental protection have become the centrepiece of the Sustainable Development Goals - SDGs adopted under the 2030 Agenda for Sustainable Development (BANTEKAS; OETTE, 2020, p. 649).

World governments agreed to the Sustainable Development Agenda (SDA) in New York in 2015.[6] This initiative established an action plan with an interdisciplinary understanding of sustainable development outlined through 17 goals and 169 targets[7] (RODRÍGUEZ, 2021, p. 102), which consider economic, social, and economic issues as components of sustainable development, and emphasise broad and central themes such as prosperity, planet, peace, security, and justice, to respond to development challenges, including those related to human development, such as poverty, inequality, climate, environmental degradation, prosperity and peace (UN, 2015, p. 5-7), to be implemented by both developing and developed states. Regarding gender disparities, it consists of an ambitious agenda that aims to end extreme poverty and hunger, guaranteeing equal rights for women and marginalised communities (BYANYIMA, 2019, p. x).

It is, therefore, up to countries[8], bearing in mind the existence of multiple controllable and uncontrollable factors, to adopt the necessary measures to try to achieve the SDGs. In fact, among the factors in question, the financing of the 2030 Agenda is a central issue. It is important to remember that in 2015, the World Bank and the

5. For example, see Shrimp-Turtle Case (1999) (WTODSB) para. 129.

6. Transforming our world: the 2030 Agenda for Sustainable Development, Resolution Adopted by the General Assembly on 25 September 2015, UN Doc. A/RES/70/1, 21 Oct. 2015, paras. 16.4 and 17.1.

7. The SDGs were first agreed at the UN Sustainable Development Summit from 25 to 27 September 2015 in New York. The SDGs were subsequently adopted as part of the UN's 2030 Agenda for Sustainable Development.

8. Despite being defined and agreed at the UN, the SDGs must be achieved by individual countries (WALKER, 2019, p. 316).

International Monetary Fund (IMF) emphasised that achieving these goals would cost several billion dollars.

In this context, since the negotiation of the SDGs, tax has been considered a key instrument for achieving the goals of the 2030 Agenda. Many of the 17 SDGs directly address tax issues, with others implicitly calling for state funding via taxation, to fill the investment gap (WALKER, 2019, p. 310). According to the Platform for Collaboration on Tax (PCT), [9]-[10] taxation is a significant factor in 10 of the 17 SDGs (2018, p. 9). Countries must adopt a comprehensive approach to taxation, favouring the promotion and complementation of other areas of development to achieve SDGs (WALKER, 2019, p. 303). Thus, Walker (2019, p. 316) concludes that taxation is a central factor to be considered by jurisdictions when implementing the SDGs, even when SDG guidelines do not expressly mention taxes.

2.2. 2030 Agenda guidelines for reducing inequalities and promoting gender equality

Among the goals set by the 2030 Agenda are gender equality (SDG5) and reducing inequalities –(SDG10). SDG 10 includes taxation among its targets to achieve the desired reduction in inequality. Target 10.4 establishes adopting policies, especially tax, wage, and social protection policies, to achieve greater equality progressively.

Reducing inequalities has been a central theme, especially in the last decade, since although market integration has reduced inequality

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9. The Platform for Collaboration on Tax (PCT) — a joint initiative of the International Monetary Fund (IMF), the Organization for Economic Cooperation and Development (OECD), the United Nations (UN), and the World Bank Group (WBG). About PCT, Walker (2019, p. 309) explains "The platform was created by the OECD, World Bank, IMF, and the UN. the Platform seeks to bolster collaboration between the sponsor institutions, support capacity-building in the area of tax for developing countries, and facilitate the participation of the latter in multilateral dialogues regarding international tax policy (REISCH, 2019, p. 41).

10. PCT organised Taxation & SDGs - First Global Conference of the Platform for Collaboration on Tax Conference Report which took place in February 2018 in New York, United States of America.

between countries (CHANCEL; PIKETTY, 2021, p. 2; AJIDE et al., 2021, p. 690), this reduction has not occurred within countries (WALKER, 2019, p. 306). In these terms, despite economic growth in recent decades, income distribution in many countries became more unequal between the early 1980s and the mid-2010s[11].

The distribution of wealth within countries, but especially inequality between nations, is challenging to control due to the absence of a central authority over states and the lack of joint action planning. However, tax systems are presented as controllable, and governments can favour adopting policies to reduce inequality (WALKER, 2019, p. 306).

SDG 10 is closely related to SDG 5 - gender equality. SDG 5 aims, among other things, to recognise and value unpaid care and domestic work through the provision of public services, infrastructure, and social protection policies and the promotion of shared responsibility within the household and family as nationally appropriate (target 5. 4); ensuring women's full and effective participation and equal opportunities for leadership at all levels of decision-making in political, economic and public life (target 5.5); and the adoption and strengthening of sound policies and applicable legislation for the promotion of gender equality and the empowerment of all women and girls at all levels (target 5.9).

Concerning tax aspects, due to the diverse and unequal positions that women and men occupy in the labour force, as consumers, as producers, as owners of goods, and as those responsible for activities included in the *care economy*, women and men experience the impact of tax policies in different ways (SERAFINI, 2017, p. 14; CARMONA, 2018, p. 2; CARMO, 2020, p. 56-57). In this way, national tax systems are not gender-neutral either, and tax rules can be designed to promote or hinder and thus mitigate or reinforce asymmetrical gender relations (TALLADA, 2017, p. 12).

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11. According to UNU-WIDER, "World Income Inequality Database (WIID 3.4). Available at: https://www.wider.unu.edu/database/world-income-inequality-database-wiid34

In this way, assessing the effects of taxation on personal income and consumption (including the 'tampon tax' in both Brazil and Portugal), as well as the impact of evasive practices on gender equality, is essential for redesigning tax policies aimed at achieving SDGs 5 and 10 of the Global Agenda (CARMO, 2020, p. 62-64).

3. The action of states in combating gender discrimination - a comparative analysis of the Portuguese and Brazilian tax panorama

Promoting gender equality is not just a task for international organisations. Due to their proximity to and knowledge of the particularities of economic, cultural, and social contexts, States have the possibility - and the duty - to build and implement a strategy to bring duties and rights between men and women closer together.

The study critically assessed current tax public policies implemented by Portugal and Brazil, identifying gaps and points requiring attention. The work also made it possible to determine whether states are implementing the international standards sponsored by the 2030 Agenda, especially SDGs 5 and 10.

3.1. Tax policies and gender inequality: analysing the Portuguese scenario

3.1.1. Legislative framework

Following the Portuguese Revolution of 1974, the Portuguese state undertook to restore to its citizens the fundamental rights and freedoms that had been damaged over the previous decades. The preamble to the Portuguese Republic's Constitution of 1976 and various constitutional rules emphasises that. Portugal is a Republic based on the dignity of the human person, where the state (and citizens) are committed to building a free and just society (Article 1), with the latter having

the duty to promote respect for and guarantee the realisation of fundamental rights and freedoms (Article 2). The Constitutional Law, in its article 9(h), clearly enshrines the promotion of equality between men and women as a fundamental task of the state, expressly prohibiting any kind of discrimination, positive or negative, on the grounds of sex, race or ancestry (Article 13(2)). Furthermore, this protection is not only expressed in the labour field, since any type of discrimination of this type is unconstitutional (Article 58(2)(b) and Article 59(1)), but also applies to the participation in political life (Article 109).[12]

On an international level, Portugal has made several international and European commitments over the decades. One example is the ratification, in 1980, of the United Nations Convention on the Elimination of All Forms of Discrimination, approved by the UN General Assembly, which reaffirms and reinforces the principle of equality between women and men, as well as, more recently, a commitment to the 2030 Agenda for Sustainable Development. Also noteworthy is the ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms, commonly known as the European Convention on Human Rights (ECHR), which prohibits any distinction in the enjoyment of the rights and freedoms recognized in that Convention (Article 14).

3.1.2. Gender Budgeting

Within the framework of all international, European, and domestic commitments, Portugal has built and developed political strategies to promote equality between men and women[13] over the last few decades.

12. In a democratic political system, both women and men must be represented in positions of power and decision-making at the most varied levels. The Council of Europe's Recommendation Rec (2003) 3 of the Committee of Ministers to Member States on the balanced participation of women and men in political and public decision-making considers the balanced participation of women and men in political and public decision-making to be an absolute priority, recognizing that an equal sharing of decision-making power between women and men strengthens and enriches democracy (IGC, 2022, p. 80).

13. Article 14 of Law no. 24-D/2022 of December 30 (State Budget Law).

First and foremost is the creation of a gender-sensitive state budget. The Council of Europe (2005, p. 10) defines gender budgeting as a "gender-based assessment of budgets, which incorporates a gender perspective at all levels of the budgetary process and restructures income and expenditure to promote equality between men and women".

This measure has been widely adopted by several countries, especially within the OECD (2023)[14], since it seems to be an essential strategy for understanding the negative impact of specific budgetary measures on gender equality. As the state budget is the "financial expression of political choices" (CIG, 2023), budgetary measures must reflect the principles of the rule of law, namely equality, seeking to improve Portuguese society in multiple ways.

The most significant advantages for the state and society inherent in this type of budgeting include increased accountability and transparency in budget planning, increased participation of men and women in the budget process, and the promotion of gender equality and women's rights (EUROPEAN INSTITUTE FOR GENDER EQUALITY, 2017, p. 4).

3.1.3. Income taxation

When it comes to taxes on income, the IRS[15] stands out. In Portugal, the IRS is a direct and personal tax, and a progressive rate is applied to the taxpayer, i.e., the rate increases or decreases as income increases or decreases, respectively. The higher the income, the higher the IRS rate. This construction represents the principle of ability to pay, also known as the ability to pay principle. According to this principle, taxpayers must contribute to the national tax system in accordance with their ability to pay, i.e., to the extent of their income.

On the other hand, to eliminate possible bias in taxation, the Portuguese tax system allows for the possibility of calculating the tax to be paid on an individual basis or by joint taxation, depending on whether

14. By 2022, around 60% of OECD countries had adopted gender budgeting practices (OECD, 2023).

15. Imposto sobre o Rendimento das Pessoas Singulares, Portuguese expression, that means individual income taxes.

it is more advantageous for the couple (Article 13, paragraphs 2 and 3). In this regard, it is worth highlighting the provisions of Article 6(3) of the Lei Geral Tributária (LGT), which stipulates that the taxation of the household cannot be higher than that which would result from the individual taxation of the people who make it up.

This factor is of considerable relevance to this study since opting for joint taxation could be detrimental to the female member of the couple. Several studies show that women have lower incomes than their spouses and are likelier to take part-time jobs or jobs with undeclared income. See the CIG (Commission for Citizenship and Gender Equality) study (2022), which shows that 9.1% of women have part-time jobs, compared to 4.7% of men. Moreover, despite the differences in income in 46% of couples, women contribute equally to expenses (50%) (SAGNIER et al. 2019, p. 98). All these situations may mean that the income earned by women will be subject to a higher tax rate due to the calculation of average income than would be the case if only their income were considered individually.

Therefore, we believe that the construction of the Portuguese tax system allows each couple to opt for the most advantageous taxation, considering each household's unique characteristics and various factors that impact their daily lives.

Articles 78 and 78-B of the IRS Code establish the rules regarding deductions from taxable income. As can be read in Article 78(1), deductions are made from the tax payable, by way of example, for dependents in the household and ascendants living with the taxpayer (paragraph a)), general family expenses (paragraph b)), health and health insurance expenses (paragraph c)) and education and training expenses (paragraph d)). These deductions stipulated by the Portuguese tax legislator make it possible to consider the taxpayer's personal and/or family situation, determining the subjective net income, since they materialize effective decreases in contributory capacity (CARMO, 2020, p. 69).

On the other hand, article 78-B of the IRS Code states that 35% of the amount borne by any member of the household may be deducted from the taxable amount for general and family expenses, with an

overall limit of €250.00 for each taxpayer, under the terms set out therein. This provision is relevant for this study, considering the difference in consumption patterns between women and men, with the former generally being more disadvantaged and the regressive nature of Value Added Tax (VAT) (CARMO, 2020, p. 70).

3.1.4. Taxation on consumption

Exploring the positive, negative, or neutral implications of consumption taxes is crucial in this context.

Consumption taxes are considered indirect taxes and are an example of promoting horizontal equality since all taxpayers are obliged to pay the same amount. However, even though there are no explicitly discriminatory tax rules in Portugal, each citizen, especially according to gender for this study, has different habits and needs, which, per se, jeopardize tax equity. In addition to the difference in consumption habits, there is sometimes the so-called *pink tax*, i.e., the increase in the price of similar products that are more expensive because they are aimed at women, such as hair removal razors or deodorants. In the United States, a study requested by the government concluded that, on average, personal care products aimed at women were 13% more expensive than similar products for men. In comparison, accessories and clothing for adults were 7% and 8% more expensive, respectively (NEW YORK CITY DEPARTMENT OF CONSUMER AFFAIRS, 2015, p. 5).

In the Portuguese case, an example is purchasing women's menstrual products. The European Parliament Resolution of January 15, 2019, warned of a European menstrual poverty problem. Certain goods, such as these, are used almost exclusively by the female sex and, therefore, involve a disproportionate tax on women.

With this excessive burden on women in mind, in 2022, the Portuguese state reduced VAT on all women's menstrual products to a minimum rate of 6%.[16]

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16. It should be remembered that sanitary towels and tampons were already covered by the 6% rate (VAT Code, List A, 2, 2.5 (c)), as were menstrual cups, which were, however,

Similarly, the 2023 State Budget provides for a study to be carried out on the impact of the pink tax in Portugal to estimate the price differences between similar products bought by men and women.

Under its international and domestic commitments, the Portuguese state is making progress in promoting gender equality, seeking to be the 'engine' of change, leading by example. In recent decades, various efforts have been made to ensure that both sexes have equal opportunities, rights, and duties. Taxes, due to their extra-fiscal component, are an essential tool for promoting fiscal equality between men and women.

3.2. Tax policies and gender inequality: an analysis of the Brazilian scenario

3.2.1. Legislative framework

The 1988 Brazilian Constitution marked the beginning of state reform to put into practice the democratization of access to services and citizen participation (MAZZARDO; AQUINO, 2014, p 2-3). During this period, the state stopped being just a guarantor of minimum rights and became one of the biggest promoters of development, both economically and socially, by guaranteeing social rights.

Concerning gender policies, we would highlight the adoption of distributive, redistributive, regulatory, and constitutive policies.[17]

individualized under (f). With the amendment of Law no. 12/2022, of June 27, the wording of this point was updated to include all menstrual products.

17. Distributive policies refer to decisions made by the government that disregard the issue of limited resources, generating more individual than universal impacts, and that favour certain social groups or regions to the detriment of the whole; they are policies that refer to allocative decisions, without fiscal counterparts. Redistributive policies, on the other hand, are considered to affect a greater number of people and impose concrete, short-term losses for certain social groups and uncertain, future gains for others, because they are those policies that in various ways (transfers, exemptions, and other benefits) redistribute resources of any kind between social groups. Regulatory policies establish standards of behavior, service or product for public and private actors, which discipline aspects of social activity. Finally, constitutive policies aim to establish relations between the various state apparatuses and guide decisions and procedures for public action (DI GIOVANNI, 2009).

They are guided by the historical process and use available social resources to mitigate the burden of inequality and the historical exclusion of women in civil society. According to the Observatory on Gender Equality in Latin America and the Caribbean (ECLAC), this type of policy aims to provide results that promote distributive justice in terms of recognition and representation, strengthening women's achievements in three main areas of concern: physical autonomy, economic autonomy, and autonomy in decision-making.[18]

The public gender policies adopted by Brazil are underpinned by international treaties and conventions, as well as international soft law, mainly represented by the following documents: United Nations Charter (1945); Universal Declaration of Human Rights (1948); Inter-American Convention on the Granting of Civil Rights to Women (1948); Convention on the Political Rights of Women (1953); ILO Convention no. 100 (1951); ILO Convention no. 103 (1952); ILO Convention no. 111 (1958); ILO Convention no. 156 (1981); ILO Convention no. 171 (1990); Convention on the Elimination of All Forms of Racial Discrimination - CERD (1966); American Convention on Human Rights, San José (1969); First World Conference on Women (Mexico City, 1975); Convention on the Elimination of All Forms of Discrimination Against Women - CEDAW (1979); Second World Conference on Women (Copenhagen, 1980); Third World Conference on Women (Nairobi, 1985); United Nations Conference on Environment and Development (Rio, 92); Second World Conference on Human Rights (Vienna, 1993); Third International Conference on Population and Development (Cairo, 94); Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women - Convention of Belém do Pará (1994); IV World Conference on Women (Beijing, 95); II United Nations Conference on Human Settlements - Habitat II'96 (Istanbul, 96);

18. CEPAL - Observatório de Igualdade de Género da América Latina e do Caribe. [S.l]. Available at: https://oig.cepal.org/pt/politicas-justas#:~:text=A%20identifica%C3%A7%C3%A3o%20e%20an%C3%A1lise%20de,de%20representa%C3%A7%C3%A3o%2C%20fortalecendo%20as%20conquistas.

Millennium Declaration (2000); Third World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (Durban, 2001); ILO Convention and Recommendation concerning Decent Work for Domestic Workers (Geneva, 2011); and the Sustainable Development Goals - SDGs of the 2030 Agenda (UN, 2015).

Among the various tools for promoting gender equality, this study proposes a reflection on tax policies. The Brazilian tax model is marked by regressivity and is considered harmful to the lower and middle classes, reinforcing gender inequality. The Brazilian tax structure is also pointed out for penalizing and intensifying inequalities by exempting tax on profits and dividends (VIECELI; AVILA; CONCEIÇÃO, 2020, p. 37 and 48).

Most Brazilian taxes are levied on the consumption of goods and services. Regarding indirect taxes, the rate is fixed and the same for all consumers, except in the case of tax exemptions and benefits.

Regressive taxation, per se, aggravates social inequalities since it disregards everyone's ability to pay. Thus, the lack of state activity to help reduce prices, exempt from taxes, and grant benefits is felt more by women, who are already disadvantaged compared to men regarding average income, supply, and competition for qualified jobs or pay parity. In this sense, the discussion on taxation as an enabler of gender equality is relevant in the Brazilian context since it is still little explored, despite being a demand of the Democratic State of Law inaugurated by the 1988 Constitution (PISCITELLI et al., 2019. p. 5-6).

In the case of the taxation of social nuclei, Brazilian tax policy does not consider the fundamental realities of equal access to state policy, such as the case of pregnant women or single or divorced women with minor children and the difficulties they face in different aspects of keeping their jobs, compared to the same age group of men in the labour market. Thus, just as women encounter more significant barriers when starting in the job market, they also face more tremendous obstacles when it comes to keeping their jobs, which is reflected in higher unemployment rates (VIECELI; AVILA; CONCEIÇÃO, 2020, p. 22).

3.2.2. Consumption taxation

Menstrual precariousness [19] is a reality that has daily implications for women in Brazil. After the issue had been marginalized for decades, in 2021, the National Congress established the Menstrual Health Protection and Promotion Program (BRASIL, 2021) to determine that the basic food baskets delivered should contain female sanitary towels as an essential item. This public policy would benefit girls and women with low family incomes who, until then, had no access to safe and efficient means of controlling their flow during menstruation. However, this measure does not appear sufficient as it does not universally cover all women. In this context, taxation is a significant factor in the accessibility of sanitary pads for women, as this type of product rarely receives any kind of tax exemption, and its tax burden has historically been excessively high when compared to the products in this food basket (NERIS, 2020, p.744). The Program for the Protection and Promotion of Menstrual Health has reflected positively on the taxation of intimate female health products, as states have started to grant exemption from ICMS[20] on female sanitary towels. [21]-[22]

19. Law no. 14.214, of October 6, 2021 defines in its article. 2, item I menstrual precariousness as being the lack of access to hygiene products and other items necessary for the period of female menstruation, or the lack of resources that make it possible to acquire them.

20. Tax on operations related to the circulation of goods and on the provision of interstate and intercity transport and communication services, instituted by the states and the Federal District, which is similar to VAT.

21. In the ICMS Regulations of the State of São Paulo (DECREE No. 45.490, OF NOVEMBER 30, 2000), the exemption is provided for in articles 8 and ANNEX I, article 176:

Article 8 - The transactions and services listed in Annex I shall be exempt from tax.

ANNEX I - EXEMPTIONS

(exemptions referred to in article 8 of these regulations)

Article 176 (ABSORBENTS) - Transactions carried out with internal and external intimate female absorbents, sanitary tampons, menstrual cups and pads, absorbent panties and intimate absorbent cloths, classified under code 9619.00. 00 of the Mercosur Common Nomenclature - NCM, destined for bodies of the Federal, State and Municipal Direct and Indirect Public Administration and their public foundations (ICMS Agreement 187/21). (Article added by Decree 66.388, of 28-12-2021; DOE 29-12-2021; in force on January 1, 2022)

22. The state of Rio Grande do Norte has amended article 27 of the ICMS REGULATIONS to make it exempt from the tax: Art. 27 The following are exempt from ICMS: (...)

However, such policies aimed at women do not reach other products for exclusive or predominantly female use that are still overtaxed in Brazil when compared to the progress made by other countries (NERIS, 2020, p.744). Products used exclusively or predominantly by women currently have a total estimated consumption tax[23] of 30% on contraceptive pills, 37% on diaper rash ointments, 33.75% on baby bottle nipples and 27.25% on breastfeeding pumps, compared to other products such as senior diapers (9.25%), male condoms (9.25%), tire pumps (9.25%) and Viagra (18%). Even in the case of sanitary towels and tampons, the rate imposed by some states is estimated at 27.25%[24]-[25].

Even though female contraception is considered an essential item that makes family planning possible, it is still subject to a high tax burden. Other relevant examples are feminine intimate soaps, a necessary product for women, who are the only consumers of this type of product, which also has a high tax rate (18% ICMS and 10% IPI) and disposable diapers (18% ICMS and 15% IPI), a product predominantly consumed by women, most of whom are single mothers and heads of household (PISCITELLI et al., 2019, p. 5).

LXII - transactions involving internal and external female sanitary pads, tampons, menstrual cups and pads, absorbent panties and absorbent sanitary towels, NCM 9619.00.00, destined for Federal, State and Municipal Direct and Indirect Public Administration bodies and their public foundations, subject to paragraph 11 of this article. (Conv. ICMS 187/21) (AC by Decree 31.101, of 11/22/2021).

23. Taxation on consumption in Brazil is made up of the following taxes: IPI, PIS/Cofins, ICMS.

24. A study presented in the Chamber of Deputies in the discussion on Tax Reform (PEC 45/2019, from the Chamber, and PEC 100/2019, from the Senate) creates a Tax on Goods and Services, along the lines of the Value Added Tax (VAT). Available at: https://www2.camara.leg.br/a-camara/estruturaadm/secretarias/secretaria-da-mulher/noticias/cashback-da-reforma-tributaria-podera-beneficiar-mulheres-e-negros.

25. Brazil has topped the list of countries that tax sanitary pads the most, amounting to 34.48% of their total value, a tax burden comparable to products such as chewing gum (34.24%) or higher than others, such as stuffed rabbits (29.92%), according to information from the government itself taken from the Impostômetro website, available at: <https://impostometro.com.br/home/relacaoprodutos>.

The regressive nature of the Brazilian tax system could impose a vital role on the principle of selectivity to correct or at least minimize the characteristic of regressivity as an instrument of tax injustice. To this end, through selectivity based on the essentiality of products consumed by women, tax policies can ensure that essential goods, consumed mainly by women are taxed at reduced rates or even at zero rates in certain situations.

Nevertheless, the current reality of the Brazilian tax system has not evolved in such a way as to achieve equality between the sexes since the criterion of selectivity due to essentiality is used to overtax cosmetic products, traditionally used for female cosmetic products, which in a historical-social context not only encourages but presupposes a more significant expenditure by the female public on such products (NERIS, 2020, p. 748). The ICMS taxation on cosmetic products, based on the technique of selectivity and being considered *superfluous*, reaches a rate of 25%.[26] National standards recognize this discrepant rate as high (NERIS, 2020, p. 748).

The technique of selectivity based on essentiality provides for the imposition of taxes according to the nature or purpose of the goods or products (PAULSEN, 2020, p. 165), thus guaranteeing a lower tax burden or the granting of tax benefits for products considered essential, such as, for example, products that make up the basic food basket in Brazil and, on the other hand, overloading the tax burden of less essential products. The constitutional basis of tax selectivity based on the essentiality of the product is justified in the sense of preventing the use of the tax element as a mechanism to promote discriminatory activities that are intended to benefit some taxpayers or even harm others unduly (NOVAIS, 2022, p. 108).

However, in a female historical and social context, where the use of cosmetic products is considered an expected standard, under penalty of being *careless* and inappropriate, especially in work environments, such goods are far from being considered superfluous. It is, therefore,

26. As a rule, consumption taxes are limited to rates of between 12 per cent and 22 per cent, depending on the good in question.

appropriate to question the application of the essentiality technique to justify the high tax burden on this category of products (PISCITELLI et al., 2019, p. 4; NERIS, 2020, p. 749). In addition, increased taxes on essentially feminine products, such as breastfeeding pads and pumps, conflict with the constitutionally guaranteed maternity protection (NERIS, 2020, p. 749).

Another fact that proves the low effectiveness of Brazilian fiscal policy in taxing consumption is the disparity in prices between the female and male versions of various products (TORRES, 2019, p. 3). From an economic and fiscal point of view, the phenomenon known worldwide as the *pink tax* also occurs in Brazil. Studies show that women's products cost an average of 7% more than the same products for men. In Brazil, this difference amounts to 12.3%.[27] In line with the options raised by movements that aim to end the *pink tax*, measures such as exempting the production and marketing of essential products for women from taxation, reducing the taxation of cosmetics and other products consumed exclusively or predominantly by women, and equalizing the prices of products aimed at men and women should be taken as a way of promoting fiscal neutrality (BRITO, 2020, p. 5-6), and can therefore promote gender equality.

Finally, when indirect taxes are considered, the tax burden of female-headed households remains at 15.05%, higher than that of male-headed households, whose burden is 14.55%. Furthermore, when considering female-headed households, those with the lowest incomes also pay the highest percentage of taxes, with an average of 29.04% of their income allocated to indirect taxes. This group bears the second highest indirect tax burden (SERAFINI, 2017, p. 14; VIECELI; AVILA, 2023, p. 2).

27. The study was carried out by ESPM and presented in March 2017. Available at: https://notaalta.espm.br/o-assunto-do-dia/mulheres-pagam-mais-por-produtos-rosa/ e https://static.poder360.com.br/2018/07/TAXA-ROSA-GENERO-1.pdf.

3.2.3. Income taxation

As far as direct taxation is concerned, there are few tax policies aimed at promoting gender equality. Income tax (*IRPF*[28]) went through a phase of expansion and increased progressivity from the 1930s onwards, reaching a maximum rate of 65% under the Goulart government. However, subsequent military governments gave "the first nod towards reducing the little tax progressivity that existed" (VIECELI; AVILA; CONCEIÇÃO, 2020, p. 39).

At the moment, the limitation on the amount of the income tax exemption, the lack of progressivity (rates vary from 7.5% to 27.5%), the lack of updating of the IRPF tables, the restricted possibilities for simple deductions for medical and school expenses, or even without any differentiation for larger families, result in a system that does not observe the equality provided for in article 150, I and II, of the Constitution (TORRES, 2019, p. 1-2). 1-2) and compliance with the *fair share*, and consequently, does not contribute to mitigating inequalities between men and women (MOSTAFA, 2021, p. 4).

A recent empirical study, based on data from 2017, found that, excluding the joint declarations of married individuals, 56.8% of individual declarants were men and 43.2% were women (VIECELI; AVILA; CONCEIÇÃO, 2020, p. 46). Mostafa (2021, p. 4) points out that, back in 2016, fewer women filed personal income tax returns, pointing to income inequality and women's inactivity as products of the "social phenomenon of gender". More recently, in 2020, this difference continued, with 56.25% of individual tax filers being men and 43.74% women (VIECELI; AVILA, 2023, p. 12).

When analysing the assets and rights declared, Vieceli, Avila, and Conceição (2020, p. 47) explain that there is an even greater disproportion: 63% are notified by men and 37% by women. In 2020, the disproportion increased: 69.87% of assets and rights were reported by men and 30.13% by women (VIECELI; AVILA, 2023, p. 12). Finally, the studies show that men make up most people in all brackets.

28. Imposto de renda da pessoa física, brazilian expression, that means individual income tax.

Still, from 30 minimum monthly salaries onwards, the participation of women falls until it reaches only 14% in 2017, in the bracket above 320 minimum monthly wages (VIECELI; AVILA; CONCEIÇÃO, 2020, p. 50). As such, the empirical research mentioned above proves the inequalities between men and women in terms of the proportion of declarants, income, and ownership of declared assets and rights.

As for education and medical expenses deductions, the same study shows no significant disparities between the sexes, with only 2.33%. Women represent 43.2% of tax filers, and their deductions comprise 42.21% of the total (VIECELI; AVILA; CONCEIÇÃO, 2020, p. 46). In this respect, too, women are doubly penalized: they are the ones who declare a minor income, but when it comes to deductible expenses, they are on an equal footing with men.

Mostafa (2021, p. 12) points out that the IRPF co-finances the dependence of tax filers and their families through deductions and that only the middle and upper classes can access this co-financing of private activities that can be deducted. In this way, deductions are used more by those with higher incomes (MOSTAFA, 2021, p. 16). In these terms, IRPF deductions are regressive rather than being neutral.[29]

Finally, this study shows that *women pay a higher rate of income tax in almost all bands, except the two bands between 80 and 240 minimum wages, in which men's rates are slightly higher than women's* (VIECELI; AVILA; CONCEIÇÃO, 2020, p. 49). According to the authors, this is because men have higher exempt incomes, i.e. the individuals who receive profits are probably primarily men, thus concluding that women pay more IRPF than men in the current tax configuration (VIECELI; AVILA; CONCEIÇÃO, 2020, p. 50). This factor was also verified by Mostafa (2021, p. 4), and in 2016, the effective rate of male taxpayers was also lower than that of women, even when they obtained a gross income 25% lower.

Finally, there is one more aspect to consider. The overload of unpaid domestic work among women impacts their entry into the labour

29. 149% higher for taxpayers who file a complete tax return (MOSTAFA, 2021, p. 16).

market and their access to monetary and time resources[30], which are ultimately reflected in their disposable income for the consumption of goods, as mentioned in the previous topic.

Thus, in the Brazilian case, direct taxation alters the income distribution between men and women (MOSTAFA, 2021, p. 17) insofar as it directly or indirectly influences disposable income.

4. Conclusion

The 2030 Agenda and the commitment by States to implement the SDGs symbolize an important milestone in the promotion of multidisciplinary, innovative, and necessary sustainable development. Despite the evolution of recent decades, particularly concerning globalisation and the economy, we can see that many inequalities still exist, and an effort is needed from all of us as citizens, as well as from States and international bodies, to reduce them.

Gender inequality is a real example of these inequalities that have a profound impact on everyday life and the future of the society in which we live. Inequality in the protection, rights, and duties of women undermines the sustainability of the state, the production of wealth, and the increase in people's quality of life.

With this panorama in mind and the role of the various international and national *stakeholders*, SDG 10, mainly target 10.4, assigns the state the task of promoting gender equality through fiscal and social measures, thus making SDG 5 a reality. Tax measures are constructed and moulded according to the unique characteristics of each country, its society, and its government. This diversity of contexts is

30. Vieceli, Avila and Conceição (2020, p. 23) explain that the results of a research carried out in 2018 indicate that *the rate of carrying out household chores was 92.2% among women, and 78.2% for men, in relation to caring for people, the female participation rate remained at 37% while among men it was 26.1%. The biggest discrepancies are in the weekly working hours by gender: women spent an average of 21.3 hours on domestic care and chores, while men spent 10.9 hours, i.e. women's working hours exceeded men's by 10.4 hours a week.*

essential for discussing and improving existing tax options regarding gender (dis)equality.

The tax models analysed, even if unconsciously, penalise and intensify gender inequalities. However, underpinned by international *hard* and *soft law*, there has been progress in public tax policies aimed at gender equality. Thus, analysing the Brazilian and Portuguese tax systems illustrates what has been mentioned above. Despite the different contexts, some measures are equivalent, namely the reduction of the tax burden on women's menstrual products.

The comparative study also showed that, due to their extra-fiscal component, taxes are an essential tool for promoting fiscal equalisation between men and women. The conclusion is that there is certainly room for improvement in tax measures capable of guaranteeing women's rights and reducing the gender inequalities that are still so marked.

Referências

AJIDE, Folorunsho M.; OSINUBI, Tolulope T.; DADA, James T, (2021). Economic Globalization, Entrepreneurship, and Inclusive Growth in Africa. **Journal of Economic Integration:** vol.36, no. 4. https://doi.org/10.11130/jei.2021.36.4.689

BANTEKAS, Ilias; OETTE, Lutz (2020). **International Human Rights Law and Practice.** Cambridge University Press, Third edition, ISBN 978-1-108-71175-3

BYANYIMA, Winnie (2019). FOREWORD in **Tax, Inequality, And Human Rights.** Edited by Philip Alston and Nikki Reisch. New York: Oxford University Press. ISBN 9780190882228

BRASIL (2021). Programa de Proteção e Promoção da Saúde Menstrual. Available at: https://www.gov.br/saude/pt-br/assuntos/noticias/2022/novembro/ministerio-da-saude-lanca-programa-de-protecao-e-promocao-da-saude-menstrual

BRITO, Maíra Konrad de (2020). Tax women: a desigualdade de gênero na tributação. Uma das vertentes discriminatórias implícitas – porém muito

representativa– no Brasil e no mundo é a pink tax. **JOTA.** Available at: https://www.jota.info/opiniao-e-analise/colunas/women-in-tax-brazil/tax-women-a-desigualdade-de-genero-na-tributacao-20032020

CAPRARO, Chiara; CHRISTIAN AID (2014). **Taxing men and women: why gender is crucial for a fair tax system.** Available at: https://www.shareweb.ch/site/DDLGN/Documents/Gender_%20taxing-men-and-women-gender-analysis-report-Christian%20Aid%20july-2014.pdf

CARMO, Marta (2020). Justiça Tributária e Direitos Humanos: As questões de igualdade de género. *In*: COUTINHO, Francisco Pereira; OLIVEIRA, Emelin de; CARAPÊTO, Maria João (ORGS.). **Livro de Atas da Conferência Igualdade de Género e Mobilidade**: desafios e oportunidades para o desenvolvimento na lusofonia. Lisboa: Universidade Nova de Lisboa Faculdade de Direito. E-ISBN 978-989-8985-07-1.

CARMONA, Magdalena Sepúlveda (2018). A injustiça fiscal tem rosto de mulher: Ações não são neutras em gênero – Faltam políticas fiscais progressivas. **Poder 360**. Available at: https://www.poder360.com.br/opiniao/a-injustica-fiscal-tem-rosto-de-mulher-diz-magdalena-sepulveda/

CHANCEL, Lucas; PIKETTY, Thomas (2021). Global Income Inequality, 1820-2020: The Persistence and Mutation of Extreme Inequality. **Working Paper n. 2021/19 – World Inequality Lab**. Available at: https://wid.world/document/longrunpaper/

COBHAM, Alex (2019). The State Role *in* **Tax Avoidance in Tax, Inequality, And Human Rights.** Edited by Philip Alston and Nikki Reisch. New York: Oxford University Press. ISBN 9780190882228

COMISSÃO PARA A CIDADANIA E A IGUALDADE DE GÉNERO (CIG) (2022). Igualdade de Género em Portugal: Boletim Estatístico 2022, p. 80, 2022. Available at: https://www.cig.gov.pt/wp-content/uploads/2022/12/Igualdade-de-Genero-em-Portugal_-Boletim-Estatistico-2022P1.pdf.

COMISSÃO PARA A CIDADANIA E A IGUALDADE DE GÉNERO (CIG), Igualdade de Género em Números: Indicadores Chave 2022, 2022. Available at: https://www.cig.gov.pt/wp-content/uploads/2023/02/2023_02_20_IC_Paginados-A4.pdf.

CONSELHO DA EUROPA, Relatório final do Grupo de Especialistas sobre a Orçamentação em função do Género (EG-S-GB), EG-S-GB (2004)

RAPFIN; Divisão da Igualdade, Direção-Geral dos Direitos Humanos, Conselho da Europa, Estrasburgo, p. 10, 2005.

COUTINHO, Francisco Pereira; OLIVEIRA, Emelin de; CARAPÊTO, Maria João (ORGS.). **Livro de Atas da Conferência Igualdade de Género e Mobilidade**: desafios e oportunidades para o desenvolvimento na lusofonia. Lisboa: Universidade Nova de Lisboa Faculdade de Direito, 2020. e-ISBN 978-989-8985-07-1.

GRANT, M. J.; BOOTH (2009). A. A typology of reviews: An analysis of 14 review types and associated methodologies. **Health Information and Libraries Journal,** v.26, n.2, p,91-108. DOI: 10.1111/j.1471-1842.2009.00848.x Available at: https://doi.org/10.1111/j.1471-1842.2009.00848.x

INSTITUTO EUROPEU PARA A IGUALDADE DE GÉNERO (2017). Gender budgeting, Publications Office, p. 4. Available at: https://data.europa.eu/doi/10.2839/07916.

KOHONEN, Matti; SARIN, Radhika; BOERRILD, Troels; LIVINGSTON, Ewan (2019). Creating A Human Rights Framework For Mapping And Addressing Corporate Tax Abuses in Tax, Inequality, And Human Rights. Edited by Philip Alston and Nikki Reisch. New York: Oxford University Press. ISBN 9780190882228

LANGEVANG, Thilde; GOUGH, Katherine (2012). Diverging pathways: young female employment and entrepreneurship in sub-Saharan Africa. **The Geographical Journal**, v. 178, n. 3, p. 242-–252. DOI: 10.1111/j.1475-4959.2011.00457.x.

LIMBERG, Julian (2019). Tax the rich"? The financial crisis, fiscal fairness, and progressive income taxation. **European Political Science Review,** 11(3), 319–336. https:doi.org/10.1017/ S1755773919000183

MCGOWAN, Pauric; REDEKER, Caroline Lewis; COOPER, Sarah Y.; GREENAN, Kate (2012). Female entrepreneurship and the management of business and domestic roles: Motivations, expectations and realities. **Entrepreneurship & Regional Development**, v. 24, n. 1-2, p. 53-72. DOI: https://doi.org/10.1080/08985626.2012.637351

MAZZARDO, Luciane de Freitas; AQUINO, Quelem Brondani (2014). Políticas tributárias e gênero: um debate necessário para a efetivação da transversalidade das políticas públicas com a perspectiva de gênero. **XI Seminário Internacional de demandas sociais e políticas públicas na sociedade contemporânea**. Available at: https://online.unisc.br/acadnet/anais/index.php/sidspp/article/view/11832/1522

MOSTAFA, Joana (2021). Gênero e Tributos no Brasil. Brasília: **IPEA**. Disponível em: https://www2.camara.leg.br/atividade-legislativa/comissoes/comissoes-permanentes/comissao-de-defesa-dos-direitos-da-mulher-cmulher/arquivos-de-audio-e-video/apresentacao-joana-05.12

NERIS, Brenda Borba dos Santos (2020). Políticas Fiscais e Desigualdade de Gênero: Análise da tributação incidente nos absorventes femininos. **FIDES,** v. 11, n. 2, p 743-759.

NEW YORK CITY DEPARTMENT OF CONSUMER AFFAIRS (2015). From Cradle to Cane: The Cost of Being a Female Consumer - A Study of Gender Pricing in New York City. Available at: https://www.nyc.gov/assets/dca/downloads/pdf/partners/Study-of-Gender-Pricing-in-NYC.pdf

NOVAIS, Rafael (2022). Direito **Tributário Facilitado.** Grupo GEN, 6th edição. ISBN: 9786559645268

OCDE (2023). Government at a Glance 2023, Paris, OECD Publishing. DOI: https://doi.org/10.1787/3d5c5d31-en.

OCDE (2023). Joining Forces for Gender Equality: What is Holding us Back?, Paris, OECD Publishing. DOI: https://doi.org/10.1787/67d48024-en.

OCDE (2023). OECD Best Practices for Gender Budgeting, OECD Journal On Budgeting, Volume 2023, Issue 1. DOI: https://doi.org/10.1787/c947ecd0-en.

OCDE (2022). Tax Policy and Gender Equality: A Stocktake of Country Approaches, Paris, OECD Publishing. DOI: https://doi.org/10.1787/b8177aea-en.

PISCITELLI, Tathiane; MASCITTO, Andréa; PRETO, Raquel; GRUPENMACHER, Betina, RODRIGUES, Catarina; LARA, Daniela Silveira; PAZELLO, Fernanda Ramos; CUBAS, Renata Correia (2019). Tributação e gênero. **JOTA.** Available at: https://www.jota.info/opiniao-e-analise/artigos/tributacao-e-genero-03052019.

RODRÍGUEZ, Eleonora Lozano (2021). Tax Incentives in Pacific Alliance Countries, the BEPS Project (Action 5), and the 2030 Sustainable Development Agenda in **Taxation, International Cooperation and the 2030 Sustainable Development Agenda.** Edited by Irma Johanna Mosquera Valderrama, Dries Lesage and Wouter Lips. Cham: Springer. https://doi.org/10.1007/978-3-030-64857-2

ROTHER, Edna Terezinha (2007). Systematic Literature Review X Narrative Review. **Acta Paulista de Enfermagem,** São Paulo, SP, v. 20, n. 2, p.

5-6. Available at: https://www.scielo.br/j/ape/a/z7zZ4Z4GwYV6FR7S9F-HTByr/?format=pdf&lang=en

SAGNIER, Laura et al. (2019). As mulheres em Portugal, hoje: quem são, o que pensam e como se sentem, Fundação Francisco Manuel dos Santos. Available at: https://ffms.pt/pt-pt/estudos/mulheres-em-portugal-hoje-0

SERAFINI, Verónica (2017). La igualdad de género y sus vínculos con la fiscalidad. In: LEÓN, Verónica (ED.). **¿Hasta cuándo las guaridas fiscales? America Latina em movimento,** n. 522. ISSN: 1390-1230.

STOTSKY, J. (2016). Gender budgeting: fiscal context and current outcomes, **Fundo Monetário Internacional,** WP/16/149, Washington DC, p. 12, .

TAHIR, Muhammad Wajid; KAUSER, Rubina; BURY, Madeline; BHATTI, Javed Shafiq (2018). 'Individually-led' or 'female-male partnership' models for entrepreneurship with the BISP support: The story of women's financial and social empowerment from Pakistan. **Women's Studies International Forum**, v. 68, p.1-10. DOI: https://doi.org/10.1016/j.wsif.2018.01.011.

TALLADA, Ana (2017). La igualdad de género en la agenda de la justicia fiscal *In*: LEÓN, Verónica (ED.). **¿Hasta cuándo las guaridas fiscales?** America Latina em movimento, n. 522. ISSN: 1390-1230.

TORRES, Heleno Taveira (2019). Desigualdade de gênero e na tributação da mulher prejudicam desenvolvimento. **Consultor Jurídico**. Available at: https://www.conjur.com.br/2019-jun-12/consultor-tributario-desigualdade-tributacao-mulher-prejudicam-desenvolvimento.

UN - UNITED NATIONS (2015). **Transforming our World: the 2030 Agenda for Sustainable Development.** Available at: https://sdgs.un.org/sites/default/files/publications/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf

VIECELI, Cristina Pereira (2021). O que é política tributária com viés de gênero e como ela impacta nas desigualdades entre homens e mulheres. **Democracia e Mundo do Trabalho em Debate.** Available at: https://www.dmtemdebate.com.br/o-que-e-politica-tributaria-com-vies-de-genero-e-como-ela-impacta-nas-desigualdades-entre-homens-e-mulheres/#:~:text=Uma%20pol%C3%ADtica%20tribut%C3%A1ria%20com%20vi%C3%A9s,ra%C3%A7a%20e%20classe%2C%20e%20os

VIECELI, Cristina Pereira; AVILA, Róber Iturriet; CONCEIÇÃO, João Batista Santos (2020). **Estrutura tributária brasileira e seus reflexos nas**

desigualdades de gênero. Instituto Justiça Fiscal. Available at: https://enep.sep.org.br/uploads/1727_1642013040_SEP_COM_ID_pdf_ide.pdf

VIECELI, Cristina Pereira; AVILA, Róber Iturriet (2023). TRIBUTAÇÃO E DESIGUALDADE DE GÊNERO E CLASSE NO BRASIL. Uma análise a partir do IRPF 2020 e da POF 2017-2018. **Instituto Justiça Fiscal.** Available at: https://library.fes.de/pdf-files/bueros/brasilien/20142.pdf

WALKER, Benjamin (2019). Facilitating SDGs by Tax System Reform *in* **Sustainable Development Goals Harnessing Business to Achieve the SDGs through Finance, Technology, and Law Reform.** Edited by Julia Walker, Alma Pekmezovic, and Gordon Walker. John Wiley & Sons Ltd. ISBN 978-1-119-54180-6

Criptoativos, tributação agravada por motivos ambientais (*mining*)

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Resumo: O *mining* de criptoativos caracteriza-se como um sistema de validação de novas transações em blockchain, através da resolução de equações matemáticas, com a utilização de poder computacional. A resolução de tais equações requer vários "*miners*" competindo entre si, sendo que o primeiro a confirmar a transação obtém o criptoativo. Este processo é ineficiente porque consome uma quantidade significativa de energia para o ganho de apenas um e, portanto, contribui para poluir o meio ambiente. Como tal, as políticas fiscais destinadas a influenciar e modelar o comportamento dos sujeitos passivos, a fim de torná-los mais amigos do ambiente, têm sido uma das escolhas mais populares entre os estados, especialmente na UE. Pelas mesmas razões, e conforme recomendado pela Comissão Europeia na sua Comunicação "Digitalizar o sistema energético - Plano de ação da UE", a Lei do Orçamento do Estado Português para 2023 introduziu uma distinção entre a tributação proveniente de mineração, das demais atividades que envolvem criptoativos, sujeitando as primeiras a uma carga tributária mais elevada. Além disso, no âmbito da meta ODS 13: Ação Climática, a implementação de impostos sobre o carbono está a expandir-se entre os estados-membros, especialmente em Portugal, pelo que estão a ser lançados mais impostos ambientais direcionados para a economia digital. Neste contexto, esta investigação pretende conhecer o atual regime de tributação do *mining* e explorar a possibilidade de políticas fiscais que visem combater as suas externalidades negativas. Este estudo poderá contribuir para a discussão

teórica sobre o papel da tributação extrafiscal no combate às alterações climáticas e a possível necessidade de novos impostos/medidas que incidam nas novas realidades da economia digital.

Palavras-Chave: *Blockchain*; criptoativos, *mining*; meio ambiente; ação climática.

Abstract: Crypto-assets' mining is characterized by a system of validation and addition of new transactions to a blockchain, by solving mathematical equations using computer technology. Solving such equations requires several "miners" competing with each other, whereby the first to confirm the transaction obtains the crypto-asset. This process is inefficient because it consumes a significant amount of energy and therefore contributes to polluting the environment. As such, tax policies aimed at influencing taxpayers' behavior, in order to make it more ecologically friendly have been one of the most popular choices among states, especially in the EU. For these same reasons, and as recommended by the European Commission in its Communication "Digitalisation of the Energy System - EU Action Plan", the Portuguese State Budget Law for 2023 introduced a distinction between the taxation of mining and other activities involving crypto-assets in general, subjecting the first to a higher tax burden. Moreover, under Goal 13 of the SDGs, Climate Action, the implementation of carbon taxes is expanding among state member especially in Portugal, so more environmental taxes directed to the digital economy are forthcoming. In this context, this research aims to ascertain the current taxation regime of the mining phenomenon and explore the possibility of tax policies aimed at combating its negative externalities. This study may contribute to the theoretical discussion on the role of extra-fiscal taxation in tackling climate change and the possible need for new taxes/measures that focus on the new realities of the digital economy.

Keywords: Blockchain; crypto-assets, mining; environmental; climate action.

1. Introdução

Com o desenvolvimento da economia digital, em particular com o surgimento dos criptoativos, a atividade de mineração ("*mining*"), tem vindo a tornar-se cada vez mais sofisticada.

Podemos descrever a atividade de *mining* de criptoativos como um sistema de validação de novas transações em *blockchain*, através da resolução de equações matemáticas, com a utilização de poder computacional. Estas transações são processadas de forma descentralizada, encontrando consenso com outros *miners* nessa mesma rede *blockchain*[1]. Essas transações envolvem vários *miners* que competem entre si, sendo que apenas o primeiro a confirmar a transação (*i.e.*, de adicionar o próximo bloco à *Blockhain*), obtém o criptoativo. Em função dos blocos que cada *miner* processa, é atribuído uma quantia de criptoativos ("*remuneração*").

Este processo revela-se, no entanto, ineficiente do ponto de vista energético, uma vez que todos estes mineiros competem entre si, utilizando poder computacional, para o ganho de apenas um.

O *mining* de determinados criptoativos tem vindo a aumentar nos últimos anos, sendo o exemplo paradigmático a *Bitcoin*. Uma vez que o número de muitos criptoativos é finito, foi necessário tornar a mineração mais difícil, tornando as equações matemáticas progressivamente mais complexas.[2]

Assim, o *mining* passou a ser um processo intensivo, que agora exige a utilização de equipamentos computacionais cada vez mais sofisticados para resolver algoritmos que são cada vez mais complexos.

Dada a progressiva valorização de alguns destes criptoativos, a concorrência para a sua mineração também aumentou, o que contribui para a necessidade de utilização de equipamentos mais rápidos e eficientes. Por isso, hoje, não basta um simples computador pessoal para ser um *miner*, mas sim a utilização de *hardware* concebido especificamente

1. Cf. António Vilaça Pacheco, Bitcoin, Self PT, Carcavelos, 2021, p. 20.
2. *Ibid*, p. 75.

para o processo. Desta forma, a capacidade de um mineiro é proporcional ao seu poder computacional, que quanto maior for, maior será a probabilidade de resolver primeiro a equação.

Tal resulta que, quanto mais computadores estiverem à procura de resolver estas equações, mais fácil será de validar a transação. Agora, imagine-se o que são milhares de *miners*, cada qual com vários equipamentos, na tentativa de obtenção de um criptoativo, *i. e.*, na tentativa de validar a transação em primeiro lugar. Por tudo isto, hoje em dia, os *miners* acabam por ser empresas ou empresários que se dedicam exclusivamente (ou predominantemente) a esta atividade, criando verdadeiras "*mining facilities*", ou seja, estruturas físicas exclusivamente dedicadas à mineração.

Dada a elevada utilização de poder computacional, não será difícil de conceber que o *mining* consome intensivamente recursos energéticos, o que resulta em significativas externalidades negativas ambientais, que se refletem, inevitavelmente, na pegada ecológica.[3]

2. Tutela ambiental: a extrafiscalidade enquanto política ambiental

Como referimos, o *mining* gera um custo social significativo através da forte pressão que a sua produção exerce sobre as fontes produtoras de energia não-renovável, contribuindo para a poluição do meio ambiente.

Regra geral, a necessidade de lidar com a ação climática e promover o desenvolvimento sustentável, leva a que sejam criados mecanismos para desencorajar atividades poluentes.

Um desses mecanismos passa pela criação de tributos que incidam sobre este tipo de atividades, na tentativa de obter uma modelação

3. Cf. Baer et al., *Taxing Cryptocurrencies*, International Monetary Fund Working Paper, July 5th, 2023, p. 14. Neste sentido, estima-se que, em 2021, a Bitcoin e Ethereum usaram mais eletricidade do que Bangladesh ou a Bélgica, sendo responsáveis por 0.28% da emissão global de gases de efeito estufa.

de comportamentos.[4] O objetivo da introdução no direito fiscal da preocupação ambiental levou à criação de tributos "*extrafiscais*", que visam atingir outros objetivos que não apenas a arrecadação de receitas, correspondendo a um "*conjunto de normas que, embora formalmente integrem o direito fiscal, tem por finalidade principal ou dominante a consecução de determinados resultados económicos ou sociais através da utilização do instrumento fiscal e não a obtenção de receitas para fazer frente face às despesas públicas*".[5]

Com esta técnica de política fiscal, o legislador imputa a certos indivíduos ou grupos, os custos sociais ("*social costs*") associados a determinados comportamentos ou estruturas de produção.[6]

Em Portugal, existem várias manifestações destes tributos extrafiscais, nomeadamente quanto ao Imposto Sobre Produtos Petrolíferos ("ISP"), que procura desencorajar o uso de combustíveis fósseis e incentiva a utilização de fontes de energia mais limpas.

Para além do mais, no âmbito da Agenda 2030 – Objetivos de Desenvolvimento Sustentável ("ODS"), adotada por todos os Estados-Membros das Nações Unidas em 2015, e que define as prioridades e aspirações do desenvolvimento sustentável global para 2030 e procura mobilizar esforços globais à volta de um conjunto de objetivos e metas comuns, no seu Objetivo 13 ("Ação Climática"), indica que devem ser tomadas "*medidas urgentes para combater as mudanças climáticas e seus impactos. Fortalecer a resiliência e a capacidade de adaptação aos perigos e desastres naturais relacionados ao clima. Integrar soluções e medidas de mudança climática nas políticas, estratégias e planejamento nacionais. Melhorar a educação sobre mitigação das mudanças climáticas, redução de impacto e alerta precoce*".[7]

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4. Cf. Ana Paula Dourado, Direito Fiscal, Almedina, Coimbra, 2015, p. 69.

5. Cf. José Casalta Nabais, O dever fundamental de pagar impostos, Almedina, Coimbra, 2004, p. 629.

6. Cf. Filipe de Vasconcelos Fernandes, A Contribuição Extraordinária sobre o Setor Energético – Regime Fiscal e Constitucional, Gestlegal, Coimbra, 2019, p. 20.

7. Disponível para consulta em: https://ods.pt/objectivos/13-combater-as-alteracoes-climatericas/.

Face a esta mudança de paradigma, tem-se verificado a formação de um corpo cada vez mais robusto de jurisprudência comunitária nesta matéria, por ação da integração negativa promovida pelo Tribunal de Justiça da União Europeia ("TJUE"), que tem sido chamado a decidir em diferentes casos sobre a conformidade de tributos ambientais (normalmente setoriais) instituídos unilateralmente pelos Estados membros, nas mais diversas indústrias, como os transportes, energia e agricultura, entre outros.[8]

Em síntese, a tributação agravada por motivos ambientais pode apresentar um caminho promissor para enfrentar os desafios urgentes da degradação ambiental e promover o desenvolvimento sustentável. Ao internalizar externalidades, modificar comportamentos e gerar receitas, esta abordagem pode incentivar a transição para práticas mais sustentáveis e verdes. No entanto, é necessário considerar cuidadosamente as preocupações económicas e a coesão do sistema tributário português, de modo a minimizar as distorções e a perda de competitividade no plano internacional.

3. O *mining* no atual Ordenamento Jurídico Português

3.1. Generalidades

Em Portugal, o enquadramento dos rendimentos obtidos com criptoativos ficou pela primeira vez expressamente consagrado na Lei n.º 24-D/2022, de 30 de dezembro, que aprovou o Orçamento de Estado para 2023 ("LOE23"). Desta forma, o legislador português, em linha com a definição consagrada pelo Regulamento (UE) 2023/1114, de 31 de maio de 2023 relativo aos mercados de criptoativos ("Regulamento MiCA"), definiu criptoativo como "*toda a representação digital de valor ou direitos que possa ser transferida ou armazenada*

8. Para uma análise mais aprofundada da jurisprudência neste domínio, por todos: Mastellone, Pietro, The emergence and Enforcement of Green Taxes in the European Union – Part 2, IBFD, European Taxation 2014 (Volume 14, no.12), pp. 252-258.

eletronicamente recorrendo à tecnologia de registo distribuído ou outra semelhante".[9-10]

No mesmo sentido, a LOE23 passou também a referir pela primeira vez, a figura da mineração de criptoativos sem, contudo, avançar com uma definição. Até à data da redação do presente artigo, desconhecemos a sua existência no Ordenamento Jurídico Português, sendo que o próprio Regulamento MiCA também não apresenta qualquer definição.

Ainda assim, a LOE23 enquadra os rendimentos derivados da mineração de criptoativos enquanto atividade comercial (Categoria B)[11] pelo seu carácter de habitualidade e orientação para a obtenção de lucros[12]. Trata-se essencialmente da posição que já vinha sendo assumida pela Autoridade Tributária e Aduaneira ("AT") através da Informação Vinculativa proferida no Processo n.º 5717/2015 de 27-12-2016, nos termos da qual, caso a atividade de transação de criptoativos seja exercida por um sujeito passivo com carácter de habitualidade e regularidade, e com escopo lucrativo, tais rendimentos devem ser declarados e tributados como rendimentos profissionais.

Caso tais rendimentos provenham de uma atividade empresarial, deverão ser aplicadas as taxas gerais e progressivas constantes do Código do IRS, conforme já decorre atualmente das regras aplicáveis aos rendimentos da Categoria B.

Quanto ao âmbito de determinação do rendimento tributável, no âmbito do regime simplificado do IRS (aquele onde em regra, os sujeitos passivos de IRS, não tenham ultrapassado no período de

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9. Cf. artigo 10.º, n.º 17 do Código do IRS.

10. De acordo com o artigo 10.º, n.º 18 do Código do IRS, ficam assim excluídos desta definição, os criptoativos únicos e aqueles que não sejam fungíveis com outros criptoativos comummente conhecidos como "NFTs" ("*non-fungible tokens*"), em linha com o Regulamento MiCA. Os NFTs correspondem a um direito de propriedade sobre um ativo digital único (como seja uma imagem digital única), não permutável nem divisível.

11. Cf. artigo 4.º, n.º 1, al. o) do Código do IRS.

12. A atividade deve ser exercida de forma estável e regular, estando associadas a uma estrutura profissional que tenha feito investimentos e encargos e que constitua uma das fontes principais de rendimento daquele sujeito passivo.

tributação anterior um montante anual ilíquido de 200.000 EUR), o imposto apenas recai sobre uma parte do rendimento bruto anual. Desta forma, são aplicados determinados coeficientes aos rendimentos auferidos, para determinar-se a percentagem de rendimentos sujeita a tributação. Contudo, enquanto se aplica o coeficiente de 0,15 às operações com criptoativos em geral (*i. e.*, ocorre a não sujeição tributação, em sede de Categoria B, de 85% dos rendimentos obtidos no âmbito deste tipo de operações e apenas 15% dos rendimentos será tributado às taxas gerais progressivas, referidas de IRS, juntamente com os restantes rendimentos)[13], aplica-se à mineração o coeficiente de 0,95, pelo que apenas 5% dos rendimentos não são sujeitos a tributação[14]. Para além disso, neste regime, não são dedutíveis as despesas incorridas com a atividade, para o apuramento do rendimento tributável.

Caso o sujeito passivo seja um sujeito passivo que opte ou seja obrigado a ter contabilidade organizada (aqueles que registem no período de tributação anterior, um montante anual ilíquido de rendimentos superior a 200.000 EUR), a determinação do rendimento tributável calcula-se de acordo com as regras estabelecidas no Código de IRC, com as necessárias adaptações.[15]

Neste regime, as despesas e encargos suportados efetivamente suportados com a atividade de mineração serão deduzidas aos rendimentos obtidos. A determinação da taxa de imposto será aquela que resultar do respetivo resultado contabilístico.

O facto gerador de rendimento considera-se obtido no momento da alienação onerosa dos criptoativos[16].

Para além disso, o legislador consagrou ainda um *exit tax*, ao equiparar a alienação onerosa de criptoativos à cessação de atividade e à

13. Cf. artigo 31.º, n.º 1, al. a) do Código do IRS.
14. Cf. artigo 31.º, n.º 1, al. d) do Código do IRS.
15. Cf. artigo 32.º do Código do IRS.
16. Cf. artigo 31.º, n.º 17 do Código do IRS.

perda da qualidade de residente em território português,[17] presumindo-se como valor de alienação, o seu valor de mercado à data da alienação.[18]

Em sede de IRC, as pessoas coletivas que registem na sua contabilidade ganhos com criptoativos, devem considera-los para o apuramento do seu lucro tributável. Neste cenário, serão dedutíveis todas as despesas incorridas, que se demonstrem indispensáveis à obtenção desse rendimento.[19]

No âmbito do regime simplificado do IRC e das operações com criptoativos, aplicam-se os mesmos coeficientes previstos no regime simplificado do IRS, não existindo possibilidade de dedução de gastos, os quais se encontram já presumidos nos respetivos coeficientes.[20]

3.2. Um tributo de base ambiental

Conforme referido, atendendo ao impacto ambiental da atividade de mineração, apenas 5% dos rendimentos obtidos não são sujeitos a tributação. Esta opção legislativa surge em linha com as recomendações dadas pela Comissão Europeia na sua Comunicação "Digitalizar o sistema energético - plano de ação da EU"[21].

Aqui, a Comissão Europeia propôs um plano de ação que prevê a redução do consumo de energia pelo setor tecnológico e apela aos países para estarem "preparados" para travar a mineração de criptoativos.

A proposta pretende dotar os consumidores de ferramentas para controlarem o seu próprio consumo e vem introduzir medidas para reduzir o uso de eletricidade no setor tecnológico e reforçar as redes energéticas.

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17. Cf. artigo 31.º, n.º 18, al. a) e b) do Código do IRS.

18. Cf. artigo 52.º, n.º 4 do Código do IRS.

19. Cf. artigo 23.º, n.º 1 do Código do IRC.

20. Cf. artigo 86.º-B, n.º 1, als. e) e i) do Código do IRC.

21. Cf. Proposta de Alteração apresentada pelo Partido Socialista ("PS") à Proposta de Lei n.º 38/XV/1.ª, que aprovou o Orçamento do Estado para 2023.

A Comissão pretende dessa forma baixar a dependência europeia de combustíveis fósseis importados e a exposição à volatilidade dos preços, privilegiando a implementação de mecanismos que permitam a redução da pegada de carbono, o qual não seria inovador, pois veja-se que já antes foram criados tributos que visam onerar custos com produtos poluentes, tal como o anteriormente referido ISP.

Contudo, verifica-se que, sobre a atividade de mineração, não incide um regime específico de tributação agravada em Portugal, o que se poderá entender face aos desafios da sua criação.

Em primeiro lugar, dada a grande volatilidade de variações de preço em curtos períodos de tempo, pois atribuir um valor monetário preciso às recompensas obtidas na mineração, pode ser um processo complexo, uma vez que o valor desses ativos é influenciado pela taxa de câmbio das criptoativos em relação às moedas fiduciárias.

Neste sentido, existe a possibilidade de considerar o momento em que os lucros provenientes dos criptoativos se encontram à disposição do indivíduo, ou, no momento em que o mesmo realize a sua alienação onerosa.

Outro desafio técnico está relacionado com a determinação do valor justo dos ativos criptográficos gerados pelos mineiros. Atribuir um valor monetário preciso às recompensas obtidas na mineração, como as novas unidades de criptoativos criadas ou as taxas de transação recebidas, além dos diferentes métodos de recompensa utilizados em diferentes protocolos de mineração, como o "*Proof of Work*" (PoW) e o "*Proof-of-Stake*" (PoS), exigem diferentes abordagens de avaliação, aumentando a complexidade da administração do tributo.

Para além disso, a quantificação precisa do consumo de energia requer a monitorização dos aparelhos de mineração, uma vez que a eficiência energética pode variar dependendo do hardware utilizado, das configurações personalizadas e das estratégias de mineração adotadas pelos sujeitos passivos.

Por outro lado, o facto de os criptoativos terem uma natureza descentralizada, pode dificultar a identificação precisa dos mineiros e o rastreamento de suas atividades ou simplesmente do proprietário de determinadas carteiras virtuais.

A tributação da mineração de criptoativos enfrenta ainda o desafio associado à complexidade técnica desta atividade, resultante da utilização da tecnologia *Blockchain*, algoritmos de consenso e *hardware* específico, como as chamadas "*Graphics Processing Units*" (GPUs) ou "*Application-Specific Integrated Circuits*" (ASICs).[22]

Essa complexidade técnica cria obstáculos ao estabelecimento de critérios claros para a quantificação da matéria tributável e até mesmo da verificação de um eventual facto tributário, o que pode revelar um custo administrativo indesejado pelas autoridades tributárias e, por conseguinte, uma carga insustentável de *compliance* fiscal nesta matéria.

Veja-se que a monitorização de todas as transações e operações desta atividade, que muitas vezes poderão ser aos milhares, será difícil tanto para o sujeito passivo como para a própria AT.

Por consequência, no atual sistema jurídico-tributário português, não está prevista qualquer incidência que vise penalizar, por via fiscal, a atividade de *mining per se*. No caso do IRS, apenas coíbe-se (levemente) os rendimentos derivados da atividade.

Conclui-se, portanto, que não está atualmente previsto um mecanismo fiscal que responsabilize o indivíduo pela prática da atividade poluidora, não existindo, neste domínio, a aplicação do princípio do poluidor-pagador, mas apenas um desdobramento do princípio da capacidade contributiva.

4. A (des)necessidade de criação de uma tributação agravada do *mining*

Numa perspetiva de poluidor-pagador, os mineiros devem criar medidas de prevenção ou de reparação necessárias, bem como suportar todos os custos associados aos efeitos nefastos criados ao meio ambiente na prossecução da sua atividade.

22. Cf. Michael Bedford Taylor, The Evolution of Bitcoin Hardware, Computer (Volume: 50, Issue: 9), University of Washington, Washington, 2017, pp. 58-66.

Em primeiro lugar, poder-se-ia equacionar a existência de um tributo que vise onerar a quantidade de energia não renovável consumida na atividade de *mining*. Assim, este tributo teria como base o consumo de eletricidade durante o *mining*, a potência computacional utilizada, o tempo de uso e a média de consumo de energia por unidade de potência. Uma variante desta medida passaria por incluir na fórmula de cálculo a quantidade de carbono emitido durante a mineração.

Neste sentido, juntar-se-ia uma variável relativamente ao tipo de energia utilizada, que permitisse aos *miners* que utilizassem energia proveniente de fontes renováveis, pagarem um valor mais baixo, mas que ainda assim, ficassem sujeitos a tributação.

É igualmente de salientar que a utilização de energias renováveis pode implicar um custo de oportunidade: se o *mining* consumir maioritariamente energias renováveis, tal pode reduzir a disponibilidade dessa energia para outras utilizações.[23]

Por outro lado, poderia ser ponderada a criação de um mercado específico de licenças de emissão no *mining*, em que os operadores e os investidores pudessem comercializar estas licenças.

Com esta medida, aqueles que na prossecução da sua atividade, criem mecanismos com um consumo de energia mais eficiente, ou que invistam em desenvolvimento tecnológico que leve à transição energética nos processos utilizados de mineração, conseguiram minerar mais, tendo uma carga fiscal inferior.

Os *miners* têm mais incentivos para prosseguirem a sua atividade perto de fontes de energia mais barata, seja esta renovável ou não, e cujo enquadramento jurídico-tributário lhes seja mais apelativo.

Assim, de uma perspetiva meramente política, a criação de tributos sobre o *mining* de criptoativos em Portugal, levaria à perda de competitividade internacional relativamente a outros Ordenamentos Jurídicos, em que tal opção não existe.

23. Cf. Digital Currencies and Energy Consumption, Itai Agur, Jose Deodoro, Xavier Lavayssière, Soledad Martinez Peria, Damiano Sandri, Hervé Tourpe and Germán Villegas Bauer, International Monetary Fund, 2022, p. 7, nota 14.

Assim, tendo em vista que o ambiente é um bem jurídico que deve ser protegido, parece-nos que os sujeitos passivos que desenvolvam técnicas que lhes permitam prosseguir com essa atividade de forma menos agressiva para com o meio ambiente, não devem ser tratados da mesma maneira daqueles que mais poluem.

5. Conclusões

O *mining* é uma atividade geradora de rendimentos, e como tal é reconhecida no ordenamento jurídico português enquanto atividade profissional. Contudo, as implicações energéticas do exercício nessa atividade parecem ter ficado longe de uma verdadeira proteção ambiental.

Apesar da identificada necessidade de se considerar fiscalmente os impactos ambientais das atividades geradoras de rendimento, a estrutura através da qual o *mining* é realizado impõe diversos desafios práticos à sua tributação, desde à dificuldade de identificar os sujeitos passivos e respetivos *assets*, à determinação do seu valor tributável.

Por outro lado, tendo em consideração a posição privilegiada que Portugal tem desfrutado enquanto um verdadeiro polo de atração da economia digital na Europa, torna-se especialmente importante ponderar a necessidade de tomar medidas no sentido de agravar a tributação destes ativos, mantendo-se, ao mesmo tempo, a competitividade fiscal e económica no cenário internacional.

Por fim, ainda que a criação de um tributo de matriz ambiental possa revelar-se uma medida prejudicial para a referida competitividade económica, o incentivo da realização da atividade de *mining* de forma mais sustentável seria bem acolhido, nomeadamente por meio da criação de mercados autónomos para licenças de emissão. Assim, permitir-se-ia o incentivo aos intervenientes desta atividade prosseguirem-na de forma cada vez mais sustentável a proteção do meio ambiente.

Bibliografia consultada

AGUR, Itai, Jose Deodoro, Xavier Lavayssière, Soledad Martinez Peria, Damiano Sandri, Hervé Tourpe and Germán Villegas Bauer, Digital Currencies and Energy Consumption, International Monetary Fund, 2022.

AUTORIDADE TRIBUTÁRIO E ADUANEIRA, Informação Vinculativa, processo n.º 14436, 03.07.19.

AUTORIDADE TRIBUTÁRIO E ADUANEIRA, Informação Vinculativa, processo n.º 5717/2015, 27.12.16.

BAER et al., Taxing Cryptocurrencies, International Monetary Fund Working Paper, July 5th, 2023.

CASALTA NABAIS, José, O dever fundamental de pagar impostos. Coimbra: Almedina. 2004.

CASALTA NABAIS, José, Por um Estado Fiscal Suportável: Estudos de Direito Fiscal, Coimbra, Almedina, 2005.

CASALTA NABAIS, José, Tributos com fins ambientais, El tributo y su aplicación. Perspectivas para el siglo XXI, tomo II, Marcial Pons, Madrid, Barcelona, Buneos Aires, 2008.

DOURADO, Ana Paula, Direito Fiscal, Coimbra: Almedina, 2015.

MASTELLONE, Pietro, The emergence and Enforcement of Green Taxes in the European Union – Part 2, IBFD, European Taxation 2014 (Volume 14, No.12).

VASCONCELOS FERNANDES, Filipe de, A Contribuição Extraordinária sobre o Setor Energético – Regime Fiscal e Constitucional, Coimbra: Gestlegal, 2019.

PACHECO, António Vilaça, Bitcoin - 10ª edição (revista e aumentada), Carcavelos: Editora Self, 2021.

PARTIDO SOCIALISTA, Proposta de Lei n.º 38/XV/1.ª, Aprova o Orçamento do Estado para 2023, Proposta de Alteração, 11.11.22.

PEREIRA COELHO, Diogo, Introdução ao Enquadramento da Tributação de Criptoativos em sede de IRS: Pré & Pós Orçamento do estado para 2023, Coimbra, Almedina, 2023.

PEREIRA COELHO, Diogo, Newsletter – Novo regime da tributação de criptoativos em sede de IRS para 2023 em Portugal, SSRN, 2023.

PEREIRA COELHO, Diogo, Newsletter – Tributação de criptoativos em sede de IRS: o novo regime proposto para 2023 (Portugal), SSRN, 2022.

VIEIRA DOS SANTOS, João, Regulação dos criptoativos, in Caderno do Mercado de Valores Mobiliários, n.º 64, CMVM, 2019.

Digital nomads - Portuguese and international tax aspects (a sustainability approach)

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Abstract: The current digital economy has been a hub for the creation of new business models. Such development only accelerated with the recent global pandemic, since lockdowns have significantly increased the use of virtual tools.

With the added flexibility of these new business models, came new concerns regarding their tax framework. Our paper addresses these new options, namely by studying the tax impacts of trends such as remote work and digital nomadism.

In this context, although recently many nations keenly adopted digital nomad visas, it would seem that tax policymakers are falling behind. As such, our goal is to revisit the approach of the double tax treaties to such trends, by analysing the outcomes of current allocation rules versus the challenges posed by these new realities.

Moreover, since in Portugal little effort has been made to regulate the tax issues surrounding such trends, our contribution shall flesh out the effects of such challenges in our internal tax order (v.g., double taxation and PE triggers), while proposing potential solutions.

In this effort, we intend to dissect the special tax regimes connected with the attraction of foreigners, most of all the NHR scheme, in hopes of measuring their (in)adequacy to tackle these new realities. In addition, we will also analyse in this same light the new rules envisaged in the 2024 State Budget Proposal which terminate the NHR

regime from 2024 onwards and create two new "replacement" special tax regimes for individuals coming to Portugal.

Furthermore, we shall also strive to aid policymakers in leveraging these trends as a means of promoting sustainability standards. In this sense, we will test the concept of sustainability as a guiding principle in the taxation of such trends, either by incentivizing sustainable activities or by imposing tax hardships on harmful behaviours.

Therefore, our research will not only assess the need for adaptation to these new digital work realities, but will also evaluate their role in the development of more sustainable tax policies and practices. We will do this from the Portuguese lens, but opening a window to the related international tax aspects.

Keywords: Digital economy; Remote work; Digital nomad; Double taxation; tax treaties; Special tax regimes.

1. Introduction

The current digital economy in which we live has brought along with it new business models. This is even more so since the recent global pandemic,[1]as the latter required lockdowns mostly all over the world and this increased significantly remote work.

In fact, the digital economy gave rise to everything digital (as its name indicates), such as remote work, home offices, digital nomads, virtual currencies, virtual services platforms, virtual stores, virtual banks, artificial intelligence, nft's[2], webinars and online lawyers' and doctors' appointments.

Among the digital economy new business models identified above, we would like to focus on the new forms of working, namely on remote work / home office and the digital nomads. Accordingly, the

1. The pandemic started around November 2019, spread globally in 2020 and 2021 and began to stabilize in 2022.

2. Non Fungible Tokens.

digitization of the economy and the global pandemic made remote work the new normal. This new trend is here to stay and, with the exception of certain professions that require an effective presence of the employee, almost all companies currently allow some form of remote or hybrid[3] work to their employees.

These new work models do not only present advantages (for example, remote work can lead to a sense of isolation and is not the ideal way to provide on-the-job training to new employees), but there is no "going back", as people have already adjusted to the added flexibility that they provide. In some cases, companies have to find ways of attracting their employees back to the office; others (like for example some US banks) mandatorily order them to go back to the office.

With remote work and its greater flexibility, came along digital nomads. Digital nomads are remote workers who can travel and work in a varied number of countries. For example, they can be freelancers, remote workers and entrepreneurs who can work using their own devices (v.g., laptops, smartphones, ipads, etc.) and this allows them to work in a foreign country and to move from one country to another. Digital nomads became such a widespread phenomenon that, as of January 2023, fifty-six countries had created digital nomad visas[4] to accommodate this new working model.

However, whereas immigration laws seem to be accommodating the digital economy and the digital nomads, tax laws seem to have fallen behind. In fact, most double taxation treaties (including the OECD Model Tax Convention on Income and on Capital[5]) envisage a traditional idea of taxation directly related to territoriality (i.e., based on concepts of physical residence and fixed base). To overcome

3. A mix of remote work and physical presence at the office (v.g., three days at home and two days at the office).

4. Portugal created this type of visa in 2022, by introducing article 61-B in the Foreigners Law (Law 23/2007, of 4 July), through Law 18/2022 of 25 August.

5. As it read on 21 November 2017, on which most of the tax treaties signed by Portugal are based on.

this some countries created personal income tax exemptions applicable to digital nomads (v.g., Croatia, Cape Verde, Dubai, Mauritius).

In Portugal, no specific tax regime solves the main tax issues that digital nomads face. The first of these tax issues is the risk of creating a permanent establishment (PE), with the corresponding implications mainly in terms of corporate taxation and related tax obligations, in every country where these individuals choose to work. The second of these tax issues is the risk of double taxation in terms of personal income tax (PIT) due to the possibility of multiple tax residencies that the digital nomads face.

Finally, in terms of Social Security, Portugal with its mandatory regimes, wide base and high rates is not a competitive option, specially for individuals that will not be benefitting from the system in the medium and long term.

Notwithstanding the above, Portugal has, since 2009[6], a specific temporary[7] tax regime for inbound individuals coming or returning to this country; it is called the Non-Habitual Residents (NHR) regime. This regime is currently envisaged in articles 16 and 81 of the PIT Code. Under these provisions, this specific tax regime exempts from PIT some types of foreign source income (v.g., interest, dividends and rentals) and grants a 20% special autonomous PIT rate to Portuguese source employment and self-employment income derived from certain qualified professions (i.e., as defined in Normative Order 230/2019, of 23 July, which envisages among other professions those related to computer programming and other digital professions).

However, this specific tax regime requires tax residency in Portugal for it to apply and the latter requires in principle a permanent home. Accordingly, although it may help accommodate some digital nomads in terms of PIT, some of them may be excluded from its application. In addition, it does not present a solution for the mentioned risk of

6. This regime was introduced by Decree-law 249/2009, of 23 September.

7. This regime applies for a 10 year period which may apply to successive years or not.

the digital nomad creating a PE in Portugal nor for the social security issue.

The above inadequacy is not surprising as the main aim of the NHR regime was to promote residential tourism and to attract foreign pensioners[8]. In view of the above, we deem important and propose to analyse how a specific tax regime for digital nomads can be created or adjusted (based on an existing one, namely the mentioned NHR regime).

In this endeavour, we find that not only it is important to find ways to overcome the above tax issues that digital nomads face, but also to promote and encourage sustainability. Accordingly, any specific tax incentives should be linked with sustainability performance measures.

For this purpose, first it is necessary to analyse how sustainable in general digital nomads and NHR's are. One aspect that is relevant to point out is the payment by each individual of his/her "fair share[9]" of taxes to at least one of the countries where they operate. In fact, although within the NHR regime taxpayers are required to be tax residents of Portugal and are only exempt from taxation on income that may be taxed in the other source States according to applicable treaties[10], digital nomads can easily avoid being tax resident in any country where they operate by juggling with the number of days they spend there and the different concepts of tax year. Accordingly, the possibility of determining mandatory tax residency in one country for digital nomads is something that should be clearly addressed in a specific tax regime for these individuals.

As mentioned above, the NHR regime envisages a special reduced PIT rate for qualified professions. Whilst this has a valid reason (to

8. This explains the very generous exemption initially envisaged under the NHR regime for pensions- leading to double non taxation- and that was changed in some of its features, in 2020 (by the State Budget Law for that year), following the complaints of several countries with which Portugal had signed double taxation conventions.

9. I.e., that the tax burden is well distributed among taxpayers and that they pay their part in it. This is also envisaged by the UN Sustainable Development Goal (SDG) 10 which aims to reduce inequality within and among countries.

10. Article 81, 4-8, of the Portuguese PIT Code.

attract much needed talent to the country), it is also worth thinking if contrarily the legislator should also not think of creating tax hardships or more onerous conditions for those individuals that carry out professions that harm sustainability. There are already some examples of this in current legislation, such as the new tax rules for cryptocurrencies[11] that introduce a much less favourable deduction coefficient[12] for those in the cryptocurrency business that dedicate themselves to mining. In fact, climate and environmental specialists say that "*the massive energy consumption of cryptocurrency mining threatens to undermine decades of progress towards achieving climate goals, and threatens grids, utilities, communities and rate payers…*[13]".

It is also worth noting that digital nomads and NHR individuals in other instances may have positive contributions towards sustainability and in these circumstances their behaviour should be incentivized from a tax standpoint. For example, when they choose to live in isolated communities in the interior of Portugal, they are contributing towards the development and well-being of such communities. In addition, digital nomads and NHR individuals that sell their furniture and living utensils in second -hand platforms or stores when they leave the country are contributing to the circular economy[14].

Taking all the above in consideration, we propose to research further and to envisage a tax framework that protects digital nomads from the mentioned shortcomings of the current tax legislation and that promotes tax sustainability. At the same time, we will look at the NHR regime and its mentioned proposed "replacement" special tax regimes and see how we can also adjust them in this same direction.

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11. Introduced in the PIT Code by the State Budget Law for 2023.

12. A 5% as opposed to a 85% deduction, under article 31, 1 of the Portuguese PIT Code.

13. https://earthjustice.org/feature/cryptocurrency-mining-environmental impacts.

14. "*The circular economy is an alternative to traditional linear economies, where we take resources, make things and throw them away. In a circular economy, products are used again and again, which reduces our use of precious raw materials and cuts CO2 emissions*" https://www.weforum.org/agenda/2022/06/what-is-the-circular-economy.

2. The current Portuguese tax and social security framework

2.1. Personal Income Tax Aspects

Under the general rules of Article 16 of the PIT Code, individuals are tax resident in Portugal if they have spent more than 183 days (consecutive or not) therein, in any 12-month period starting or ceasing in the year at stake. In addition, they may still qualify as tax residents if they have spent less time in Portugal, but have there during any day of the above mentioned period a home in conditions which may indicate an intention of occupying it and maintaining it as their habitual place of residency. Under Article 15 (1) of the PIT Code, Portuguese tax residents are taxed on their worldwide income at rates which may vary between 14.5% and 53%.

As already mentioned, Portugal has no specific tax rules for digital nomads, so in principle they will fall under the above general provisions. This means that it will be very difficult for them not to qualify as Portuguese tax residents with the above mentioned very heavy tax implications. In fact, it is enough for them to have a home[15] in Portugal for one day in a 12-month period for them to qualify as Portuguese tax residents.

Notwithstanding the above, there are two aspects that can attenuate this possibility and its unfavourable tax implications. One of them is the application of a double tax taxation treaty (DTT) signed by Portugal and the other country where the individual at stake may also qualify as tax resident. If the individual in question is in Portugal for less than 183 days, there is a significant chance that he/she may qualify as tax resident in another country and possibly his/her connections with this country may be stronger which may justify his/her tax residence there instead of being double tax resident. The majority of the tax treaties signed by Portugal envisage a “tie-breaker” clause in their

15. It does not have to be owned, it may be rented.

initial provisions which is based on the one envisaged in the OECD Model Tax Convention on Income and on Capital.[16]

As its name indicates, this clause aims to solve tax residency conflicts based on the following sequential criteria: place of permanent residence, centre of vital interests (personal and economic relations), place of habitual permanence and nationality. If most cases of tax residence conflict, from our experience, are solved based on nationality, in relation to digital nomads this should definitely be the case. In fact, the other three preceding criteria are clearly outdated in relation to the concept of digital nomads, as these usually do not have a permanent or habitual residence and their centre of vital interests is where they are at the moment.

Based on the above, and although most DTT's signed by Portugal are not adapted to the concept and reality of digital nomads, it may be possible in certain circumstances to avoid Portuguese tax residency based on them. DTT's also envisage the elimination of international double taxation, although this is also possible[17] under Portuguese domestic rules.[18]

The second aspect that can attenuate the heavy tax burden of digital nomads that come to Portugal and qualify as tax residents is the concept of partial tax resident. This possibility exists in Portuguese tax law since 2015[19] and in the year of arrival and in the year of departure to and from Portugal limits the taxation of one's worldwide income to the time effectively spent in Portugal during that/those year(s). Although some specific tax abuse rules[20] may apply, partial residency may help reduce the tax burden and inefficiencies of digital nomads.

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16. In Article 4 (2).

17. Not always a reality in practice, as there are many bureaucratic and formal constraints.

18. Article 81 of the PIT Code.

19. Article 16 (3)(4) of the PIT Code.

20. Article 16 (14)(15) (16) of the PIT Code.

2.2. Social Security Aspects

In terms of Social Security, Portuguese rules do not facilitate the life of digital nomads coming to Portugal. Under the Social Security Contributive Code[21], for those that are employees, the full salary and many fringe benefits/allowances are liable to Social Security contributions at a combined 34.75% rate (11% due by the employee and 23.75% due by the employer). Self-employed individuals also pay social security in principle on 70% of their professional income at a 21.4% rate. These mentioned rates and bases for contributions, both for employed and self-employed individuals, are unusually high in comparative terms with other countries.

It may be possible to come to Portugal and continue to pay Social Security in the State of the employer under EU law[22] or under international totalization agreements signed by Portugal, but this temporary possibility (up to a maximum of 5 years) normally implies that there is a secondment to a Portuguese group company (which in many situations of digital nomads is not the case).

The same temporary possibility of maintaining contributions in the EU Member State of origin is also envisaged for self-employed individuals, but the implementation process is also not an easy one.

In a recent EU Framework Agreement on Telework[23] (which Portugal signed), there is a ray of hope on rendering the social security situation of digital nomads in Portugal easier and less onerous, as the legislator proposes the treatment of teleworkers similar to that of border workers.[24] This would allow them to pay social security contributions in the country of the employer if the work rendered in the country of residence does not exceed 49% of the total work.

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21. Approved by Law 110/2009, of 16 September.

22. EU Regulations 883/2004, of 29 April; 987/2009, of 16 September; 1231/2010, of 24 November; 465/2012, of 22 May.

23. Envisaged in Notice AC 125/22 REV 2, of 14 June 2022

24. Envisaged in Article 16 of the mentioned EU Regulation 883/2004.

2.3. The Risk of Creating a Permanent Establishment

If an individual works for a company in one country and continues to work for this same company after moving to another country, he/she extends the presence of the company in question to the second country. The same may happen - "*mutatis mutandi*"- to a business of a self-employed entrepreneur, moving from one country to another. It is at this point that the risk of a permanent establishment (PE) appears.

We call it a risk because from a tax and social security standpoint, this new "entity" (even if not formalized and registered with the competent authorities) may bring upon itself the main tax and social security obligations that a resident corporate entity has to comply with (including the payment of corporate tax at the normal rate on income obtained in that territory, without the assurance of the deductibility of the general costs allocated by the respective head office).

This can represent a huge risk for a company or group of companies and it is why, for example, during the pandemic some multinationals started asking their employees to report the number of days that they worked remotely from abroad and restricted the amount of days in question in order to avoid the possibility of generating PE's in various countries around the world.

Under Portuguese tax law, PE's are envisaged both in the PIT[25] and in the Corporate Tax Code[26], although the latter treats the subject more extensively and thus the first remits to it. Accordingly, under Article 5 (1) of the Corporate Tax Code (CTC), a PE is any fixed installation through which a commercial, industrial and agricultural activity is exercised. The remaining numbers of this Article provide some examples of a PE (v.g., a branch, an office, a factory, a mine, an oil well, etc.) and different minimum periods of permanence (depending on the type of "installation" at stake) in order to qualify as a PE.

25. In Articles 18 (2)(3) of this Code.

26. In Articles 4 (4)(5) and in Article 5 of this Code.

The above rule is based on the one envisaged in the OECD Model Tax Convention on Income and Capital[27], although the CTC is stricter in terms of the minimum period of permanence which gives rise to a PE (thus, envisaging shorter periods). The same also happens vis-a-vis the DTT's signed by Portugal which in general envisage more generous periods of permanence for purposes of qualification as a PE than the mentioned domestic tax provisions[28]. Accordingly, invoking the relevant DTT's, may in principle protect against/attenuate the risk of attribution of a PE in the country of residence of the global mobile employee or entrepreneur.

2.4. Special Tax Regimes

Considering that the Portuguese tax and Social Security framework do not envisage any specific rules for digital nomads, our only expectation would be that they would find a special regime that embraces their specific characteristics. In the introductory chapter, we refer to a special regime for inbound individuals, envisaged in Portuguese tax law, called the NHR regime.

The NHR regime is envisaged mainly in Articles 16 (Residency) and 81 (Elimination of international double taxation) of the PIT Code. It applies to people moving to Portugal that have not been tax resident in this country for the last 5 years. In addition, it is a temporary status (for 10 years, consecutive or otherwise) and requires tax residency in Portugal during those years, under the normal tax residency requirements envisaged in the law for normal taxpayers.

The main tax benefits of this regime apply to foreign source income that may be exempted from PIT, if the same income may be taxed in the source country under the provisions of the applicable

27. As envisaged in its Article 5.

28. An exception to this is for example Article 5 (3) d) of the DTT signed between Portugal and Angola which envisages a minimum period of more than 30 days, in order to deem the existence of a PE, in relation to installations that are meant to explore natural resources in the other contracting state.

DTT or (in the absence of a DTT) the mentioned OECD Model Convention. An exception to this rule applies in relation to foreign source pensions[29] to which currently a 10% PIT tax rate applies (initially foreign pensions were exempted, resulting in double non-taxation, as most tax treaties allocate exclusive taxing rights to the country of residence).

In relation to Portuguese source income, NHR's are taxed in the same way as normal tax residents in Portugal with the exception of those whose professional activities qualify as "high value added professions". For these, a 20% flat rate applies to their employment or self-employment income derived from these professions. The reason behind such benefit is the attraction of high skilled professionals to Portugal which is an essential factor for the development of the Portuguese economy.

The above special tax regime, although not specifically designed for digital nomads, helped to provide a reasonable tax framework for this type of mobile individuals in terms of PIT (although it did not solve the PE risk and the Social Security situation). In fact, in terms of PIT, most of their foreign source income could benefit from an exemption in Portugal if it was taxable in the source country (thus eliminating most double taxation problems). In addition, the fact that the NHR status applies for 10 years, which may be non-consecutive, allows the digital nomads to come, leave and return to Portugal during this period, benefitting from the status whenever they qualify as Portuguese tax residents.

However, the NHR regime will soon cease to apply and with its revocation will also end the possibility of using it to improve the tax situation of digital nomads coming to Portugal. In fact, the budget proposal for 2024 approved in general by the Portuguese Parliament revoked the NHR regime from 2024 onward, by introducing amendments to the referred Articles 16 and 81 of the PIT Code. This was clearly not expected and we understand that it is mostly a political

29. The reason for this exception is the promotion of residential tourism in Portugal.

decision[30] taken hastily due to the pressure of the housing crisis in Portugal.

The above 2024 budget proposal, possibly to appease investors, replaces the NHR regime with two tax incentives of a clearly more restrictive nature. The first of these incentives mirrors most features of the NHR regime, but as its name indicates ("Tax Incentive to Scientific Research and Innovation") it only applies to specific university professors, researchers and individuals working under specific qualified contracts for productive investments under the Tax Investment Code. Therefore, it excludes many digital nomads not qualifying under the mentioned professions/roles.

The second proposed tax incentive transformed a previous temporary tax incentive, applicable to ex-residents that returned to Portugal[31], in such a way that it can now also be viewed as an alternative to the NHR regime. In fact, this tax incentive, which consists of the PIT taxation at the general rates of only 50% of the employment and self-employment income received during 5 years, was extended up to 2026 and no longer requires prior tax residency in Portugal. Therefore, it may be an alternative to the NHR regime for those coming to Portugal in the near future.

Notwithstanding these legal requirements, the new regime should not work very well for digital nomads, as it cannot be used in a non-consecutive timeframe (as currently the NHR regime can and, thus, allows travelling back and forth). As the proposal for this tax incentive is not yet approved by Parliament in final terms, it would be great if the possibility of using this incentive in a non-consecutive manner, during its 5 year period could be introduced in the final legal

30. It is not based on any analytical study on the balance between the advantages and drawbacks of this tax benefit, both in terms of tax revenues and positive economic impact in general. This study, as a basis of the decision to keep or not this incentive, was recommended by the group of experts that studied Portuguese tax benefits in 2019 and is now being suggested by tax professors and company directors in the Portuguese market.

31. "Programa Regressar", envisaged in Article 12-A of the PIT Code.

provision. This could be a possibility of improving the tax situation in Portugal of digital nomads in the near future.

Finally, it is clear that the proposed revocation of the NHR regime and its replacement by the two above proposed tax incentives renders Portugal less competitive from a tax standpoint and, as far as we can see, does nothing towards the direct promotion of sustainability as would be desirable.

3. International tax aspects

As mentioned in the previous section of this paper, the tax treaties, EU Social Security Regulations and totalization agreements mostly helped digital nomads coming to Portugal because, in general, they go beyond and are more generous than the domestic tax and Social Security provisions.

The above being said it is clear that these legal documents are not designed and provide an adequate framework for digital nomads[32]. In fact, the Articles on tax residence, permanent establishment, employment income and self-employment income in tax treaties signed by Portugal[33]are based on concepts such as "permanent home", "habitual abode", "physical presence"," fixed base" which either do not apply to digital nomads or need to be clarified in order to facilitate their application to them.

As mentioned, some countries grant exemptions from PIT, in general up to a year, in order to attract digital nomads. Such exemptions mainly avoid double taxation problems.

32. On this matter, BERETTA, Giorgio. "Work on the Move": Rethinking Taxation of Labour Income under Tax Treaties, *The Lisbon International & European Tax Law Seminars*, 7, 2022, 41-48.

33. Mostly based in Articles 4, 5, ex-14 and 15 of the mentioned OECD Model Tax Convention on Income and Capital.

Some academics, like Professor Avi-Yonah[34], in a recent webinar organized by the ACTL[35], proposed that a tax regime, based on nationality as opposed to physical presence (very much like the US tax regime applicable to US nationals), apply to digital nomads. The exception to this rule would be when the state of which the individuals were nationals of was not a democracy, in order to avoid sending tax revenues to a non-democratic country. This regime would avoid the loss of tax revenue and tax fraud, which can occur in relation to digital nomads in the absence of a clear and adjusted national and international tax and Social Security framework.

4. Conclusions

Based on the above, we may conclude that Portugal does not have a tax and Social Security framework adjusted to digital nomads. It created a digital nomads visa, but there is lack of articulation with the tax and Social Security applicable rules (a very common Portuguese problem between different public- and sometimes also private- entities which tend to work in silos). The proposed revocation of the NHR regime (capable of providing some support to digital nomads) and the replacement by two proposed limited tax incentives render the situation even worse in our perspective.

From an international tax standpoint, the panorama is not much better as most tax treaties, to which Portugal is a party, envisage outdated concepts, in general, not easily applicable to the tax reality of digital nomads.

Currently we understand that it would be important to preferably maintain the NHR regime or, if not feasible, to introduce improvements to the two proposed replacement incentives, as described

34. AVI-YONAH, Reuven. And Yet It Moves: Taxation and Labour Mobility in the 21st Century. *University of Michigan Law & Economics Research Paper No. 12-008*, 2012.

35. ACTL- Amsterdam Centre for Tax Law.

above. We also recommend the revision of the tax treaties in order to reflect the new concepts of labour and mobility.

Finally, it is important to bear in mind that the absence of an adequate framework for digital nomads is not a sustainable situation in itself as it may lead to situations of non-compliance, non-reporting of income and loss of tax revenues, with the related implications in terms of inequality and lack of governance. Therefore, we find it most important to rapidly put an end to this situation.

Bibliography

AVI-YONAH, Reuven. And Yet It Moves: Taxation and Labour Mobility in the 21st Century. *University of Michigan Law & Economics Research Paper No. 12-008*, 2012

BERETTA, Giorgio. Cross-Border Mobility of Individuals and the Lack of Fiscal Policy Coordination Among Jurisdictions (Even) After the BEPS Project. *Intertax,* 2019, 47.1

BERETTA, Giorgio. "Work on the Move": Rethinking Taxation of Labour Income under Tax Treaties. *The Lisbon International & European Tax Law Seminars*, 7, 2022

CATARINO, João Ricardo; PEREIRA, Paula Rosado. Fiscalidade Internacional- Questões Atuais, 2023

CÓDIGO DO IRC

CÓDIGO DO IRS

CONCEIÇÃO, Apelles J. B.. Segurança Social- Manual Prático, 12th Edition, 2020

COURINHA, Gustavo Lopes. A Residência no Direito Fiscal Internacional, 2015

COURINHA, Gustavo Lopes. Estudos de Direito Internacional Fiscal, 2015

DOURADO, Ana Paula. Direito Fiscal, 7th Edition, 2022

ESTATUTO DOS BENEFÍCIOS FISCAIS

EUROPEAN COMMISSION. Ways to Tackle Cross-Border Tax Obstacles Facing Individuals within the EU- Report of Expert Group, 2015

GARBARINO, Carlo. Tax Treaties and the Mobility of Workers. *European Business Law Review*, 2022, 33.6

HILL, Tessa. Building a Digital Nomad Internet Country: Reinventing Global Mobility for a Borderless World, 2023
HOLMES, Kevin. International Tax Policy and Double Tax Treaties, 2014
MORAIS, Rui Duarte. Sobre o IRS, 3rd Edition, 2015
OECD. Implications of Remote Working Adoption on Place Based Policies. A Focus on G7 Countries, 2021
OECD. International Migration Outlook, 2022
PEREIRA, Paula Rosado. Convenções sobre Dupla Tributação no Atual Direito Fiscal Internacional, 2021
PEREIRA, Paula Rosado. Manual de IRS, 3rd Edition, 2021
PIRES, Rita Calçada. Manual de Direito Internacional Fiscal, 2018
SCHON. Is Everybody obliged to Pay Taxes Somewhere?. Max Planck Institute for Tax Law and Public Finance. Working Paper No. 9, 2023
SMIT, Amanda. Post-Pandemic Private Wealth Migration and Mobility Trends. *TAXtalk 2023*, 2023, 102: 44-46
SOLIMANO, Andrés. International Mobility of the Wealthy in an Age of Growing Inequality. *Norteamérica*, 2019, 14.1: 163-181
SURAK, Kristin. Millionaire Mobility and the Sale of Citizenship. *Journal of Ethnic and Migration Studies*, 2021, 47.1: 166-189
TONGE, Richard. Global Mobility during a Global Pandemic: Workforce Issues Take Center Stage. *Tax Executive*, 2021, 73: 36
VERGINER, Luca; RICCABONI, Massimo. Talent Goes to Global Cities. The World Network of Scientists' Mobility. *Research Policy*, 2021, 50.1: 104127
XAVIER, Alberto. Direito Tributário Internacional, 2nd Edition (updated), 2014
ZUGER, Mario. Arbitration under Tax Treaties. *IBFD Doctoral Series*, 2002

Políticas fiscais em matéria de habitação – Das reformas fiscais do final do século XX ao 'Programa Mais Habitação' e à Lei do Orçamento do Estado para 2024

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Resumo: Portugal atravessa uma (nova) crise na habitação. O objetivo do presente artigo é, de forma resumida, proceder a uma descrição da evolução histórica das políticas fiscais em matéria de habitação, desde as reformas do final do século XX até à aprovação do denominado "Programa Mais Habitação" e da Lei do Orçamento do Estado para 2024, bem como realizar uma análise comparativa sobre a evolução histórica de tais políticas fiscais em matéria de habitação.

Palavras-chave: habitação; fiscalidade; políticas fiscais.

Abstract: Portugal is going through a (new) housing crisis. The aim of this article is to briefly describe the historical evolution of tax policies on housing, from the reforms at the end of the 20th century to the approval of the so-called "Mais Habitação Programme" and the State Budget Law for 2024, as well as to carry out a comparative analysis of the historical evolution of such tax policies on housing.

Keywords: housing; taxation; tax policies.

1. Introdução

Portugal atravessa uma (nova) crise na habitação. A nossa análise não se deterá nos motivos ou causas que conduziram a essa crise, mas no conjunto das medidas fiscais aprovadas com o objetivo de solucionar tal crise.

O direito à habitação é um direito constitucionalmente consagrado, sendo uma tarefa fundamental do Estado promover o direito à habitação.

Na prossecução dessa tarefa, o Estado pode munir-se do sistema fiscal, encarado historicamente como forte aliado da política de habitação, no sentido de conformar ou incentivar comportamentos nos cidadãos que promovam e assegurem uma maior justiça e igualdade social.

Assim, o objetivo do presente artigo é, de forma resumida, proceder a uma descrição da evolução histórica das políticas fiscais em matéria de habitação, desde as reformas do final do século XX até à aprovação do denominado "Programa Mais Habitação" e da Lei do Orçamento do Estado para 2024, bem como realizar uma análise comparativa sobre a evolução histórica de tais políticas fiscais em matéria de habitação. Não se pretende fazer um levantamento exaustivo, mas antes enunciar as principais medidas e os seus resultados conhecidos.

A análise histórica das políticas fiscais com influência na habitação permitirá também constatar que a crise que se vive atualmente não é inédita, sendo um constante desafio adaptar a legislação vigente à realidade social e económica que se vive.

O presente artigo não pretende julgar acerca da justiça ou razoabilidade das políticas adotadas, mas sobretudo efetuar uma análise comparativa entre as medidas do passado e as medidas recentemente aprovadas e a existência ou não de uma identidade entre as mesmas.

2. Resumo histórico das principais medidas fiscais relativas à habitação

2.1. Final da Década de 80 e Década de 90 do Século XX

O final dos anos 80 veio trazer uma profunda reforma na tributação do rendimento com a criação do Imposto sobre o Rendimento das Pessoas Singulares (IRS) e Imposto sobre o Rendimento das Pessoas Coletivas (IRC)[1].

A criação do novo sistema de tributação do rendimento veio determinar a existência de um imposto global "único" por contraposição aos correspondentes impostos cedulares que o antecederam[2]. Estes novos impostos estruturam-se em torno do conceito de rendimento-acréscimo por contraposição ao conceito de rendimento-produto que servia de referência basilar aos impostos substituídos.

Em matéria de rendimentos prediais a base de incidência tributária do novo IRS veio incluir apenas os rendimentos efetivamente auferidos de prédios arrendados afastando a tributação de rendimentos presumidos com base no valor locativo ou nas rendas fundiárias dos prédios não arrendados.

Assim se pretendia cumprir, em matéria de tributação de rendimentos das pessoas singulares, o disposto no n.º 1 artigo 106.º da Constituição da República Portuguesa (na versão original de 1976): "O *sistema fiscal será estruturado por lei, com vista à repartição igualitária da riqueza e dos rendimentos e à satisfação das necessidades financeiras do Estado.*".

A Reforma Fiscal de 1989 determinou ainda a criação da Contribuição Autárquica[3] incidente sobre o valor patrimonial de prédios rústicos e urbanos. Esta nova contribuição justificou-se "(…) *não só por*

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1. Através do Decreto-Lei n.º 442-A/88 e do Decreto-Lei n.º 442-B/88, ambos de 30 de novembro, respetivamente.

2. Imposto Profissional, Contribuição Predial, Contribuição Industrial, Imposto sobre a indústria agrícola, Imposto de capitais e Imposto de mais-valias, bem como o Imposto complementar, substituídos pelo IRS e pelo IRC, respetivamente.

3. Decreto-Lei n.º 442-C/88, de 30 de novembro.

imperativos decorrentes de reforçar imediatamente o financiamento fiscal das autarquias locais que a partir de 1989 sofreriam a perda de receita municipal imputável aos extintos impostos locais da contribuição predial rústica e urbana e do imposto de mais-valias, cujos rendimentos passaram a ser englobados nos novos impostos estaduais sobre o rendimento (IRS e IRC), mas ainda por que sendo princípio estruturante da reforma, a tributação dos rendimentos efectivos, com exclusão dos rendimentos imputados aos prédios afectos ao uso próprio pelos respetivos proprietários, como sucedia no imposto predial extinto, daí decorreria que os prédios não arrendados ou não cedidos a terceiro a título oneroso, não produzindo rendimento efectivo, deixariam de ser tributados (…)"[4].

A tributação estática do património alavanca-se no princípio do benefício, assumindo como contrapartida dos proprietários as "(…) *obras e serviços que a colectividade lhes proporciona.*"[5].

A nova contribuição passa a incidir, não sobre o valor do rendimento periódico dos prédios, mas sobre o valor do próprio prédio. Ora, para que esta contribuição cumprisse o seu propósito era necessário que fosse implementado um sistema fiável de avaliação predial, à falta de um cadastro predial construído com base no novo paradigma tributário.

Com efeito, relativamente a este novo imposto, o legislador assumiu, *ab initio*[6], que "*(…) o seu desejável êxito ficará dependente da existência de um sistema correcto e frequentemente actualizado de avaliações, sob pena de termos uma tributação iníqua e geradora de distorções, em relação à qual se dará um compreensível fenómeno de rejeição, e ainda uma fonte insatisfatória de receitas, face às necessidades crescentes dos municípios portugueses.*" Afirmando ainda que "*Assim se justificam as diligências que estão a ser feitas para o estabelecimento de procedimentos mais adequados, que virão a constar de um* Código das Avaliações *(devendo vir também a ser objecto de diploma autónomo a matéria das matrizes). Será através destes*

4. Cf. NUNO SÁ GOMES, «Considerações em torno da Contribuição Predial Autárquica», *in* Revista Ciência e Técnica Fiscal n.º 385, pág. 7 e seguintes.

5. Cf. §3 do n.º 1 do preâmbulo do Código da Contribuição Autárquica

6. Cf. n.º 7 do preâmbulo do Código da Contribuição Autárquica

procedimentos que se estabelecerá o valor tributável dos prédios, para efeitos da aplicação da contribuição predial e ainda de outras formas tributárias, como a sisa, o imposto sobre as sucessões e doações e ainda o IRS e o IRC, em relação às mais-valias a eles sujeitos, podendo ainda, desejavelmente, servir de base a objectivos não fiscais."

A verdade, porém, é que naquele contexto histórico a aprovação de um modelo de avaliação com base em valores de mercado dos prédios não se revelou possível, tendo o legislador optado por "*(...) estabelecer um regime transitório (no decreto-lei de aprovação), nos termos do qual a contribuição autárquica será, entretanto, aplicada aos valores capitalizados dos rendimentos constantes das matrizes, procedendo-se, além disso, a uma actualização automática destes valores. Estabeleceu-se este regime como consequência da impossibilidade referida, mas poderá vir a revelar-se vantajoso que a introdução do novo imposto não seja influenciada, logo no primeiro ano de aplicação, pelo novo sistema de avaliações*"[7].

Este regime transitório constava do artigo 8.º do Decreto-Lei n.º 442-C/88, de 30 de novembro, que estabelecia, no seu n.º 1, que "*Enquanto não entrar em vigor o Código das Avaliações, os prédios continuarão a ser avaliados segundo as correspondentes regras do Código da Contribuição Predial e do Imposto sobre a Indústria Agrícola, aprovado pelo Decreto-Lei n.º 45104, de 1 de Julho de 1963, determinando-se o seu valor tributável de acordo com o disposto nos n.os 1 dos artigos 6.º e 7.º do presente decreto-lei.*", remetendo-se, no seu n.º 2, para o Código da Sisa e do Imposto sobre as Sucessões e Doações no caso de terrenos para a construção.

A Contribuição Autárquica foi criada com base num sistema temporário de avaliação dual que partia da conversão do valor de rendimento coletável de cada prédio para efeitos de Contribuição Predial, estabelecido com base na última declaração de rendas para prédios arrendados ou renda potencial para prédios não arrendados, multiplicado por 15 para prédios urbanos e 20 para prédios rústicos. De notar que o valor locativo dos prédios não arrendados era estabelecido por

7. Ponto 7 do preâmbulo do Código da Contribuição Autárquica.

referência a outros prédios arrendados, em regime de liberdade contratual, de preferência na mesma localidade e que pudessem constituir termo de comparação (cf. regra 7ª do artigo 144.º do Código da Contribuição Predial e do Imposto sobre a Indústria Agrícola).

Até à sua extinção, a Contribuição Autárquica não viu a publicação do Código das Avaliações.

No que respeita à tributação do património imobiliário no momento da sua transação, onerosa ou gratuita, o valor patrimonial tributário constante das matrizes prediais constituía referência para a liquidação quer do Imposto Municipal de Sisa, sempre que fosse superior ao valor da transação, quer do Imposto Sobre Sucessões e Doações.

No «Projecto de Reforma da Tributação do Património»[8], a COMISSÃO DE REFORMA DA TRIBUTAÇÃO DO PATRIMÓNIO[9] avalia negativamente a situação do cadastro predial e a sua relevância para uma eficiente tributação do património imobiliário afirmando que "*As matrizes portuguesas, de tão antigas, por um lado, e de tão imperfeitas, por outro, não espelham, na esmagadora maioria dos casos, a presente realidade física, funcional e económica dos nossos imóveis urbanos. Com efeito, o regime jurídico vigente baseia-se num sistema de valorização imobiliária criado para uma sociedade com um verdadeiro mercado destinado ao arrendamento. Reduzido este mercado a uma dimensão pouco significativa, foi minguando, mesmo nas grandes cidades o termo de referência basilar da lógica da valorização imobiliária. E, ainda nesse mercado, com uma enorme dispersão de valores impeditiva da aplicação de tal critério: ou se trata de rendas muito antigas que, por força do regime legal que as condiciona, se tornam inúteis; ou de rendas muito modernas, mas poucas, colocadas no polo oposto devido a algum grau de exagero utilizado preventivamente pelos senhorios*".

A desatualização do valor patrimonial tributário dos imóveis, que deveria constituir uma válvula de segurança na liquidação dos impostos sobre a sua transmissão, tornou-se inoperante. Referindo-se às

8. COMISSÃO DE REFORMA DA TRIBUTAÇÃO DO PATRIMÓNIO, *in* Ciência e Técnica Fiscal, n.º 182, Lisboa: Centro de Estudos Fiscais, 1999, págs.61 e seguintes.

9. Criada a 3 de setembro de 1997.

últimas décadas de vigência da Sisa e do Imposto sobre as Sucessões e Doações, JOSÉ MARIA PIRES[10], afirma que *"Era assim que o sistema funcionava, com uma evasão fiscal generalizada (...) e com um Estado impotente para a combater por falta de um sistema de avaliações eficiente."*

O sistema de avaliação era assegurado subjetivamente por comissões de avaliação, admitindo-se que, nos últimos anos de vigência da Contribuição Autárquica, o desvio típico do valor patrimonial tributário dos prédios face ao valor de mercado seria de cerca de menos 40%[11].

Esta situação tinha necessariamente reflexos em sede de tributação do rendimento pois à omissão de declaração de valores de aquisição por parte do comprador correspondia a omissão de declaração de valores de venda por parte dos vendedores, relevantes para o apuramento e tributação de mais-valias imobiliárias.

De meados da década de 80 até ao final da década de 90 foram várias as iniciativas legislativas impulsionadoras do crédito à habitação, com reflexos evidentes na indústria da construção civil.

O Decreto-Lei n.º 328-B/86, de 30 de setembro, marca o início da coexistência de 3 regimes de crédito à habitação: o regime geral; o regime bonificado e o regime jovem bonificado.

Com a gradual descida das taxas de juro durante a década de 90 e aumento do endividamento das famílias, a bonificação dos créditos à habitação é reduzida. Os regimes bonificados de crédito à habitação acabam por ser revogados pelo Decreto-Lei n.º 305/2003, de 9 de dezembro.

Destaque-se ainda como impulsionador da poupança destinada à compra de habitação própria, a criação das contas poupança-habitação pelo Decreto-Lei n.º 35/86, de 3 de março, mais tarde regulada pelo Decreto-Lei n.º 27/2001, de 3 de fevereiro, a que estavam associados benefícios fiscais[12].

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10. *In* «Lições de Impostos sobre o Património e do Selo», Almedina, 2015, 3.ª ed., pág. 35.

11. Cf. JOSÉ MARIA PIRES, *op cit.* pág. 35.

12. Previstos inicialmente no Decreto-Lei n.º 382/89, de 6 de novembro (sob a forma de isenção de IRS quanto aos juros ativos e dedução à coleta do IRS dos montantes aplicados

Desde a criação do IRS que se prevê a possibilidade de diferimento da tributação das mais-valias auferidas em razão da alienação de imóveis para habitação do sujeito passivo ou do seu agregado familiar por via do reinvestimento do respetivo valor de realização.

A partir de 1998 e até 2012[13] era admitida uma dedução à coleta, com limites, dos juros e amortizações de dívidas contraídas com a aquisição, construção ou beneficiação de imóveis para habitação própria e permanente ou arrendamento devidamente comprovado, para habitação permanente do arrendatário, com exceção das amortizações realizadas por mobilização dos saldos das contas poupança-habitação.

As prestações devidas em resultado de contratos celebrados com cooperativas de habitação ou no âmbito do regime de compras em grupo, para a aquisição de imóveis destinados à habitação própria e permanente ou arrendamento para habitação permanente do arrendatário, na parte correspondente a juros e amortização da dívida beneficiavam igualmente deste regime.

Semelhante dedução era admitida em relação às importâncias líquidas de subsídios ou comparticipações oficiais suportadas a título de renda pelo arrendatário de prédio urbano ou da sua fração autónoma para fins de habitação permanente, quando referentes a contratos celebrados ao abrigo do Regime do Arrendamento Urbano[14].

Os anos 90 foram também palco para uma reformulação do Regime do Arrendamento Urbano, introduzida pelo Decreto-Lei n.º 321-B/90, de 15 de outubro. Interessante notar a resenha histórica contida no preâmbulo deste diploma que dá conta do (a esta data) centenário e crónico mecanismo de congelamento de rendas de contratos antigos

com determinados limites) e depois no próprio Decreto-Lei n.º 27/2001, de 3 de fevereiro (sob a forma de dedução à coleta do IRS dos montantes aplicados e isenção de ISD sobre as transmissões por morte a favor do cônjuge, filhos dos saldos das contas poupança-habitação).

13. E após essa data para contratos de crédito à habitação celebrados até 31.12.2011.

14. Passando a prever-se, a partir de 2001, esta dedução também em relação a rendas pagas ao abrigo de contratos de locação financeira para os mesmos fins, na parte em que não constituíssem amortização do capital.

em Lisboa e Porto, ao qual era já imputado o reconhecido efeito de inflacionar as rendas dos novos contratos[15].

Não só o mercado de aquisição de habitação, mas também o mercado do arrendamento foi impulsionado com apoios estatais promovidos pelo Decreto-Lei n.º 68/86, de 27 de março, que previa três tipos de regime de renda: o regime geral de renda; o regime especial e ainda um regime especial para arrendatários deficientes. Na década de 90 foi ainda criado, através do Decreto-Lei n.º 162/92, de 5 de agosto, um incentivo ao arrendamento específico para jovens arrendatários.

No que respeita à promoção da reabilitação do parque habitacional e centros históricos há que destacar o papel desempenhado pelo Regime Especial de Comparticipação na Recuperação de Imóveis Arrendados (RECRIA) instituído pelo Decreto-Lei n.º 4/88, de 14 de janeiro.

2.2. Década de 2000 do Século XXI

Na década de 2000, ocorreram grandes mudanças ao nível da tributação do património. Em 2000 é aprovado o Código do Imposto do Selo e em 2003 é aprovada a Reforma da Tributação do Património. Neste âmbito, é importante também contextualizar a aprovação do Novo Regime de Arrendamento Urbano, em 2006. Por fim, assinala-se em 2008/2009 uma nova vaga de incentivos fiscais à reabilitação urbana.

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15. Destaca-se a seguinte passagem sobre o estado do mercado habitacional em meados da década de 70: "*Nas vésperas da Revolução de 1974, havia numerosas rendas, em Lisboa e no Porto, que não eram actualizadas desde o imediato pós-guerra. Ora, como foi afirmado em 1966 pelo então Ministro da Justiça, em comunicação à Assembleia Nacional, o artigo 10.º do diploma preambular do Código Civil devia ser meramente transitório, por «o benefício concedido aos antigos inquilinos de Lisboa e do Porto estar no fundo a ser pago, com larga soma de juros, pelos novos arrendatários, de quem os proprietários exigem (até certo ponto justificadamente, dada a estagnação forçada do contrato) rendas que são excessivas para o padrão médio das remunerações do trabalho». Acresce ainda, continuou ele, que «da inalterabilidade das rendas, no mercado em permanente evolução, há-de resultar por força a progressiva deterioração de uma parcela não despicienda do património imobiliário nacional, fenómeno a que os poderes públicos não devem assistir impassíveis»*".

Abordamos de seguida os aspetos mais importantes de cada uma dessas etapas.

2.2.1. Aprovação do Código do Imposto do Selo em 2000

Em 1 de março de 2000 entra em vigor o novo Código do Imposto do Selo, aprovado pela Lei n.º 150/99, de 11 de setembro. O Imposto do Selo, o mais antigo imposto do sistema fiscal português[16], até então vigente sob a forma do Código de Imposto do Selo de 1926, sofreu uma profunda transformação em 2000, alterando-se significativamente o seu âmbito de incidência, o qual já havia sofrido alterações também aquando da entrada em vigor do IVA em Portugal em 1986.

Com a Reforma de 2000, o Imposto do Selo passa de ser um imposto sobre documentos para passar a ser um imposto sobre operações que, revelando rendimento ou riqueza, não estejam abrangidas por outras normas fiscais (cf. Preâmbulo). Passa a atender-se à "substância económica" das operações, princípio que encontrava respaldo legal na Lei Geral Tributária, aprovada no ano anterior, em 1999, fazendo ruir todo o edifício ancestral de matriz essencialmente formalista (cf. Carlos Lobo, «As operações financeiras no Imposto do Selo: enquadramento constitucional e fiscal», *in* Revista de Finanças Públicas e Direito Fiscal).

Embora a Reforma de 2000 não impacte, pelo menos diretamente, nas políticas de habitação, património e arrendamento, não deixa de constituir mais um marco importante na formação do sistema fiscal português como o conhecemos nos dias de hoje.

Merece especial relevo a alteração da filosofia de tributação do crédito, que passou a recair sobre a sua utilização e já não sobre a celebração do respetivo negócio jurídico de concessão.

Com a reforma da tributação do património, o Código do Imposto do Selo sofreu uma profunda remodelação. A decisão de abolir o imposto sobre as sucessões e doações relativo às transmissões gratuitas a favor de herdeiros legitimários tornou injustificável a manutenção de um

16. Remonta ao século XVII (1660).

Código destinado a tributar apenas as restantes transmissões gratuitas. Essas transmissões passaram, a partir de então, a ser tributadas em imposto do selo, pelo que o Código teve de ser ajustado e dotado das normas necessárias a esse fim. Mas esta reforma não se limita a introduzir no Código as normas do antigo imposto sobre as sucessões e doações. Antes pelo contrário, introduz outras alterações na tributação das transmissões gratuitas.

A Reforma do Património de 2003, de que falaremos de seguida, incorporou no novo Código do Imposto de Selo a tributação das transmissões gratuitas, introduzindo neste âmbito uma isenção para as operações entre herdeiros legitimários.

2.2.2. Reforma da Tributação do Património em 2003

Foi com o Decreto-Lei n.º 287/2003, de 12 de novembro, que foram aprovados os Códigos do IMI e do IMT[17], tendo sido revogados o Código da Contribuição Predial, o Código da Contribuição Autárquica e o Código do Imposto Municipal da Sisa e do Imposto sobre as Sucessões e Doações.

Com a aprovação do Código do IMI, institui-se um sistema de avaliações dos prédios assente no valor de mercado, rompendo-se com o anterior regime de avaliação em função do rendimento normal (rendimento gerado ou suscetível de ser gerado, por cada prédio) – o que era de mais fácil determinação nos prédios arrendados, não tanto nos prédios não arrendados[18].

Até 2003, portanto, vigorava um sistema de avaliação baseado no rendimento gerado pelos prédios, o qual havia sido concebido e

17. Códigos do Imposto Municipal sobre Imóveis - CIMI - e do Imposto Municipal sobre as Transmissões Onerosas de Imóveis - CIMT

18. A avaliação em função do rendimento normal, no caso de prédios não arrendados, era baseada numa presunção de renda possível, o que era altamente subjetivo e muito pouco sustentado. Nestes casos, a tributação não ocorria sobre o rendimento real e efetivo, mas sobre o rendimento normal ou potencial, o rendimento-padrão. Como vimos acima, em 1989, com a Reforma da Tributação do Rendimento e a aprovação do Código do IRS, abandonou-se o modelo do rendimento normal, consagrando-se como regra a tributação do rendimento real e efetivo.

implementado por Salazar, em 1929, e mais tarde consagrado no Código da Contribuição Predial e do Imposto sobre a Indústria Agrícola (CCPIIA) em 1963[19]. Historicamente, os impostos que incidiam sobre o acervo imobiliário eram impostos sobre o rendimento, e não impostos sobre o património.

Só com a Constituição de 1976, é que o património imobiliário passa a ser tributado numa ótica de manifestação de riqueza, e não numa ótica de manifestação de rendimento.[20]

Nas palavras de JOSÉ MARIA PIRES, "*(...) o modelo de determinação do valor patrimonial nos termos da antiga Contribuição Autárquica assentava num regime de determinação autoritária do rendimento normal, e estava claramente desajustado dos princípios constitucionais da Constituição de 1976. Na verdade, a inexistência de regras objetivas de avaliação dos prédios não arrendados e a inexistência de um mercado livre de arrendamento em Portugal (...) tornavam também os valores patrimoniais dos imóveis muito afastados da realidade do mercado (...)*" (cf. «Lições de Impostos sobre o Património e o Selo», Almedina, 2015, 3.ª ed., pág. 27). Também CASALTA NABAIS considerava que a tributação do património anterior à reforma de 2003 não respeitava os princípios constitucionais (cf. «Estudos de Direito Fiscal», Almedina, 2005, pág. 124).

Como referimos , em 2003, o valor patrimonial tributário dos prédios passa então a basear-se no valor de mercado, tendo em conta as condições de mercado e a forma como este valoriza as características específicas do prédio e da sua situação.

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19. O CCPIIA obrigava os proprietários dos prédios arrendados a entregar uma declaração caso ocorresse alguma alteração ao valor da renda e com base nessa declaração era atualizada a matriz do prédio e o valor sujeito a imposto. Já para os prédios não arrendados, não havia uma atualização automática anual (subsequente ao ano de construção). A atualização de valor que ocorresse tinha sempre que partir da iniciativa da administração tributária e era muito esporádica. Conforme nota JOSÉ MARIA PIRES, a atualização nem sequer acompanhava a inflação, o que contribuiu, ao longo dos anos, para uma forte erosão dos valores patrimoniais (ob.cit., p. 38).

20. Artigo 103.º, n.º 1: "*O sistema fiscal visa a satisfação das necessidades financeiras do Estado e outras entidades públicas e uma repartição justa dos rendimentos e da riqueza*."

Esse valor de mercado, que já se vinha advogando, deveria ser calculado com base em parâmetros como "*(...) a área, a localização, o destino do imóvel, a antiguidade, porventura majorado e minorado com referência a elementos mais subjetivos, como certas infraestruturas que valorizem ou desvalorizem o imóvel.*" (cf. VASCO VALDEZ, «Os impostos sobre o património – situação atual e perspetivas futuras», Revista Fisco, n.º 101/102, pág. 72).

O novo regime de avaliação, mais objetivo e previsível (assente em regras de determinação de valor pré-definidas) vai mais de encontro ao estabelecido no artigo 104.º, n.º 3, da Constituição da República Portuguesa, "*A tributação do património deve contribuir para a igualdade entre os cidadãos.*"

A entrada em vigor do novo sistema de avaliações do Código do IMI foi faseada, tendo entrado de imediato em vigor para os prédios novos, e para os prédios já existentes após a sua transmissão.

Posteriormente, um dos domínios mais importantes onde se fizeram sentir os efeitos do sistema de avaliações do Código do IMI foi no Novo Regime do Arrendamento Urbano (NRAU), aprovado pela Lei n.º 6/2006, de 27 de fevereiro, a qual veio permitir a atualização das rendas antigas e consagrou o sistema de avaliações do Código do IMI como a referência para a determinação do valor máximo das novas rendas a aplicar.

Conforme nota JOSÉ MARIA PIRES, a prévia reforma do sistema de avaliações foi importante neste processo de atualização de rendas porquanto "*(...) um processo deste tipo, em que o quadro legal permite a atualização de rendas congeladas há vários anos ou mesmo décadas, é sempre um processo com um elevado potencial de conflito (...). A introdução no modelo de um sistema de avaliações objetivo, transparente e que está para além da vontade e dos interesses particulares de cada uma das partes no contrato de arrendamento, na determinação da nova renda, corresponde a essa necessidade de pacificação e objetividade.*" (cf. ob.cit., pág. 31). Aliás, essa mesma preocupação vem expressa na Exposição de Motivos do NRAU.

Foram também essas razões de segurança, objetividade e previsibilidade que levaram o legislador a adotar tal modelo para determinar o

valor de venda dos imóveis penhorados (em 2007 e em 2008, seja nas execuções fiscais, seja nas execuções civis).

Só em 2011, com a Lei n.º 60-A/2011, quando foi determinada por lei a avaliação geral de todos os prédios que a essa data ainda não tivessem sido avaliados nos termos no Código do IMI, é que se concluiu esse longo processo de atualização dos valores patrimoniais tributários dos prédios no território nacional.

Feita a devida resenha e contextualização histórica, não há dúvidas de que o anterior modelo da Contribuição Predial e da Contribuição Autárquica não eram conformes com a Constituição de 1976 e, mesmo antes, eram ineficientes e geradoras de injustiças relativas entre os contribuintes, na medida em que tributava de forma desigual os titulares de prédios antigos e de prédios novos[21] e era muito permeável à fraude e evasão fiscal (também neste sentido, JOSÉ MARIA PIRES, ob. cit., pág. 35). Aliás, no limite, dois prédios iguais e com a mesma localização, podiam ter valores de avaliação completamente diferentes (ob.cit., pág. 37).

Nota ainda o Autor que, para além da ostensiva discriminação e injustiça fiscal, o panorama à data desincentivava a renovação do parque imobiliário, porque dela resultaria uma nova avaliação, com a inerente subida do imposto. No fundo, "*(…) o sistema beneficiava a degradação dos imóveis (…)*" (ob.cit., p. 40).

O Preâmbulo do diploma que aprova o Código do IMI é neste conspecto deveras pertinente:

> *"Há muito tempo que se formou na sociedade portuguesa um largo consenso acerca do carácter profundamente injusto do regime actual de tributação estática do património imobiliário. Esse consenso é extensivo*

21. Os titulares de prédios novos seriam discriminados por pagar um imposto proporcionalmente superior pela simples razão de os seus prédios terem sido recentemente avaliados porque o foram aquando a sua construção. Por outro lado, prosperavam os titulares dos prédios antigos, que não viam atualização de valor há quase décadas, e por essa razão, podiam nem pagar qualquer imposto, porque o valor ficava abaixo do mínimo legal.

à identificação das causas do problema, a saber, a profunda desactualização das matrizes prediais e a inadequação do sistema de avaliações prediais.

Embora o Código da Contribuição Autárquica tenha entrado em vigor em 1 de Janeiro de 1989, o sistema de avaliações vigente é ainda o do velho Código da Contribuição Predial e do Imposto Sobre a Indústria Agrícola, de 1963, que em grande parte manteve o sistema do Código da Contribuição Predial de 1913.

O sistema de avaliações até agora vigente foi criado para uma sociedade que já não existe, de economia rural e onde a riqueza imobiliária era predominantemente rústica. Por essa razão, o regime legal de avaliação da propriedade urbana é profundamente lacunar e desajustado da realidade actual.

A enorme valorização nominal dos imóveis, em especial dos prédios urbanos habitacionais, comerciais e terrenos para construção, por efeito de sucessivos processos inflacionistas e da aceleração do crescimento económico do País nos últimos 30 anos, minaram a estrutura e a coerência do actual sistema de tributação.

A combinação destes factores conduziu a distorções e iniquidades, incompatíveis com um sistema fiscal justo e moderno e, sobretudo, a uma situação de sobretributação dos prédios novos ao lado de uma desajustada subtributação dos prédios antigos.

Mantêm-se, no entanto, plenamente actuais as razões que, aquando da reforma de 1988-1989, levaram à criação de um imposto sobre o valor patrimonial dos imóveis, com a receita a reverter a favor dos municípios, baseado predominantemente no princípio do benefício.

Porém, a profundidade das alterações a introduzir é de tal ordem que se entendeu, em lugar da contribuição autárquica, criar o imposto municipal sobre imóveis (IMI), terminologia de resto mais adequada para designar a realidade tributária em causa, para além de que existem outros tributos que têm as autarquias como seus sujeitos activos.

(...) Com este Código opera-se uma profunda reforma do sistema de avaliação da propriedade, em especial da propriedade urbana. Pela primeira vez em Portugal, o sistema fiscal passa a ser dotado de um

quadro legal de avaliações totalmente assente em factores objectivos, de grande simplicidade e coerência interna, e sem espaço para a subjectividade e discricionariedade do avaliador.

É também um sistema simples e menos oneroso, que permitirá uma rapidez muito maior no procedimento de avaliação.

(...) Os objectivos fundamentais das alterações propostas são, pois, o de criar um novo sistema de determinação do valor patrimonial dos imóveis, o de actualizar os seus valores e o de repartir de forma mais justa a tributação da propriedade imobiliária, principalmente no plano intergeracional.

De referir também que outro dos objectivos principais a alcançar é o da rápida melhoria do nível de equidade. Tal desiderato é prosseguido, enquanto não for determinada a avaliação geral, através da actualização imediata dos valores patrimoniais tributários (...)."

Assim, a Reforma de 2003 terá sido fundamental para o alcançar de um sistema de tributação mais justo e equitativo e para ajustar o valor do património imobiliário à realidade económica atual.

Outro dos aspetos importantes da Reforma de 2003 foi a diminuição da taxa de tributação das transmissões onerosas de imóveis (da anterior SISA para o atual IMT), com o objetivo de fomentar as transações de imóveis e, por essa via, promover a renovação do parque imobiliário[22].

Conforme decorre do Preâmbulo do Código do IMT,

"*Quanto à determinação do valor tributável, observa-se que passa a ser determinado segundo as regras previstas pelo novo regime de avaliações previsto no Código do Imposto Municipal sobre Imóveis, (...) obtendo-se assim garantias de actualização, de objectividade e de uniformidade dos valores oficiais dos imóveis que se transmitam (...).*

22. Vasco Valdez, "*Aspectos Gerais da Reforma da Tributação do Património*", in C.T.F. n.º 408, Outubro-Dezembro 2002 e João Ricardo Catarino, "*Aspectos Relevantes do Novo Regime de Avaliação da Propriedade Urbana para Fins Fiscais*", Revista Fisco 119 (2005).

As elevadas taxas do anterior imposto municipal de sisa e a ausência de qualquer correspondência credível entre os valores matriciais da esmagadora maioria dos prédios e os valores praticados no mercado imobiliário, a que se aliava a convergência de interesses entre alienantes e adquirentes, vinham gerando um endémico e elevado grau de fuga fiscal (...).

Em matéria de taxas, procede-se a uma descida muito significativa dos seus valores nominais, o que, em simultâneo com a actualização dos escalões, originará uma clara diminuição da carga fiscal relativa às aquisições de imóveis. Esta redução da tributação será uma realidade mesmo considerando que o incremento patrimonial resultante da aplicação das novas regras de avaliação aproximará os valores patrimoniais a cerca de 80% a 90% dos valores de mercado destes mesmos bens."

Como já se mencionou, a degradação dos edifícios e a necessidade de renovação do parque imobiliário era uma das maiores preocupações à data.

Por essa razão, outra das novidades fundamentais trazidas pela Reforma de 2003 foi a criação da denominada "primeira vaga" de incentivos fiscais à reabilitação urbana, com a introdução, à data, do então artigo 40.º-A no Estatuto dos Benefícios Fiscais.

Nos termos do referido preceito, eram criados dois benefícios fiscais: isenção de IMI durante dois anos para prédios reabilitados e isenção de IMT para a aquisição com o objetivo de reabilitação.

Outros benefícios fiscais introduzidos com a Reforma de 2003 consistiram na sobejamente conhecida isenção de IMI durante 3 anos na aquisição de habitação própria e permanente (cf. atual artigo 46.º do EBF) e a isenção de IMI para prédios de reduzido valor patrimonial de sujeitos passivos de baixos rendimentos.

2.2.3. Novo Regime do Arrendamento Urbano (NRAU) em 2006

Outra das razões que impedia a renovação do parque imobiliário e contribuía para a sua degradação prendia-se com a legislação que impedia os senhorios de atualizarem as suas rendas, logo, desincentivando-os

totalmente de efetuarem obras de conservação e manutenção dos prédios arrendados.

Por essa razão, e já imbuído do progresso alcançado com a Reforma de 2003, o legislador aprovou a Lei n.º 6/2006, de 27 de fevereiro, que teve como primordial objetivo a atualização das rendas degradadas para valores de mercado, em consonância com as novas regras de determinação do valor patrimonial tributário dos prédios.

Com efeito, os objetivos prosseguidos prendiam-se com a promoção do "*(…) mercado de arrendamento para a habitação, criando um alternativa, económica e real, à aquisição de casa própria; proporcionar a mobilidade dos cidadãos, em especial dos mais jovens, permitindo a sua adequação às necessidades do mercado de trabalho; incentivar a reabilitação urbana, criando em consequência condições para o regresso da população ao centro das cidades; encorajar a racional utilização dos recursos habitacionais disponíveis, através da colocação no mercado de arrendamento dos fogos vagos e de uso sazonal; proporcionar o aumento da qualidade habitacional, por via do incentivo à recuperação dos fogos degradados (…)*" (cf. JORGE BACELAR GOUVEIA, «Arrendamento Urbano, Constituição e Justiça – Perspectivas de Direito Constitucional e de Direito Processual», Lisboa, O Espírito das Leis, 2004, p.134).

Porém, conforme decorre do próprio Portal da Habitação[23], "*(…) a reforma do arrendamento urbano de 2006 não conseguiu dar uma resposta suficiente aos principais problemas com que se debate o arrendamento urbano, especialmente os relacionados com os contratos com rendas anteriores a 1990, com a dificuldade de realização de obras de reabilitação em imóveis arrendados e com um complexo e moroso procedimento de despejo.*"

Com efeito, "*(…) Apesar da boa intenção da alteração legislativa, estes mecanismos de actualização de rendas mostraram-se ineficazes derivado aos elevadíssimos custos que eram exigidos aos senhorios para poderem proceder a tal, e não só, pois tratava-se de um processo moroso e burocrático, permanecendo a grande maioria dos contrato antigos com as rendas por actualizar. Nos contratos antigos manteve-se ainda a proibição de denúncia pelo senhorio.*

23. Disponível em: http://www.portaldahabitacao.pt

Pelo exposto, a reforma de 2006 também não atingiu os objectivos que visava cumprir. Os contratos antigos mantiveram-se vinculísticos, perdurando os entraves à dinamização do mercado de arrendamento, bem como o envelhecimento do parque edificado. Começou-se então a sentir necessidade de uma reforma mais ampla. Necessidade essa que aumentou com a crise financeira internacional de 2007 que também se repercutiu no sector imobiliário ao colocar elevadas restrições ao recurso ao crédito, responsável por uma enorme fatia da dívida externa privada de Portugal. A percentagem de imóveis arrendados no país permanecia uma das mais baixas da Europa." (cf. Mónica Filipa Morais da Silva, «O Regime Transitório da Nova Lei do Arrendamento Urbano», Dissertação de Mestrado, Coimbra, 2014, página 22).

Conforme nota JOSÉ MARIA PIRES, ao abrigo da Reforma de 2006, o número de contratos com rendas congeladas que foram atualizadas ascendeu somente a 3.036, num universo de 255.000. "*Não são conhecidos estudos que expliquem esse aparente insucesso, mas o facto de a reforma de 2006 fazer depender a atualização da renda da avaliação para efeitos fiscais, e de à data da sua entrada em vigor ser ainda escasso o número de prédios avaliados nos termos do CIMI, pode ter sido uma das causas.*" (ob.cit., página 157).

Uma nota adicional para salientar que, também no NRAU surgia a preocupação pela reabilitação urbana. No referido diploma, previa-se que a atualização da renda pelo senhorio pressupunha que o prédio tivesse um estado de conservação mínimo. A determinação do coeficiente de conservação era efetuada após a avaliação nos termos do Código do IMI (cf. artigo 35.º NRAU).

Em 2012, é aprovada uma nova Reforma do Arrendamento Urbano, de que falaremos melhor adiante.

2.2.4. Incentivos fiscais à reabilitação urbana de 2008 e de 2009

Após a aprovação do NRAU, foi aprovado um Regime Extraordinário de Apoio à Reabilitação Urbana, com a Lei do Orçamento de Estado para 2008 (Lei n.º 67-A/2007, de 31/12). Este regime foi mais tarde integrado no Estatuto dos Benefícios Fiscais, com a Lei do Orçamento do Estado para 2009 (Lei n.º 64-A/2008, de 31/12).

Introduzido em 2008, inicialmente pensado para ser um regime temporário, visando um fenómeno generalizado e acelerado de reabilitação urbana e que estaria concretizado findo esse período transitório, acabou por se tornar um regime mais estável e permanente, integrando o EBF, em 2009, sendo aí ainda mais alargado.

Para os prédios que fossem então objeto de reabilitação urbana, verificadas determinadas condições, estabelecidas no então artigo 71.º do EBF, estavam previstos, designadamente, os seguintes benefícios fiscais:

i. Isenção de IMI durante cinco anos, renovável por mais cinco anos;
ii. Isenção de IMT na primeira aquisição do imóvel reabilitado, quando destinado a habitação própria e permanente;
iii. Isenção de IRC para os rendimentos obtidos por fundos de investimento imobiliário, constituídos entre 1.1.2008 e 31.12.2012, desde que 75% ou mais dos seus ativos sejam bens imóveis sujeitos a ações de reabilitação urbana;
iv. Taxas reduzidas de tributação em sede de IRS e IRC na detenção e transmissão de unidades de participação em fundos de investimento imobiliário;
v. Dedução à coleta de IRS de 30% dos encargos incorridos com reabilitação de imóveis;
vi. Taxas reduzidas de tributação de rendimentos prediais e de mais-valias para titulares de prédios objeto de reabilitação.

Por esta altura, são também atualizadas as normas de incentivos fiscais à reabilitação urbana previstas em sede de IVA, para as empreitadas de reabilitação urbana, que beneficiam da taxa reduzida de 6%.

Já desde 1999 que a Lista I anexa ao Código do IVA, na verba 2, previa a aplicação da taxa reduzida de IVA às empreitadas de construção, beneficiação ou conservação de imóveis realizadas no âmbito do Regime Especial de Comparticipação na Recuperação de Imóveis Arrendados (RECRIA), tendo sido acrescentadas ao longo dos anos e até

à Lei do Orçamento de Estado para 2008[24] novas realidades como as empreitadas de construção, beneficiação ou conservação de imóveis realizadas no âmbito do Regime de Apoio à Recuperação Habitacional em áreas Urbanas Antigas (REHABITA), assim como do Regime Especial de Comparticipação e Financiamento na Recuperação de Prédios Urbanos em Regime de Propriedade Horizontal (RECRIPH) e do Programa SOLARH aprovado pelo Decreto-Lei nº 7/99, de 8 de Janeiro.

2.2.5. O regime dos Fundos e sociedades de investimento imobiliário para arrendamento habitacional (FIIAH e SIIAH) de 2009

Com a Lei do Orçamento do Estado para 2009 (Lei n.º 64-A/2008, de 31/12), foi criado o regime especial aplicável aos fundos de investimento imobiliário para arrendamento habitacional (FIIAH) e às sociedades de investimento imobiliário para arrendamento habitacional (SIIAH).

O referido regime contemplava uma série de benefícios fiscais para os ditos FIIAH e SIIAH, com duração de 5 anos, a saber:

- Isenção de IRC;
- Isenção de IRS e IRC quanto aos rendimentos respeitantes a unidades de participação nos referidos fundos de investimento, pagos ou colocados à disposição dos respetivos titulares, quer seja por distribuição ou reembolso, excluindo o saldo positivo entre as mais-valias e as menos-valias resultantes da alienação das unidades de participação;
- Isenção de IRS quanto às mais-valias resultantes da transmissão de imóveis destinados à habitação própria a favor dos referidos fundos de investimento, que ocorra por força da conversão do direito de propriedade desses imóveis num direito de arrendamento;
- Dedução à coleta das importâncias suportadas pelos arrendatários dos imóveis dos fundos de investimento em resultado da

24. Que passou a remeter para o conceito de reabilitação urbana definido em diploma próprio.

conversão de um direito de propriedade de um imóvel num direito de arrendamento;

- Isenção de IMI, enquanto se mantiverem na carteira do FIIAH, para os prédios urbanos destinados ao arrendamento para habitação permanente que integrem o património dos fundos de investimento;
- Isenção de IMT nas aquisições de prédios urbanos ou de frações autónomas de prédios urbanos destinados exclusivamente a arrendamento para habitação permanente, pelos fundos de investimento e nas aquisições de prédios urbanos ou de frações autónomas de prédios urbanos destinados a habitação própria e permanente, em resultado do exercício da opção de compra pelos arrendatários dos imóveis que integram o património dos fundos de investimento;
- Isenção de Imposto do Selo em todos os atos praticados, desde que conexos com a transmissão dos prédios urbanos destinados a habitação permanente que ocorra por força da conversão do direito de propriedade desses imóveis num direito de arrendamento sobre os mesmos, bem como com o exercício da opção de compra.

O regime tem vindo a ser prorrogado, sendo que, mais recentemente, a Lei n.º 75-B/2020, de 31 de dezembro (Lei do Orçamento do Estado para 2021) prorrogou-o até 31 de dezembro de 2025.

Quanto aos motivos que presidiram à criação do regime fiscal especial para os FIIAH: "*(…) constituem um mecanismo claro de apoio à banca e às famílias, face aos problemas emergentes do aumento das taxas de juros e ao já referido crédito "mal parado" das instituições de crédito, permitindo assim a conversão das prestações de crédito a habitação pagas pelos clientes das instituições de crédito (a título de proprietários dos imóveis) no pagamento de rendas relativamente a esses mesmos imóveis (em função da alteração da titularidade dos mesmos pelos FIIAH), acompanhado sempre de uma opção de compra sobre o imóvel cuja propriedade se transmitiu.*" (cf. FILIPE ROMÃO e MAFALDA ALVES, «Os fundos de investimento

imobiliário como medida de combate à crise económica e financeira», 2010, Vida Imobiliária, n.º 143).

O texto que serve de base à proposta do Orçamento do Estado para 2009 refere que "*Com esta iniciativa pretende-se criar um estímulo adicional ao mercado do arrendamento urbano em Portugal, (...). Deste modo, pretende-se criar as condições necessárias, à colocação dos imóveis no mercado de arrendamento e permitir, ainda, às famílias oneradas com as prestações dos empréstimos à habitação, alienar o respetivo imóvel ao fundo ou à sociedade, com redução dos respetivos encargos, substituindo-os por uma renda de valor inferior àquela prestação e mantendo uma opção de compra sobre o imóvel que arrendem ao fundo.*"

Em 11 de julho de 2023, o Supremo Tribunal Administrativo proferiu o Acórdão Uniformizador de Jurisprudência n.º 3/2023, no sentido de que as isenções fiscais dos n.os 6 (IMI), 7 (IMT) e 8 (IS) do artigo 8.º do regime jurídico dos FIIAH, na sua redação original, derivada da Lei n.º 64-A/2008, de 31/12 (LOE 2009), devem ser interpretadas no sentido de que estão sujeitas à condição resolutiva de efetiva destinação do imóvel a arrendamento para habitação permanente, ficando aqueles benefícios fiscais sem efeito se o imóvel vier a ser alienado sem ter sido arrendado ou sem que o Ministro das Finanças autorize a sua alienação.

Conforme decorre do referido aresto, "*(...) o enquadramento deste regime jurídico no respetivo contexto socioeconómico de 2008-2009 permite compreender que, (...) a finalidade de interesse público a prosseguir com este regime fiscal mais favorável era a de assegurar a continuidade do acesso à habitação das famílias que se viram em situação económica difícil no contexto da crise financeira internacional, originária da crise do subprime, que tinha tido início em 2007, nos EUA. O objetivo do regime jurídico era (...) apoiar estas famílias através de um regime de benefícios fiscais por via do IRS e por via da conversão dos empréstimos em arrendamentos graças ao incentivo instituído a favor dos FIIAH. Ora, se estes fundos não chegassem a arrendar os imóveis ficaria frustrado o objetivo desta política económica e fiscal e, mais do que isso, no que no aqui releva em termos jurídicos, tornar-se-ia injustificada a despesa fiscal a favor de certas entidades. Também*

por essa razão este seria um resultado interpretativo inadmissível à luz do disposto no n.º 3 do artigo 14.º da LGT, que impõe uma definição clara dos objetivos dos benefícios fiscais."

2.3. Década de 2010

Na década de 2010, Portugal continua a ter um sector particularmente vasto de alojamento ocupado pelos respetivos proprietários e a enfrentar dificuldades relacionadas com habitações degradadas, a deterioração de parte do parque habitacional público, a sobrelotação das casas públicas e a ausência de investimento em políticas de habitação pública[25].

Além disso, as reformas da década anterior não atingiram os resultados desejados no setor do arrendamento privado, que continuava em declínio.

A crise financeira global chegou, também, a Portugal e obrigou à disciplina do Programa de Assistência Económica e Financeira cuja implementação ocorreu a partir de meados de 2011 e durou até 2014, tendo sido supervisionada pela Troika, constituída pela Comissão Europeia ("CE"), o Banco Central Europeu ("BCE") e o Fundo Monetário Internacional ("FMI").

No Memorando de Entendimento da Troika[26] foi incluído um ponto especialmente dedicado às questões habitacionais, com o objetivo de melhorar o acesso das famílias à habitação e a qualidade da mesma, dando especial atenção ao mercado de arrendamento[27].

Tal como na década anterior, são identificáveis, portanto, três grandes eixos de ação: a habitação social, a reabilitação urbana e a dinamização do mercado de arrendamento.

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25. HABITAÇÃO: CEM ANOS DE POLÍTICAS PÚBLICAS EM PORTUGAL, 1918-2018, A política de habitação em Portugal de 2002 a 2017, publicado pelo Instituto da Habitação e da Reabilitação Urbana.

26. "PORTUGAL: MEMORANDUM OF UNDERSTANDING ON SPECIFIC ECONOMIC POLICY CONDITIONALITY", de 3 de maio de 2011.

27. Ponto 6. do Memorando de Entendimento.

2.3.1. Avaliação Geral dos Prédios

Apesar de o Decreto-Lei n.º 287/2003, de 12 de novembro, acima analisado, prever a conclusão da avaliação geral no prazo de 10 anos (i.e., até 2013), foi apenas com o Memorando de Entendimento celebrado com a Troika que o processo foi devidamente impulsionado[28], com o intuito de aproximar o valor patrimonial tributável dos imóveis do seu valor de mercado.

O quadro jurídico da avaliação geral foi aprovado através da Lei n.º 60-A/2011, de 30 de novembro, e a avaliação foi desencadeada pela administração fiscal no início de 2012. JOSÉ MARIA PIRES sistematiza as características do regime da avaliação em cinco princípios: (i) o "*princípio da identidade*", na medida em que no método de determinação do VPT se utilizou os mesmos coeficientes e o modelo previsto no Código do IMI (ex. localização, qualidade e conforto, vetustez); (ii) o "*princípio da oficiosidade*", tendo o processo sido desencadeado oficiosamente pela administração fiscal, sem iniciativa do sujeito passivo; (iii) o "*princípio da simplicidade e da desmaterialização*", dispensando-se os sujeitos passivos da apresentação da declaração Modelo 1 do IMI, privilegiando-se as notificações eletrónicas, adotando-se um procedimento de segunda avaliação simplificado e dispensando-se as vistorias; (iv) o "*princípio do gradualismo*", compensando-se o inevitável aumento do VPT com a aplicação de taxas de IMI mais baixas aos prédios avaliados e com a aplicação de um regime transitório para evitar um aumento demasiado abrupto do IMI a pagar pelos sujeitos passivos; (v) o "*princípio da celeridade e do pragmatismo*", patentes, nomeadamente, na fixação de um prazo máximo de 60 dias para a conclusão do procedimento e no envio oficioso de plantas pelas câmaras municipais (cf. *ob.cit.*, pág. 167-170).

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28. O Governo comprometeu-se a rever o quadro para a avaliação do parque habitacional e de terrenos para fins fiscais e a apresentar medidas para (i) garantir que, no final de 2012, o valor tributável de todas as propriedades estava próximo do valor de mercado e (ii) que a avaliação do imóvel fosse atualizada regularmente (a cada ano para imóveis comerciais e uma vez a cada três anos para imóveis residenciais, conforme previsto na lei).

2.3.2. Reforma do Arrendamento Urbano

Também por imposição da Troika, Portugal procedeu à revisão do regime jurídico do arrendamento urbano[29], o que ocorreu através da Lei nº 31/2012, de 14 de agosto de 2012[30]. Com a sua aprovação, pretendeu-se dar cumprimento às obrigações assumidas no âmbito do Memorando de Entendimento de dinamizar o mercado do arrendamento, promovendo a liberdade das partes na estipulação das regras relativas à duração dos contratos de arrendamento, a atualização de rendas de contratos anteriores a 1990, a reabilitação dos imóveis arrendados e a celeridade dos procedimentos de despejo, de forma a permitir a rápida recolocação dos imóveis no mercado de arrendamento.

O facto de, em 2012, já estar em fase de conclusão a avaliação geral dos prédios nos termos do Código do IMI facilitou o processo de atualização das rendas, que deixou de estar dependente da intervenção da administração tributária e passou a depender da vontade das partes. O VPT passou a ser relevante apenas para contratos anteriores a 1990 e em casos excecionais, para proteção dos mais vulneráveis: (i) inexistência de acordo entre as partes relativamente ao valor da renda, ou (ii) idade do arrendatário superior a 65 anos, (iii) incapacidade do arrendatário superior a 60%, ou (iv) arrendatário titular de rendimento bruto corrigido inferior a cinco vezes o valor do rendimento mínimo nacional anual.

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29. Refere-se no ponto 6.1. do Memorando de Entendimento: "*The Government will present measures to amend the New Urban Lease Act Law 6/2006 to ensure balanced rights and obligations of landlords and tenants, considering the socially vulnerable. [Q3-2011] This plan will lead to draft legislation to be submitted to Parliament by [Q4-2011]. In particular, the reform plan will introduce measures to: i) broaden the conditions under which renegotiation of open-ended residential leases can take place, including to limit the possibility of transmitting the contract to first degree relatives; ii) introduce a framework to improve households' access to housing by phasing out rent control mechanisms, considering the socially vulnerable; iii) reduce the prior notice for termination of leases for landlords; iv) provide for an extrajudicial eviction procedure for breach of contract, aiming at shortening the eviction time to three months; and v) strengthen the use of the existing extrajudicial procedures for cases of division of inherited property.*"

30. Entretanto alterada pela Lei n.º 79/2014, de 19 de dezembro, pela Lei n.º 43/2017, de 14 de junho, e pela Lei nº13/2019, de 12 de fevereiro.

Por outro lado, o Memorando de Entendimento impôs a adoção de medidas de incentivo ao arrendamento que, de algum modo, pretendia igualar os benefícios atribuídos a quem adquire habitação própria. Embora não tenham sido totalmente adotadas durante o período do Programa (2011-2014), foram sendo progressivamente implementadas e reforçadas medidas que passaram pelo IRS, pelo IMT e pelo IMI:

a. a partir de 2012 eliminou-se a dedutibilidade, em sede de IRS, dos juros de créditos relacionados com habitação própria e permanente, mantendo-se a dedução apenas para juros de dívidas por contratos celebrados até 31 de dezembro de 2011;
b. desde 2015, é aplicável uma dedução em IRS de 15% das rendas suportadas pelo sujeito passivo, embora esteja determinado um limite máximo de dedução;
c. desde 2019, de forma a incentivar os senhorios a colocarem imóveis no mercado para arrendamento de longa duração, foram implementadas taxas reduzidas de IRS para os contratos celebrados por períodos iguais ou superiores a dois anos, sendo aplicáveis taxas variáveis entre 26% e 10% (em vez da taxa geral de 28%), consoante a sua duração;
d. O IMI relativo a propriedades devolutas ou não arrendadas foi agravado.

2.3.3. Nova Geração de Políticas de Habitação

Em 2017, os efeitos das medidas adotadas não tinham ainda alterado a tendência da década anterior: em Portugal, a propriedade de casa própria continuava a ser de 74%, o mercado de arrendamento correspondia a 17% e a habitação social a 2%[31].

Nesse ano, o Governo apresentou um pacote de medidas, a que deu o nome de "*Nova Geração de Políticas de Habitação*", com o qual

31. Página 91 do relatório "The state of housing in the EU 2017", publicado pela Housing Europe (2017).

pretendia reforçar a promoção e segurança[32] no arrendamento, iniciada pela Estratégia Nacional para a Habitação (ENH) aprovada em 2015.

No âmbito da Nova Geração de Políticas de Habitação, o Governo aprovou o Decreto-Lei n.º 68/2019, de 22 de maio, que cria o Programa de Arrendamento Acessível ("PAA"), o qual entrou em vigor a 1 de julho de 2019. De acordo com o preâmbulo, "*O Programa de Arrendamento Acessível é um programa de política de habitação, de adesão voluntária, que visa promover uma oferta alargada de habitação para arrendamento a preços reduzidos, a disponibilizar de acordo com uma taxa de esforço compatível com os rendimentos dos agregados familiares*."

O PPA introduziu incentivos direcionados aos proprietários, permitindo aos senhorios beneficiar da isenção total de IRS e de IRC sobre os rendimentos prediais. Para isso, os contratos de arrendamento têm, nomeadamente, de ter um prazo mínimo de 5 anos (ou de 9 meses, no caso dos arrendamentos a estudantes) e o valor das rendas tem de ser 20% inferior aos preços de mercado e não representar taxas de esforço superiores a 35% para os arrendatários. Além disso, é necessário haver um contrato de seguro.

Outro incentivo previsto para a colocação de casas em arrendamento acessível é o IVA a 6% em construções para arrendamento com rendas acessíveis durante, pelo menos, 25 anos.

3. A presente década (2020-), o programa Mais Habitação e a Lei do Orçamento do Estado para 2024

Chegados à década de 2020, é possível traçar a evolução do mercado habitacional em termos de propriedade dos ocupantes ("casa própria") e em termos de outra entidade proprietária (ocupantes arrendatários ou nenhum ocupante). Veja-se:

32. Página 17 da publicação do programa "Para uma nova geração de políticas de habitação - Sentido estratégico, objetivos e instrumentos de atuação", outubro de 2017, disponível para consulta em ficheiro.aspx (portugal.gov.pt).

Anos	Tipo de entidade proprietária							
	Total	Ocupante proprietário	Outra entidade proprietária					
			Total	Ascendentes, descendentes de 1º ou 2º grau	Particulares ou empresas privadas	Estado, institutos públicos autónomos, instituições s/ fins lucrativos, empresas públicas	Autarquias locais	Cooperativas de habitação
1991	3 055 401	1 978 036	1 077 365	x	935 838	90 918	43 349	7 260
2001	3 551 229	2 688 469	862 760	139 490	605 288	57 290	57 000	3 689
2011	3 991 112	2 923 271	1 067 841	221 058	718 163	38 969	84 189	5 462
2021	4 142 581	2 900 093	1 242 488	221 653	882 631	32 120	90 933	15 151

Alojamentos segundo os Censos: total e por entidade proprietária
Fontes de Dados: INE - III, IV, V e VI Recenseamentos Gerais da Habitação
Fonte: PORDATA
Última actualização: 2023-04-27

Já em 1996, em relatório divulgado pelo Parlamento Europeu relativo às políticas da habitação, referia-se que Portugal tinha um sector particularmente vasto de alojamento ocupado pelos respetivos proprietários, ao passo que o número de alojamentos para arrendamento de carácter social era mínimo, sendo o sector de arrendamento de "modesta qualidade", de carácter privado e em declínio. De acordo com o mesmo relatório, a despesa pública com a política relativa à habitação era inferior a 1% do PIB[33].

Esta tendência poderá ser explicada pela flexibilização do acesso ao crédito à habitação e à descida das taxas de juros ao redor dos anos 90 e, bem assim, possivelmente, dado o apontado "favorecimento" fiscal dado à aquisição de imóveis.

De acordo com os dados conhecidos, a preponderância da aquisição de casa própria ainda se mantém.

Todavia, nos últimos anos, agravou-se a dificuldade da classe média e das novas gerações em acederem a habitação própria ou arrendada, devido às elevadas taxas de esforço, bem como ao "encarecimento" do mercado do arrendamento, sobretudo nos principais centros urbanos.

Às consequências de uma situação de pandemia[34], acresceu a incerteza decorrente do deflagrar de uma guerra na Europa, o aumento

33. Relatório disponível através do link A POLÍTICA DE HABITAÇÃO NOS ESTADOS-MEMBROS DA UE (europa.eu)

34. Em 30 de janeiro de 2020, a Organização Mundial de Saúde ("OMS") decretou a COVID-19 como uma Emergência de Saúde Pública de Importância Internacional ("ESPII") e em 11 de março de 2020, o diretor-geral da OMS anunciou que a COVID-19 estava caracterizada como uma pandemia. A 5 de maio de 2023, a OMS declarou o fim da ESPII.

constante das taxas de inflação e das taxas de juro, com o consequente aumento das prestações do crédito à habitação.

Para dar resposta às atuais necessidades habitacionais, o Governo lançou um novo pacote de medidas, desta vez o programa intitulado "*Mais Habitação*"[35], que incluiu algumas medidas de caráter fiscal.

De forma a incentivar o arrendamento para habitação permanente, o Mais Habitação veio reduzir a taxa de tributação de rendimentos prediais, em sede de IRS, decorrentes de arrendamento habitacional de longa duração, para taxas que variam entre 25% e 5%. A taxa especial, por sua vez, desce de 28% para 25%.

Acresce a introdução de isenção em sede de IRS e IRC dos rendimentos prediais decorrentes de contratos de arrendamento que resultem da transferência para arrendamento, para habitação permanente, de imóveis afetos à exploração de estabelecimentos de alojamento local e a isenção de IMT e de IMI no âmbito do Programa de Apoio ao Arrendamento[36]. Prevê-se, também, uma isenção de IRS relativamente às mais-valias decorrentes da alienação de imóveis ao Estado.

Por outro lado, apesar de se manter a não tributação de mais-valias decorrentes da venda de habitação própria e permanente em caso de reinvestimento noutra habitação própria e permanente, alterou-se a redação da lei relativamente a três requisitos, que tornaram a aplicação do regime mais restrita por determinarem um período mínimo de utilização da habitação alienada[37], implementarem um hiato temporal para a utilização do mesmo regime[38] e por

35. Lei n.º 56/2023, de 6 de outubro.

36. Para além de outras medidas de caráter não fiscal, como o arrendamento forçado (que colocou dúvidas acerca da sua constitucionalidade) ou o limite à atualização de rendas e a criação de um apoio ao arrendamento acessível.

37. Passou a exigir-se que o imóvel transmitido tenha sido destinado a habitação própria e permanente do sujeito passivo ou do agregado familiar nos 24 meses anteriores à transmissão (a redação anterior não fazia qualquer referência ao conceito de domicílio fiscal para efeitos deste regime).

38. Tornou-se necessária a comprovação daquele requisito pela fixação do domicílio fiscal neste imóvel (até à entrada em vigor do Mais Habitação, não se encontrava estabelecido

fazerem coincidir a habitação própria e permanente com o domicílio fiscal[39].

Em sede de IMI, agravaram-se as taxas aplicáveis aos prédios urbanos ou frações autónomas devolutas há mais de 1 ano, prédios em ruínas, e terrenos para construção inseridos no solo urbano cuja qualificação atribua aptidão para o uso habitacional, sempre que se localizem em zonas de pressão urbanística, e em sede de IVA a aplicação da taxa reduzida de 6% foi alargada às empreitadas de construção ou reabilitação de imóveis de habitação para arrendamento acessível.

Foram limitados os benefícios fiscais para fundos de investimento imobiliário, excluindo-se de tais benefícios os fundos constituídos entre 1 de janeiro de 2008 e 31 de dezembro de 2013 em que, pelo menos 75%, dos seus ativos sejam bens imóveis sujeitos a ações de reabilitação realizadas nas áreas de reabilitação urbana.

É criada uma Contribuição Extraordinária sobre os apartamentos em Alojamento Local (CEAL). Ficam excluídas da obrigação de pagamento desta contribuição, porém, por exemplo, os imóveis localizados no interior do território.

Prevê-se que as entidades fornecedoras de água, luz, gás e comunicações informem a Autoridade Tributária, trimestralmente, de ausências de consumos ou de consumos baixos, em prédios identificados.

A par com a aprovação do Programa Mais Habitação, foi também aprovado o Decreto-Lei n.º 20-B/2023, de 22 de março, que cria apoios extraordinários às famílias para pagamento da renda e da prestação de contratos de crédito (bonificação dos juros).

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qualquer período temporal mínimo para a utilização da habitação alienada como própria e permanente).

39. Passou também a prever-se que o mesmo contribuinte não pode ter beneficiado deste regime de exclusão de tributação no ano da obtenção dos ganhos e nos três anos anteriores, exceto quando se comprove que tal se deveu a circunstâncias excecionais.

Com a lei do Orçamento do Estado para 2024, aprovada em novembro de 2023, foi ligeiramente aumentado o limite de dedução de rendas em IRS[40].

Acresce que Portugal começou, de forma controversa entre os especialistas, a restringir progressivamente regimes de atração de investimento estrangeiro, com o intuito de atenuar o aumento dos preços da habitação[41]: "golden visa" e residentes não habituais. Contudo, não há dados verificáveis sobre o eventual contributo destas realidades para aquele fenómeno.

4. Conclusões

As medidas adotadas nos anos mais recentes não se apresentam como inéditas face às de décadas anteriores, ressalvados os grandes marcos que mudaram o paradigma da fiscalidade nacional, no final do século XX e início do século XXI. Contudo, o mercado da habitação já sofria de fragilidades a essa data, não muito diferentes daquelas que sofre hoje, com a agravante agora do grande desequilíbrio entre a oferta e a procura, com a consequente subida de preços. Desde a crise do *subprime* que este tema tem estado na agenda. Tem-se discutido quais são os fatores causadores do fenómeno, olhando-se com uma certa desconfiança para o investimento estrangeiro.

Nota-se no legislador um claro conflito entre a promoção desse investimento estrangeiro, determinante para o crescimento económico e a garantia do direito constitucional de acesso à habitação.

40. Na data de elaboração do presente artigo, a Lei ainda não se encontrava publicada.

41. No relatório de acompanhamento após Programa de Ajustamento da Comissão Europeia ("Post-Programme Surveillance Report Portugal, Spring 2022"), de maio de 2022, refere-se que "*House prices continued growing at a faster pace than consumer prices. Following an increase by 8.8% in 2020, house price growth picked up to 9.4% in 2021. The deflated house price index, adjusted by the private consumption deflator, increased by 8.0% and 8.1% respectively. Similar to developments in previous years, demand for real estates was mainly driven by non-debt financing, including foreign investments and the accumulation of household savings in the context of low interest rates on bank deposits*." (página 8).

Verifica-se que as principais áreas de atuação continuam a ser o incentivo ao arrendamento e à reabilitação urbana. Podemos dizer que há uma maior preocupação com o mercado do arrendamento, em comparação com a aquisição de casa com recurso a crédito.

O Programa Mais Habitação mostra algum reforço do papel do Estado na promoção direta de respostas habitacionais, tradicionalmente incipientes, por contraposição à resposta fundamentalmente centrada no mercado privado. Todavia, assinala-se que "*(…) a necessidade de robustecer o parque habitacional público não invalida a importância de um mercado de arrendamento privado saudável e que proporcione rendas a preços compatíveis com os rendimentos das famílias*."[42]

Outra das preocupações que é patente está relacionada com a constatação de que existem muitos imóveis devolutos ou desocupados (seja da propriedade do Estado, seja de propriedade privada) ou não afetos a fins habitacionais. Neste último conspecto, talvez a medida que mais se destaca atualmente, por inédita, em comparação com o passado, seja a criação de uma nova contribuição extraordinária, sobre o setor do Alojamento Local, com o propósito declarado de desincentivar esta atividade, considerada "excessiva", sobretudo nos centros urbanos, e considerada potenciadora da ausência de imóveis disponíveis para fins habitacionais.

Certo é que, como também decorre da Exposição de Motivos da Proposta de Lei subjacente ao Programa Mais Habitação, a promoção de políticas públicas de habitação não deve ser estática, antes assumindo a necessidade de criar respostas que se adaptem às necessidades sentidas em cada momento pela população, e a uma escala nacional.

Todas estas medidas são muito recentes à data do presente artigo, sendo interessante esperar para ver se atingem o objetivo almejado. E não há dúvidas que a fiscalidade desempenha um papel fulcral na conformação dos comportamentos necessários para atingir o mesmo.

42. Preâmbulo do Decreto-Lei n.º 20-B/2023.

Referências bibliográficas

CATARINO, JOÃO RICARDO, *Aspectos Relevantes do Novo Regime de Avaliação da Propriedade Urbana para Fins Fiscais*, Revista Fisco 119 (2005);

COMISSÃO DE REFORMA DA TRIBUTAÇÃO DO PATRIMÓNIO, in Ciência e Técnica Fiscal, n.º 182, Lisboa: Centro de Estudos Fiscais, 1999;

COMISSÃO EUROPEIA, *Post-Programme Surveillance Report Portugal*, 2022

GOUVEIA, JORGE BACELAR, *Arrendamento Urbano*, *Constituição e Justiça – Perspectivas de Direito Constitucional e de Direito Processual*, Lisboa, O Espírito das Leis, 2004;

HOUSING EUROPE, *The state of housing in the EU 2017*;

INSTITUTO DA HABITAÇÃO E DA REABILITAÇÃO URBANA, *Habitação: cem anos de políticas públicas em Portugal, 1918-2018, A política de habitação em Portugal de 2002 a 2017;*

INE – III, IV, V e VI Recenseamentos Gerais da Habitação e PORDATA, Alojamentos segundo os Censos: total e por entidade proprietária, 27-04-2023;

LOBO, CARLOS, *As operações financeiras no Imposto do Selo: enquadramento constitucional e fiscal. Enquadramento constitucional e fiscal.*, in Revista de Finanças Públicas e Direito Fiscal, Ano 1, N.º 1;

MEMORANDO DE ENTENDIMENTO TROIKA: "Portugal: memorandum of understanding on specific economic policy conditionality", de 3 de maio de 2011;

NABAIS, CASALTA, *Estudos de Direito Fiscal*, Almedina, 2005;

PIRES, JOSÉ MARIA, *Lições de Impostos sobre o Património e do Selo*, Almedina, 2015, 3.ª ed.;

ROMÃO, FILIPE e ALVES, MAFALDA, *Os fundos de investimento imobiliário como medida de combate à crise económica e financeira*, 2010, Vida Imobiliária, n.º 143;

SÁ GOMES, NUNO, *Considerações em torno da Contribuição Predial Autárquica*, in Revista Ciência e Técnica Fiscal n.º 385;

SILVA, MÓNICA FILIPA MORAIS DA, *O Regime Transitório da Nova Lei do Arrendamento Urbano*, Dissertação de Mestrado, Coimbra, 2014;

VALDEZ, VASCO,

Os impostos sobre o património – situação atual e perspetivas futuras, Revista Fisco, n.º 101/102;
Aspectos Gerais da Reforma da Tributação do Património", in C.T.F. n.º 408, Outubro-Dezembro 2002;

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