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The Ability to Pay Principle: a Portuguese/Brazilian perspective

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Abstract

Despite the possible negative points of the wealth tax, this tax has the substantial function of diminishing social inequalities, the assumption of which is a vital element of the ability to pay principle. Wealth taxation should be the rule and not the exception in the range of opportunity in tax policy.

Keywords: Ability to pay; solidarity; equality; tax justice; Portugal.

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Introduction

The Brazilian song “farinha pouca, meu pirão primeiro,”[1] whose plot symbolizes the greed of man in times of scarcity, represents well the current contributory feeling. People don’t want to contribute even according to their ability. Curious that when talking about wealth tax, we would not be in a context of economic need, but of abundance.

By the logic of the Fiscal State, one must tax the riches, in their proportions, so that they can be distributed fairly. Certainly, taxes integrate a lot of consideration in the composition of state revenues, through which it will be possible to carry out public policies and provide public services necessary for collective well-being.

So why is it so hard to demand a tax on the big fortunes? In the European experiences, few nations created and, mainly, maintained the current wealth tax, with the central justification of the potential evasion of the assets to be taxed.

Even in the face of matters related to tax policy, it is intended to ascertain whether the absence of the wealth tax contradicts the logic of the tax structure and whether the reasons against its

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1. SILVA, Bezerra. *Meu Pirão Primeiro*. Disponível em: https://www.youtube.com/watch?v=9YfTuIPwhMY. Acesso em: 29 de abr. 2022.

creation are justifiable. To this end, the Portuguese and Brazilian legal systems will be referenced by the similarity in treatment of tax principles and policies, together with the fact that both live in a similar financial scenario, in which taxes are expressive in the structure of tax revenue.

Therefore, there is a need to understand the basis of a modern tax state, essentially by the manifestation of the ability to pay principle on taxes that affect income and capital, to verify the relevance of the wealth tax.[2]

1. Ability to pay and the Tax on Large Fortunes in the Portuguese and Brazilian Legal System: the financial impact of Taxation on Income and Capital

Even in older civilizations, income and wealth were targeted for taxation.[3] Even, at certain times, of a confiscatory or punitive nature.[4] This is due to the logical practicality of its collection: so, all that increases in its capital is income and, part of it, should contribute to the other. This, quite indeed, is the basis for every organization that aims at a common good, whether state or not, including religious institutions.[5]

Moreover, the need to tax property and income date back to the archaic state model, in which often the Government and the Faith resided in the same organic structure, confusing the contributions to the Gods to the taxation itself, because it was believed that the supreme power would repay the good to the community. Curiously, throughout history, tributes to the Gods, even the sacrifice of one's own body or life, were given with faith, aware that, that action would undoubtedly result in something better.[6]

It seems to us that this desire to contribute has been reconstituting itself concerning the progress of social and economic structures.[7] It turns out that the taxpayer began to question the binomial contribution/retribution, that is, raising whether "it is worth paying taxes", while, given the complexity of the market, the State Entity began to have difficulties demanding such a benefit. It is not for nothing that for a long time, the use of force in monarchical models for the financing of the crown was adopted.

2. For the complexity of ascertaining the ability to pay in an international mobile context, see in the EU the 'Schumacker' case and Vermeulen, Hein, *Individual Income taxation*, in Terra/Wattel, *European Tax Law*, 7th edition, Wattel, Marres, Vermeulen (eds), vol.I, Wolters Kluwer, 2019, p. 857:

   "*In contrast with income related tax deductions, which connect to specific sources of income and can therefore be territorially alocated, personal and family related tax benefits are not attributable to any specific item or source of income, because the expenses for which they seek to compensate are not instrumental in earning any specific income, but burden the taxpayer's total personal ability to pay tax*".

3. ZILVETI, Fernando Aurelio. *A evolução História da Teoria da Tributação*: Análise das estruturas socioeconômicas na formação do Sistema Tributário. São Paulo: Saraiva, 2017, p. 104. For example, in feudal times, the patrimony of rural lands were the main targets of taxation.

4. "taxation as punishment for political failure also came to the fore in England during the interregnum between the civil war and the Restoration, When the country came as close to military rule as it ever has" (KEEN, Michael; SLEMROD, Joel. *Rebellion, Rascals, and Revenue:* tax folies and wisdom through the ages. Princeton University Press. New Jersy: 2021, p. 145). Much of the tribute was intended to finance the costs of wars, which were sometimes charged to defeated foreigners. (ZILVETI, Fernando Aurelio. *A evolução História da Teoria da Tributação*: Análise das estruturas socioeconômicas na formação do Sistema Tributário. São Paulo: Saraiva, 2017, p. 74).

5. "Levai todos os vossos dízimos ao meu celeiro, e haja mantimentos na minha casa, e depois disto fazei prova de mim, diz o Senhor". (Malaquias 3:10. *Bíblia Sagrada*: Antigo e Novo Testamento. São Paulo: Didática Paulista, 2007, p. 604).

6. ZILVETI, Fernando Aurelio. *A evolução História da Teoria da Tributação*: Análise das estruturas socioeconômicas na formação do Sistema Tributário. São Paulo: Saraiva, 2017, p. 93.

7. In particular, in the 18th century, when we had "profound political changes caused in large part by the pressure of collection". (ZILVETI, Fernando Aurelio. *A evolução História da Teoria da Tributação*: Análise das estruturas socioeconômicas na formação do Sistema Tributário. São Paulo: Saraiva, 2017, p. 221).

Therefore, historically, taxes are seen negatively by society,[8] as aggression or invasion of private property. By the way, the harmony between tax authorities and taxpayers is the elementary problem of the current discussions on taxation: while one aims to increase its collection, another wants to reduce tax costs as much as possible.

Despite these brief reports, the current models of tax state seek in their essential purposes, the modification of skeptical thinking about the benefit of paying taxes.[9] For these reasons, the ideal of the "duty to pay taxes" has taken on significant proportions in tax discussions, greatly influenced by the axiological statements of taxation, especially tax justice, solidarity, equality, and contributory capacity.

See that these values build fundamental reasoning in the construction of modern society: I have a solidary duty to contribute according to my capacity to ensure fair and equitable taxation and, above all, to collaborate with the construction of a more just and equal community.

This is the basis for the sustenance of any social organization, from the simplest to the most complex, as is the case of civil society.[10] However, these precepts must be prescribed at a higher legislative level, and it is possible to rescue this "contributor" thought in modern society.

Paulo de Barros Carvalho[11] says that it is common in modern tax systems to "urgently need to hold the legislator in search of facts that demonstrate signs of wealth because only then can distribute the tax burden uniformly and with satisfactory relevance to the principle of equality". He concludes: "From the providence contained in the choice of the presumptive facts of economic fortune arises the possibility of the legislator subsequently distributing the tax burden in an equitable manner, establishing, proportionately to the dimensions of the event, the degree of contribution of those who participate in it."

In Portugal, articles 103 and 104 of the Constitution of the Portuguese Republic stand out for relating the fundamentals of the tax system: (i) the fundamental rights of taxpayers; (ii) the objective of reducing social inequalities; (iii) progressive tax in attention to family needs and income; (iv) contribute to equality between citizens: (v) economic development and fiscal justice; (vi) duty to burden luxury consumption.

To this end, the precepts of the generality of taxation and contributory capacity impose basic material limits on the tax legislation, so that it is possible to officialize all the presuppositions and purposes of the tax State,[12] because by burdening all those manifestations of wealth, the extent of their economic expressiveness, there will be fair taxation.

Thus, the 'ability to pay' shall have an overall approach, covering income (and also the social security burden if not yet integrated in the income tax structure), estate and consumption taxes, taking also into account deductions, expenses and applicable tax benefits. Further, we need to consider both the impact of the administrative tax burdens upon taxpayers and the efficiency of the implementation of anti-abuse provisions.

In the Brazilian tax system, it is no different. In addition to the fundamental objectives of the Federative Republic of Brazil,[13] it expressly provides for the need for equal taxation of equivalent

8. Ives Gandra (*Teoria da imposição tributária*. In: Curso de Direito Tributário. 13.ed. São Paulo: Saraiva, 2011, p. 22) states that taxes should be studied as a norm of social rejection.

9. "In modern states, there is an increasing concern to build and maintain competitive and fair tax systems" (TEIXEIRA, Glória. *Manual de Direito Fiscal*. 6.ed. Coimbra: Almedina, 2021, p. 53).

10. Becker states that: "an ancient principle is that each individual contributes to the expenses of the collectivity, by reason of his economic strength". (BECKER, Alfredo Augusto. *Teoria Geral do Direito Tributário*. 6.ed. São Paulo: Noeses, 2013, p. 513).

11. CARVALHO, Paulo de Barros. Direito Tributário: linguagem e método. 6.ed. São Paulo: Noeses, 2015, p. 341.

12. General Tax Law of Portugal, articles 4 and 5.

13. Article 3 of the Constitution of the Federative Republic of Brazil.

legal situations, with the following warning: "whenever possible, taxes will be personal in nature and will be graduated according to the taxpayer's economic capacity."[14] It implies, at this point, the horizontal and vertical unfolding of equality, and equal tax should be applied to those who have equal contribution capacity and different tax burdens, in proportion to this difference, for taxpayers with greater capacity.[15]

Glória Teixeira,[16] in addressing tax equity with contributory capacity, teaches that the objective of these values is an "equitable distribution of income through progressive taxation of income (vertical equity). Taxpayers with higher levels of income or wealth are subject to higher rates of tax, graduated depending on the amount of income obtained or the value of their assets."

So you ask yourself: why hasn't the estate tax or, for some, a large wealth tax been created yet?[17] Is the absence of this tax against the ability to pay principle?

2. The European Scenario: The Main Reasons for the Inefficiency of the Large Fortune Tax[18]

According to The Role and Design of Net Wealth Taxes in the OECD[19] report published by the Organization for Economic Cooperation and Development, less than a third of its members instituted the wealth tax, most of which have already revoked it, remaining among European countries as Spain, Switzerland, and Norway.

In the case of France, although the tax is not completely extinguished, there was a restriction on the extent of the Solidarity Tax on Fortunes – ISF, which began to reach only real estate fortunes, reducing the collection, in 2018, from approximately 5 billion euros to about 1.8 billion euros, breaking with the constant annual growth of the previous ISF revenue. At this point, the author Piketty[20] says that, even in the face of possible practical difficulties of the taxation, the tax collection could reach the level of 6 billion euros in 2022.

For the French Government, this tax did not have much impact on the composition of GDP, representing 0.2% in 2016. However, the creation of this tax increased a high risk of capital exodus and tax evasion, which would impact the internal wealth in the country. It is not worth the risk of taxing wealth, because the opposite, tax evasion, may just occur as a consequence.

In this Report, the following positive and negative points were listed:

14. Article 145, §1 and article 150, II of the Constitution of the Federative Republic of Brazil.

15. NABAIS, José Casalta. O dever fundamental de pagar impostos: contributo para a compreensão constitucional do estado fiscal contemporâneo, 3ª ed. Coimbra: Almedina, 2015, p. 687.

16. TEIXEIRA, Glória. *Manual de Direito Fiscal*. 6.ed. Coimbra: Almedina, 2021, p. 57.

17. Article 153, VII of the Constitution of the Federative Republic of Brazil.

18. In the EU context, see articles 2-6 of the Treaty on European Union and the tax principles directly impacting the ability to pay principle: principle of proportionality and principle of non-discrimination.

19. Organização para a Cooperação e Desenvolvimento Econômico. *The Role and Design of Net Wealth Taxes in the OECD*. 2018. Disponível em: https://www.oecd-ilibrary.org/sites/9789264290303-en/1/2/3/index.html?itemId=/content/publication/9789264290303-en&_csp_=b746b256f23e109b9244f92078eb7093&itemIGO=oecd&itemContentType=book. Acesso em: 19 de abr. 2022.

20. PIKETTY, Thomas. *Yellow vests and tax justice*. 2018. Disponível em: https://www.lemonde.fr/blog/piketty/2018/12/11/yellow-vests-and-tax-justice/ Acesso em: 23 abr. 2022. It is worth mentioning that "the gilets jaunes movement in France, prompted by a fuel tax increase, is generally seen as reflecting a wider 'anger at de perception that Mr. Macron governs for the better-off, Paris-based elite". (KEEN, Michael; SLEMROD, Joel. *Rebellion, Rascals, and Revenue:* tax folies and wisdom through the ages. Princeton University Press. New Jersy: 2021, p. 346).

POSITIVE	NEGATIVE
Reducing Wealth Inequalities	Confiscatory Effects of Taxes on Income and Assets
Lowest Sacrifice of the Taxpayer	Economic Demotivation and Weakening of Entrepreneurship
Ability to Reduce the Tax Burden of Other Income Taxes	Difficulty in Defining Wealth Liquidity
Increased Investment in Human Capital	Low Return Asset Penalty
	Capital Flight and Tax Outstate
	Avoidance and Tax Evasion
	Administrative Obstacles: Constant Valuation of Assets

Among the main reasons against the OECD-listed tax, we can highlight the most common among countries that have already repealed or even instituted it:

a) Confiscatory effect due to the accumulation of several other taxes that already affect income and equity.

b) Tax exodus of millionaires to tax havens;

c) Increase in Abusive Tax Planning and Tax Evasion.

From what we can see, only paragraph a goes back to a dogmatic discussion of tax science, and not politics because it is certain that, in modern tax models, even in the face of the fundamental duty to pay tax, this cannot prevent the individual development or represent an unmeasured invasion of the citizen's property.

Ernani[21] says it is an axiological unfolding of the value of social solidarity, expressing a duty of collaboration to collect taxes to contribute to the cost of public finances according to their economic availabilities – preventing the arbitrary distribution and distribution of this public burden and preserving the set of goods sufficient to meet basic needs, the vital minimum. Thus, the author has two connotations: (i) duty to contribute; (ii) the taxpayer's guarantee to prevent the confiscatory effects of the tax.

In reality, tax revolts go beyond the tax system itself. The author[22] points out that "tax measures are more often a tipping point, sparking conflict whose deeper source lies in more fundamental disputes over how a wider range of sovereign powers are allocated or are being exercised". And complements the ultimate aim, and sometimes outcome, of the most tumultuous tax revolts in to reallocate power, not just to change the tax system.

Still, even because of the variability between each tax system and its social inequalities, the experiences already tested in the wealth tax did not exacerbate taxpayers' assets, not acting as a hindrance to development. It is emphasized that no attacks occurred against the equity of companies, investments, or salaries of workers in general.

21. CONTIPELLI, Ernani de Paula. *Solidariedade Social Tributária*. Coimbra: Almedina, 2010, p. 222 – 225. Greco (GRECO, Marco Aurélio. *Planejamento Tributário*. 3.ed. São Paulo: Dialética, 2011, p. 209) It is also positioned like this: "It is not a mere burden to bear the tax by law. A stance linked to solidarity and contributing to society". Manoel Cavalcante also manifests himself in this way when he defends that capacity acts as a fundamental right of the taxpayer to not confiscate and to guarantee the existential minimum (LIMA NETO, Manoel Cavalcante de. *Direitos Fundamentais dos contribuintes*: limitações constitucionais ao poder de tributar. Recife: Nossa Livraria, 2005, p. 253).

22. KEEN, Michael; SLEMROD, Joel. *Rebellion, Rascals, and Revenue:* tax folies and wisdom through the ages. Princeton University Press. New Jersy: 2021, p. 375.

Freitas[23] says that historically, the maximum tax rate on large fortunes in France has never exceeded 1.5% of net equity. That is, from a general perspective, the Tax on Large Fortunes functions as a complement to other taxes on capital and income, precisely because the progressivity adopted in the other taxes imposed on income, loses its efficiency in high levels of wealth. At some point in progressivity, no distinction will be made between riches and great fortunes will contribute in the same proportion as other riches.

Gloria Teixeira[24] says:

> […] the principle of progressivity essentially affects classes with smaller resources or/and dependent workers. Taxpayers with more resources benefit not only from the application of proportional tax rates to certain types of income but also from the effective non-taxation of benefits in kind, often allocated by the employer or institutions to which they are linked.

Moreover, the same confiscatory criticism is forgotten when we talk about taxes imposed on consumption, which burdens the income of a huge part of the population, in much higher proportions than the wealth tax. It cannot be justified the non-incidence of the tax, to the detriment of other taxes. If the logical structuring of taxes has mistaken targets, this must be changed, the formulation of which must find this balance between consumption tax and those that affect income and capital.

Paragraphs b and c are faces of the same currency. The Laffer curve aggravated by today's globalized asset mobility can be applied. The higher the taxation, the greater the chances of reducing the collection, either by tax evasion and simulated practices or by transference to another country. Raimundo Oliveira[25] points out that "the excess of taxation undermines productive activity and interferes in a harmful way in the collection of taxes, contributing to the increase of the informal economy".

However, tax evasion and capital flee are already at the top of the concerns of the global economy and it would not be timid taxes on large fortunes that would cause such capital transference. Nevertheless, its implementation should be accompanied by supervisory improvement or compensatory measures that will combat possible evasion, including abusive practices in the international context.

3. Is there observance of the ability to pay principle in the Absence of Taxation on Wealth?

From the outset, we can simplify the question, in some questions: does the non-taxation of wealth, go against the right of the non-rich? Is the non-taxation of the small minority of the population (wealth) unfair to the elderly? Does a 1% tax on wealth have the power to reduce it? Or rather: why is wealth taxation an exception, when according to the tax logic should be the rule?

Certainly, European experiences show us that wealth tax is necessary, although some adjustments to each legal system are possible. What cannot be ignored is an efficient instrument in strengthening the basic presupposition of democratic states: the reduction of social inequality.

However, it is perceived that the exercise of tax competence has an intimate relationship with government policy, or rather, a policy of power, even given the logical structure of the tax system,

23. FREITAS, Antônio Albano de. *O Impacto da Herança e de Sua Tributação na Distribuição Patrimonial e de Rendimentos*. Tese (Doutorado em Economia) – Instituto de Economia, Universidade Federal do Rio de Janeiro. Rio de Janeiro: 2017, p. 123 e 124.

24. TEIXEIRA, Glória. *Manual de Direito Fiscal*. 6.ed. Coimbra: Almedina, 2021, p. 80.

25. JUNIOR, Raimundo Frutuoso de Oliveira. *Análise econômica do direito e o uso da curva de Laffer na efetivação do direito fundamental à vedação do confisco tributário.* 2020, p. 189.

based on its constitutional axioms. To admit the imposition of the Tax on Large Fortunes for extra fiscal reasons is to ignore the essentials of the tax State, especially the values of justice, equality, solidarity, and ability to contribute.

In technical terms, there is no doubt that great fortunes have the quality of being in the top positions of the tax queue. What is the greatest wealth, if not fortune?

Brazil and Portugal, concerning the relevance of taxation in the composition of state revenue, are similar:

According to the National Institute of Statistics,[26] the tax burden in 2021 represented 35.8% of the Portuguese GDP, reaching the nominal amount of 75.6 billion euros. According to the data presented, 27.2% is composed of taxes on income and capital, of which 72.1% is the portion of the Personal Income Tax, 23.6% of the Corporate Income Tax, and 4.3% on other direct taxes. Meanwhile, 43.2% stems from indirect taxes, in which only the Value Added Tax occupied approximately 58.4% of this amount.

In addition, the Global Wealth Report 2021[27] found an increasing concentration of income and capital in a small portion of the population. According to this survey, 10% of the richest get 56.2% of their parents' wealth, concentrating 20% in the hands of only 1% of the wealthiest. On the other hand, half of the Portuguese inhabitants own 6.5% of all national wealth.

Similarly, the tax burden in Brazil[28] reached the level of 33.9% of GDP, 8.02% of which was due to taxes on income, profits, and capital gains, 1.65% on property taxes, 14.76% on goods and services, and 9.47% on social contributions and other taxes. Also, under the World Inequality Report 2022,[29] "income inequality in Brazil has long been marked by extreme levels", since:

> while the bottom 50% earns €PPP2,800 (BRL8,800), the top 10% earns almost 30 times more (€PPP82,000 or BRL255,760). Brazil is one of the most unequal countries in the world: the top 10% captures 59% of total national income while the bottom half of the population takes only around 10%.

In addition, the top 1% (the richest) holds approximately half of Brazil's total wealth. A worrying reversal of social values.

Although both countries have not yet instituted the Large Fortune Taxation, this scenario demonstrates the need to seek balance in it. Gloria Teixeira[30] understands as ideal tax "one who withdraws from the taxpayer in proportion to his wealth or expenditure so that she or he changes to a minimum his or her pattern of behaviour", which is rightly envisioned in the tax on large fortunes in these legal systems.

It is a complex task to identify equalities and inequality when applying the tax rule,[31] but this cannot justify the inertia of tax jurisdictions in the search for fair and equitable taxation.

26. Instituto Nacional de Estatísticas. *Estatísticas das Receitas Fiscais* 2021. Disponível em: https://www.ine.pt/xportal/xmain?xpid=INE&xpgid=ine_destaques&DESTAQUESdest_boui=536481635&DESTAQUESmodo=2. Acesso em: 20 de abril de 2022.

27. Credit Suisse. *Global Wealth Report 2021*. Disponível em: https://www.credit-suisse.com/about-us/en/reports-research/global-wealth-report.html. Acesso em: 21 de abr. 2022.

28. Carga Tributária do Governo Geral (2021). https://www.gov.br/economia/pt-br/assuntos/noticias/2022/abril/carga-tributaria-bruta-do-governo-geral-chega-a-33-90-do-pib-em-2021#:/~:text=Em%202021%2C%20a%20Carga%20Tribut%C3%A1ria,2020%20(31%2C76%25).

29. *World Inequalitu Report 2022*. Disponível em: https://wir2022.wid.world/www-site/uploads/2022/03/0098-21_WIL_RIM_RAPPORT_A4.pdf. Acesso em: 24 de abi. 2022.

30. TEIXEIRA, Glória. *Manual de Direito Fiscal*. 6.ed. Coimbra: Almedina, 2021, p. 55.

31. TEIXEIRA, Glória. *Manual de Direito Fiscal*. 6.ed. Coimbra: Almedina, 2021, p. 59.

Conclusion

Despite the possible negative points of the wealth tax, this tax has the substantial function of diminishing social inequalities, the assumption of which is a vital element of the ability to pay principle. Wealth taxation should be the rule and not the exception in the range of opportunity in tax policy.

In several countries, there is an express provision in the constitutional text of the central government's competence to institute a tax on large fortunes, but so far they have not used this tax power. Moreover, as occurs in Portugal and Brazil, Constitutions are full of social values such as solidarity, equality, and tax justice, which reinforce the need for equitable taxation of the holders of large patrimonial assets.

Therefore, although we find practical obstacles, taxation of wealth is crucial for the consolidation of the ability to pay principle and other values that surround tax justice. Furthermore, the tax State shall improve its tax administration with more efficient tax inspections, preventing the evasion of income and capital in the international context.

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