

Freedom of movement of businesses: the outcome of exit taxes *

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1. Introduction

The subject of my speech should necessarily be assessed in the broader context of the global financial markets and economic and fiscal policy of the public authorities which should address the relationship between the exercise of the power to tax and the free movement of enterprises and capital.

In this sense, the repeated changes in the direction of economic policy (openness/protection), often show a cyclic dynamism and a marked dependence on domestic and international juncture (e.g. effects of the sub-prime crisis or the drop on the value of commodities in the international arena and protection policies or restrictions on imports as the Argentine case up to 2016).

Proof of this can be seen in the successive changes of scenario in the Region. For example, at the time of our Congress (2016) we pointed out that while there were States that had developed a strategy for opening (e.g. Pacific Alliance), others like Venezuela or Argentina had instead established protectionist measures with respect to foreign investment, which resulted in

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strong limitations de facto or de jure to the free movement of capital and the repatriation of dividends³. While this situation has changed radically in Argentina with the new Government (2015-2019), the situation in Venezuela has been exacerbated and the burgeoning Pacific Alliance seems to have stopped after the change of course of the current US Government. From the point of view of the regulatory systems, it should be noted that freedom of movement of business in Latin America is not heterogeneous. The picture is even more complex if one takes into account that the changes in economic policies are often reflected late into changes in tax regulations. At the same time, tax regulations on this subject are increasingly more influenced by the actions of OECD –firstly the BEPS Plan- not only in the field of international tax law (DTCs), but also in the domestic environment in a direct way (e.g. greater performance of international exchange of information; unilateral incorporation of anti-abuse rules or against the double-non-taxation; modification of tax havens and of noncooperative jurisdictions parameters; etc.). In this context, the crisis of the residence principle (and not only with regard to e-commerce) acquires significant relevance, topic that has been discussed in this Congress.

2. Free movement of businesses and exit taxation

It should be noted that together with the so-called "exit taxes" *stricto sensu*, there are other legal measures that anyway affect the free movement of enterprises and the neutrality at the entrance and exit of capital ("businesses" as shown in the translation of the title). Among these, the tax effects of the redomiciliation of the societies and the existence of taxes levied on both the distribution of dividends and the transfer of shares

³ From a strictly taxation perspective it is noted the strong impact in customs taxes, mainly on exports. Maybe more ominously is that these measures (when not only de facto) came into conflict with constitutional regulations, free trade agreements and the WTO Treaty, among others. Thus, e.g. importers were demanded to export in a similar amount, forcing strategies among operators that, in addition to contrast with WTO rules, implied higher unplanned costs, when not the closure of the activity. Obviously, all these limits have created an enormous distortion in the market and also in the regulatory field.

of companies based in the country or whose assets are mainly located there (usually known as financial income taxes) are especially relevant.

In either of these cases, the answers provided by the tax systems of the region are also heterogeneous and changing. Let me list a few examples that may help illustrate this claim.

a) Exit tax and redomiciliation of societies

International doctrine usually attributes to "exit taxes" a dual-purpose: combating the erosion of the tax base and fostering the coherence of the system. In practice, we should add one more, achieving a greater tax collection through the anticipation of the imposition moment.

This leads us to questioning whether this is a useful tool to protect the tax base against future capital gains that would be not reached by the country from which the society has migrated or if it is only an anticipation of the tax collection without the premises for the realization of the (eventual) gain. In both cases, the answer must be confronted with the principle of freedom of establishment.

As I stated before, in Latin American context systems usually have not provided an *ad hoc* exit tax.

Such scenario often involves tax uncertainty about the effects (fiscal neutrality vs. imposition) of the exit of subjects and activities abroad. Such uncertainty is emphasized there where corporate and tax legislations are not in harmony with the effects that this phenomenon entails.

From the point of view of domestic taxation, home systems adopt heterogeneous responses ranging from formal criteria (place of incorporation of the society or registration in official records for individuals⁴) to material criteria (establishment of the main activity or effective management headquarters), the coexistence of both criteria is common,

⁴ This is the situation of Brazil, where "a pessoa que pretende se ausentar do Brasil em caráter temporário ou em caráter permanente deverá apresentar, em caráter definitivo, tanto a CSDP como a Declaração de Saída Definitiva do País ("DSDP"), according to Instrução Normativa nº 208/2002 (IN 208)

either as joint requirements or using the material criterion as a antielusive remedy.

A similar conclusion can be extended to the conventional context, since the problem is not solved with the single adoption of the criterion of the "effective management headquarters". It has been observed by countries such as Italy that have claimed the coexistence of others factors for the attribution of the residence. Indeed, it is possible to transfer the main activity to another country without changing the effective management headquarters or vice versa. This results in phenomena of double or multiple taxation.

In my opinion, the well-known BEPS Action Plan of the OECD, although it warns about the problems that affect the principle of residence, has not modified this criterion as the principle of main attribution, even when it is intended to provide greater power to the jurisdiction where more value is generated.

The phenomenon of residence loss can be motivated well in the decision of changing the headquarters abroad, well in the application of corporate rules of anti-avoidance nature. So for example, the antielusive measure present in numerous systems as the Argentinian or Chilean that considers a society to be domiciled and resident in the State when it develops there its main activity.

Against this phenomenon, Latin American systems have different answers. A few systems consider this result as a fiscally neutral event, others presuppose the liquidation of the society in the country of departure or an effective realization of the assets located there.

A clear example of this position is the Uruguayan system that only considers it neutral from the fiscal point of view after the redomiciliation of the company abroad. In this case, the rules provided for residents abroad will be of application but this does not imply the existence of any derived capital gains from the redomiciliation.

At the other end many systems foresee an anticipated taxation of the assets of the company, which will have the treatment reserved for capital gains.

Examples of this response can be found in the Australian system and in many Latin American systems such as the Peruvian.

At a midpoint between both positions, there are those that provide for less extensive consequences for the redomiciliation, for example: limiting the consequence only with respect to the invoked activity, allowing the exit of the accumulated losses, foreseeing the ultractivity of the residence for a determined period (especially for individuals), and mainly when it is developed in a tax haven or a non cooperating jurisdiction.

Another possible system would be considering it a neutral corporate reorganization from the fiscal point of view, free of taxes. However, although this measure is included in almost all internal systems, strict requirements often make very difficult to apply it, especially when the reorganization has a transnational nature.

Although, theoretically, it should be possible to distinguish those cases in which the domicile change involves the transfer of all the assets and activities of the entity, from those where, despite the change of address, the legal entity maintains its activities and assets in the country under another legal appearance (e.g., as the head of a branch or a permanent establishment)⁵, the reality is that most of the domestic systems lack a specific legislation with that goal.

The thoughts of the doctrine regarding the Argentinian system may serve as an example, as it has been said "...there is no rule in the LIG (Income Tax Law) that contemplate the taxability of the assets of a legal person when there is a domicile change abroad. In this sense, it is not a case of «disposal» as provided in article 3 of the LIG, nor is there a transfer of goods to a «third party», since it is the same entity that is still in possession of its assets, but whose activities continue abroad.

The LIG does not include any presumption in the case of a change of the domicile of a legal person nor the application of an "exit tax" on all or just certain assets of the entity. From the tax point of view, the change of

⁵ Asorey, Rubén O. "Similitudes y diferencias entre el concepto de renta en la ley de impuesto a la renta de Perú (LIR) y en la ley del impuesto a las ganancias de la Argentina (LIG)", en *Revista de Derecho Fiscal RDF*, marzo - abril, 2009-2, p. 9.

domicile is not considered equivalent to the "dissolution" or "liquidation" of the legal entity, neither is it so on the provisions of the LSC, Law on Commercial Companies). As mentioned above, unlike the cases of early dissolution of a society, the LSC provides the right of recess in the case the domicile is transferred to other country, which supports the idea that the change of address implies the continuity of the society abroad, without any distribution in favour of partners, since the society is not dissolved or liquidated"⁶.

b) Tax on the transfer of shares and financial income

Taxes on the distribution of dividends and/or the transfer of shares certainly affect the movement of capital and the profitability of businesses. The problem may worsen when this imposition leads to an economic double taxation, the same income is taxed twice, first on the production company and then on the shareholder, recipient of dividends.

An example of this can be found in the recent Argentinian reform introduced by law 27.430/2017⁷ that decided to tax such incomes reaching both, transactions among residents and also those among non-residents. Accordingly, the article incorporated after article 13 of LIG considers as income Argentine source gains obtained by non-residents with respect to the transfer of assets located in the country, even those carried out through an interposed entity (indirect) when legal conditions are met. In particular: the market value of the shares sold comes at least in a 30% from shares, titles etc. of a company, fund or trust incorporated in Argentina.

Decree 279/2018⁸ regulated certain aspects of this reform with a tax rate applicable to the trading of shares from 5% to 15%, according to a

⁶ Conclusions of "III Jornadas De Tributación Internacional" (AAEF – Bs.As. 6,7/11/ 2014). Informe de Relatoría del Tema I: "Residencia Fiscal. Aspectos Controvertidos" (Pte. A. Messineo- Relatora: D. C. Rey).

⁷ Ley 27.430 introduced important modifications in: Impuesto a las Ganancias (IG), IVA, impuesto a los débitos y créditos en cuenta bancarias, custom taxes and also at the procedural and penal tax law levels.

⁸ It is mandatory according to R.G. RG Afip 4189/2018 (10.1.18); RG 4190/2018 (11-01-18); RG 4219/2018 (26-03-18) y la R.G. 4227/2018.

withholding tax mechanism that works as unique and final payment. The rate rises to a maximum of 35% in the case of non-cooperating jurisdictions.

Such taxation reaches even beneficiaries from abroad who must submit the tax in their own name when they have no representative in Argentina.

It should be noted that such provisions may be modified if there is a current DTC with the country of residence of the foreign beneficiary, so the residence of the beneficial owner of such transfer is not indifferent.

3. As a corollary:

The comparative analysis shows that most Latin American systems do not provide a specific exit tax.

Also tax-legal consequences of the companies change of residence are heterogeneous in both cases, when it is motivated by a corporate decision or when it is the application of anti-avoidance rules. The theoretical purpose of the measures born as anti-avoidance rules is often surpassed by a mere revenue goal that fictitiously considers income that is not based on real transactions.

In addition, the legal uncertainty generated by the absence of a specific regulation of the change of residence phenomenon in the domestic systems is not solved by the bilateral Double Tax Conventions (DTC).

In fine, if one of the main challenges of Latin American systems is increasing the volume of domestic market through investments, job creation and higher added value, exit tax rules - and tax rules in general - should be assessed in the light of being consistent with that purpose. In this sense, we can verify at a glance that the solutions of our systems tend to be inconsistent, when not contradictory to this end.

In that way, the accumulation of anti-abuse measures do not guarantee by itself a higher tax collection and might become instead a dangerous source of legal insecurity affecting negatively the growth of domestic and international investment.