BRAZILIAN PERSPECTIVES ON SECRET, COOPERATION AND INTERNATIONAL TAX COMPETITION

Carlos Otávio Ferreira de Almeida and Maria Eliana Pereira

SYNOPSIS

This article examines important topics for the agenda of States: the secret, the cooperation and the international tax competition under the Brazilian perspective. The secret, possible obstacle to the effective exchange of information has been subject to measures to reduce its effects, in national legislation as well as international law under the banner of the necessary fight against tax evasion. Therefore, an atmosphere of cooperation between the States is needed so they do not compete in a deliberately harmful way. It happens that, in some cases, the domestic legislation restrains this impulse, as in the Brazilian case, where the issue of bank secrecy is treated as a fundamental right.

The Authors: Carlos Otávio Ferreira de Almeida. *Research Professor of the Pontifical Catholic University of Campinas; Visiting researcher at the international and Austrian Institute of Tax Law (Wirtschaftsuniversität); Doctor in Economic, Financial and Tax Law of the University of São Paulo; Master in Public Law of the University of the State of Rio de Janeiro; Master in Tax Law at the University of Florida (Levin - US).* ***Maria Eliana Pereira.*** *Student - researcher at the Faculty of Law at the Pontifical Catholic University of Campinas; Fellow of the National Council of Scientific and Technological Development (CNPq).*

Content

The growing mobility of goods, services, people and, above all, capital is a factor that stimulates the competition of States to attract revenue. Although it is legal, based on sovereignty, to improve the national tax system to attract investors; It is inevitable, however, that such measures affect other jurisdictions. With different conditions to compete, States use various practices to become more attractive to foreign direct investment (FDI). Some of these practices, however, were considered as harmful for other jurisdictions and damaging their tax base (harmful tax practices).[1]

Once the harmful tax competition affects several jurisdictions around the world, unilateral measures, even when they are adopted by several States, will not be sufficient to combat it. Therefore, the problem of the harmful tax competition cannot find a solution without a broad and effective international cooperation.

The Organization for cooperation and economic development (OECD) is one of the main promoters of international tax cooperation. In order to combat the opacity of tax systems, the organization proposed new international tax rules on transparency and the exchange of information. It has launched the Plan BEPS (Base Erosion and Profit Shifting), following the demand of the G-20, worried about the loss of revenue of the States under the transfer of profits of multinationals to low taxation (offshore) jurisdictions.

In the case of Brazil, the tax policy is focused on the expansion of international tax cooperation. This is evidenced by the participation of the country in the G-20. As a result, discussions were held for the preparation of the BEPS Plan in the Global Forum on transparency of OECD, which integrates the Steering Group and the Peer Review Group; in the regional integration organizations such as ALADI (Latin American Integration Association), UNASUR (Union of South American Nations) and the MERCOSUR. The country has also closer relations with the BRICS member countries (Brazil, Russia, India, China and South Africa); and adheres to the modifications in exchange of information generated by FATCA (Foreign Account Tax Compliance Act).

This cooperative expansion has clear roots in the Federal Constitution, which promote the international relations of Brazil (art. 4, II and IX) in the sense of cooperation between nations for the progress of humanity, but always in the respect of human rights.

Through the peer review process, the Global Forum on transparency of OECD (Global Forum), responsible for verifying the compliance of countries with the standards of transparency and exchange of information, qualified Brazil in 2013 as a cooperating jurisdiction, despite having identified some incompatibility with the proposed rule, such as the timing for sending tax information requested by another State.

1. Work resulting from the activities of scientific initiation of research "International legal cooperation", in the project " would tax secrecy or international cooperation: a question of fundamental right?". It took place from August 2014 to July/2015, in the Faculty of law of the Pontifical University Catholic of Campinas (SP), with support of the National Council of scientific and technological development (CNPq), through the scholarship PIBIC/CNPq.

The timing allowed for the exchange of information is a topic currently debated, in view of the anticipated ruling of the direct action of unconstitutionality No. 2390 (and other enclosed), whose object is article 6 of the complementary law No. 105/01, which empowers the Treasury, under certain requirements, to request banking data to financial institutions directly. The Supreme Federal Tribunal (STF) cited the precedent (RE 389.809/PR) in the sense that access to the banking information would be subject to jurisdiction, therefore under the exclusive competence of the judiciary.

If the country is ready to cooperate actively to combat international tax evasion, it should regulate it in a coherent manner. The excessive granting of tax expenditures can compromise the public budget and the desirable promotion of economic development and human dignity, fundamental precepts of the Brazilian State[2], as well as damage the ability to contribute if it is not compatible with the legitimate rules of mitigation of this valuable principle.

Obviously, in the debate between transparency and privacy, it is vital to design a tax system able to minimize the loss of income arising from harmful tax practices in other jurisdictions. Ultimately, at stake is the formulation of a tax policy effectively promoting economic development and implementing the fundamental guarantees.

This paper aims to investigate, under the Brazilian perspective, possible obstacles to cooperation because of tax secrecy, usually evoked as a fundamental right. The issue has current relevance in view of the expansion of transparency in international practice, aimed mainly at combating harmful tax competition.

1. HARMFUL TAX COMPETITION AND INTERNATIONAL COOPERATION

Currently, the tax collection function stands out as an indispensable instrument for complying the functions of the State in order to guarantee fundamental rights. The contemporary tax is of the fundamental duty to exalt the dignity of the human person,[3] because it is the tool responsible for transferring resources to the State, which, once prepared the necessary means, must implement measures to reduce social inequalities and ensure adequate conditions of living.

Initially the taxation and economic development pertained only to the sovereignty of the State. This understanding did not pose great difficulties to the design of the tax policy, because the Government would impose the tax burden that it deemed convenient, and would spend the revenue according to its deliberations.

The allocation of cross-border capital intensified the competition for income, mainly by foreign direct Investment. Given that the sovereignty of a State reflected a single power - in the middle of two hundred other competing with each other to attract investment -, the reduction in the tax burden could become a genuine strategy to attract revenue.

2. BRAZIL. Federal Constitution. Article 1, III; Article 3, II.
3. JIMENEZ, C. A. Ruiz. Fair Trial Rights on Taxation: The European and inter-American Experience. In: KOFLER, Georg; MATURE, Miguel Poiares; PISTONE, Pasquale (Editors). Human Rights and Taxation in Europe and the World. Amsterdam: IBFD, cap.30, 2011, p.521.
4. DAGAN, Tsilly. The tragic choices of tax policy in a globalized economy. In: BRAUNER, Yariv; STEWART, Miranda (Editors). Tax, Law and Development. Cheltenham: Edward Elgar, 2013, part. I, p.67.
5. EASSON, Alex. Taxation of Foreign Direct Investment. London: Kluwer Law International, 1999, p.10.
6. DAGAN, Tsilly. The tragic choices of tax policy in a globalized economy. In: BRAUNER, Yariv; STEWART, Miranda (Editors). Tax, Law and Development. Cheltenham: Edward Elgar, 2013, part. I, p.57.

Competition, however, has become unacceptable to many jurisdictions threatened with the loss of their tax base by what now is called harmful tax practices. However, to make the difference between harmful competition and acceptable competition is not a simple task, and the absence of clear outlines making possible to distinguish situations.

In General, according to the OECD, the harmful effects of tax competition would depend on of the deliberate invasion of the tax base of a State by the aggressive stance intentionally directed to divert flows of capital and of investment by another State. In fact, according to the report Harmful Tax Competition: an Emerging Global Issue OECD (Report 1988), the potential damage would be linked, among other things, to the distortion of investment flows; a dissuade taxpayers comply with tax obligations; and the collapse of the correlation between tax revenue and spending (which gives opportunity of free riders). With the release of the final report of BEPS action five - fighting more effectively harmful tax practices considering transparency and substance - 2015, the concept was reformulated, which now includes also transparency and substance.

A priori, international tax competition may seem related to economic development, in view of improving the state location factors. However, instead of working infrastructure, reducing the administrative and legal bureaucracy, promoting the simplicity and clarity of the tax systems, states often prefer one simplistic policy, of conceding tax incentives. Give up revenues without the corresponding tax responsibility is putting at risk the taxable base and risk becoming, in last instance, "a race to the bottom".

Identifying and fighting harmful tax competition, which involve transnational corporations, transcends the possible effects of unilateral anti-avoidance measures, especially because these companies make use of the gaps and differences between national laws (mismatches) to create strategies for action. It is thus fundamental to develop mutual assistance among States to strengthen their tax sovereignty and inhibit the effects of low taxation allied with the fiscal secrecy, such as tax evasion, corruption, international terrorism, money laundering, among others .

In search of the neutralization of harmful tax competition, the OECD has encouraged countries to ratify tax agreements. It emphasizes the tax cooperation as an instrument to fight the loss of tax revenue. It may assist that country in administrating and/or enforcing its own domestic laws. It may serves as a mechanism that enables tax authorities to solicit cooperation from foreign governments in cases of tax and white-collar related crime.

Abusive avoidance and evasion undermine important values for the taxation of the 21st century, constitutionally guaranteed by the democratic rule of law, such as the contributory capacity and equality. In addition, the loss of revenue undermines the implementation of public policies, delaying economic development and the implementation of fundamental guarantees. International tax cooperation is therefore an important current issue, which can change the mode of action of States as a useful tool to obtain and maintain satisfactory income levels whenever there is a real political willingness.

7. GEERS, Tonny Schenk. International exchange of information and the protection of the taxpayer. Alpen aan den Rijn: Kluwer, 2009, p.103. On this topic, see also SANTOS, Ramon Tomazela. The expansion of the exchange of information under international agreements to avoid the double taxation of income - the fight against Tax Evasion and the protection of the rights of taxpayers. In: ZILVETI, Fernando Aurelio (coord.), current tax law. São Paulo, n.31, p.117, 2014.

8. Original: the information received from the requesting country is used to ascertain facts in relation to income and capital of a tax treaty partner; (2) the information received from the requesting country may assist that country in administrating and/or enforcing its own domestic laws. And (3) more importantly, the exchange of information serves as a mechanism that enables tax authorities to solicit cooperation from foreign governments and prosecute more effectively tax and related white-collar crime. ANAMOURLIS, Tony; NETHERCOTT, Les. An Overview of Tax Information Exchange Agreements and Bank Secrecy. Bulletin for International Taxation. Amsterdam: IBDF, v.63, n.12, p.618, 2009.

In fact, the scenario in which the States advocate cooperation is the same as when they compete. Several jurisdictions announce measures to fight against harmful tax practices, on the one hand, and offer special regimes more beneficial to taxpayers, on the other.

It happens that external pressure has been growing, as evidenced by the rapid expansion of FATCA and its intergovernmental agreements to open data of nationals and residents abroad. In this sense, the 08/10/2015, in Lima (Peru), the G-20 members expressed their support for the package of measures recommended in the reports of the BEPS and committed to a comprehensive, coherent and coordinated reform of their national tax systems

Ultimately, the concerted action of all jurisdictions in sincere cooperation should lead to changes in the behaviors of multinationals and of states themselves, to offer a more beneficial tax treatment.

2 TRANSPARENCY IN THE INTERNATIONAL ORDER

With the intensification of cross-border capital flows and the consequent erosion of the tax base of the States, the tools developed for international tax cooperation began to combat not only low or null taxation, but also the opacity. Since 2001, the standard agreed internationally to identify tax havens or non-cooperating jurisdictions was based on two criteria: transparency and the exchange of information - requirements that cooperating jurisdictions apply, and, by contrast, tax havens do not apply.

The dissemination of the TIEA (Tax Information Exchange Agreement) models in 2002, as well as updates to the art.26 of the Model Convention, both carried out by the OECD, have materialized the transparency and exchange of information as an international standard for cooperation[9].

The Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum), multilateral structure formed by members and non-members of the OECD, is the body in charge of analyzing the enforcement of the international standard of cooperation. To this end, the internal legislation of the states is subject to revision by pairs (peer review) to measure their compatibility with the newly approved standard on transparency and exchange of information, in two phases. The first phase examined the legal and regulatory framework of the information exchange. The second assesses the applicability of those provisions. In the end, the jurisdiction is classified in three levels: compatible, incompatible, and partially or mainly compatible.[10]

Therefore, the compatibility of the jurisdiction with the transparency and the information exchange will depend on the non-opacity of the tax system. It requires the existence of mechanisms for the exchange of information upon request; access to bank information and property by the administrative authority; for sending data to the requesting jurisdiction in proper timing; and the guarantee of the confidentiality of the information exchanged.[11]

9. Available at:www.ocde.org.br>. Accessed: 05 Nov. 2015
10. Global Forum on Transparency and Exchange of Information for Tax Purposes. Available at: http://www.oecd.org/tax/transparency/GFannualreport2014.pdf>. Accessed: 09 Nov. 2015, p.26/27.
11. Available at: www.ocde.org.br. Accessed: 05 set. 2015

The standard previously established required agreements providing for the exchange of information on request. However, the urgency of the effective fight against harmful tax competition has brought about a change towards the automatic exchange of information and encouraged the multilateralism, with a view to increase the spectrum of data exchange, to the detriment of bilateral agreements.

Published in 1988 by the OECD, the Multilateral Convention on mutual administrative assistance in tax matters now offers automatic exchange of information because of its modification, in 2010, the same year that the United States implemented the Foreign Account Tax Compliance Act (FATCA), catalyst for the automatic multilateralism and data exchange.

The FATCA law requires financial institutions domiciled abroad to report the bank details of American people and foreign entities with substantial participation of Americans to the Internal Revenue Service (IRS), under the penalty of a 30% withholding on income of U.S. source.

The profound innovation introduced by FATCA promoted the implementation of the new international tax rules within the OECD and the G20. Among other measures, the OECD published the Multilateral Competent Authority Agreement, which provides for the automatic and multilateral exchange of information between the signatories of the Convention. Since its launch on October 29, 2014, the agreement has been signed by 74 jurisdictions that have committed to exchanging the first automatic information in 2017 or 2018.[12]

In addition to this new international standard for cooperation, OECD has developed initiatives to combat aggressive tax planning used by multinational enterprises (MNEs). In general, MNEs take advantage of gaps in the tax systems of the jurisdictions to define connections to systems that serve to reduce the effects of the tax burden. As a result, the OECD and the G-20 developed the BEPS Action Plan (Base Erosion and Profit Shifting), comprising 15 initiatives for changes in tax laws and the adoption of the international standard of transparency, substance and coherence.

Brazil not only participate in the discussions related to BEPS, but also begins to reform the internal legislation in order to comply with the final recommendations of this Action Plan. An example is the program of reduction of tax litigation (PRORELIT), created by the provisional measure no. 685/2015[13], whose content is similar to the defendant by the action of the BEPS 12 - Mandatory Disclosure Rules. The PRORELIT creates an obligation to taxpayers to declare annually to the Receita Federal of Brazil (RFB), before September 30, acts or legal facts giving rise to the suspension, reduction or postponement of a tax. This is under the penalty of characterization of intentional fraudulent omission with the purpose of evasion or fraud, in addition to the collection of late fee and of the expected interests and fines[14].

12. Available at: www.ocde.org. Accessed: 12 Nov. 2015.
13. At the time of the closing of this work, the text had been approved by Congress and awaiting presidential approval for its conversion into law
14. BRAZIL. Provisional measure n ° 685, 21 July 2015. Creates the program of reduction of tax litigation (PRORELIT), °.7, caput and art.9 °, caput.

3. BANK SECRECY AND TAX SECRECY

Among the list of fundamental rights laid down in the Federal Constitution of Brazil, is the so-called right to privacy, expressed by the inviolability of privacy, private life, honor and image of persons (article 5 °, X) [15].

One aspect of privacy is the confidentiality of the data, which guarantees to individuals and institutions the confidentiality of the information transmitted to public or private organizations. Both the data handled by the administrative authority and the information held by financial institutions are, therefore, under the scope of this constitutional provision.

The Brazilian legal system offers tax authorities access to information from taxpayers and the respective duty to keep it under secret, according to provisions of the art.198 of the national tax code (CTN) that says:

(...) disclosure by the public Treasury or its agents, of information on the taxpayer or third parties economic or financial situation and on the nature and status of their business or activities is prohibited.

Although they derived from the right to privacy, tax secrecy and bank secrecy are different concepts. While the first refers to information obtained under the charge of the tax authorities, the second is the one that financial institutions are obliged to preserve in their active, passive and operations services (art. 1, LC 105/01). Even if access to the administrative authority to the bank details of taxpayers means the violation of bank secrecy, this does not mean, that the taxpayer is unprotected at all. There is another, more extensive protection area, which includes various types of information coming to the tax authorities, since the same data will be protected under the tax secrecy.

On the other hand, when the tax authority have access to taxpayers' data kept by financial institutions, the bank details remain, in accordance with the legislation in force, under a strict secret. In this case, the secrecy would be a kind of tax secrecy, under the information (bank details) managed by the tax authorities.

The complementary law 105/01, in its article 6, gives tax authorities the power of direct access to bank information, if a tax procedure or an administrative procedure has started and these examinations are deemed necessary by the administrative authority[16]. This competence has a constitutional basis because art.145, § 1, of the Federal Constitution allows the tax administration to identify assets, while respecting individual rights, in order to assess the economic capacity of the taxpayer.

However, in its decision of the Extraordinary Appeal (RE in Portuguese) 389808/PR, in 2010, the Federal Supreme Court ruled (in a 5-4 vote) in favor of the clause of judicial reserve, which imposes the need for prior judicial authorization to access the bank details.

The judges who voted in favor of the RE argued that the Brazilian State is based on the dignity of the human person, the sanctity of individual rights and legal certainty, so that access to

15. BRAZIL, 1988 Federal Constitution, article 5 °, X. Intimacy, privacy, honor and image of persons, guaranteeing the right to compensation for material or moral damage resulting from breach are inviolable.
16. Complementary Law No. 105 of 10 January 2001. It has about the secrecy of the operations of financial institutions and other measures, Art.6 °.

such data, without passing through the sieve of the judicial power, would affect the privacy of taxpayers.

Meanwhile, the judges who rejected the RE understood that there is no violation of privacy, given the provisions of the art.145, § one CF, above mentioned. According to this view, we must not talk about violation of bank secrecy, but the transfer of data since the Federal revenue has the duty to maintain data confidentiality.

The unconstitutionality of article 6, of the 105/01 LC was also subject to the direct action of unconstitutionality 2390 (Rel. Min. Dias Toffoli), with no decision announced yet. If the incidental understanding previously adopted by the STF prevails, the Treasury will depends on a judicial authorization to access bank data, since the effects now will apply to all (erga omnes).

In addition to the clash between transparency and privacy, the discussion involves the shape of Brazil's policy towards harmful tax competition and the inclusion of Brazil in the international scenario, with the goal of growing to achieve transparency, as described in the previous point.

The possible declaration of unconstitutionality of article 6, LC 105/01 gives rise to doubts about the timeliness of information exchange, since judicial decisions are characterized, in general, by being delayed. Without a need for judicial authorization, only 20% of requests made to Brazil were answered in 90 days[17], figures that need to be improved with the participation of Executive and judicial powers, if the country wants to meet the expectations of international transparency.

In addition, the adequacy of Brazil to the international tax standard also requires the renegotiation of some double taxation agreements in order to enter in the (5) art.26 of the OECD Model Convention. This clause is already included in the agreements signed with Chile, Peru, Turkey and Venezuela. In this case, Brazil may not invoke banking secrecy of the data requested. Other observations made by the Global Forum are also incompatible with judicial reserve of banking data, so this measure seems to contradict the pursuit of transparency and exchange of information that States have expected, and the measures in this sense taken by the Brazilian Government.

4. BRAZIL ON THE INTERNATIONAL TAX COOPERATION STAGE

The Global Forum published in 2012 and 2013, respectively, the reports of phases 1 and 2 (peer review), relating to the Brazil's compliance with international tax rules. In the initial phase, the OECD assessed the regulatory and legal framework for the exchange of information. In the second phase, the Organization analyzed the practical application of the rules of transparency under the aspects of the information availability, access to information and information exchange.

In General, Brazil was considered a cooperating jurisdiction; however, the reports identified some aspects to review, namely:

(i) Exchange of information in proper time:

sending timely data is emphasized by the OECD as fundamental for effective international cooperation, taking into account, to this end, a 90 days' timeframe, beyond which there will

17. OECD (2013), Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Brazil 2013. Phase 2: Implementation of the Standard in Practice, OECD Publishing p.112/114. Available at: http://www.eoi-tax.org/jurisdictions/BR#latest>. Accessed: 06 Nov. 2015.

possibly be damage and the eventual failure of the investigation carried out by the requesting jurisdiction.

Brazil would have not promptly answered the majority of requests for Exchange of information, pertaining to the RFB, through the General coordination of international relations (CORIN), which send this information. Upon receipt of the request for Exchange, the CORIN verifies if the information is included in the RFB database, sending it directly to the applicant if yes. Usually the RFB database stores information of simple nature, such as address, name and tax return.

The more complex information, which are not included in the database of the RFB, must be submitted to the unit of the RFB that hold jurisdiction over the domicile of the taxpayer (local unit).[18]

The Global Forum stressed that because of "the lack of clear internal controls within the deadlines, the inadequacy of resources for the units of information exchange, as well as the difficulty for the local units to forward the data in time"[19], the sending of information abroad in due time was hampered. Among the 89 requests for Exchange of information received by Brazil, in the period from 2009 to 2011, 12 were exchanged directly and 77 were directed to the local jurisdiction unit of the RFB[20]; 20% answered within 90 days; 46% up to 180 days; 68% up to 1 year; and 17% still not have been completed. For these reasons, the Brazil was rated as partially compatible in terms of the timely nature of data exchange.

The improvement of these figures, of course, requires investment in tax administration, providing it with the necessary logistics to develop a regular attention to foreign requests, as well as the development of Brazilian requests and the decoding of the data to be used before any indication of violation of the tax legislation.

(ii) Process of prior notification to the taxpayer in case of Bank data request:

The right to notify is a controversial issue. If on the one hand the lack of notification may result in a constraint to the defense of the taxpayer, on the other hand, notifying could frustrate the progress of abusive circumvention or evasion investigation.

In the field of the European Union, the Court of Justice of the European Union (CJD), in the case Sabou (case C-276/12), expressed for the first time the rights of taxpayers in the procedure of exchange of information, including the on right to prior notification. The Court ruled that in the investigation phase, the taxpayer is not entitled to a notification about the request for Exchange of information. On the other hand, the State has the duty to ensure the protection of the fundamental rights of taxpayers, such as the confidentiality of data exchanged[21].

In the Brazilian case, the RFB precludes the prior notification to the taxpayer under investigation for the exchange of tax information. As indicated in its database, the Agency can send the data directly as well as request them from a third party.[22]

18. OECD (2013), Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Brazil 2013. Phase 2: Implementation of the Standard in Practice, OECD Publishing p.72/73. Available at: http://www.eoi-tax.org/jurisdictions/BR#latest>. Accessed: 06 Nov. 2015.
19. In the original, "the lack of clear monitoring of internal timeframes and the insufficient level of resources within the EIO Unit, as well as difficulties in obtaining information from local units in a timely manner, have led to considerable delays in response times". OECD (2013), Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Brazil 2013. Phase 2: Implementation of the Standard in Practice, OECD Publishing p.88/89. Available at: http://www.eoi-tax.org/jurisdictions/BR#latest>. Accessed: 06 Nov. 2015
20. OECD (2013), Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Brazil 2013. Phase 2: Implementation of the Standard in Practice, OECD Publishing p.73. Available at: http://www.eoi-tax.org/jurisdictions/BR#latest>. Accessed: 06 May. 205
21. SEARA, Alberto Quintas; CARRERO, José Manuel Calderón. The taxpayer´s right of defense in cross-border exchange of information procedures. Bulletin for International Taxation. Amsterdam: IBDF, v.68, n°9, p. 501, 2014.
22. OCDE (2013), Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Brazil 2013. Phase 2: Implementation of the Standard in Practice, OCDE Publishing p.83. Available at: http://www.eoi-tax.org/jurisdictions/BR#latest>. Accessed: 06 may 2015.

In case of request for banking information, the Agency should consider the indispensable information to access it directly, being understood that the negative answer by the account holder implies responsibility or liability for the financial transactions. Such refusal or no manifestation of will open the Fiscal procedure (TDPF), and RFB would directly request the data to the financial institution (Dec. No. 3724/01 ° Art.3, X ° and art.4, §2 °).

In this sense, the Global Forum understood that the notice to the taxpayer must have exceptions like "the urgency of the request for exchange of information or situations in which it is foreseeable that notification will affect the chances of success of the research carried out by the requesting jurisdiction".[23]

This is not surprising. The suggestion of the OECD has been, for a long time, registered under Brazilian procedural law. Whenever there is a threat to any right, procedural rules are flexible to secure it to the detriment of the formalities usually necessary. It is the case, for example, in terms of the presentation of the power of Attorney posterior to the request in the event of loss of right; and precautionary measures granting.

The urgency of research needs information to confirm and verify a possible fraud, which, if it is not set, will never lead to the investigated on the passive side of the tax obligation relationship. However, it would not be reasonable to deny the existence of prescriptive terms and limits that run against the Treasury, in view of the urgent need of the information requested.

It is desirable to preserve all the rights of the investigated taxpayer. However, it also requires the preservation of the interests of all the contributing society, linked together by the ties of solidarity that turn citizens into taxpayers.

(iii) Professional secrecy within the lawyer-client relationship:

under the national tax code, professional secrecy is one of the exceptions to the obligation, by request in writing, to provide to the administrative authority all the information detained with respect to the goods, business or activities of third parties[24].

In the case of the attorney-client relationship, art. 7 of law Nº 8.906/94 is clear about the "inviolability of the office or workplace of the legal counsel, as well as their work tools, their written or electronic correspondence, telephone and telematics related to the exercise of the legal profession". Therefore, only the relationship that arises from the practice of law is under the protection of professional secrecy, understood as the legal representation before the judicial bodies such as advice, consultancy and legal address.

While the legislator defined the instruments covered by professional secrecy in the attorney-client relationship, there is a clear definition of the scope of these relationships. As a result, the attorney-client relationship could possibly be invoked as a basis for not presenting data to the tax authorities, although not without the actual practice of the legal profession.

As a result, it was recommended to Brazil review the provisions related to professional secrecy in the attorney-client relationship, more clearly explaining its limits.

(iv). Effective international information exchange:

Brazil, to exchange information, signed 39 agreements on tax matters (32 double taxation agreements and 7 TIEAs), of which 33 are in force (32 double taxation agreements and 1

23. OECD (2013), Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Brazil 2013. Phase 2: Implementation of the Standard in Practice, OECD Publishing p.84. Available at: http://www.eoi-tax.org/jurisdictions/BR#latest>. Access on: 06 may 2015.
24. BRAZIL. Law No. 5172 of October 25, 1966. Available on the national tax system and establishes general rules of tax law applicable to the Union, the States and municipalities, Art.19.

TIEA). This scenario could be more favorable to the Exchange if it were not for the delay in the procedure of ratification of the agreements already signed, as in the case of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters, signed in 2011, but not ratified.

A noteworthy point refers to the 2010 update to the art.26 of the Model Convention of the OECD, which earlier demanded "necessary" information exchange only and was made more flexible for "foreseeably relevant" information. In the case of Brazil, the agreements, except the agreement with Turkey, provide for the exchange of the necessary data.[25]

An update from 2012 to article 26 (2) of the OECD Model Convention brought the controversy of the use of fiscal information exchanged with purposes other than taxation as, for example, criminal offences, however this extension is not provided for in Brazilian agreements.

A provision of the art.26 (5) of the OECD Model Convention, under which the Contracting State may not refuse to provide the information requested to be in the custody of a financial institution, is expressed only in the double taxation agreements with Chile, Peru, Turkey and Venezuela, and the TIEAs with Bermuda, Cayman Islands, Guernsey, Jersey, United Kingdom and Uruguay.

The Global Forum also pointed out the fact that only the double taxation agreements with Turkey and Peru are adjusted to art.26 (4) of the OECD Model Convention. The regulation establishes that lack of national interest in the exchange of information is not a reason for the requested State to avoid sending it.

The effectiveness of the exchange of information progressed with the enactment of the Intergovernmental Agreement (IGA), through Decree No. 8506 24 August 2015. The agreement adapts the exchange of information provided for in the existing TIEA with the United States to FATCA, establishing the duty of the States to the automatic exchange of banking information. Therefore, annually and in reciprocal fashion, the Internal Revenue Service (IRS) and the Brazilian Federal Income (RFB) will send information on financial transactions of Brazilians/Americans taxpayers in financial institutions of USA/Brazil.

Joining FATCA was a boost for the new automatic information exchange standard, since so far only the Multilateral Convention on Mutual Administrative Assistance in Tax Matters, pending approval, provided for the automated exchange of data. However, the automatic exchange on a multilateral basis planned in the Multilateral Competent Authority Agreement must be implemented by Brazil in 2018, according to the commitment assumed by the country.[26]

However, the fundamental pillars of development and human dignity, authentic axiological vectors of the Brazilian legal system, require for its implementation more than measures to combat evasion practices. It recognizes the importance of international cooperation, but also focuses on coherence in the use of resources collected or waived. In summary, the budgetary revenue column must necessarily maintain close relationship with spending under the mantle of good governance and fiscal responsibility.

The waiver of income, expressed in the form of tax expenditures, has shown considerable growth in Brazil. Federal income data indicate, by the year 2015, tax expenditures of approximately

25. OECD (2013), Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Brazil 2013. Phase 2: Implementation of the Standard in Practice, OECD Publishing, and p.91. Available at: http://www.eoi-tax.org/jurisdictions/BR#latest>. Accessed on: 06 may 2015.
26. Available at:www.ocde.org>. Accessed: 05 sep. 2015.

R $ 282 billion, representing a growth of 13.04% compared to 2014 and 4.92% of the GDP.[27] Direct effect of this is the primary deficit of R$100 billion reals, presented in the budget bill for the year 2016. Therefore, it is normal that the budgetary pressure falls on the need for revenue that would justify the measures in the fight against international tax evasion.

Even if granting tax incentives to compete well on the international agenda is not condemned, this practice requires caution. There will be loss of income by the state, due to the allocation of foreign investment, and we will have to assess that there will be greater benefits than costs. From this point, the difficulty lies in the lack of transparency and absence of objective control of trade-off of these concessions.[28] Improvement of location factors reduces the need to offer tax incentives. In contrast, an unattractive internal environment tends to offer tax incentives in a disproportionate manner.[29]

In this scenario, therefore, of necessary reform in the tax system, Brazil has made efforts to be more competitive and cooperative, especially in the fight against the tax bases erosion and profit shifting. Therefore, the expatriation of resources has also affected the Brazilian tax base, since in the period from 1970 to 2010, ¼ of the $ 999 billion remitted by people from 33 countries of Latin America and the Caribbean came from Brazil[30].

In short, to be more competitive, it is necessary that the country develop a policy that seeks the attraction of capital, without neglecting domestic taxpayers, to avoid losing them or not discriminate against them in an arbitrarily or unfairly. Thus harmonizing the stage of multilateral cooperation seems inevitable, however, at the same time, it is necessary to enforce every part of the collection, given that the waiver or excessive expenditure of public revenue will inevitably reduce the well-being of taxpayers, breaching the pillars of the democratic rule of law.

5. CONCLUSION

Regardless of the progress of the Brazilian tax policy towards the exchange of information, an effective international cooperation requires adopting measures increasingly promoted by international forums. In fact, cooperation should be seen in the context of the exchange of information, as a two-ways roads, with greater risk when greater protection is offered by the domestic legislation of States on certain issues.

A topic of interest whose protection varies between the different internal systems is the banking secrecy. The recent measures recommended by the international order

27. Receita Federal do Brasil. Demonstrativo dos Gastos Governamentais Indiretos de Natureza Tributária (Gastos Tributários) – PLOA 2015. Disponível em: <http://idg.receita.fazenda.gov.br/dados/receitadata/gastos-tributarios/previsoes-ploa/arquivos-e-imagens/dgt-2015>. Accessed: 14 Nov. 2015.
28. BRAUNER, Yariv. The future of tax incentives for developing countries. In: BRAUNER, Yariv; STEWART, Miranda (Editors). Tax, Law and Development. Cheltenham: Edward Elgar, 2013, part. I, p.44.
29. ALMEIDA, Carlos. Sistemas Tributários Competitivos à luz da Interdisciplinaridade do Direito Tributário Internacional. Revista Novos Estudos Jurídicos – Eletrônica, v.20, n.1, p.234, 2015.
30. In the original: "in regard to Latin America and the Caribbean, the study indicates that the richest people in 33 countries sent twice an amount equivalent to $ 999 billion offshore between 1970 and 2010. More than a quarter of that amount comes from Brazil". VASCO, Carbajo Domingo; PORPORATTO, Paul. The latest advances in terms of transparency and exchange of tax information. In: Inter-American Center of tax administrations, 2013, p.8.

emphasize the need for a specific treatment of banking data. Thus, paragraph 5 of article 26 of the OECD Model Convention was modified to stimulate the exchange of banking information between the signatories of the agreement. Similarly, the issue occupied a prominent place in peer reviews carried out by the Global Forum, in addition to being the main objective of the significant changes introduced by FATCA, which concentrated precisely on access to banking data for the exchange of information. This, therefore, seems an irreversible picture.

Brazil gives priority to the protection of fundamental rights, among which stands out the privacy of citizens and taxpayers. The exchange of tax information, adapted to effective cooperation between States, whose objective is to progress, as required by article 4 of the Federal Constitution, does not mean, a priori, the violation of the protection of the taxpayer's trust by the State.

Conversely, fiscal actions seeking access to the banking data of taxpayers may never arise from the discretion of the tax authorities. The indispensability of the information, a necessary requirement for allowing the tax administration access to the banking data of taxpayers, is regulated specifically in the legislation regulating the action of the tax administration. Any breach carries penalties provided for in the specific standard.

In this case, access to the banking information by the tax authorities does not violate the fundamental right to secrecy, since bank details remain under another broader protection, i.e. the tax secrecy. A similar reasoning here leads to the conclusion that understanding the opposite means, a priori, assuming that the administrative authority shall commit an offence able to justify sanctions to the abusive collector.

On the other hand, the interest of the State in development, while ensuring the well-being of its taxpayers implies the supremacy of the public good over the private, so the ambivalence of exchanges of information must in the case of Brazil as a requisite, serve the interest of investigations limited to legal provisions. The possible understanding of the Federal Supreme Court to recognize the jurisdiction reserve above all and any access to the banking information goes in the opposite direction to the cooperation requested by the international order, increasingly in search of transparency. However, this understanding, if it prevails, does not imply for Brazil the impossibility of sending the information requested by other jurisdictions in a timely manner, if the Judicial and Executive powers reach an agreement for this purpose.

The conformation of BEPS reports, so that with the adoption of the IGA in the view of the FATCA aims to combat tax regimes privileged in order to preserve public revenue. In this sense, high tax expenses with tax waivers and the lack of effective legislation to repatriate omitted revenues from abroad are examples where the Brazilian international tax cooperation policy is not yet well defined. Consistency is needed, avoiding the loss of revenue, increasingly important on the international agenda. There is no justification for further actions to preserve the tax base and simultaneously affecting the budget because of tax expenditures, without guarantee of the greater benefits that would bring the collection.

The path of the States at this time is under strong external pressure. Among other things, they must adopt anti-avoidance measures, expand transparency, promote the exchange of information and combat the harmful competition from privileged regimes, and their internal legislations are challenged in their ability to respond coherently, in order to provide security not only to the international order but also, internally, to their taxpayers.

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