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TAX AVOIDANCE, ENFORCEMENT, AND COMPLIANCE: CONTEMPORARY CHALLENGES FOR TAX ADMINISTRATIONS

EVASIÓN FISCAL, APLICACIÓN DE LA LEY, Y CUMPLIMIENTO: RETOS ACTUALES PARA LAS ADMINISTRACIONES TRIBUTARIAS

Jacques Malherbe*
Universidad Católica de Lovania

En los últimos años, el derecho tributario ha enfrentado desafíos crecientes derivados de la complejidad de las operaciones económicas globales, la expansión de estándares internacionales contra la elusión y la presión de las administraciones por asegurar la recaudación. Estos fenómenos han puesto en cuestión el equilibrio entre la potestad fiscal del Estado y la seguridad jurídica de los contribuyentes, especialmente cuando decisiones legítimas de planificación son interpretadas como esquemas abusivos.

En este contexto, el Dr. Jacques Malherbe ofrece una reflexión sustentada en su amplia trayectoria académica, analizando la necesidad de distinguir con precisión entre la economía de opción y los acuerdos artificiales. Asimismo, examina el rol de las Normas Generales Antielusión y el Test del Propósito Principal (PPT), advirtiendo que su aplicación indiscriminada puede generar incertidumbre y afectar operaciones genuinas, incluso en casos de doble no imposición que pueden ser legítimos.

Finalmente, Malherbe expresa su preocupación por la creciente expansión de mecanismos sancionadores y del derecho penal tributario, señalando que su uso excesivo puede desnaturalizar la función esencial del sistema, basada en la capacidad contributiva.

Palabras clave: Derecho tributario; elusión fiscal; recaudación; sanción; evasión fiscal.

In recent years, tax law has faced growing challenges arising from the increasing complexity of global economic transactions, the expansion of international anti-avoidance standards, and the pressure on tax administrations to secure revenue. These developments have called into question the balance between the State's taxing power and taxpayers' legal certainty, especially when legitimate planning decisions are interpreted as abusive schemes.

In this context, Dr. Jacques Malherbe offers a reflection grounded in his extensive academic trajectory, analyzing the need to clearly distinguish between lawful tax planning and artificial arrangements. He also examines the role of General Anti-Avoidance Rules (GAARs) and the Principal Purpose Test (PPT), warning that their indiscriminate application may generate uncertainty and affect genuine transactions, even in cases of double non-taxation that may be legitimate.

Finally, Malherbe expresses concern over the growing expansion of sanctioning mechanisms and criminal tax law, noting that their excessive use may distort the essential function of the system, which is rooted in the principle of ability to pay.

Keywords: Tax law; tax avoidance; revenue collection; sanctions; tax evasion.

* Abogado. Magíster en Derecho por la Universidad de Harvard. Doctor en Derecho por la Universidad Católica de Lovania (UCL). Doctor honoris causa por la Universidad Nacional Mayor de San Marcos (UNMSM). Ex vicepresidente del Comité Científico Permanente de la Asociación Fiscal Internacional (IFA). Profesor de Derecho Tributario y Derecho Mercantil en la Facultad de Derecho de la UCL. Asesor jurídico de Simont Braunt. Contacto: jacques.malherbe@simontbraun.eu

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I. In the contemporary tax debate, particular attention has been given to cases in which Tax Administrations mistakenly characterize legitimate transactions as tax avoidance. In your view, what is the most appropriate standard to clearly distinguish when a taxpayer is making decisions within the scope of legitimate tax planning (economy of option), rather than engaging in an artificial arrangement aimed at tax evasion?

In my view, the starting point must be the principle of legality. A taxpayer is entitled to arrange his affairs in the manner that the law permits, including by choosing the least taxed legal route among several genuine alternatives. This is the classical 'economy of option'. It should not be confused with evasion, which involves concealment, false declarations or a breach of law, nor automatically with avoidance merely because the taxpayer has obtained a tax advantage.

The appropriate standard should combine an objective and a subjective inquiry. The objective inquiry asks whether the transaction has economic and commercial reality and whether it remains within the purpose of the provisions invoked. The subjective inquiry asks whether the tax advantage is merely a consequence of a genuine transaction, or whether the arrangement is artificial, circular or contrived and has no rational explanation other than the tax benefit. Kluwer commentary by Schwarz on GAAR case law rightly emphasizes the centrality of factual evidence and commercial reality in this analysis (2020).

II. In this regard, most tax systems include a General Anti-Avoidance Rule (hereinafter GAAR) in the preliminary section of their Tax Codes. What do you consider to be its underlying rationale, and what role should it play within the tax system?

The rationale of a GAAR is to protect the integrity of the tax system against transactions that comply formally with the words of the statute but defeat its purpose. It is therefore a safety valve, not a substitute for precise legislation. Specific anti-avoidance rules remain preferable where the legislature can identify the mischief in advance. A GAAR should intervene only where the taxpayer's legal form is used in a manner inconsistent with the object and purpose of the relevant tax rule.

For that reason, the GAAR should be applied with procedural discipline. The Tax Administration should carry the initial burden of identifying the abusive character of the arrangement; the taxpayer should have the opportunity to demonstrate commercial reasons, economic substance and consistency with legislative purpose. The GAAR must be accompanied by reasoned decisions, access to advance rulings where appropriate, independent review and proportionate adjustments. This is especially important because comparative tax literature continues to identify legal certainty as one of the main tensions in the operation of general anti-abuse standards.

III. At the international level, Action 6 of the Base Erosion and Profit Shifting (BEPS) Project introduced the Principal Purpose Test (PPT) to counter abusive practices in the use of double taxation treaties, such as treaty shopping. From your perspective, are there instances of double non-taxation that may be considered legitimate, or should Tax Administrations seek to prevent them in all cases?

Not every case of double non-taxation is abusive. Double non-taxation may arise from deliberate policy choices, such as participation exemptions, territorial tax systems, source-state exemptions, timing differences or mismatches that the legislature has accepted. It may also result from the interaction of two sovereign tax systems, each applying its own connecting factors. Such outcomes may be politically debatable, but they are not necessarily unlawful or abusive.

Tax Administrations should prevent double non-taxation where it results from evasion, treaty shopping, artificial interposition of entities or arrangements that undermine the purpose of a treaty. The OECD BEPS Action 6 standard is directed precisely at treaty abuse, and clarifies that tax treaties are not intended to create opportunities for non-taxation or reduced taxation through evasion or avoidance, including treaty shopping. That is different from saying that every instance of non-taxation must be eliminated.

IV. In that context, what challenges does the application of the Principal Purpose Test (hereinafter PPT) pose for domestic tax systems when distinguishing between legitimate cases of double non-taxation and those constitute abusive practices?

The Principal Purpose Test is useful because it allows tax administrations to address treaty shopping without needing an exhaustive list of abusive structures. Its difficulty is that it is deliberately broad. Under the MLI formulation, treaty benefits may be denied where it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining the benefit was one of the principal purposes of the arrangement, unless granting the benefit is consistent with the object and purpose of the treaty provision.

The challenge for domestic systems is to prevent the PPT from becoming a general suspicion against cross-border tax planning. Many multinational groups, investment funds and holding structures are created for a mixture of commercial, legal, regulatory and tax reasons. A benefit being considered in structuring should not be enough. Tax administrations need to identify abuse through objective indicators such as lack of substance, circular flows, conduit features, prearranged passing-on of income, lack of entrepreneurial risk or inconsistency with the allocation of taxing rights intended by the treaty. Kluwer commentary by Kuźniacki on the PPT also shows why burden of proof and reasoned factual analysis are central to preserving the balance between revenue protection and taxpayer certainty (2018).

V. With regard to tax revenue, in some jurisdictions there has been an increase in collections derived from penalties and late payment interest associated with the sanctioning powers of Tax Administrations. However, the traditional purpose of the tax system is to raise revenue based on taxpayers' ability to pay. Do you consider that the growing expansion of sanctioning mechanisms may alter the nature of taxation and undermine the fundamental purpose of the tax system?

Sanctions and late-payment interest have a legitimate role in a tax system. Interest compensates the public treasury for the time value of money, while penalties deter and punish non-compliance. They are, however, ancillary to taxation. They should not become a parallel revenue source detached from taxpayers' ability to pay or from the substantive tax liability.

If the administration begins to rely structurally on penalties as a source of revenue, the nature of the system is distorted. The taxpayer may perceive the administration not as applying the law but as seeking punitive yield. That undermines trust and voluntary compliance. The IMF's guidance on interest and penalty regimes stresses that penalties should be calibrated to culpability, harm, fairness and proportionality, and that interest should compensate rather than become punitive.

VI. In response to this trend, in recent years fiscal policy has increasingly prioritized voluntary compliance and regularization mechanisms rather than relying solely on sanctions against non-compliant taxpayers. From your perspective, does this approach effectively contribute to reducing tax evasion in the long term?

Yes, voluntary compliance mechanisms can reduce evasion in the long term, but only if they are part of a broader compliance strategy. Taxpayers comply not only because they fear sanctions, but also because the system is understandable, predictable and perceived as legitimate. The OECD's work on tax morale emphasizes that compliance depends on intrinsic motivation, trust and perceptions of the tax system.

Regularization mechanisms are most effective when combined with risk-based audits, data matching, taxpayer services, clear guidance and credible enforcement for those who do not regularize. Cooperative compliance programmes for large taxpayers can also be useful where they are based on transparency, tax control frameworks and timely resolution of uncertainty. The OECD's work on cooperative compliance highlights the importance of tax control frameworks and the relationship between internal controls and material tax liabilities.

VII. In connection with the above, it has also been suggested that such mechanisms may weaken the deterrent effect of sanctions if taxpayers anticipate the possibility of regularizing their situation at a later stage. Do you consider this risk to be real? What role should compliance incentives play in fiscal policy?

The risk is real if regularization becomes predictable or recurrent. If taxpayers expect repeated amnesties, the expected cost of non-compliance decreases. In that case, regularization may reward strategic delay and penalize taxpayers who complied on time. This is why voluntary disclosure programmes should not be confused with tax amnesties that simply monetize past non-compliance.

Compliance incentives should reward early disclosure, cooperation and correction before detection. They may justify reduced penalties where the taxpayer acts voluntarily and in good faith, but the underlying tax and compensatory interest should ordinarily remain due. The policy objective should be to bring taxpayers into the system permanently, not to create a cycle in which non-compliance is periodically forgiven. The OECD notes that voluntary disclosure initiatives can be beneficial when appropriately designed, including for taxpayers, compliant taxpayers and government.

VIII. A phenomenon that has gained relevance in tax law is the expansion of criminal law as a tool to combat tax evasion. In this regard, do you consider that the current design of tax crimes complies with the principle of minimum intervention of criminal law, or does it instead undermine it?

Criminal law should remain an ultima ratio. It is appropriate for deliberate fraud, falsified documents, concealment of income or assets, organized VAT fraud, offshore evasion and laundering structures. It is not appropriate for ordinary interpretative disputes, reasonable legal positions, negligence or cases where the issue is merely whether a GAAR should recharacterize a disclosed transaction.

The design of tax crimes should therefore require clear statutory elements, materiality thresholds, men rea, proportionality and coordination with administrative penalties. The OECD's work on tax crime properly emphasizes robust legal and institutional frameworks, investigative powers and cooperation, but this should not be read as an invitation to criminalize uncertainty. Administrative penalties and reassessments should deal with most non-compliance; criminal prosecution should be reserved for serious, intentional and socially harmful conduct.

IX. With respect to the growing international cooperation among Tax Administrations, what implications does the increasing internationalization of tax law have for the fight against tax evasion? In your opinion, what advantages or disadvantages does this entail for domestic tax systems?

The internationalization of tax law has profoundly changed the fight against evasion. Automatic exchange of information, exchange on request, country-by-country reporting, beneficial ownership transparency and joint administrative assistance reduce the information asymmetry that historically enabled offshore evasion. The OECD records that current international transparency standards include exchange on request and automatic exchange, including financial account information and crypto-asset information.

The advantages are evident: better detection, less secrecy, more consistent enforcement and a fairer competitive environment. The disadvantages are also real. Domestic systems may face increased compliance costs, data-protection risks, dependence on standards designed elsewhere and possible pressure on fiscal sovereignty. For developing countries, the key issue is capacity: international cooperation is valuable only if administrations have the legal, technological and human resources to use the information effectively and lawfully.

X. Finally, considering the transformations brought about by economic and technological globalization in tax law, what reforms do you believe should be undertaken to strengthen tax collection systems while simultaneously combating tax fraud?

The first reform is simplification. Complex taxes create opportunities for avoidance and errors, and they make enforcement more expensive. Tax bases should be broad, rules should be clear, exemptions should be justified and anti-abuse rules should be targeted. Digitalization is also essential: e-filing, e-invoicing, pre-filled returns, data analytics and real-time reporting can reduce the tax gap while lowering compliance costs. For Peru in particular, IMF research found that VAT e-invoicing increased reported firm sales, purchases and value added by more than 5% in the first year after adoption.

The second reform is institutional. Tax Administrations need risk-based audit selection, trained personnel, taxpayer-rights guarantees, independent dispute resolution and strong safeguards for data use. At the international level, reforms should include effective beneficial ownership registers, implementation of the Crypto-Asset Reporting Framework, and careful coordination of global minimum tax rules. The OECD's Tax Administration 3.0 work presents digital transformation as a move toward more seamless Tax Administration, while Pillar Two creates a coordinated top-up tax mechanism where effective tax rates fall below the agreed minimum.

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