
Kluwer International Tax Blog

Imperial Taxation: The Awkward Protection for States Against Taxpayers in Contemporary International Taxation

Sergio André Rocha (Rio de Janeiro State University, Sergio André Rocha Advocacia & Consultoria Tributária) · Friday, January 29th, 2016

In 2015, people around the globe celebrated the 800th anniversary of the *Magna Carta Libertatum*, considered to be the first constitutional-like document that established restrictions on a sovereign's basically unlimited power. The principle of "no taxation without representation" has its origins in this British document of 1215.

The symbolic relevance of the *Magna Carta* has survived the test of time throughout the centuries because it challenged dogmas such as "the king can do no wrong" that marked absolutism.

In the *Magna Carta*, one can find the earliest origins of the protection of citizens' rights against State power, which is at the base of the bills of rights found in modern constitutions and human rights treaties. Importantly, the application of the *Magna Carta*'s rules was limited to nobles, not to common people.

There is no doubt that taxation is one of the areas where the balance between the legitimate exercise of Government power and the illegitimate violation of citizens' rights is most challenging.

In current times, the use of the word "citizen" is significant since the term "taxpayer" (as a legal category) has been demonized by some sectors of the media, local governments, and international organizations.

Yes. Before being taxpayers we are all citizens. Even legal entities are ultimately comprised of people.

The transformation of the majority of modern States into Fiscal States – i.e., States that depend on tax collection to obtain the resources to fund all its activities – has changed the nature of the obligation to pay taxes. Some authors have begun to argue that there is a fundamental or constitutional obligation to pay taxes.[1. The work of Portuguese Professor José Casalta Nabais should be singled out. See José Casalta Nabais, *O Dever Fundamental de Pagar Impostos* (Coimbra: Almedina, 1998).]

However, this line of thought, to which we subscribe, has been used to support an inversion of the whole structure of tax systems. Legal principles that are, at their core, protections of taxpayers against the State have been transformed into protections for the State against taxpayers.

Let's consider, for instance, the principle of transparency, which is at the center of modern constitutional, administrative, financial, and tax law. It is, first and foremost, a protection for the citizens against the State, establishing as a goal a state of affairs that guarantees full disclosure of a government's actions to its citizens.[2. Of course, stating that the principle of transparency imposes primarily an obligation to States is not the same as stating that there is no room for exceptions. In specific and exceptional – mostly outside the scope of taxation – cases secrecy will be allowed.]

The principle of transparency is not a one-way street. It also applies to citizens, requiring disclosure and combating opaque situations that prevent the due application of laws in general. Nevertheless, one should not forget: State and Government transparency come first.

This maxim seems to have been forgotten by those now in charge of reshaping the international tax regime.

Some of the most relevant criticism directed towards the work on transparency and exchange of information that is coordinated by the Global Forum on Transparency and Exchange of Information (hereinafter "Global Forum") is that it has given very little importance to the protection of taxpayer's rights in its crusade to ensure transparency.[3. See Sergio André Rocha, *Troca Internacional de Informações para fins Fiscais* (São Paulo: Quartier Latin, 2015) pp. 174-175.] The BEPS Project approach with respect to transparency is also not exempt from such criticism.

A few months ago, New York University School of Law hosted the annual David R. Tillinghast Lecture on International Taxation. The speaker was the well-known Pascal Saint-Amans, Director of the OECD's Centre for Tax Policy and Administration and the ultimate coordinator of the BEPS Project.

At the end of the 43rd minute of the speech (which is available on YouTube),[4. Available at https://www.youtube.com/watch?v=K8V_6j1gx-k.] Saint-Amans stated that, "Transparency, from my perspective, is transparency from the taxpayer to the Tax Administration, and maybe the other way around as well. You know that there is an Action related to more transparency from the Tax Administrations to the taxpayer and that is the Action 14 on Mutual Agreement Procedures."

With all due respect to Saint-Amans' position, he could not be more wrong.

As previously mentioned, it is impossible to think about the principle of transparency as a legal concept directed first to citizens and only secondarily – if at all – to State and government officials.

We must be very careful with discourses that justify the eclipse of taxpayers' rights that have been gained after centuries of struggle on the war against an arch-enemy, whether such an arch-enemy is terrorism, weapons and drugs trafficking, or the surprising-deemed public enemy #1 of countries: multinational enterprises.

In current times, which have been marked by financial crises and the fall of the welfare state (in those countries that have it), multinationals have been tried and found guilty in the court of public opinion for struggles that common people are facing in their day-to-day lives. Not poor management by state administrations. Not corruption scandals. Multinationals!

States diminish themselves in face of the all-mighty multinationals. It is claimed that the fight against such powerful enemies requires a new approach to international taxation that puts the

protection of taxpayers' rights in second place. The stage is set.

This clearly underlies the approaches to transparency and exchange of information. Taxpayers' notification rights are seen as potential obstacles to the effectiveness in the exchange of information and therefore should be ignored.

The first problem with this line of thought is that States are not the weak link compared to multinationals – especially those States that are OECD member countries. The problem is that they operate under the maxim “each man – in this case, each country – for himself.”

To some extent, the BEPS Project is an attempt on the part of States to show that they can put aside domestic interests and work together in a coordinated fashion. Whether or not this will prevail remains to be seen.

However, States should have started by pointing the fingers at themselves because, if there is aggressive tax planning, they are as much to blame for it as large multinationals.

The reshaping of fundamental tax principles and the limiting of taxpayers' rights can lead to what we term *Imperial Taxation*. This produces our greatest concern: how the “regular Joes” – small, mid-size, and even large domestic companies and small multinational corporations – will be affected. We should make no mistake: once legal principles have been mutilated and taxpayers' rights overturned, effects will be felt by all taxpayers – individuals and legal entities alike.

The public discourse that States are “in dire need of tax revenues” should not be directed only to multinationals. For instance, the notion that transparency is more an obligation of taxpayers than their right has profound domestic tax implications and affects taxpayers of all sizes, be they individuals or legal entities.

The financial crisis and its impacts on countries' budgets have triggered a significant change in the relationship between States and taxpayers. For instance, in Portugal the crisis was used to justify an attempt to overcome basic taxpayers' rights, such as the right not to be charged new or increased taxes in the same fiscal year they were created or increased, based on the argument of State's state of financial emergency.[5. See Suzana Tavares da Silva, *Sustentabilidade e solidariedade em tempos de crise*, José Casalta Nabais and Suzana Tavares da Silva, *Sustentabilidade Fiscal em Tempos de Crise* (Coimbra: Almedina, 2011) pp. 61-91.]

The role played by the public opinion is also very dangerous. The “Scarlet Letter” that was initially hung on multinationals is easily passed along to other taxpayers, damning the entrepreneurial class as a whole.

Financial need and people in the streets is a dangerous combination in the hands of populist governments and can pose a threat to taxpayers' rights. Brazil's current situation is a perfect example. Under huge budgetary pressure, taxes are being created or increased – not always in accordance with constitutional provisions – thereby putting taxpayers' ability to pay at risk.

Both the Global Forum's and BEPS' work share a common feature: they are aimed at optimizing States' tax collection. The taxpayer – the citizen – is not in their focus. This is unacceptable. There is nothing more urgent than recovering the protagonist role of the taxpayer in taxation, where he rightfully belongs. This does not mean that their focus is completely misguided. It means that they need to find a way to achieve their rightful objectives without leaving taxpayers' rights behind.

To make sure you do not miss out on regular updates from the *Kluwer International Tax Blog*, please subscribe [here](#).

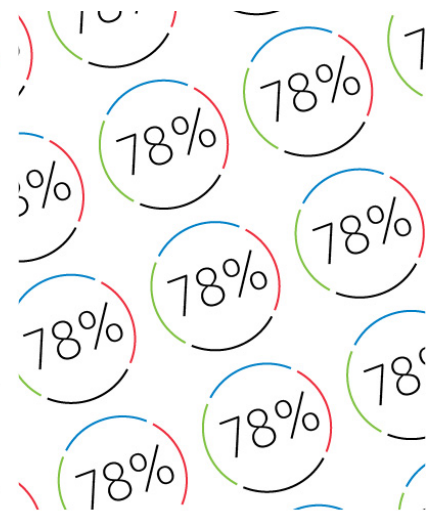
Kluwer International Tax Law

The **2022 Future Ready Lawyer survey** showed that 78% of lawyers think that the emphasis for 2023 needs to be on improved efficiency and productivity. Kluwer International Tax Law is an intuitive research platform for Tax Professionals leveraging Wolters Kluwer's top international content and practical tools to provide answers. You can easily access the tool from every preferred location. Are you, as a Tax professional, ready for the future?

Learn how **Kluwer International Tax Law** can support you.

78% of the lawyers think that the emphasis for 2023 needs to be on improved efficiency and productivity.

Discover Kluwer International Tax Law.
The intuitive research platform for Tax Professionals.



2022 SURVEY REPORT
The Wolters Kluwer Future Ready Lawyer
Leading change

This entry was posted on Friday, January 29th, 2016 at 12:05 am and is filed under [Tax Policy](#). You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can skip to the end and leave a response. Pinging is currently not allowed.