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At the Heart of International Taxation: Double Taxation

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Abstract: ***Tax law studies tax systems. Transposed internationally, it becomes the international tax law whose object is the determination of the conditions of taxation of international transactions of the resident of a State A in the territory of another State B or with a resident of that other State. Also, the taxation rules for the possession of property and capital by the resident of State A in another State B do they fall under international tax law. International tax problems arise from the contradiction between the mobility of persons, goods, services or capital and the segmentation of the global space into separate tax jurisdictions seeking, from a given territory, the collection of products resulting from their tax laws. Among the problems that international taxation is experiencing we have double taxation. And to avoid this, it is necessary to sign a tax convention which will give techniques to avoid it but the DRC in the organizations that it is not signed any convention on double taxation and consequently gives rise to another situation which is double non-taxation.***

Keywords: heart, taxation, international, double taxation

1. Introduction

The globalization of the economy or better the growing internationalization of business or commercial and financial relations is a particularity of the late twentieth and early twenty-first century.

For the economies of the world in general and the Democratic Republic of Congo, in particular, this phenomenon is something that cannot be ignored or neglected.

The progressive realization of economic markets (EU in Europe, ECCAS, COMESA, ECOWAS and SADC etc. in Africa, ASEAN in South-East Asia, Andean Community in Latin America etc.) which "is accompanied by a growing impact of Community law on the rules of national tax law is another important factor which concerns all the Member States of the economic communities concerned.[1]

Given these elements, the Congolese taxpayer / taxpayer operating for example abroad (and the foreign taxpayer / taxpayer operating in the Democratic Republic of Congo) must take into account not only Congolese tax law, "but also foreign tax systems, often based on completely different concepts, as well as rules deriving from bilateral double taxation agreements, or even rules of Community law.[2]

Double taxation exactly? Why is there such pressure between states? What is this famous international tax?

To realize this, it is necessary to place oneself on a world scale and not to imagine any simple relations between economic actors within the same State.

Individuals and companies carry out numerous operations in many different countries. For example, an American multinational has its headquarters in the United States, but it has many subsidiaries around the globe. In the same way, an individual can own a building in another country, and release from this building income from land.

Since each State has these same principles in its territory, double taxation results. First of all, by the State in which (in our example) the building that generates property income is located, and then by the State in which the owner of the building is tax resident.

International taxation puts in place a system to avoid double taxation. This system is based on the use of tax treaties between two states. These agreements will determine which State has the right to tax or not on each type of income / benefit.

2. Concept of Double Taxation

2.1 Notion

In internal tax law, there is double taxation where in the same fiscal year the same taxpayer is struck twice with the same tax (legal double taxation) or when the same taxable matter is subject to two taxes in the same tax year for two different taxpayers (this is economic double taxation).

Economic double taxation is better illustrated by the taxation of profits. They are taxed a first time on behalf of the company when they are made and a second time on behalf of the partners when they are distributed. However, this double taxation is ineffective as long as the profits remain in reserve or used in self-financing.[3]

Example of economic double taxation.

[1]DASSESSE (M) et MINNE (P) : Droit fiscal, principes généraux et impôts sur les revenus, 2ème Edition, Bruyland, Bruxelles, 1991, p. 777.

[2]DASSESSE (M) et MINNE (P) : **op cit** p. 777

[3] COZIAN, Maurice, Précis de fiscalité des entreprises, 22è Edition, LITEC, Paris, 1998, p. 36, n° 116 et Ss.

A Congolese SARL makes a profit of 100 FC.

1st taxation: the professional contribution: 40%

$$CP = \frac{100\ FC \times 40}{100} = 40$$

Contribution: Congolese SARL
Distributable Profit 100 FC - 40 FC = 60 FC

2nd taxation: the movable contribution: 20%

Taxpayers shareholders receiving dividends.

In international tax law, on the other hand, it is appropriate to note the differences, namely the legal double taxation and the double economic taxation.[4]

1) The legal double taxation is characterized by the imposition of the same taxpayer in two States on the same income;
2) Economic double taxation is characterized by the imposition of the same income on behalf of two different taxpayers. Thus, in the absence of a tax credit exactly representing the profits tax paid by the distributing company, the taxation of dividends in the hands of the partners constitutes with the corporation tax an economic double taxation. Double taxation of this kind also occurs when two closely related companies (parent and subsidiary companies) are established in two different countries and there is a conflict between the two administrations over the revenue to be taken into consideration for the tax base (distribution of the taxable "substance").

In international taxation, what matters most is the double taxation that is at the root of international tax problems. It is essentially in two cases:

1) The same taxpayer is subject to tax in two states on his worldwide income, resulting from the conflict of dual residence; A taxpayer domiciled in one State is taxed on income from another State by the two States concerned (conflict between the State of residence and the State of the source).
2) Double taxation is a major problem in international taxation and the solution of which will be outlined in Chapter 5 (see 1. The causes of double taxation are manifold.
3) In internal tax law, there is double taxation where in the same fiscal year the same taxpayer is struck twice with the same tax (legal double taxation) or when the same taxable matter is subject to two taxes in the same tax year for two different taxpayers (this is economic double taxation).
4) Economic double taxation is better illustrated by the taxation of profits. They are taxed a first time on behalf of the company when they are made and a second time on behalf of the partners when they are distributed. However, this double taxation is ineffective as long as the profits remain in reserve or used in self-financing.[5]
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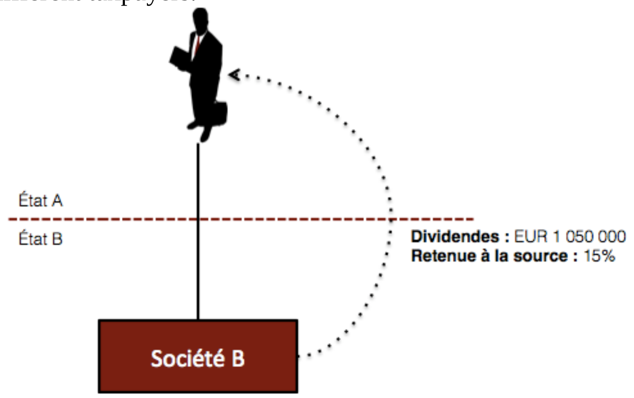
Double taxation is a major problem in international taxation. The causes of double taxation are manifold. In an almost global way, states have based their tax system around two principles: the source of income and the residence of the taxpayer. Thus, the state on which the source of income is located has the primary right to tax, and the state in which the resident is located has a residual right to tax.

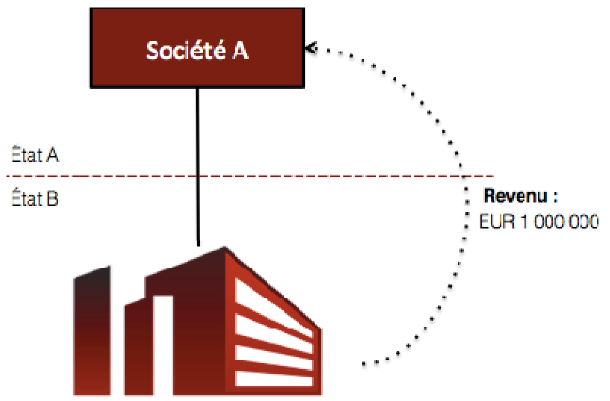
2.2 The different forms of double taxation

First of all we find legal double taxation. These are comparable taxes made by more than one state on the same taxpayer on the same income or capital over the same period. This double taxation is most often the result of taxes levied on financial transactions between different countries.

Then there is economic double taxation. This time it is the same income or capital subject to comparable taxes by more than one state over the same period, but in the hands of different taxpayers.



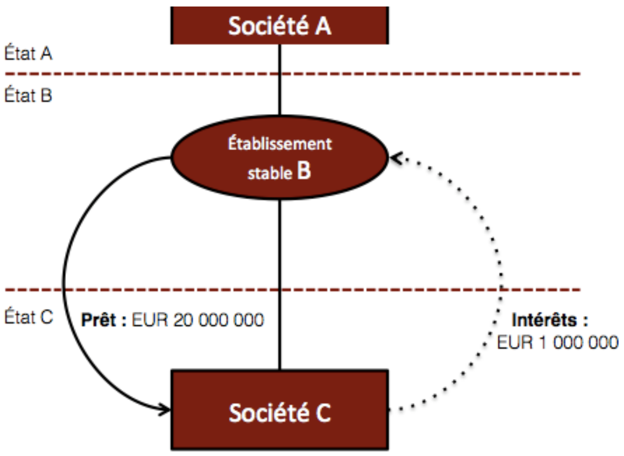
Reasons for double taxation
Taxation both in the source state of income and in the state of residence of the taxpayer. Example: A business located in State A has earned income from a leasing activity of properties in State B. The business is taxed in State A for all of its revenues, even those located abroad (principle of national sovereignty, globality of the tax). But State B will also tax the income from the letting of buildings located on its territory (principle of territorial sovereignty).



[4] DOUVIER (Pierre-Jean), Droit fiscal dans les relations internationales, Pedone, Paris, 1996, p. 50.
[5] COZIAN, *Op. Cit.* p. 36, n° 116 et Ss.

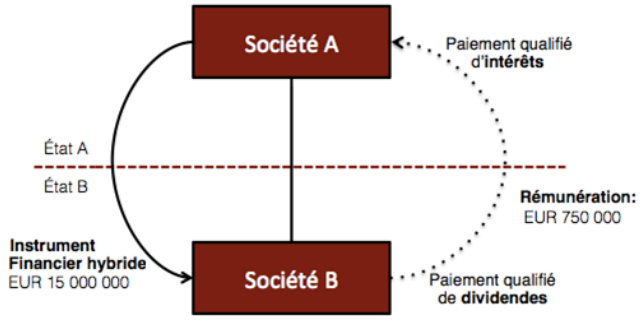
Double taxation may also result from double residence. Each State considers that the person concerned is resident in his State. This person (physical or moral) will be liable for all of his income earned throughout the world in the two states concerned...

Two states at the source of income may create a situation of double taxation. Nothing better than an example to understand the situation: a company a resident in the State Beheaded money to a company C located in State C through its permanent establishment in State B. Here, State C may levy a withholding tax on the interest paid by Company C to the permanent establishment of Company A located in State B State B may also collect at source the income distributed by the permanent establishment of A situated on the territory of State B to Company A.



A problem of legal qualification may also be the cause of a situation of double taxation. These include hybrid structures and hybrid financial instruments.

For example, a corporation A resident in State A allocates a fund to its subsidiary B located in State B through a hybrid financial instrument (the instrument has both the characteristics of a capital, but also a debt). State B considers that it is a capital, the transfer of money to Company A will therefore be considered as dividends (not deductible in State B) whereas State A considers that it is a question of debt, this return of money is therefore considered as interest (taxable in State A).



As you have understood, the challenge of international taxation lies in double taxation. And it is the tax treaties between states that provide solutions to avoid double taxation. But misuse of these conventions can lead to a situation of double non-taxation.

International Taxation is addressed to:
- To persons carrying out an international transaction subject to tax;
- People who want to master all the parameters of their international environment.

This wealth information concerning international taxation can concern very diverse economic operations such as international succession, international real estate capital gain, and taxation on income in two countries.... It will bring you a synthetic vision of international conventions and the way of use.

2.3 The causes of double taxation

The causes of legal double taxation are multiple and can be summarized as follows:
- The sovereign application by the States concerned of two or more opposite tax principles or conflict between the State of the source and the State of residence.
- The conflict of dual residence.

2.3.1 The conflict between the State of the source and the State of residence:

Example 1
A taxpayer residing in State A placed his capital in State B, which provides him with income which he repatriates to his country of residence. At the end of the financial year, State B withholds tax on income, using the withholding tax technique, based on the principle of territoriality. State A, in turn, imposes the global income of its residents.

Taxpayer A

Etat A (France) residence / income beneficiary □ residency principle: taxation on global income. Y = global income collected iy = calculated according to the tax scale 80 Fc repatriation	***Etat B*** (RDC) → Source of income - taxation according to the principle of territoriality (withholding tax) x = Dividends realized and collected (100 Fc) ix = 20 % = 20 Fc dividendes nets = $\boxed{80\ Fc}$ Double taxation in the head of taxpayer a.

Example 2
A US citizen B resides in the DRC where he carries out his professional activities which provide him with a yearly income taxable to the professional contribution. According to the principle of the territoriality of the (Congolese) tax on the professional income, Mr. B will have to pay to the Congolese FISC, the professional contribution X.

On the other hand, as a US citizen, he must pay on the same income the federal tax (his country) on the basis of the principle of nationality. There will be in his head a double taxation.

2.3.2. The conflict of residence.
It is the situation of a taxpayer who is considered to have his tax residence in each of the two states that are in competition with respect to the right to tax, each of them applying the concept of tax residence to tax income collected by their (respective) residents.

We will examine below in chapter IV, the mechanisms implemented to solve this problem of double taxation due to the conflict of residence. But in the meantime, let us see briefly the consequences of the legal double taxation.

2.4 The consequences of double taxation.

Any taxpayer naturally seeks to evade taxes.[6]This situation, which is very true in the case of taxpayers concerned with the payment of a tax in a given state, is also found at the international level.

Indeed, "the tax management of multinationals is not neutral; in their search for tax optimization (see below), they tend to locate their benefits where they are least required.[7]

Thus, the consequences of double taxation are numerous and generally reduce to two: tax evasion and tax evasion. In domestic law, these two notions have a definite outline with regard to the modalities of their materialization which differentiates them from those in international economic relations.

2.5 The elimination of double taxation

International taxation is based on a set of rules that have developed over time in response to the phenomenon of double taxation. In order to promote international trade, States have bilateral agreements with one another to settle certain cases of double taxation that may arise during economic transactions (such as sales, real estate, donations or estates).

As such, there are two main types of double taxation:
a) Double taxation: it is the one that consists of the same good or the same income in two different territories. (Example: a person receives wages that are taxed in two different states).
b) Economic double taxation: it is the one in which two different persons are taxable on the same income or the same fortune. (Example: a taxed dividend at the company AND beneficiary level)

In order to eliminate these possibilities of double taxation, four processes are used by the conventions:
- The distribution of the taxable matter: States give themselves an alternative right to impose certain categories of income;
- The product division: only one State imposes, but it pays part of the proceeds of the tax to the other State;
- The exemption: A State renounces imposing a taxpayer who has close ties with the other State;
- Deduction: Each State tax the income, less the tax paid in the other State.

Of course, these different methods do not produce the same result for the taxpayer, and it is therefore important to remain very vigilant about how states are working to eliminate double taxation. Although it is true that the lack of a method to eliminate double taxation is worse than anything, some methods such as the exemption with application of the effective rate (method very popular with the French administration) are not terrible.

3. R.D.C and the Problem of Double Taxation

3.1 The Resence in Congolese Tax Law

1) Principle of Territoriality
Articles 3, 13 and 27 of the OL of February 10, 1969, as amended and completed to date, as well as article 1 of the OL of August 10, 2010, define, on the one hand, taxable enterprises in DR Congo, by specifying the conditions (the exercise of activities on the Congolese territory) and the Congolese fiscal space. The scope of territoriality implies that only income derived from an activity carried out in DR Congo may be taxed in the DRC even though the beneficiary would not have its registered office, principal place of business, domicile or permanent residence there.

2) Definitions from the Internal Standard (The Congolese Tax Topic)
International taxation is based on the distinction between the State of Residence (R) and that of Source (S) Hence the importance of clarifying the rule of residence. In principle, Article 4 of the Tax Convention lays down the rule according to which the subjection is attached to the notion of residence.

In accordance with Article 4 of the model, residence is defined as the place where the tax is liable to tax, because of the domicile, residence, place of management or any other criterion of a similar nature.[8]

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[6]DUVERGER, M., Finances publiques, Coll. Thémis, PUF, Paris, 1968, p. 395.
[7]COZIAN, M., Précis de fiscalité des entreprises, 22è Ed., Litec, Paris, &998, p. 316, n° 1420.
[8]CASTAGNEDE, B. Precis de fiscalite des entreprises. PUF, PARIS, *2013, p. 347*

Under article 174 (2) of the DR Congo Constitution, the contribution to public office is a duty for everyone living in the Democratic Republic of Congo.

It is necessary to specify that it is not a question of the only nationals, but rather of any person living on the Congolese territory.

A. Corporation

The foreign direct investment can be done by two ways, either of a subsidiary and a branch. According to the article 3 of the OL N ° 69/009 of the bearing February 10, 1969 relating to the taxes on the incomes:

- As a foreign company, for the purposes of this Ordinance-Law, any company which is not a company incorporated under national law is considered as a foreign company.
- Is considered as a company under national law, the company created under the legislation applicable in Zaire (DR Congo) and having both its registered office and its main administrative establishment.

Notion of Subsidiary

The subsidiary is the choice of foreign direct investment by creating a separate legal entity. This implies a tax personality in its own right. According to the provisions of Article 3 above, the subsidiary is a company under Congolese law, and therefore constitutes a Congolese fiscal subject by nature.

Stable Establishment Concept

The other foreign direct investment channel is the branch. By this way, the created structure has no moral (legal) personality. The investment structure remains, within the meaning of Article 3 above, a foreign company. Without legal personality, international tax law still simulates, to a certain extent, a tax personality. This is made possible by the stable establishment theory (E.S.).

Article 5 of the OECD Model Convention requires that it be a fixed and permanent physical installation which is the extension of headquarters activities.

Articles 68 and 69 of OL No 69/009 of 10 February 1969 provide that a foreign company carrying on business in the national territory may be taxed on profits made by its permanent establishment or fixed establishment situated therein, Insofar as :

- It has an effective place of management, a branch, a factory, a factory, a workshop, an agency, a shop, an office, a laboratory, a buying or selling outlet or any other any fixed or permanent installation of a productive nature;
- Or, in the absence of a physical installation, where it exercises directly under its own corporate name, a professional activity for a period of not less than six months, insofar as it can not be considered as an activity assistance to a company under national law. Therefore, the Congolese system is not in phase with the OECD model convention.

B. Physical Person

According to Article 27 (2) of OL 69/009 of 10 February 1969, natural persons paid by a third party for an activity carried out on the national territory, with the exception of a company contract) , are subject to the IPR.

Principle

The principle of residence is defined in Article 62 of OL 69/009 of 10 February 1969. This is any person related to his retributor by a contract resulting in a relationship of subordination. For any activity carried out in this context on the national territory and for which remuneration is paid, the IPR is due in DR Congo.

Exception

The provision states that the business contract is excluded. In reality, since the business contract does not result in a subordination relationship, but a contract link between two structures is completely independent, the related income is submitted to the IBP.

3.2 Double International Taxation

International double taxation is the fact that a subject of tax law is found to be subject to similar taxes twice in two different tax jurisdictions for the same income, the same period, so that the weight exceeds that which the subject could bear if it was only subject to one of these jurisdictions. The existence of tax treaties avoids this kind of harmful situations to international trade and FDI.

Conventional Congolese Network

Although none of these conventions is operational, speaking of the Congolese conventional network, we can cite the conventions signed with:

- Belgium,
- The Republic of South Africa.

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2) Consequences of the Inactivity of the Conventional Congolese Network

The inactivity of our conventional network leads to the persistence of double taxation and the lack of competitive attractiveness of foreign direct investment, given the absence of double taxation guarantees international law and its methodology will certainly have made it possible to sensitize the reader, the researcher, the international trade practitioner or the international tax specialist to the international dialogue.

These few elements of international taxation have highlighted the negative consequences of the cultural reflexes of states in tax matters. The internationalization of commercial, economic and financial relations, the trivialization of travel and the development of transnational companies have rendered obsolete a static conception and "Nationalist" of the taxation of individuals, natural and legal persons. The latter rationally use tax havens as the most effective legal means of tax optimization, even though the big states, threatened with their interests, both security and financial, are waging a merciless war against companies that resort to tax havens.

Finally, in view of the rapid development of the phenomenon of internationalization of business, the DRC is obliged not to remain indifferent to this global phenomenon and should accelerate its programs of tax reforms in all sectors of national life in order to integrate all the parameters required today, on the one hand to preserve "its subsistence" and, on the other hand, to carve out a place on the international chessboard.

4. Conclusion

International taxation is at the heart of current debates. In fact, international taxation concerns every individual, every company, and every state. Just look at the media to see the topics that come up again and again: the SwissLeaks, LuxLeaks, Starbucks, Apple, Amazon and hundreds and thousands, or even hundreds of thousands!

But international taxation is opposed to several problems including double taxation: International double taxation is the fact that a subject of tax law is found to be subject to similar taxes twice on two separate tax jurisdictions for the same income, the same period, so that the weight exceeds that which the subject could bear if he were only subjected to one of these jurisdictions.

The existence of tax treaties makes it possible to avoid such situations harmful to international trade and FDI. The conventions have an essentially analytical approach to tax matters: they examine each income category by determining for each of them which State has the right to tax.

Apart from the above, the DRC in relation to its geographical situation is found in more than one international organization (ECCAS, SADC, OHADA, CERGL, etc.) but no convention for the fight against double taxation because as we underlined above tax convention is a means of avoid double taxation.

This attitude of the DRC gives rise to the creation of another phenomenon which is double non-taxation. Reason why the Congolese tax system must be revised to be efficient and competitive.

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Loi

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