Abuse of Law in the Context of the European Tax Law: Analyse of the Question of Direct Taxation of Cross Border Self-Employers Incomes

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Abstract *The notion of the abuse of law it is a concept that reveals in private law in many jurisdictions. In relation to the European Tax Law, the principle of the abuse of law it is consistent with the principles of primacy and effectiveness. Recently, the Court of Justice of the European Union has resorted to the concept quite often when dealing with the reach of the fundamental freedoms guaranteed by the Treaty of the European Union. The proposed paper applies the abuse of law concept to European Tax Law related to the question of the direct taxation of cross border self-employers incomes. Of central importance here are the rules issued from the Court of Justice of the European Union that legitimize, when assessing the absence of the harmonized rules in the field of the direct taxation, restrictive measures of the fundamental freedoms of establishment and to provide services in relation of the self-employers. The proposed paper starts by exploring the context of the debate related to the abuse of law with respect to European Tax Law. The general elements of the abuse of law concept are then presented. It is an interpretative concept that looks at the dominant purpose of a particular legal provision. The proposed paper explores this concept with respect to potential abuses in relation of direct taxation of cross border self-employers concerning the freedoms of establishment and to provide services. The proposed paper concludes with the conclusion that the adaptation of the restrictive measure of the freedoms of establishment and to provide services in relation of the direct taxation of cross border self-employers are justified only in the general interest and for which need the proportionality principle.*

Key words: *European Tax Law, abuse of law, self-employed activity, freedom of establishment, right to provide services*

1. Introduction

The establishment of the European Law[1] has as purpose to create the legal boundaries of the common market whose formation it is inspired from the general objective to establish the single European economic space.

In fact, the process of the configuration of the European order it is completed with a set of rules issued from the European institutions integrated and reinforced from the jurisprudence of the Court of Justice of the European Union well-known for its role of the *«guard»* of the European Union Treaty in order to guarantee the *«four liberties»* defined as pillars of the single market.

As result, the European Law tries to *«approximate»* or to *«harmonized»,* where it is possible, the legal orders of the Member States with the purpose to abrogate all the fiscal borders that prevent the correct function of the common market.

In this context, it is not difficult to understand how the activity of self-employers or self-employed activity represent institutes of profound interests against the objectives contained to the Treaties of the European Communities and pursued among the issue of the acts in conformity with the European Law derived.

In function of these finalities, the European Law has influenced completely in different sectors of the right in force to the Member States operating, in particularly, on those that directly influenced to the constitution of the single market. As result, the intervention of the European Union to guarantee the function of the common market, it is an expression of the European tax policy configured to the positive and negative forms.

The formulations of the positive policy of the European Union, more teeth from the Single European Act, prevue the progressive realization of the harmonization[2] and approximation process of the national legal orders of the Member States.

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[1] The European Law is defined as the whole of provisions that discipline the organization and the development of the European Union and also the relations between the European Union and Member Stated of the European Union. For more see: TAHIRAJ, (2007), *Dal mercato comune all'ordinamento tributario europeo*, Annali del II Encontro de Estudios Tributários 18-21 setembro 2007 – Instituto de Direito Tributário de Londrina/Brasil.

[2] The process of the harmonization of the tax orders of the Member States it is legitimized from the article 113 of the Treaty of the European Union (*ex*. article 92 of the Treaty of the CEE) that establishes *«the adaptation with Counsel's unanimity of the articles that*

In fact, the process of the harmonization it is realized only in the field of the VAT. Instead, it is absent an equivalent provision in the field of the direct taxation. Meanwhile, the process of the approximation of the tax systems of Member States result to be subject of the article 115 of the Treaty of the European Union (*ex*. article 94 of CEE Treaty) from which detect that *«the Counsel has the power to adapt the directives to approximate the national orders»*. But, I must highlighting that, in recent years, a set of the European intervention was protagonist given its increasing importance in the process of the European economic integration.

In consideration of this conclusion, I can deduct that *«in the EU Treaty doesn't exist any provision that can discipline the field of the direct taxation of self-employers incomes»*; a deduction that confirm the inexistence of the European direct taxation model related to the cross border self-employers incomes.

In the light of the reflections already highlighted and taking into consideration the peculiarities that characterize the gradual process of harmonization and approximation of tax orders of Member States with the European Law as well as the abusive application of the European provisions related to the exercise of the freedom of establishment and the right to provide services of cross border self-employers, this paper has as purpose to outline that the adaptation of the restrictive measures of the freedoms of establishment and to provide services in relation of direct taxation of cross border self-employers are justified only in the general interest and for which need the proportionality principle.

2. Abuse of law in the European Tax Law.

The general principles of the European Union, in the context of historical evolution of the European Law, have been used by the Court of Justice of the European Union with the purpose to guarantee the coherence and completeness of the normative system on the basis of its function.

Instead, these principles have permitted the adaptation to the national legal orders of these provisions that reflect the progressive evolution of the European Law. Under this last profile, their application has permitted to exclude the effects of the national legal orders that resulted in contrast with these principles even in the absence of an explicit provision that must specify the exact content.

In particularly, in relation of material fields where was not adapt a specific provision in the European Law or it was not prevue an explicit attribution rules in favor of the European Union, the general principles of the European Law have forced the legal orders of the Member States and their jurisprudential evolution in the field of their specific skills to be oriented in coherence with the indication furnished from the progressive elaboration of these general principles. Moreover, in this evolution it was not simple to find the common principles for all the Member States.

Often, are adapted as European principles some principles clearly expressed only in some legal orders, but valuated particularly functional to the realization of the European objectives and for which it is interested to integrate and justified in this sense their application.

In this context, it should be noted that in relation of the principle of the interdiction of the abuse of law[3], one of the general principle of the European Law reached from the case-law of the Court of Justice of the European Union, the Court of Justice of the European Union qualifies as abuse of law *«all juridical acts essentially conformed to get a fiscal advantage»*. This typology would constitute a *tertium genus*, in addiction to the physiological ones (all the licit), and to the pathological ones (the simulated or fraudulent).

According to the European case-law, the Court of Justice of the European Union searches to the abuse of law the street to subject in taxation the economic activities jumping the obstacle interposed from the legal form adapted by the subjects for the operations. In this way, the European Union uses a concept that evokes a long geology of the concepts of legal culture of the States of civil Law going back to the medieval law.

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concern the harmonization of the legal orders related to the turnover taxes, consumption taxes and others indirect taxes must be carried out to the extent in which the harmonization it is necessary to assure the establishment and the function of the single market».

[3] Under the story of legal thinking, the abuse of law has characteristics rather variable; except that to return cyclically. More than a concept the abuse of law it is a topic which marks the interpreter, appealing from time to time to psychological dates as *animus nocendi* or moral as *injustice* or economic as the *prejudice to the general welfare*, to correct a theory, a principle, a provision, a right, and to obtain a different solution from that impose the *strictum jus*. For more see: GENTILI (2009), *Abuso del diritto, giurisprudenza tributaria e categorie civilistiche,* IANUS n. 1-2009.

In fact, the Court of Justice of the European Union applies widely the traditional civil categories and the general theory in order to can not apply the alternative rules and to render ineffective the forms that call back.

Then, the Court of Justice of the European Union in the field of the abuse of law has searched to operate a balance between the over ordination of the European Law and the needs of the States, that can not see whipped their objectives facing a subject that claims to avail abusively a liberty guaranteed by the Treaty arguing the interdiction of the restrictions of the European Law.

However, the problem rise at the moment of the individualisation of the general interesses that legitimate the adoption of the restrictive provisions. Of course, these are absolute hypotheses as it is verified in the case of the adoption of the discriminatory measures, as we assist to a contrast between the Member States that tend to bring back to imperative needs connected to general interests the restrictive measures and the Court of Justice of the European Union, contrary, get one to the unification or application of the European Law, as well as reason of their exceptional character, aims to realize an application as much as possible restrictive.

Eventually, I can conclude, taking into account the case-law on the abuse of tax law related to the fundamental freedoms of the Court of Justice of the European Union, that the Member States retain considerable competence to deal with such abuse and to take proportionate action in the general interest. This is because of the lack of the European Union harmonized rules in this area.

However, a Member State's exercise of its direct taxing competence to deal with abuse of tax law may result in the restriction of a fundamental freedom. Consequently, the Court must perform a delicate balancing function: it has to weigh the European Union's interests alongside the interests of the Member State and apply the principle of proportionality in coming to its decision. Examples from across the freedoms to provide services and establishment of self-employers demonstrate the difficult balancing act conducted by the Court of Justice of the European Union in this area. It is worthwhile examining this jurisprudence to understand the background to the Court's approach in the area of the abuse of law in relation of the direct taxation of the cross border self-employers.

3. The abuse of law in relation of the direct taxation of cross border self-employer's incomes concerning the freedom of establishment and the right to provide services: the case *Van Binsbergen*.

The results of the research related to the case-law of the Court of Justice of the European Union confirms that the entry of the concept of abuse of law in the European Law in relation of the direct taxation of the cross-border self-employers incomes started with the case *Van Binsbergen*[4] ; a case that concerns the freedom to provide services related to a Dutch lawyer, a cross-border self-employer that find fiscal barriers related to the direct taxation of the incomes derived from the exercise of self-employed activity.

In fact, the Court of Justice of the European Union has played a decisive role as well as determinant to underline the concept of abuse of law concerning the freedom of the establishment and to guarantee the purposes and the European principles established to the Treaty of the European Union underlining the incompatibility with the European Law of the national legal orders of the Member States.

The case *Van Binsbergen* concerns a Dutch lawyer that, after having been entrusted to act as legal representative before the Courts in the Netherlands for a local party, had transferred its residence from Netherlands to Belgium during the course of the proceedings, losing its capacity to represent the party in question due to a Dutch requirement that legal representatives be permanently established in the Netherlands.

In fact, it is believed that this way to exclude the change of the residence of a provider services directed to its State of the origin can be utilize between the application of the freedom to provide services, in order to avoid the application of the professional rules of its State of the origin in the field of which its services despite continued to be provided and performed.

In this prospective, the measures adapted from its State of the origin in order to exclude this eventuality will consider legitimate because are justified with the purpose to repress abusive behavior of the European liberties. For this reason, the Court of Justice of the European Union had to rule on the issue whether this requirement could be reconciled with the prohibition of all restrictions on freedom to provide services within the Community.

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[4] The case *Van Binsbergen* it's the first case recognized from the doctrine as well as the case-law of the Court of Justice of the European Union as important in order to apply the interpretative criteria of the European Law in accordance with the principles in any measures due to the abuse of law. Case *Van Binsbergen* 33/74, Racc. 1974, p. 1299.

After recognizing in general terms that a requirement, whereby the person providing the service must be habitually resident within the State where the service is to be provided, may deprive article 56 of the Treaty of the European Union of all useful effect, the Court of Justice of the European Union took into consideration the particular nature of the services.

In this respect, the Court of Justice of the European Union stated that specific requirements imposed on persons providing the services can not be considered to be incompatible with the Treaty of the European Union if they aim at applying professional rules of conduct where the person providing the service would escape the application of these rules by establishing himself in another Member State.

The rules in this case were justified by the general good as organizations, qualifications, professional ethics, supervision, liability and were binding on all persons established in the State concerned.

Consequently, the Court of Justice of the European Union found that a Member State it is entitled to take measures to prevent the exercise by a services provider whose activity is entirely or principally directed towards its territory of the freedom guaranteed by article 56 of the Treaty of the European Union for the purpose of avoiding the professional rules of conduct which would be applicable to him if he were established within that State.

Although the Court of Justice of the European Union did not yet expressly use the word "*abuse"*, a first type of conduct in the case *Van Binsbergen* was that *"the resort to fundamental freedoms for a purpose that of avoiding professional rules of conduct that result different from the purpose pursued by the Treaty articles granting the fundamental freedoms themselves*.

The specific situation was a kind of *"U transaction"* as establishment of its residence in another Member State by a national of a Member State whose activity is directed toward this Member State which was regarded as aimed at escaping national rules of conduct which would be otherwise applicable.

In this case the Court of Justice of European Union made specific reference to the nature of the service involved and to the rules of conduct concerned, without statements of general character, this decision, whilst clarifying that Member States are entitled to take measures to prevent the conduct at stake, raised three interconnected key questions. First, whether Member States would be entitled to take measures to prevent the circumvention of any type of national rules in whatever area. Second, and in consequence, whether any conduct aimed at escaping national rules by using fundamental freedoms could be prevented by Member States. Third, and as an ultimate question, whether the key element in this conduct ought to be identified in the intention of escaping national rules or in the achievement of the concrete result of doing so with prejudice for third parties.

However, the case *Van Binsbergen* was followed not only by other rulings in the area of free movement of services but also by a number of rulings in other areas as the freedom of establishment and the free movement of goods and workers[5]. These rulings made it clear that Member States are allowed to take measures to prevent situations of circumvention of national rules similar to that at stake in *Van Binsbergen*[6] or to prevent other situations of use of rights conferred by the Treaty of the European Union for improperly gaining benefits.

Nonetheless, the key question whether any circumvention of national laws via the resort to rights granted by the European Law would amount to abuse, did not yet find the response. This response would have requested a test for identifying, in all its constituent elements, the notion of abuse applicable to the instances of avoidance of national law via the recourse to fundamental freedoms and to other situations of improper reliance on rights conferred by the Treaty of the European Union.

Other rulings which involved not circumvention of national laws, but reliance on rights conferred by the European Law provisions, provided the occasion for a further development of the case-law of the Court of Justice of the European Union concerning the abuse of rights.

It can well be noted in reference to the case *Van Binsbergern* that the Court of Justice of the European Union generally used the verbs *"to avoid"*, *"to escape"* or *"to evade"*. Despite this difference in the language, it could be argued that using the exercise of fundamental freedoms, such as the freedom to provide services or the freedom of establishment, for a purpose that relate to the escaping national rules which is different in substance from the purpose of

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[5] Case C- 148/91, *Veronica Omroep Organisatie v. Commissariat voor de Media* [1993] ECR I-487; Case C-211/91, *Commission v. Belgium*, [1992] ECR I-6773; Case C- 23/93, *TV10 v. Commissariat voor de Media* [1994] ECR I-4795; Case 229/83, *Leclerc v. Au ble vert* [1985] ECR 1; Case 39/86, *Lair v. Universitat Hannover* [1988] ECR 3161; Case 115/78, *Knoors v. Staatssecretaris van Economische Zaken* [1979] ECR 399; Case C-370/90, *The Queen v. Immigration Appeal Tribunal and Surinder Singh* [1992] ECR I-4265.

[6] Case 229/83, *Leclerc v. Au ble vert*; Case 115/78, *Knoors v. Staatssecretaris van Economische Zaken* [1979] ECR 399; Case C-370/90, The *Queen v. Immigration Appeal Tribunal and Surinder Singh* [1992].

the Treaty provisions of the European Union granting the fundamental freedoms themselves, amounts to an *"artificial"* use of those freedoms. In other words, the *"artificiality"* can be regarded as a common element of both types of conduct.

However, whilst the case-law of *Van Binsbergen* showed that the artificial use of these freedoms could be prevented by Member States when the outcome was the circumvention of national rules intended to protect the general interests and thus, impliedly, indicated that, in these cases, *"circumvention"* could be regarded as synonymous of *"abuse"*. Inter alia, from the case *Van Binsbergen* arising the key point that the Member States, in the absence of harmonised rules, can take certain measures which restrict the freedoms if they can justify them in the general interest, measures that are indistinctly applicable and for which they meet the requirements of the proportionality principle; in other words, if the national rules comply with the *Gebhard* formula[7].

4. Conclusions

The attitude of the Court of the Justice of the European Union related to the abuse of law it is coherent among the European fundamental freedoms. Also, the harmonized provisions are not issued in all the sectors of the single market, specifically, in relation of the direct taxes, the reason for which the Member States retain important powers in relation of their territory. Therefore, the Member States are competent to keep tax provisions that aim to prevent the abuse of tax law, subject to compliance with EU law.

Sometimes, the Member States may have rules which treat non-residents in the same way as residents, and benefits secured through the use of EU law rules may be denied if abuse can be proved on the basis of objective evidence. An abusive conduct of European Union law rights has been demonstrated on the balance of probabilities, motive may play an important role in rebutting the presumption of abusive conduct. Nevertheless, the Member States can not expect *"abuse"* when advantages that are freely available in another Member State are availed of by its nationals through the use of the freedoms. Therefore, when a transaction appears to abuse the European Tax Law of reason of the exercise of self-employed activity may need to be demonstrated for conducting the transaction, over and above the obtaining of the tax advantage because the burden of proof has shifted to the person exercising the fundamental freedoms of establishment and to provide services to demonstrate that the exercise of the freedom was proper.

At the end, I can conclude that the Court of Justice of the European Union with the case *Van Binsbergen* established an important rule issued as result of the absence of harmonised rules in the field of direct taxation legitimizing the application of certain measures as indistinctly applicable that restrict the freedoms if they can justify them in the general interest and for which need the requirements of the proportionality principle.

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