Brazil/International

*Sergio André Rocha**

Exchange of Tax-Related Information and the Protection of Taxpayer Rights: General Comments and the Brazilian Perspective

This article examines certain specific points relating to the protection of the rights of taxpayers within the context of the exchange of information for tax purposes, with emphasis on the Brazilian experience. In this respect, the author considers both automatic exchange and exchange on request.

1. Introduction

It is well known that the exchange of tax-related information is one of the most important topics in the context of current international taxation.[1] Numerous books and articles on the subject have been published. Nevertheless, however much may have been written on the exchange of information, there is an aspect of the matter that still requires careful consideration, principally in view of the position that has been adopted by most states, i.e. the protection of the rights of taxpayers within the context of the exchange of information for tax purposes.

One clear aspect of the way in which the exchange of information for tax purposes is being treated is the fact that the protagonists in the discussions on the matter are the states themselves. The taxpayers only have, at best, a supporting role to play, although it is constantly stated that the preservation of their rights is fundamental. After all, it would be impossible to imagine a perspective that advocated disregard for the rights of taxpayers, although, in most cases, practice appears to be somewhat distant from theory.

The urgency of international transparency is frequently justified by its role in countering some of the principal villains of the 21st century, i.e. terrorism, the international drug trade, arms trafficking, the financial crisis, etc. However, the purpose of this article is only to discuss transparency with regard to illegal trading. The question of transparency also principally affects the large multinational enterprises (MNEs) that drive the current world economy.

It is, therefore, evident that the importance of international fiscal transparency must be balanced by the protection of the fundamental rights of taxpayers. As Rosembuj (2004) noted:

> the balance between the fundamental rights and liberties of the interested party and the safeguard of the fiscal interests of the other State cannot represent the sacrifice of the former for the benefit of the latter.[2,3]

Consequently, this hiatus between the dogmatic approach to the exchange of fiscal information and the protection of the rights of taxpayers has become something of a recurring topic for jurists.

In this context, Sánchez López (2011) refers to the taxpayer as the "forgotten party" in the discussions regarding exchange of information.[4] Schenk-Geers (2009) draws attention to the fact that the obligation to exchange information is:

> almost exclusively focused on the protection of the tax interests of the Contracting states. Until now, only a weak trace of the existence of a state's legal obligation toward its information suppliers has been found, in the warranty of secrecy regarding information by the receiving state.[5]

Oberson (2003), in referring to the OECD Model,[6] also states that:

> Until now, and this is true with the Model Agreement, little attention has been paid to protecting taxpayers' rights and the rights of other persons involved in the process of international assistance.[7]

In addition, Pistone (2013) notes out that international fiscal cooperation cannot be realized at the cost of the fundamental rights of taxpayers. In this respect, he states that such rights:

> should be protected domestically and cross-border for the simple reason that taxpayers are human beings and, therefore, entitled to the protection of their human rights.[8]

The same criticism is raised by Brodzka and Garufi (2012), for whom:

* **Professor of Tax Law, Rio de Janeiro State University (UERJ) and Founder of Sergio André Rocha Advocacia e Consultoria Tributária. The author can be contacted at sergio.andre@sarocha.com.br.**

1. S.A. Rocha, *Troca Internacional de Informações para Fins Fiscais* pp. 28-33 (Quartier Latin 2015).
2. T. Rosembuj, *Intercambio Internacional de Información Tributaria* p. 70 (Edicions Universitat de Barcelona 2004). *See also* F. Ardito, *La Cooperazione Internazionale in Materia Tributaria* p. 267 (CEDAM 2007).
3. All English translations of texts and laws are the author's (unofficial) translations.
4. M.E. Sánchez López, *La tutela del contribuyente en la relación con las actuaciones de intercambio de información tributaria en el ámbito internacional*, in *Intercambio Internacional de Información Tributaria: Avances y Protección Futura* p. 138 (M. Ángel Collado Yurrita ed., Aranzadi 2011).
5. T. Schenk-Geers, *International Exchange of Information and the Protection of Taxpayers* p. 159 (Kluwer 2009).
6. Most recently, *OECD Model Tax Convention on Income and on Capital* (26 July 2014), Models IBFD.
7. X. Oberson, *The OECD Model Agreement on Exchange of Information A Shift to the Applicant State*, 57 Bull. Intl. Taxn. 1, sec. 3.3.4. (2003), Journals IBFD.
8. P. Pistone, *Exchange of Information and Rubik Agreements: The Perspective of an EU Academic*, 67 Bull. Intl. Taxn. 4, sec. 1. (2013), Journals IBFD.

> One aspect that does not seem to have received adequate attention by international organizations relates to protection of taxpayers. Although the standard covers data protection and confidentiality of information exchanged, the question of how to grant such protection, in practice, has not been sufficiently addressed.[9]

Finally, a similar stance is adopted by Carrasco (2013), who states that:

> there is not a proper international standard on the legal protection of taxpayers and states might violate the rights of a taxpayer by exchanging information.[10]

This situation had already been the focus of the International Fiscal Association (IFA) Congress of 1990,[11] which dealt with the exchange of information and, as can be seen from the General Report of the IFA Congress of 2013 on this topic, no satisfactory resolution has been realized in the 20-odd years that have passed since then.[12] The crisis regarding the protection of the rights of taxpayers in these circumstances is perceived to be so serious that the issue was again raised at the IFA Congress in Basel in 2015.[13]

On analysing the challenges involved in establishing a global system of exchange of tax information between states, it can be seen that possibly the greatest of these is the effectiveness of such a system. In other words, the major challenge is to ensure that the information reaches the state that needs it in time for it to be used effectively by the fiscal or judicial authorities of that state. On the other hand, the institutionalization of rights of taxpayers, to the extent that this includes them in a process that would otherwise occur only between states, prolongs the time for reply on the part of the requested state and may even, in a specific case, make the exchange of information ineffective.

In choosing between the effectiveness of the exchange of information and protection of the rights of the taxpayers, greater importance has been attached to the former, thereby leaving the rules governing the rights of taxpayers to the domestic legislation of the states involved. Even then, these are always subject to the principle that rights guaranteed by domestic law cannot jeopardize the exchange of information.

When considering the rights of taxpayers in procedures in respect of the exchange of information, the OECD has divided these into the following three categories:

(1) the right to be informed regarding a given request for information and its essential content, i.e. the "right of notification";
(2) the right to participate in the procedure for gathering information, i.e. the "right of consultation"; and
(3) the right to appeal and to control the legitimacy of the request for information, i.e. the "right of intervention".[14]

The various OECD Models have never included these rights.[15] Even when there is a clearer reference to them, this is only to state that the rights set out in the domestic legislation of the contracting states are respected. This is a point to be considered. Would it not be more satisfactory if the rights of taxpayers to participate in the process were more specifically set out in the text of the relevant tax treaty or the Tax Information and Exchange Agreement (TIEA)?

In addition, the fact must be taken into account that the OECD and the Global Forum on Transparency and Exchange of Information for Tax Purposes have sought a migration from a system based almost exclusively on the exchange of information on request to a system under which automatic exchange of information has greater relevance. The question must, therefore, be raised as to how to put into operation a model of automatic exchanges, while, at the same time, protecting the rights of taxpayers to participate.

The OECD classification referred to earlier in this section, which summarizes the matter well, is not exhaustive. There are other rights that the OECD does not consider. The first is the right to an effective and substantive confidentiality in relation to the information passed to the applicant state. In this respect, the OECD standard, in the sense that secrecy is protected as established in the legislation of the applicant state, is insufficient, in considering the fact that, frequently, the right to secrecy is not comprehensively protected in the domestic law of some states.

Another extremely important aspect, which is normally overlooked in these discussions, relates to the right to compensation in cases in which one of the states violates the right to secrecy. The liability of both states is essential to assure taxpayers to whom the information relates that they will not be adversely affected in the event of a leak of the information.

The purpose of this article is to examine certain specific points relating to the protection of the rights of taxpayers within the context of the exchange of information for tax purposes. In this context, both automatic exchange and exchange on request are considered.

9. A. Brodzka & S. Garufi, *The Era of Exchange of Information and Fiscal Transparency: The Use of Soft Law Instruments and the Enhancement of Good Governance in Tax Matters*, 52 Eur. Taxn. 8, sec. 8. (2012), Journals IBFD.
10. A.L. Carrasco, *Exchange of Information and the Legal Protection of the Taxpayer*, in *Exchange of Information for Tax Purposes* p. 571 (O.-C. Günther & N. Tüchler eds., Linde 2013).
11. B. Gangemi, *General Report*, in *International Mutual Assistance through Exchange of Information*, IFA, *Cahiers de Droit Fiscal International* vol 75b, sec. D. (Kluwer 1990).
12. X. Oberson, *General Report*, in *Exchange of information and cross-border cooperation between tax authorities*, IFA, *Cahiers de Droit Fiscal International* vol. 98b, sec. 4.5. (Kluwer 2013).
13. P. Baker & P. Pistone, *General Report*, in *The practical protection of taxpayer's fundamental rights*, IFA, *Cahiers de Droit Fiscal International* vol. 100b, secs. 1.-9. (Kluwer 2015).
14. OECD, *Tax Information Exchange Between OECD Member Countries* para. 66 (OECD 1994).
15. S. Dorigo, *La Cooperazione Fiscale Internazionale*, in *Principi di Diritto Tributario Europeo e Internazionale* p. 216 (G. Giappichelli ed. 2011). As G. Patón García, *Desafíos del Intercambio Internacional de Información Tributaria y su Operatividad en el Fraude Fiscal en España*, in *Estudios sobre Fraude Fiscal e Intercambio Internacional de Información Tributaria* p. 31 (M. Ángel Collado Yurrita & S. Moreno González eds., Atelier 2012) notes that: "the most constant criticisms of the current text of article 26 of the MC are concentrated on the safeguards of the taxpayer, who witnesses the exchange of tax information as a mere bystander, as part of a panorama characterized by the absence of a legal Statute providing protection for the taxpayer at the international level or a global Charter of rights". With regard to the various *OECD Models*, *see* Rocha, *supra* n. 1, at pp. 87-112.

2. Exchange of Information on Request and the Need for a Specific Procedure

The exchange of information for tax purposes between states is guided by the principle of proportionality. As a result, the supply of information with regard to a taxpayer is only legitimate when the applicant state can demonstrate that there is no other way of obtaining the information requested. In other words, the exchange of information should not be used for the obtaining of data that the applicant state could obtain for itself. Such exchange is also not a suitable instrument for trying to obtain information when there is no evidence as yet that it would be useful for the purposes of the legal and revenue system of the applicant state, i.e. the prohibition of "fishing expeditions".

In addition, the exchange of information is limited by various rules contained in the tax treaties based on the OECD Models. However, the presence or otherwise of such limitations in a given case depends on an analysis of the request in the light of the specific tax treaty that is being applied.

With regard to Brazil, it should not be forgotten that the tax treaties that Brazil has concluded do not, for example, contain a uniform rule regarding the exchange of information. Some tax treaties, for example, do not authorize the exchange of information for the purpose of application of the domestic legal system of the contracting states. These include the tax treaties that Brazil has concluded with the Czech Republic, Hungary, Italy, Japan, Korea (Rep.), Luxembourg, the Philippines, the Netherlands and the Slovak Republic. In such cases, a request for information for this purpose would be illegitimate.

In fact, the sole paragraph of article 199 of the Brazilian *Código Tributário Nacional* (National Tax Code, CTN)[16] only permits the exchange of information if this is provided for in an international treaty. The exchange of information not authorized in an international treaty would, therefore, be an illicit act on the part of the administrative authority.

Consequently, the existence of a procedure to consider the merit of requests for information is a natural requirement regarding the legitimacy of the exchange of information. It is also essential that a preliminary analysis as to compliance with the requirements of a tax treaty is undertaken, and within the limits imposed by the Brazilian Federal Constitution, before the procedure for gathering the information requested starts.

3. Exchange of Information and the Procedural Rights of Taxpayers

3.1. The OECD Models and general comments on the issue

Article 26 of the OECD Model does not refer to procedural rights of the taxpayer to whom the information relates. In fact, it is only in the Commentaries on Article 26 of the OECD Model that there is any reference to procedural rights. However, the focus there is only on protecting the procedural rights set out in the domestic legislation of the contracting states, provided that these do not make ineffective the supply of the information to the applicant state.[17]

The final part of article 1 of the OECD Model Agreement on Exchange of Information in Tax Matters contains a provision similar to that in the Commentary on Article 26 of the OECD Model, in relegating to the internal law of the countries the stipulation of procedural rights. Under this provision:

> the rights and safeguards secured to persons by the laws or administrative practice of the requested Party remain applicable to the extent that they do not unduly prevent or delay effective exchange of information.[18]

A similar rule can be found in article 21(1) of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters, in accordance with which:

> nothing in this Convention shall affect the rights and safeguards secured to persons by the laws or administrative practice of the requested State.[19]

It is, therefore, evident that none of the OECD Models provides for any procedural right for taxpayers. The Multilateral Convention addressed the matter, but it merely provides that it does not invalidate any procedural rights stipulated in the domestic legislation of the contracting states. This point has been endorsed by jurists.

In this regard, Calderón Carrero (2000) has observed that:

> neither the OECD MCs, UNO, USA nor Directive 77/799/EEC regulate, even to a minimum degree, the position of the taxpayers who are affected by an ongoing procedure for exchange of information between two States. Only the Multilateral Convention of the Council of Europe/OECD (1988), on mutual administrative assistance in tax matters included a provision to this effect.[20]

In the opinion of Gonçalves Mota (2011), this minimalist attitude in relation to the protection of the rights of the taxpayer in respect of exchange of information is due to the justification of this institution as an instrument in countering tax fraud.[21] However, this justification is not acceptable.

In fact, it is currently evident that the exchange of information has become a mechanism that has greatly transcended its initial purpose as an instrument for countering tax evasion and abusive or aggressive tax planning.[22] To a large extent, the exchange of information has become a tool for the correct application of a domestic tax system, as it is present in situations in which there is no indication of any kind of illegality or abuse.[23]

16. BR: *Código Tributário Nacional* (National Tax Code, CTN).

17. *OECD Model Tax Convention on Income and on Capital: Commentary on Article 26* para. 14.1 (26 July 2014), Models IBFD.
18. *OECD Agreement on Exchange of Information on Tax Matters* art. 1 (18 Apr. 2002), Models IBFD.
19. *OECD The Multilateral Convention on Mutual Administrative Assistance in Tax Matters Amended by the 2010 Protocol* art. 26 (1 Jul. 2011).
20. J.M. Calderón Carrero, *Intercambio de Información y Fraude Fiscal Internacional* p. 337 (Centro de Estudios Financieros 2000).
21. R. Gonçalves Mota, *A cooperação internacional na operacionalização do intercâmbio de informações fiscais*, in *Sustentabilidade Fiscal em Tempos de Crise* p. 197 (J. Casalta Nabais & S. Tavares da Silva eds., Almedina 2011).
22. Rocha, *supra* n. 1, at pp. 75-86.
23. Id., at pp. 79-80.

Consequently, in a scenario in which the exchange of information has begun to be applied to licit and legitimate transactions, it is to be expected that a system would be developed to control this exchange, which would protect the rights of the taxpayer. As a result, it appears to the author that the argument that the exchange of tax-related information applies to cases of fraud and that this is the reason for the absence of any fundamental rights permitting the participation of the taxpayer lacks sound legal backing, at least in those jurisdictions, such as Brazil, that recognize the fundamental right of persons, whether individuals or legal entities, to participate in administrative proceedings.

In line with this view is the fact that a taxpayer's right to participate is essential. This is not only to guarantee that the taxpayer is aware of the proceedings and can, therefore, take action in relation to the request for information, but also to enable the taxpayer, in cooperation with the local tax authorities, to ensure that the information delivered is correct and accurately reflects the facts that are under investigation.

One of the principles that govern administrative action in Brazil is that of material truth, which is a corollary of the principle of legality, under which the administrative authorities have a duty to make every effort to discover the circumstances in which a given event, which produced the relevant effects for the government and the citizen, has occurred.[24] In view of the government's duty to seek the material truth, it is clear that the participation of a taxpayer, in providing information and documents and supplying data for the operation to be carried out by the tax authorities, makes it possible to ascertain, with the greatest possible accuracy, the circumstances in which the facts occurred that are relevant to the government and the taxpayer.

There is also an important link between the right of participation and the effectiveness of the limitations on the exchange of information, especially that related to the protection of business, industrial, intellectual and commercial secrets of the companies. In fact, given the complexity of the current business world, it is possible that the tax authorities may transmit information that violates the right to business secrecy, which would probably not have arisen had a taxpayer had an opportunity to be heard.

In analysing this issue from the perspective of the Spanish legal system, Martínez Giner (2008) states that:

> the need for the recognition of rights for taxpayers in these proceedings becomes essential, as evidenced both by legal writers and by the general principles recognized in other normative texts, such as the Spanish Constitution.[25]

Schenk-Geers (2009) also emphasizes the importance of the right of notification, in noting that this must occur before the exchange of information takes place.[26]

3.2. Restriction on procedural rights in cases of fraud

In this context, reference is usually made to the denial of the participation rights of taxpayers in cases of fraud. This point has, for example, been emphasized by Calderón Carrero (2000):

> The normal practice nowadays is that all rights of participation are excluded if the taxpayer is involved in an interchange where there exist suspicions or evidence of tax fraud. On justifying the request for exchange of information, the normal practice will be for the applicant State to ask the requested State not to communicate the existence of the request to the taxpayer under investigation, on the grounds that such communication could jeopardize or frustrate the investigation carried out in its territory.[27]

This opinion is shared by other authors, such as Schenk-Geers (2009), according to whom:

> certain government interests mentioned in Article 13 of the Privacy Directive do provide grounds for changing the time the notification must take place. Interests such as national security or combating tax fraud are so important, in my opinion, that they must justify a postponement of the notification until after the disclosure of data, and even the erosion of the legal protection that results from him.[28]

It does not appear to the author of this article to be possible to establish a direct link between the suspension of procedural rights and "aggressive" tax planning. In fact, the author believes that only in those cases involving facts legally classified as crimes would it be possible to contemplate the suspension of procedural rights that could jeopardize the gathering of data necessary to prove the occurrence of criminal activity.

3.3. Participation rights and international treaties

In view of the absence of rules in tax treaties regarding the legal position of a taxpayer with regard to the exchange of tax information between states, it is for the national law of the contracting states to make such a provision. As noted by De Moura Borges and Khoury (2011), this could hinder the exchange of information given the lack of a homogeneous procedural standard.[29]

Treatment of this issue exclusively in the domestic legislation of the states involved is a subject criticism by Fernández Marín (2007), for whom:

> recourse to national jurisdictions for the regulation of the rights and safeguards of taxpayers affected by the exchange of information may not always be a suitable solution from the point of view of the dogmatic construction of human rights.[30]

24. A. Pitanga Seixas Filho, *Princípios Fundamentais do Direito Administrativo Tributário: A Função Fiscal*, 2nd edn. pp. 45-89 (Forense 2001) and A. Xavier, *Do Lançamento: Teoria Geral do Ato, do Procedimento e do Processo Tributário*, 2nd edn. pp. 122-123 (Forense 2002).
25. L.A. Martínez Giner, *La Protección Jurídica del Contribuyente en el Intercambio de Información entre Estados* p. 168 (Iustel 2008).
26. Schenk-Geers, *supra* n. 5, at pp. 280-281.
27. Calderón Carrero, *supra* n. 20, at p. 346.
28. Schenk-Geers, *supra* n. 5, at, p. 283.
29. A. de Moura Borges & L.J.A. Khoury, *O intercâmbio de informações sobre matéria tributária entre administrações estrangeiras: posição atual e especificidades no Brasil*, in *Sigilos bancário e fiscal: homenagem ao Jurista José Carlos Moreira Alves* p. 354 (O.O. de Pontes Saraiva Filho & V. Branco Guimarães eds., Fórum 2011).
30. F. Fernández Marín, *La tutela de la Unión Europea al contribuyente en el intercambio de información tributaria* p. 24 (Atelier 2007). Countries have dealt with the matter in different ways. According to a work published by

In reality, and this is the most important point, even though it may be left to the domestic legislation of the contracting states to determine the detailed procedure to be applied in cases of exchange of information, the ideal solution would be for an international treaty to expressly provide for the participation rights of taxpayers. In view of the silence in relation to the matter in the OECD Models, some states, as well as the European Union, have included in their legislation clear procedural rules protecting a taxpayer's right of participation. This is briefly commented on in section 3.4. in relation to the European Union in and in section 3.5. in relation to Brazil.

3.4. Taxpayer's right of participation under EU law

Matters relating to mutual assistance between the competent authorities of the Member States of the European Union were initially dealt with in Directive (77/799).[31] Directive (77/799) was subsequently repealed and replaced by Directive (2011/16).[32] Directive (2011/16) does not contain detailed rules regarding the protection of the rights of taxpayers. What Directive (2011/16) does, in article 25, is to expressly refer to Directive (95/46),[33] in the following terms:

> All exchange of information pursuant to this Directive shall be subject to the provisions implementing Directive 95/46/EC. However, Member States shall, for the purpose of the correct application of this Directive, restrict the scope of the obligations and rights provided for in Article 10, Article 11(1), Articles 12 and 21 of Directive 95/46/EC to the extent required in order to safeguard the interests referred to in Article 13(1)(e) of that Directive.

Article 10 of Directive 95/46 sets out the right to information regarding the person affected by the exchange of information:

> Information in cases of collection of data from the data subject
>
> Member States shall provide that the controller or his representative must provide a data subject from whom data relating to himself are collected with at least the following information, except where he already has it:
> (a) the identity of the controller and of his representative, if any,
> (b) the purposes of the processing for which the data are intended,
> (c) any further information such as
> – the recipients or categories of recipients of the data;
> – whether replies to the questions are obligatory or voluntary, as well as the possible consequences of failure to reply;
> – the existence of the right of access to and the right to rectify the data concerning him insofar as such further information is necessary, having regard to the specific circumstances in which the data are collected, to guarantee fair processing in respect of the data subject.

On the other hand, article 12 of Directive (95/46) establishes the rights of access in respect of the person implicated in the exchange of information.

> Member States shall guarantee every data subject the right to obtain from the controller:
> (a) without constraint at reasonable intervals and without excessive delay or expense:
> – confirmation as to whether or not data relating to him are being processed and information at least as to the purposes of the processing, the categories of data concerned, and the recipients or categories of recipients to whom the data are disclosed;
> – communication to him in an intelligible form of the data undergoing processing and of any available information as to their source;
> – knowledge of the logic involved in any automatic processing of data concerning him at least in the case of the automated decisions referred to in Article 15(1);
> (b) as appropriate the rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data;
> (c) notification to third parties to whom the data have been disclosed of any rectification, erasure or blocking carried out in compliance with (b), unless this proves impossible or involves a disproportionate effort.

Finally, article 21 of Directive (95/46) delineates a general transparency rule:

> 1. Member States shall take measures to ensure that processing operations are publicized.
>
> 2. Member States shall provide that a register of processing operations notified in accordance with Article 18 shall be kept by the supervisory authority.
>
> The register shall contain at least the information listed in Article 19(1)(a) to (e).
>
> The register may be inspected by any person.
>
> 3. Member States shall provide, in relation to processing operations not subject to notification, that controllers or another body appointed by the Member States make available at least the information referred to in Article 19(1)(a) to (e) in an appropriate form to any person on request.
>
> Member States may provide that this provision does not apply to processing whose sole purpose is the keeping of a register which according to laws or regulations is intended to provide information to the public and which is open to consultation either by the public in general or by any person who can provide proof of a legitimate interest.

These provisions constitute a solid system of protection of the rights of taxpayers within the context of proceedings for the exchange of information. However, the effectiveness of these rights is severely restricted by the exception set out in article 25 of Directive (2011/16), which states that those rights may be limited:

> to the extent required in order to safeguard the interests referred to in Article 13(1)(e) of Directive no. 95/46/CE.

The specific text of this provision is as follows:

> 1. Member States may adopt legislative measures to restrict the scope of the obligations and rights provided for in Articles 6(1), 10, 11(1), 12 and 21 when such a restriction constitutes a necessary measure to safeguard:

the European Association of Tax Law Professors (EATLP), countries, such as Belgium, Finland, Italy, Poland, Spain and the United Kingdom, do not accord rights of participation to taxpayers in proceedings for exchange of information. On the other hand, Germany, Hungary, Luxembourg, Portugal and Sweden recognize such a right. *See* R. Seer & I. Gabert, *General Report*, in *Mutual Assistance and Information Exchange* p. 46 (R. Seer & I. Gabert eds., EATLP 2010).

31. Council Directive 77/799/EEC of 19 December 1977 Concerning Mutual Assistance by the Competent Authorities of the Member States in the field of Direct Taxation, EU Law IBFD.
32. Council Directive 2011/16/EU of 15 February 2011 on Administrative Cooperation in the field of Taxation and Repealing Directive 77/799/EEC, OJ L64 (2011), EU Law IBFD.
33. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of Such Data, EU Law IBFD. In this context, Directive 95/46 states in its preamble that it relates "to the protection of individual persons as regards the treatment of personal data and the free circulation of such data".

...

e) an important economic or financial interest of a Member State or of the European Union, including monetary, budgetary and taxation matters;....

As can be seen, this provision allows the rights of taxpayers to be restricted whenever such a restriction is necessary for the protection of "an important economic or financial interest". The open-ended and indeterminate nature of this rule means that the Member States can considerably limit the participation rights of their citizens in proceedings regarding the exchange of information.

3.5. Taxpayer's right of participation in Brazil

3.5.1. The relevant Brazilian law

Brazilian law does not contain specific rules regarding a taxpayer's participation in proceedings involving the exchange of tax information between states. Even though there is no express provision for the taxpayer's participation, it would, however, appear that this right can be directly derived from the fundamental right to a full defence, as set out in item LV of article 5 of the Brazilian Federal Constitution, according to which:

> litigants in judicial or administrative proceedings, and defendants in general are assured the right to adversary proceedings and full defence, with the means and appeals inherent thereto.

The author has discussed the question of a full defence with regard to administrative proceedings, including an analysis of views of various jurists on this matter, in another work, to which the author refers the reader.[34] For the purposes of this article, it is only important to emphasize that the principle of a full defence guarantees a citizen the right to exercise all of the active measures that may be necessary for the protection of the citizen's rights.

The fundamental right to a full defence is specifically referred to in Law 9.784/99,[35] which regulates federal administrative proceedings. Consequently, in accordance with article 2 of this Law:

> the Governmental Authority shall obey, among others, the principles of legality, finality, motivation, reasonableness, proportionality, morality, full defence, adversarial proceedings, legal security, public interest and efficiency.

In this respect, item V of the sole paragraph of Law 9.784/99 clearly states that:

> in administrative proceedings the following criteria shall be observed, among others:... official publication of administrative acts, except for cases of secrecy referred to in the Constitution.

This rule is very important, as it makes clear that secrecy is only admissible when authorized by the Brazilian Federal Constitution.

Article 3 of Law 9.784/99 deals with the rights of the citizen, including the right:

> to be informed regarding the situation of administrative proceedings in which he is interested, to have access to the record, to obtain copies of documents contained therein and to be informed of the decisions handed down [and] to present arguments and produce documents prior to the decision, which shall be duly considered by the competent authority.

As a result, in the author's opinion, the right of a taxpayer affected by the exchange of information to participate is inferred from the Brazilian legal system, irrespective of any specific rule governing this issue.[36] As stated by Schoueri and Barbosa (2013):

> the possibility of exchanging information without the prior participation of the interested party does not seem coherent with the Rule of Law and with the principle of due legal proceedings.[37]

Where the taxpayer has the relevant information, the Brazilian tax authorities have no alternative but to serve notice on the taxpayer to produce it under the procedures currently set out in Administrative Act 1.687/2014. However, where the tax authorities already have the information, there is no guarantee that the taxpayer is advised regarding the exchange of information.

Despite this, it can be inferred from Brazil's Global Forum Phase 2 Report prepared by the OECD that, in the view of the federal tax authorities, there is no need to serve a notice on a taxpayer, except in those situations where, without the participation of the taxpayer, it is not possible to obtain the information.[38] In this context, it appears to the author that the absence of specific rules gives rise to uncertainty and insecurity regarding the procedure to be adopted by the Brazilian authorities. Consequently, it is beyond doubt that the Brazilian system tends towards the establishment of specific rules relating to the participation of taxpayers affected by proceedings in respect of the exchange of information.

It is important to emphasize that the purpose of a taxpayer's participation is not only to allow the taxpayer to defend his interests, but also to avoid any errors or omissions regarding the supply of the information resulting from the collaboration of the taxpayer.[39] In any event, the taxpayer's participation is of fundamental importance for the correct application by the requested state of the limitation set out in article 26(3)(c) of the OECD Model, which authorizes that state not to supply the information requested if this violates a trade, business, industrial or professional secret, or a commercial process of the taxpayer. If, for example, the taxpayer does not participate in the procedure regarding the exchange of information, the taxpayer may be denied an opportunity to demonstrate that the information requested falls into one of these categories, which may even damage the country's economy.

34. S.A. Rocha, *Processo Administrativo Fiscal: Controle Administrativo do Lançamento Tributário*, 4th edn., pp. 118-121 (Lumen Juris 2010).
35. BR: Law 9.784/99 of 29 Jan. 1999.
36. The author has emphasized elsewhere that one of the principal functions of administrative proceedings is the democratic legitimization of administrative actions. *See* Rocha, *supra* n. 34, at pp. 14-19.
37. L.E. Schoueri & M.C. Barbosa, *Da Antítese do Sigilo à Simplicidade do Sistema Tributário: os Desafios da Transparência Fiscal Internacional*, in *Transparência Fiscal e Desenvolvimento: Homenagem ao Professor Isaias Coelho* p. 518 (E.M. Diniz de Santi et. al. eds., Fiscosoft 2013).
38. OECD, *Brazil: Peer Review Reports, Phase 2, Implementation of the Standard in Practice* p. 67 (OECD 2013).
39. On this topic, *see* T. Rosembuj, *Intercambio Internacional de Información Tributaria* p. 59 (Edicions Universitat de Barcelona 2004).

In accordance with this line of reasoning, the author's view is that a federal law should be enacted setting out the procedure to be applied in cases involving the exchange of tax information with other states. It is important that, in order to guarantee the legal security of taxpayers resident in Brazil, the measure introducing such rules should be a formal law, rather than an administrative act that may be altered at any time by the tax authorities. As the author has noted elsewhere, the requirement of a law in these cases is an imposition of the principle of due legal process, which cannot be circumvented.[40]

3.5.2. Participation rights and tax crimes

There is a justified concern regarding the possibility that a taxpayer's participation rights may made ineffective with regard to the exchange of tax information in certain special situations. Typically, such situations involve fraud.

In this respect, it is important to note that, in certain cases, a taxpayer's participation rights should be limited. Nevertheless, taking into consideration the Brazilian legal system, the author believes that it would be advisable to avoid use of the word "fraud".

Although the term "fraud" is defined in tax legislation by article 72 of Law 4.502/64,[41] there is a noticeable tendency to use this term imprecisely in Brazilian tax law in general. The term refers to conduct that constitutes a crime against the tax system or situations in which the legitimacy, as opposed to the legality, of given tax planning is questioned.[42]

In this context, in the author's opinion, the exceptions that would restrict or eliminate a taxpayer's right to participate in the procedure for the exchange of information would only arise where the conduct attributed to the taxpayer were classified as a tax crime both in the applicant state and in Brazil. In other words, the justification for restricting participation rights would be to protect the applicant state's right to take criminal proceedings. However, issues concerning tax planning would never be a sufficient argument to disregard the taxpayer's rights to have knowledge of, and to express views, regarding the exchange of information.

It is evident that, given the foregoing, in order to contemplate any limitation on the participation rights of a taxpayer interested in the exchange of information, a reasoned request must be made by the applicant state, in justifying the reasons for the limitation. The administrative decision permitting the request for secrecy regarding the exchange of information must also be justified by the Brazilian tax authorities.

3.5.3. Potential criticism regarding application of the principle of full defence

A possible criticism of the position set out in section 3.5.2., as raised by Oberson (2013),[43] consists of the statement that the exchange of information occurs within the administrative audit procedure and not the administrative review process, so that the general principles that regulate the administrative process would not apply. The author has, on another occasion, on the basis of the distinction of the legal regime between the inspection procedure and the administrative tax proceedings,[44] expressed the opinion that the principles of due legal process and full defence did not apply to the former.[45]

These comments notwithstanding, it must, however, be recognized that, in respect of the exchange of information between states, this is not the same situation as that which exists domestically. In such circumstances, i.e. international exchange, it is not possible to guarantee the relevant stage of the fiscal action of the state applying for the information. In fact, the information may have been requested for inclusion in proceedings that are already pending before a court.

Although the process of gathering information for the purpose of exchange may, from a certain perspective be similar to that exercised in the context of an inspection procedure, it is by no means the same thing. It must also not be forgotten that, in the specific case of the exchange of information, there are other aspects that are important, such as guaranteeing that information that reveals secrets protected by international treaties is not supplied. Consequently, although it should be noted that the interpretation to the effect that the procedural nature of the exchange of information would eliminate procedural rights, it does not appear to the author that such a line of interpretation reflects the extent of the principles of due legal process and full defence, at least as set out in the Brazilian Federal Constitution.

3.6. Procedural rights in the context of the automatic exchange of information

To date, there has been a notable increase in the importance attributed to the automatic exchange of information,[46] which is considered to be essential for the tax management of states in a globalized economy. This is despite the fact that there is still no legal system available to make such a method of exchange viable in a globally efficient and systematic way.

Automatic exchange has two important characteristics that distinguish it from the exchange of information by

40. Rocha, *supra* n. 34, at p. 119.
41. BR: Law 4.502 of 30 Nov. 1964, which reads: "Art. 72. Fraud is any wilful act or omission that tends to prevent or delay, totally or partially, the occurrence of the main taxable event, or to exclude or modify its essential characteristics, so as to reduce the amount of tax due or to avoid or defer payment thereof."
42. A distinction is usually made between the avoidance of the law, i.e. *fraus legis*, and a breach of the law, i.e. *contra legem*. In the words of R. Lobo Torres, *Planejamento Tributário: Elisão Abusiva e Evasão Fiscal* p. 128 (Campus 2012), "what must not be done is to confuse criminal fraud or fraud *contra legem*, which is a form of evasion and constitutes a crime, with *fraus legis*, which is a form of abusive avoidance (article 116, sole paragraph, of the CTN, and art. 166, VI, of the CC)". In this context, *see also* M.A. Greco, *Planejamento Tributário* 3rd edn., pp. 249-257 (Dialética 2012).
43. Oberson, *supra* n. 12, at sec. 5.1.
44. Rocha, *supra* n. 34, at pp. 330-332.
45. Id., at pp. 117-121.
46. Rocha, *supra* n. 1, at pp. 119-126.

request with regard to a taxpayer's rights of participation. First, in various countries, there is the question of access to information held by financial institutions. Second, the type of information that is intended to be exchanged automatically, at least in the Brazilian context, consists of information that the federal tax authorities normally has in its system, without the need for participation of third parties.

It is with regard to the automatic exchange of information that a taxpayer's participation rights are in the greatest danger of being completely disregarded. As the automatic exchange of information does not occur within ongoing inspection proceedings in the other state, there are no means of notifying a taxpayer resident in Brazil regarding use of the information by the other state. This should not mean, however, that the automatic exchange of information can take place without the knowledge of the taxpayer.

On the automatic exchange, there is an increased risk of supplying incorrect information to the other state, thereby giving rise to potential problems with regard to undue demands on the part of the latter. There is, therefore, no doubt that, at least under the Brazilian legal system, the automatic exchange of information should not be accorded completely different treatment from an exchange by request.

Following this line of reasoning, the author believes that the constitutionality of the automatic exchange of information under the Brazilian legal system depends on the preservation adopted regarding a taxpayer's participation rights. For this purpose, at least 30 days prior to sending the information to the other state, the taxpayer in question should be notified regarding the information to be sent by the Brazilian federal tax authorities.

The constitutionality of automatic exchange does not, however, mean that the Brazilian tax treaties in force provide for this. The question, therefore, arises whether the tax treaties that Brazil has concluded permit the automatic exchange of information? This topic is considered in section 4.2.

4. Brazil and the Exchange of Information

4.1. Tax treaties and the automatic exchange of information

4.1.1. Opinions in tax literature

According to the OECD's Phase 2 Global Forum Review Report on Brazil, although only the Brazil-Portugal Income Tax Treaty (2000) expressly refers to the automatic exchange of information,[47] the other tax treaties concluded by Brazil are not restricted to exchange by request and can also be used in respect of the automatic exchange of information.[48] On analysing the articles on exchange of information in the tax treaties concluded by Brazil, the author can, in fact, find articles that do not expressly restrict exchange of information by request. However, careful consideration must be given to the question whether it is possible to reconcile automatic exchange of information with the requirement of "necessity" or of "foreseeable relevance", which indicates that the information requested is included in the context of an ongoing investigation. The automatic exchange of information is, therefore, perilously close to the concept of a "fishing expedition". If it is certain that these "fishing expeditions" are illegal, and, in the author's research, he has not found a single author who holds a different opinion, it would appear that the automatic exchange of information is an exception to this general rule in respect of a given type of income.

Up to this point there is no problem. It is possible to develop an automatic exchange system that contains an exception to the general rule prohibiting "fishing expeditions". Nevertheless, as the automatic exchange, in the author's opinion, is counter to the requirement to demonstrate "necessity" and "foreseeable relevance", its permission should be expressly provided for in the relevant tax treaty, rather than be inferred from a lacuna.[49]

In this respect, Engelschalk (1997), who is responsible for the chapter on article 26 of the OECD Model, as coordinated by Vogel (1997),[50] argued that automatic exchanges, despite the fact that it may not be provided for in a tax treaty, must be permitted, as the Commentaries on the OECD Model (1977)[51] onwards expressly refer to this issue. In his opinion, considering that, in general, a tax treaty must be interpreted in accordance with the version of the Commentaries on the OECD Model that applied at the time of its signature, the conclusion that follows is that:

> an automatic or spontaneous exchange of information in not admissible under DTCs concluded before 11 April 1977 unless it has been expressly permitted by the wording of the DTC in question.[52]

The line of interpretation defended by Engelschalk (1997) is based on a concept in respect of the normative effects of the Commentaries on the OECD Model, with which

47. *Convention between the Portuguese Republic and the Federative Republic of Brazil for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income* art. 26(3) (16 May 2000), Treaties IBFD, which reads: "The competent authority of one Contracting State shall supply to the competent authority of the other Contracting State, annually, on prior identification of the taxpayers, or may supply, even without their prior identification, the following information normally produced by the taxpayers: a) information relating to profits obtained in their territory by legal entities or stable establishments situated there, to remit to the competent authority of the Contracting State where the associated legal entity or parent company or head office is domiciled; b) information regarding profits declared by legal entities domiciled in the first Contracting State related to operations carried out in the other Contracting State by associated legal entities or stable establishments; c) any other type of information which they may agree to exchange."
48. OECD, *supra* n. 38, at p. 90.
49. Along the same line of reasoning, *see* M.A. Torres Jiménez, *The Extent of Exchange of Information under Article 26 OECD Model (Article 26 (1) OECD Model)*, Günther & Tüchler eds., *supra* n. 10, at p. 91. For a contrary view, in stating that article 26 of the *OECD Model* justifies the automatic exchanges of information, *see* P. Baker, *Double Taxation Conventions* para. 26-5 (Thompson 2005).
50. The latest edition of the chapter on article 26 of *Klaus Vogel on Double Taxation Conventions* (J. Becker, K. Vogel & E. Reimer eds., Kluwer L. Intl. 2015) was written by A.P. Dourado.
51. *OECD Model Tax Convention on Income and on Capital: Commentaries* (11 Apr. 1977), Models IBFD.
52. M. Engelschalk, *Article 26, Exchange of Information/Exchange of Information and Administrative Assistance*, in *Klaus Vogel on Double Taxation Conventions* p. 1.407 (K. Vogel ed., Kluwer L. Intl. 1997). For a similar view, *see* Calderón Carrero, *supra* n. 20, at pp. 122-123.

the author does not agree. As argued in another work, the author is of the opinion, which is shared by Xavier (2010),[53] that the OECD Commentaries should be regarded in the same way as a passage from a respectable author of international tax law and without attributing to them the same function in the context of an international tax treaty.[54] As a result, and considering that Engelschalk (1997) based his opinion on the force attributed to the OECD Commentaries, it seems to the author that, without this, the quoted passage could be interpreted as supporting the view expressed in this article.

This conclusion gives rise to very important effects for the Brazilian system. Following this line of reasoning, only in the case of the Brazil-Portugal Income Tax Treaty (2000) would automatic exchange of information be possible. In all other cases, this would depend on an amendment to the relevant tax treaty.

It is worth noting that the Council of Europe-OECD Mutual Assistance Treaty (1988)[55] was recently approved in Brazil. The entry into force of this treaty will change this assessment, since Brazil will have a basis for exchanging information automatically with all other countries where this convention has also entered into force.

4.1.2. Article 199 of the CTN and the automatic exchange of information

Even if all of the tax treaties that Brazil has concluded are amended to expressly refer to the automatic exchange of information and the Council of Europe-OECD Mutual Assistance Treaty (1988) enters into force in Brazil, the issue of automatic exchange of information should be analysed with regard to its compatibility with article 199 of the CTN. The principal concern here is the use of the information so made available.

As noted earlier, the CTN only authorizes the exchange of information for tax purposes.[56] On the exchange of information on request, this requirement can be evaluated, as there is a request for information from the other state. On the other hand, with regard to automatic exchange, there are no documents to guarantee how the information is to be used. In principle, if a tax treaty only permits use for tax purposes, as authorized by the CTN, the applicant state can only use the information for this purpose. Given the relevance of this issue, which affects the very legitimacy of the exchange of information for the Brazilian state, it should be noted that the Brazilian tax authorities seek guarantees regarding the intended use of the information by the applicant state.

4.2. Duty to provide reasons for decision authorizing the exchange of information

The legitimacy of the exchange of information on request depends on the analysis by the Brazilian tax authorities regarding the legitimacy of the transfer of the information requested in the light of the provisions of the Brazilian Federal Constitution, the CTN and the tax treaty. It is also necessary that a taxpayer's participation rights are protected. It is, therefore, clear that the control of such activities by the tax authorities, the taxpayer and, if applicable, the courts is only possible if the final decision of the federal tax authorities, in authorizing the exchange of information, can be justified. In this respect, according to Gomes (2010):

> the duty of express justification obliges the Federal Revenue to state the reasons of fact and of law that led it to act in the way it did, setting out clearly the internal procedure for reaching its decision.[57]

Consequently, the guarantees of the participation of a taxpayer can only be protected given the requirement for the justification of the decision authorizing the transmission of information to the tax authorities of the other state. The transfer of information without the necessary reasoning invalidates the action and is sufficient to justify a civil liability of the state if loss or damage is suffered by the taxpayer.

4.3. Right of participation where Brazil is the requesting state

Given all of the comments relating to the taxpayer's rights of participation noted in sections 4.1. to 4.3., the question arises as to their application in cases where Brazil is the state requesting the information. Here, it appears to the author that it would be impossible to argue, in the light of the Brazilian legal system, in favour of the existence of the right of notification and participation. In such a case, the Brazilian tax authorities, as the applicant in respect of the information, would not, during the process of exchange of information, be actively gathering data, which would be a task that would be carried out by the requested state. As a result, any obligation with regard to the notification and participation of a taxpayer during the interchange of information would make no sense.

If the Brazilian tax authorities were still at the inspection stage, given the non-application of the principle of due legal process, there would be no question of the taxpayer's right of notice and participation, which are rights that only arise on the issue of an assessment. On the other hand, if the matter to which the requested information related had already been the subject of a tax assessment or was being considered by the courts, with proceedings already under way governed by the principle of due legal process, the taxpayer would be guaranteed the rights of notification and participation.

53. A. Xavier, *Direito Tributário Internacional do Brasil* 7th edn., p. 139 (Forense 2010).
54. S.A. Rocha, *Interpretation of Double Taxation Conventions: General Theory and Brazilian Perspective* pp. 130-131 (Kluwer L. Intl. 2009).
55. *Convention between the Member States of the Council of Europe and the Member Countries of the OECD on Mutual Administrative Assistance in Tax Matters* (25 Jan. 1988), Treaties IBFD.
56. Rocha, *supra* n. 1, at pp. 155-158.
57. M.L. Gomes, *A Interpretação da Legislação Tributária: Instrumentos para a unificação de critério administrativo em matéria tributária* p. 78 (Quartier Latin 2010).

4.4. Possible defects in collecting the information: The question of illegal evidence

The Brazilian legal system prohibits the use of illegal evidence. In accordance with item LVI of article 5 of the Brazilian Federal Constitution "evidence obtained by illegal means is not admissible in the proceedings". This prohibition is also set out in article 30 of Law 9.784/99, according to which "evidence obtained by illegal means in administrative proceedings is not admissible".

As can be inferred from this, the concept of proportionality has been indicated as a criterion for the decision regarding the use or otherwise of illegal evidence in the proceedings. According to Borba Franco (2008):

> only evidence obtained legally may be admitted, except in the case where the consideration of illegal evidence is essential, based on the principle of proportionality.[58]

By analysing the decisions of the Brazilian *Supremo Tribunal Federal* (Supreme Court, STF), it is possible to observe that the STF refuses to admit illegal evidence.[59] However, this raises an even more difficult issue, i.e. if such evidence is generally not admissible, what is to be said of legal evidence that has been produced based on knowledge gained by way of the illegal evidence?

The issue here concerns the limit of the application of the theory of the fruit of the poisonous tree. In principle, if the evidence was illegal, any evidence derived from such illegal evidence would also be tainted. Nevertheless, the use of this theory is mitigated by other theories. First, the "theory of inevitable discovery" can apply, according to which, if the fact identified would be discovered in any case and independently of the original illegal evidence, there is no question of contamination of the former by the latter.[60] Second, there is the theory that Marinoni and Cruz Arenhart (2011) refer to as "probably independent discovery", under which:

> the second item of evidence is not admitted as derived evidence, but as probably independent evidence, and thus free from the causal link with the illegal evidence.[61]

Finally, for those who argue that the prohibition of illegal evidence should be weighted based on the concept of proportionality, the same reasoning would also apply to the treatment of evidence tainted by derivation, which could be admitted by reason of the circumstances of the specific case.[62]

In *Habeas Corpus*, Case No. 93.050 (2008),[63] the STF expressly accepted the theory of the fruit of the poisonous tree, in an appeal decision of which the head-note reads as follows:

> CRIMINAL PROCEEDINGS. Evidence. Illegality. Characterization. Breach of bank secrecy without judicial authorization. Confession obtained based on illegal evidence. Contamination. HC granted to acquit the defendant. Violation of art. 5, item LVI, of the CF. Criminal evidence consisting of defendant's bank data obtained without a warrant is regarded as illegal, and as such it taints the other evidence produced on the basis of such illegal evidence.

In deciding *Habeas Corpus*, Case No. 93.050, the STF reinforced the importance of the causal link between the illegal evidence and other evidence obtained and produced to prove the occurrence of the fact, such that the evidence derived from the illegal evidence would likewise be illegal, while other evidence, independent from the illegal evidence, would be admissible in the proceedings. This judgement reads as follows:

> ... The doctrine of illegality by derivation (theory of the "fruit of the poisonous tree") repudiates, on the grounds of being constitutionally inadmissible, evidence which, although produced validly at a later moment, is nevertheless tainted by the (very serious) vice of original illegality, which is transmitted to it, resulting in contamination, by reason of causal repercussion. Situation where the new evidence only came to the notice of the public authorities, by reason of an earlier transgression committed originally by the agents of the state, who failed to respect the constitutional guarantee of inviolability of domicile. – The evidentiary elements to which the state authorities only had access by reason of evidence that was originally illegal is therefore inadmissible by reason of illegality by derivation, since it was obtained as a result of the transgression by government agents of constitutional and legal rights and guarantees, the conditional effectiveness of which, in the area of the Brazilian positive system, imposes a significant limitation of a juridical order on the power of the State vis-à-vis its citizens. – If, however, the prosecution can show that it obtained legitimately new elements of information from an autonomous source of evidence – that has no relationship of dependence nor results from the original illegal evidence, not maintaining any causal link with the latter -, such evidentiary data will prove to be fully admissible, since it is not tainted by the original illegality. – THE ISSUE OF THE INDEPENDENT SOURCE OF EVIDENCE AND THE LACK OF A CAUSAL LINK WITH THE EVIDENCE OBTAINED ILLEGALLY – LEGAL COMMENTARIES – PRECEDENTS OF THE FEDERAL SUPREME COURT (RHC 90.376/RJ, Rel. Min. CELSO DE MELLO, v.g.) – CASE-LAW COMPARED (THE EXPERIENCE OF THE U.S. SUPREME COURT): CASES 'SILVERTHORNE LUMBER CO. v. UNITED STATES (1920); SEGURA v. UNITED STATES (1984); NIX v. WILLIAMS (1984); MURRAY v. UNITED STATES (1988). (Emphasis in the original)[64]

In the light of this, there arises the question, most appositely raised by Greco (2011):

> does the illegality on obtaining the information in the other country taint the use that is made of it here?[65]

This author also comments on a case that gained international notoriety, as can be inferred from the following passage:

58. F. Borba Franco, *Processo Administrativo* p. 142b (Atlas 2008).
59. *See*, for example, the decisions in BR: STF, 18 June 2013, *Agravo Regimental no Recurso Extraordinário*, Case No. 730.067, published in the Official Gazette of 1 Aug. 2013; BR: STF, 28 June 2011, *Habeas Corpus*, Case No. 96.056, published in the Official Gazette of 8 May 2012; and BR: STF, 8 Sept. 2009, *Habeas Corpus*, Case No. 90.298, published in the Official Gazette of 16 Oct. 2009.
60. In this respect, *see* BR: STF, 24 Apr. 2012, *Habeas Corpus*, Case No. 91.867, published in the Official Gazette of 20 Sept. 2012.
61. L.G. Marinoni & S. Cruz Arenhart, *Prova*, 2nd edn. p. 278 (Revista dos Tribunais 2011).
62. C.D.M. da Silva, *Provas Ilícitas*, 6th edn., p. 25 (Atlas 2010).
63. BR: STJ, 10 June 2008, *Habeas Corpus*, Case No. 93.050, published in the Official Gazette of 1 Aug. 2008.
64. *See also* BR: STF, 9 Oct. 2007, *Habeas Corpus*, Case No. 89.032, published in the Official Gazette of 23 Nov. 2007 and the appeal in BR: STF, 3 Apr. 2007, *Habeas Corpus*, Case No. 90.376, published in the Official Gazette of 18 May 2007.
65. M.A. Greco, *Troca Internacional de Informações Fiscais*, in De Pontes Saraiva Filho & Guimarães eds., *supra* n. 29, at p. 182.

> Let us look at another case in order to analyze the matter in greater depth. It concerns what occurred in Europe in the so-called "Liechtenstein Case". The German secret service bought from an employee of a Liechtenstein bank or from an intermediary (there are details in the case which will not be examined here) a list of the bank's customers. The German secret service delivered the list to the German tax authorities, who in turn saw that there were Germans on the list, as well as nationals of other European countries. Based on the European Directive on the exchange of information (Directive 77/799/EEC), Germany spontaneously sent a copy of this information to these other countries, which promptly opened revenue proceedings to recover the taxes that they considered due. This is the problem. It is currently under discussion whether this evidence is tainted since it was obtained illegally.... Among jurists there are diverging opinions; there are those who argue that, in relation to Germany, it is tainted because it was Germany who obtained it, but in relation to the other countries it is not tainted because, for example, the Italian revenue authorities received the information from the German authorities; and, finally, others claim that all the evidence is tainted, since the information should never have been obtained in Liechtenstein.[66]

The discussion regarding the admissibility of the evidence in these circumstances evolved in Germany, principally from the criminal aspect. In this regard, the German *Bundesverfassungsgericht* (Constitutional Court, BFG) has concluded that the evidence obtained by their fiscal agents was admissible, their principal arguments being that the latter did not bribe the bank employee in question nor did they seek him out to persuade him to obtain the information. On the contrary, it was the authorities who were contacted by the person who had the information. Another argument that prevailed was that in Germany there was no "fruits of the poisonous tree" doctrine".[67]

The same question has been discussed in France, but with a different outcome. In the French case, the position adopted by the *Cour d'Appel* (Court of Appeal, CdA) was that the information could only be used by the French tax authorities if the latter were unaware of its illegal origin. As, however, the French tax authorities knew that the source of the evidence was illegal, the evidence was not admissible.[68]

The exchange of tax information between states lies at the intersection of constitutional principles that point in opposite directions, i.e. transparency conflicts with the privacy rights of taxpayers. However, the latter gives way to the former in the light of the fundamental duty to contribute to the cost of government. Nevertheless, transparency has limits and the principle of morality exercises a fundamental role here.

The taxpayer's duty to collaborate and the government's power to obtain information cannot disregard the ethical requirements that arise from the legal system itself. However important the purpose envisaged may be, it is not possible to adopt a purely utilitarian perspective and ignore the rights and safeguards of taxpayers to realize this. Consequently, the illegal origin of the information must prevent it from being used, unless, in accordance with the application of the concept of proportionality, the use of illegal evidence in a specific case proves to be the most reasonable course of action on weighing up the principles and interests at stake. However, an attitude such as that adopted by Germany in the case described previously in this section is completely unacceptable under the Brazilian Federal Constitution. Here the prohibition of the use of illegal evidence is not in question, but, rather, of the application of the principle of morality. The Brazilian state cannot, in the light of this principle, interpret the constitutional prohibition on the use of illegal evidence in a utilitarian manner.

4.5. Incompatibility of the final part of article 26(2) of the OECD Model (2014) with Brazil's CTN

It has already been indicated on a number of times that the sole paragraph of article 199 of the CTN only authorizes the exchange of information for tax purposes. The new text of article 26(2) of the OECD Model (2014) permits information exchanged to be used for other purposes, provided that this is authorized by the law of the contracting states and their competent authorities. This means that, unless the CTN is amended, such wide use of the information is impossible. Consequently, this provision should not be included in the tax treaties that Brazil concludes or, if it is, the use of information for non-fiscal purposes should not be authorized.

5. Confidentiality, Secrecy and Guarantees on the Basis of the Domestic Legislation of the Applicant State

One of the most sensitive topics relating to the exchange of tax information is that of confidentiality. All of the models and tax treaties dealing with this matter establish that the information transferred must be treated in a confidential manner. However, as Calderón Carrero (2000) notes, differing tendencies are evident in comparative law. While some countries, such as Spain and the United Kingdom, have a tradition of protecting tax secrecy, others, such as Denmark, France, Italy, and Sweden, have a more open approach to the issue, based on the principle that the community should know whether individuals and entities are complying with their fiscal duties.[69]

If there is no uniformity as to how the countries treat the secrecy of the information, it is evident that the standard practice of regulating the exchange in accordance with the legislation of the applicant state is of little use in protecting the right of confidentiality of taxpayers to whom the information refers. As stated by Chirinos Sota (2013):

> the clear reference to the internal legislation of the receiving state is critical at this point. This has created an environment of uncer-

66. Id., at pp. 182-183.
67. M. Valta, *Germany*, in *Tax Secrecy and Tax Transparency: The Relevance of Confidentiality in Tax Law* vol. I, pp. 472-474 (E. Kristoffersson et. al. eds., PL Academic Research 2013).
68. T. Dubut, *France*, in Kristoffersson et. al. eds., supra n. 68, vol. I, at pp. 438-439.
69. Calderón Carrero, *supra* n. 20, at pp. 36-37. Similarly, in noting the non-existence of uniformity regarding the treatment of tax secrecy, *see* E. Kristoffersson & P. Pistone, *General Report*, in Kristoffersson et. al. eds., *supra* n. 68, vol. I, at p. 3.

> tainty due to the different scope of "national tax secrecy" in different states.[70]

Similarly, Schenk-Geers (2009) argues that:

> to the taxpayers involved, secrecy is so essential that it simply cannot be left to the unknown domestic legislation of the other state.[71]

Based on the principle of isonomy, i.e. equality before the law, as provided for in article 5 caput and article 150, II of the Brazilian Federal Constitution, it appears to the author that there would be no constitutional grounds to accept that a taxpayer resident in Brazil should be subject to a more flexible form of tax secrecy than any other taxpayer who is also resident in Brazil.

Ávila (2008), in analysing the principle of equality from a structural perspective, states that this includes the following elements: subjects, measure of comparison, element indicative of the measure of comparison and the objective. For the purposes of this article, the most important element is the objective. As Avila (2008) has stated:

> The objectives that may serve as a parameter for the choice of the measures of comparison are those referred to in the constitutional normative system. This affirmation, in the case of equality, is of great importance, especially in Tax Law. The Constitution provides for various objectives to be achieved, which may be subdivided under two broad headings: rules with a fiscal objective (*Fiskalzwecknormen*), defined as those that seek primarily to collect funds for the State and therefore divide the tax charges in accordance with measures of comparison based on elements present in the taxpayers themselves, such as their economic capacity; and rules with an extra-fiscal objective (*Nichtfiskalzwecknormen*), defined as those that seek to achieve some separate public purpose, such as protection of the environment or regional development, and, for this reason, distribute the obligations by using measures of comparison estimated by existing elements outside the personal universe of the taxpayers, such as the pollution potential and regional underdevelopment. In this case, the distinction between the taxpayers is made on the basis of elements exterior to them....[72]

Based on the premise that the right to tax secrecy has a constitutional basis, despite the fact that this is not absolute, the Brazilian Federal Constitution does not contain any principle or rule that conveys the idea that such right may be made more flexible where the information on the taxpayer is made available to another state if the legislation of the latter provides for reduced protection regarding tax secrecy.

Returning to the main theme of this article, the exchange of information is a fundamental instrument that enables states to exercise their taxation functions. Transparency, as a principle, is an essential part of the taxation process in the 21st century. However, it is not possible to ignore the fundamental rights assured to persons subject to legal tax obligations. Consequently, if the Brazilian legal system guarantees tax secrecy within certain limits, the same right must be guaranteed, within the same limits, in respect of the exchange of tax information between states.[73] Based on this line of reasoning, the tax treaties concluded by Brazil should always refer to the protection of the confidentiality of the information in accordance with Brazilian legislation, rather than following the law of the applicant state.

It could be argued that this proposal would make the exchange of information unworkable, given practical difficulties. However, this does not appear to the author to be the case. If the law of the applicant state is less stringent with regard to protection of tax secrecy than Brazilian law, the issue may be resolved simply by the signature of a protocol between the states, whereby the other state undertakes to guarantee the same level of secrecy in respect of the information as that guaranteed by Brazilian law.

6. Confidentiality, Secrecy and the Non-Disclosure of Information in Public Court Proceedings in the Applicant State

In accordance with article 26 of the OECD Model, it should be possible for information exchanged between contracting states to be disclosed in public court proceedings. It, however, appears to the author that such permission is incompatible with the Brazilian legal system.

On deciding the appeal in "*Agravo Regimental*" (2010),[74] Brazil's *Superior Tribunal de Justiça* (Superior Court of Justice, STJ) held that "the lifting of the tax secrecy of persons under investigation requires a decree of legal confidentiality for the proceedings – Law No. 9.296, of 1996". If the lifting of tax secrecy requires that the proceedings be heard in camera, this does not appear to the author to be compatible with the principle of isonomy, as considered in section 4.6., that the transmission of information to another state should be accorded a lesser degree of protection to a taxpayer who is resident in Brazil. As a result, Brazil could not include such a provision in its tax treaties and those tax treaties that do contain such a provision, such as those concluded with China, Finland, India, Peru, in which case the constitutional rules of each state must be observed, and Turkey, are incompatible with the Brazilian Federal Constitution.

7. Article 26(3) of the OECD Model Prescribes a Duty Not To Deliver the Information?

Article 26(3) of the OECD Model is drafted such that the requested state can refuse to supply the information where the delivery of the information has the potential to disclose industrial, commercial, professional secrets, etc. This rule appears to reflect the tendency to favour the state in the exchange of information. Even if it can be demonstrated that the interchange of information would disclose an industrial secret of the taxpayer, the requested state could, nevertheless, decide to supply the information.

It does not appear to be reasonable that the state should have such power of disposal over private interests. As soon

70. C. Chirinos Sota, *Confidentiality Rules under Article 26 OECD Model (Art. 26 (2) OECD Model)*, Günther & Tüchler eds., *supra* n. 10, at p. 98.
71. Schenk-Geers, *supra* n. 5, at, p. 139. *See also* T. Schenk-Geers, *International Exchange of Information and the Protection of the Taxpayer*, in Seer & Gabert eds., *supra* n. 30, at p. 108.
72. H. Ávila, *Teoria da Igualdade Tributária* pp. 63-64 (Malheiros 2008).
73. For a similar opinion, *see* Schoueri & Calicchio Barbosa, *supra* n. 37, at pp. 517-518.
74. BR: STJ, 29 June 2010, "*Agravo Regimental*", Penal Action No. 573, published in the Official Gazette of 23 August 2010.

as it is evident that supplying the information would reveal secrets in respect of the taxpayer involved, the delivery of the information should be prohibited. Again the OECD Model adopts a utilitarian posture, which limits the rights of taxpayers to the benefit of the tax-gathering interest of the applicant state. Consequently, the tax treaties that Brazil concludes should expressly provide that, in the case of the limitations set out in the equivalent of article 26(3) of the OECD Model and especially those in article 26(3)(c), the contracting states should be prohibited from supplying the information, in not having the discretion to decide whether to deliver the information.

8. The Civil Liability of States on the Violation of the Rights of Persons Subject to Tax Obligations

One of the most overlooked aspects in the debate on the exchange of information concerns compensation for taxpayers in respect of the loss or damage they may suffer as a result of the exchange of information between states. Section 4.9. has demonstrated that the confidentiality of the information transferred is guaranteed. However, what happens in the event of a leak of the information? Who is liable for the damage suffered by a taxpayer?

Under the Brazilian legal system, the civil liability of the state is dealt with in article 37(6) of the Brazilian Federal Constitution. According to this provision:

> public law legal entities and private law entities that provide public services shall be liable for loss or damage that their agents, in such capacity, may cause to third parties, subject to a right of recourse against the party responsible in the cases of fraud or negligence.

As noted by Cavalieri Filho (2003):

> the expression in italics – their agents, in such capacity – evidences the fact that the Constitution adopted expressly the theory of administrative risk as the basis of liability of public authorities, rather than the theory of entire risk, because it has made the strict liability of the public authorities conditional upon the damage resulting from their administrative activity, that is, cases in which there is a relation of cause and effect between the activity of the government agent and the damage.[75]

As a result, although the civil liability of the state is objective, in the sense that proof of fraud or negligence is not required, it is necessary to demonstrate the existence of a causal link between the conduct of the government official and the loss or damage caused to the citizen. There is no doubt that government action in the tax area can give rise to damage to the citizen and/or taxpayer. Abuse and excess in the exercise of power by the tax authorities, apart from errors committed in the exercise of activities, has the potential to give rise to harm and the state must be held liable for any damage suffered by a taxpayer. As observed by Lacerda Troianelli (2004), in matters relating to the civil liability of the state, there is nothing specifically said in relation to tax losses.[76]

In analysing the rule in article 37(6) of the Brazilian Federal Constitution, there is no doubt as to the fact that the federal government is civilly liable if one of its agents acts in such a way as to cause damage to a taxpayer in connection with a procedure regarding the exchange of information. However, this protection appears to the author to be insufficient. The important question is what happens if a taxpayer's rights are violated not here, but in the state requesting the information? In such circumstances, in considering article 37(6) of the Brazilian Federal Constitution, the federal government would, in principle, not be liable, as the action violating the rights of the taxpayer would have been undertaken by an agent of another state. However, this position results in a weakening of the taxpayer's rights, as jurisdictional protection in respect of violation would have to be sought in the courts of the other state.[77]

Imagine, for example, an exchange of information between Brazil and China, in which a Chinese authority disclosed secret information regarding a Brazilian company, thereby causing loss to the latter. In such a case, would the Brazilian company have to sue the Chinese state in China in seeking redress for the damage suffered? This does not appear to the author to be the most satisfactory solution.

The only way to assure citizens of the effectiveness of their procedural instruments in respect of the violation of rights is to provide for the joint and several liability of both states involved in the procedure for exchange of information. The states are the principal parties interested in the procedures for exchange of information and should, therefore, be held jointly and severally liable for any damage that may be caused to private citizens as a result of this.

Such an ambitious target cannot depend on domestic legal systems. Under the Brazilian system, the possibility of bringing an action for damages against the state, by reason of an act performed by the other state, seems remote. I therefore propose the inclusion in international conventions of an express rule providing for joint and several liability between the states in the event of damage suffered by the taxpayer, so that the latter may seek reparation in his country of residence. In the absence of a conventional rule the omission may be remedied by having recourse to the domestic legislation of the states in question.

In the OECD works on exchange of information, there is much talk of the need for an effective interchange. The effectiveness cannot be a banner only in cases which are of interest to the states. It is important also to have an efficient protection of the rights of taxpayers, and this will only be possible with an efficient system providing also for the civil liability of the states.

9. Application over Time of Tax Treaties for the Exchange of Information between States

There is international pressure on Brazil to update the tax treaties that it has concluded to adapt them to the text of the

75. S. Cavalieri Filho, *Programa de Responsabilidade Civil*, 5th edn. p. 243 (Malheiros 2003).
76. G. Lacerda Troianelli, *Responsabilidade do Estado por Dano Tributário* p. 91 (Dialética 2004).
77. The non-existence of adequate means of protecting taxpayers in this respect was noted by Chirinos Sota, *supra* n. 72, at p. 103.

OECD Model (2014). Brazil has also signed the Council of Europe-OECD Mutual Assistance Treaty (1988), although this is not yet in force. Another tendency is the signature of specific TIEAs, such as the Brazil-United States Exchange of Information Agreement (2007),[78] enacted by Brazil by way of Decree 8.003/2013.[79] This brings to light the question regarding the efficacy over time of such juridical instruments in relation to facts that occurred before the entry into force of the relevant TIEA. The question is, therefore, as a tax treaty has come into force that permits the exchange of information with a given jurisdiction or that widens the existing scope of the exchange of information, for example, in authorizing automatic exchange where only exchange by request was previously possible, can such a tax treaty be extended to apply to facts that happened prior to its entry into force? This issue raises an issue that involves the application of the tax law over time, i.e. "intertemporal tax law".

With regard to compulsory rules, the Brazilian CTN is clear, in article 105, when it establishes the general rule that:

> the tax legislation is immediately applicable to future and pending taxable events, the latter being defined as those the occurrence of which has begun but has not been completed in accordance with article 116.

Exceptions that permit the retroactive application of the tax legislation are set out in article 106 of the CTN. The rule in the CTN confirms the rule of non-retroactivity in respect of tax laws in article 150(III)(a) of the Brazil Federal Constitution.

The objectionable retroactivity of laws, as explained by Maximiliano (1946), applies if:

> the facts that brought about the constitution or extinction of a juridical situation governed by the earlier rule did not have the power to do so; or, on the contrary, the facts that had not given rise to the constitution or extinction of a juridical situation when the previous provision was in force, had power to produce something else.[80]

The general rule of non-retroactivity of the tax laws would, however, appear not to apply to rules that deal with "accessory obligations" and tax procedures.[81] This is because the rule that permits the exchange of tax information does not give rise to a tax obligation. On the contrary, it only allows the taxing state to obtain further information concerning the taxable event, such that it may apply its domestic legislation correctly.

The creation of new instruments of control, which are to be applied to facts unaffected by this pre-emption, does not conflict with the rule regarding the non-retroactivity of laws, as it does not give rise to a new tax obligation, but, rather, seeks to give a guarantee to the instruments of the tax authorities to verify a taxable event.

This view is corroborated by article 144(1) of the Brazilian CTN, which reads as follows:

> The assessment relates to the date of occurrence of the taxable event and is governed by the law then in force, even if later modified or repealed.
>
> 1. The assessment is subject to legislation that, after the occurrence of the taxable event, may have instituted new criteria for calculation or inspection procedures, increased the powers of investigation of the administrative authorities, or granted to the tax liability additional guarantees or privileges, except in the latter case for the purpose of attributing tax liability to third parties.

On examining this provision, Lodi Ribeiro (2010) adopted an interpretation in line with that argued previously in this section, in stating that:

> retroactivity as regards the procedural aspects, provided it is limited to these, does not violate art. 150, III (a), of the Federal Constitution, since nothing is being changed regarding the elements necessary to confer foreseeability in relation to the event that is to provoke the obligation to pay, nor the amount payable, nor even to whom payment is to be made. Such procedural rules, not bearing any relation to the contributive capacity defined by the tax laws, can have retroactive effects and may even be applied analogically.[82]

Cubero Truyo and Diáz Ravn (2012) report that, in Spain, an express rule was included in a number of tax treaties in stating the possibility of exchange of information in relation to facts that had occurred before signing of the tax treaty.[83] Such an approach could be adopted by Brazil. However, considering that the discussion in Brazil in relation to the issue is carried on at a constitutional level, a provision in a tax treaty would be of little value if it were subsequently held that the exchange of information in relation to past events violated the rule of non-retroactivity.

10. The Illegality of the Transfer of Information Received by the Applicant State to a Third State

An important aspect relating to the exchange of information refers to the possibility of the state requesting information transferring it to a third state, based on another international treaty. In other words, say that Brazil sends information requested by Portugal to Portugal. Could the competent authorities in Portugal transfer this information to France? The author believes that, in general, the answer to this question must be in the negative.

In fact, as noted in section 1., the exchange of tax information between sovereign states that involves Brazil is only possible in accordance with an international treaty authorizing such an exchange. On the other hand, it is because of this that the first stage in an information exchange procedure must be a careful check to establish whether the

78. *Agreement between the Government of the United States of America and the Government of the Federative Republic of Brazil for the Exchange of Information relating to Taxes* (20 Mar. 2007), Treaties IBFD.
79. BR: Decree 8.003/2013 of 15 May 2013.
80. C. Maximiliano, *Direito Intertemporal ou Teoria da Retroatividade das Leis* p. 37 (Freitas Bastos 1946).
81. The author is aware of the current heated debate regarding the legal correctness of use of the term "accessory obligation". However, as this topic does not form part of this article, the author retains the use of the expression, which has been adopted by the Brazilian CTN and other Brazilian non-constitutional tax legislation.
82. R. Lodi Ribeiro, *Limitações Constitucionais ao Poder de Tributar* p. 85 (Lumen Juris 2010).
83. A. Cubero Truyo & N. Diáz Ravn, *Convenios para Evitar la Doble Imposición Suscritos por España y Modelo de la OCDE* p. 315 (Tirant Lo Blanch 2012).

requirements in the Brazilian Federal Constitution and the international treaty have been satisfied.

If this is the necessary requirement for a legal exchange of information, in principle of the transfer of the information by the requesting state to a third state would be incompatible with Brazilian law. The only situation where it would be possible to contemplate the possibility of such a second exchange would be in those in which all the three, or more, of the states were parties to the same multilateral agreement in respect of the exchange of information. In such circumstances, as the grounds for the exchange would be the same under the relevant tax treaties, it appears to the author that there would be no impediment to the transfer of the information received by the requesting state. This view has been corroborated by the OECD and by the Global Forum in the report "Keeping it Safe", in which it is stated that:

> information may not be disclosed to a third country unless there is an express provision in the bilateral treaty allowing it.[84]

84. OECD, *Keeping it Safe* p. 13 (OECD 2012).

11. Conclusions

The exchange of tax information has been treated as a matter of state. The rights of taxpayers do not form part of the daily scheme of things. A form of state of exception is developing with regard to tax matters, under which taxpayers are treated as wrongdoers who are not entitled to such basic and fundamental rights as the right to receive notice. The purpose of this article is, therefore, to provoke a debate on this important subject, before it is too late.