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TAX SYSTEM IN TIMES OF CRISIS: THE CASE OF THE COVID-19 PANDEMIC

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1. Fiscal system, tax benefits, taxpayer's ability to pay and indirect goals of taxation

Tax benefits¹² are the result of a system of tax monopolization by the State. In the particular case of Portugal, that process of centralization was set in motion with the Portuguese tax reform of 1830, which began to dismantle the tax system of the old regime that was, in fact, a coexistence of three systems: the Church's tax system, the State' tax system and the manor' tax system.

¹ Tax benefit is a similar expression to tax subsidy, tax relief, tax concession, and, in german, *Indirekte Förderungen*. Each of these names identifies the positive part of the concept, that is, the advantage coming from the public will to waive certain public revenue. Nevertheless, each of them has a specific nature within the wider concept of tax expense (which all of them are).

² On the concept of tax benefit see, in portuguese, NUNO SÁ GOMES, *MANUAL DE DIREITO FISCAL, CADERNOS DE CIÊNCIA TÉCNICA E FISCAL*, CENTRO DE ESTUDOS FISCAIS, DGCI, LISBOA, 1993, p. 323; NUNO SÁ GOMES, *TEORIA GERAL DOS BENEFÍCIOS FISCAIS*, LISBOA: CCTF, 1991, p. 12; MARIA PAULA VAZ FREIRE, *NASCIMENTO, MODIFICAÇÃO E EXTINÇÃO DOS BENEFÍCIOS FISCAIS*, LISBOA, 1995, *PASSIM*; ALBERTO XAVIER, *MANUAL DE DIREITO FISCAL*, LISBOA, 1974, PAGES 291-293; AMÁVEL SÍLVIO DA COSTA/J. H. PAULO RATO RAINHA/FREITAS PEREIRA, *BENEFÍCIOS FISCAIS EM PORTUGAL*, COIMBRA, 1987, PAGES 15-16; AND IN ITALIAN, NICOLA D'AMATI, *AGEVOLAZIONI ED ESENZIONI TRIBUTARIE*, IN *NOVISSIMO DIG. IT.*, APPENDICE, TORINO 1980, p. 153; FRANCO FICHERA, *LE AGEVOLAZIONI FISCALI*, PADOVA, 1992, *PASSIM*; FRANCO FICHERA, *IMPOSIZIONE ED EXTRAFISCALITÀ NEL SISTEMA COSTITUZIONALE*, ESI, NAPOLI, 1973, *PASSIM*; MOSCHETTI-ZENNARO, "AGEVOLAZIONI FISCALI", IN *DIGESTO*, IV ED., TORINO, 1988, I, p. 84; SALVATORE LA ROSA, "ESENZIONI E AGEVOLAZIONI TRIBUTARIE", IN *ENC. GIUR. TRECCANI*, XIII, ROMA, 1989, *PASSIM*; SALVATORE LA ROSA, "ESENZIONE" (DIRITTO TRIBUTARIO), IN *ENC. DIR.*, XV, MILANO, 1966, p. 567; SALVATORE LA ROSA, "LE AGEVOLAZIONI TRIBUTARIE", IN *TRATTATO DI DIRITTO TRIBUTARIO* (ANDREA AMATUCCI ED.), I, 1, PADOVA, 1994, p. 401; SALVATORE LA ROSA, "VERSO LA SCOMPARSA DELLE AGEVOLAZIONI TRIBUTARIE?", IN *RIV. DIR. TRIB.*, 1991, I, p. 173.

In fact, despite the fact that the Renaissance' taxation system had a national component, it was very distant from the characteristics of generality and equality that stand out in modern tax systems, which induced the development of the concept of "tax privilege".

"Tax privileges" or "tax favors" "are situations of tax advantage characterized by excessive favoring of certain tax subjects in violation of the principle of equality, which occurred in the period prior to the current constitutionalism".³ The starting point of this concept resides in the notion of "ability to pay", which is a logic and conceptual condition of all principles that justify and simultaneously impose limits on the duty of contribution.⁴ The ability to pay is generally seen as⁵:

- a) One of the criteria on which a given taxation policy should be drawn upon - though not the only one - and one that expresses the idea of tax justice (since it is a part of a wider principle which is tax equality);
- b) The basis of "the normative system of taxation"⁶ - for where a given

³ JORGE BACELAR GOUVEIA, "OS INCENTIVOS FISCAIS CONTRATUAIS AO INVESTIMENTO ESTRANGEIRO NO DIREITO FISCAL PORTUGUÊS - REGIME JURÍDICO E IMPLICAÇÕES CONSTITUCIONAIS", IN MINISTÉRIO DAS FINANÇAS - DGCI, XXX ANIVERSÁRIO DO CENTRO DE ESTUDOS FISCAIS - COLÓQUIO SOBRE "A INTERNACIONALIZAÇÃO DA ECONOMIA E A FISCALIDADE", LISBOA, DGCI, 1993, p. 277.

⁴ In the draft bill of the "Tax Benefits Code", prepared by ALBERTO PINHEIRO XAVIER/ANTÓNIO LUCIANO DE SOUSA FRANCO, LISBOA, 1969, WE CAN FIND, IN ARTICLE 1/1, THAT SAME IDEA THAT WE HEREBY REPRODUCE: "ALL PEOPLE ARE OBLIGED, UNDER THE LAW, TO CONTRIBUTE, IN ACCORDANCE TO THEIR PERSONAL ASSETS, TO PUBLIC COSTS."

⁵ See MIGUEL ÁNGEL MARTÍNEZ LAGO, LEONARDO GARCÍA DE LA MORA, *LECCIONES DE DERECHO FINANCIERO Y TRIBUTARIO*, 2ND ED., MADRID: IUSTEL, PORTAL DERECHO, SA., 2005, PAGES 73-75.

⁶ In an attempt to answer the question raised by MANUEL HENRIQUE DE FREITAS PEREIRA, IN *FISCALIDADE*, COIMBRA, ALMEDINA, P. 355, NOTE 518, AS TO THE IDEA THAT THE MEANING OF "NORMATIVE SYSTEM OF A TAX" IS NOT QUITE ESTABLISHED IN THE SCIENTIFIC COMMUNITY, WE THINK THAT THE ANALYSIS SHOULD CONCENTRATE FIRSTLY ON WHAT IS THE PLACE OCCUPIED BY NORMS THAT CREATE TAX BENEFITS WITHIN THE LEGAL ORDER AND, AFTERWARDS, ON SETTING OUT THE LIMITS OF THE AFOREMENTIONED NORMATIVE SYSTEM. ON THE SUBJECT, SEE KLAUS TIPKE, JOACHIM LANG, *STEUERRECHT* (17TH ED.), KÖLN, VERLAG DR. OTTO SCHIMDT, 2002, PAGES 719-722, AND JOSÉ CASALTA NABAIS, *O DEVER FUNDAMENTAL DE PAGAR IMPOSTOS*, COIMBRA, ALMEDINA, 1998, PAGES 645 - 654. FOR FURTHER DEVELOPMENTS SEE KARL HEINRICH FRIAUF, *VERFASSUNGSRECHTLICHE GREZEN DER WIRTSCHAFTSLENKUNG UND SOCIALGESTALTUNG*, TÜBINGEN, 1966, KRAINER WERNSMANN, "DIE VERFASSUNGSRECHTLICHE RECHTFERTIGUNG DER ABZUGSFÄHIGKEIT VON VORSORGEAUFWENDUNGEN - ZUGLEICH ZUM UNTERSCHIED ZWISCHEN EXISTENZNOTWENDIGEM UND INDISPONIBLEM EINKOMMEN", *STEUER UND WIRTSCHAFT (StuW)*, 1998, PAGES 317-333, M. SCHADEN, *DIE STEUERVERGÜNSTIGUNGEN ALS STAATLICHE LEISTUNG, FINANZVERFASSUNG UND GLEICHHEITSSATZ*, SINZHEIM, 1998, KLAUS VOGEL, "VERFASSUNGSRECHTSPRECHUNG ZUM STEUERRECHT", IN *SCHRIFTENREIHE DER JURISTISCHEN GESELLSCHAFT ZU BERLIN*, HEFT 160, 1999, RAINER WERNSMANN, *DAS GLEICHHEITSWIDRIGE STEUERGESETZ - RECHTSFOLGEN UND RECHTSSCHUTZ*, MÜNSTERISCHE BEITRÄGE ZUR RECHTSWISSENSCHAFT, Bd. 128, BERLIN, 2000, RAINER WERNSMANN, "VERFASSUNGSRECHTLICHE ANFORDERUNGEN AN DIE EINFÜHRUNG UND AUSGESTALTUNG VON STEUERVERGÜNSTIGUNGEN", *NEUE JURISTISCHE WOCHENSCHRIFT (NJW)*, 2000, PAGES 2078-2080.

tax does not consider the taxpayer's ability to pay it can be deemed as confiscatory;

- c) A sort of moral justification for the duty to pay taxes, thus contributing to their vindication;
- d) An underlying component of all public policy decisions, thus leading public decision makers to bear in mind the social and economic status of all taxpayers throughout the decision making process;
- e) Having an elastic content that has to be determined on a case-by-case basis, notwithstanding the need to establish its basic core;
- f) The foundation and expression of the contributory principle that can be applied in other kinds of public charges.

In light of the foregoing, the concept of tax benefit can in fact be considered as a derogation of the principle of the ability to pay, which is one of the representations of the notion of tax equality, since it disregards the social and economic position of the taxpayer.

Actually, the origin of the tax benefit concept is associated with the doctrine of limitations to instruments of political power, which began in the medieval period⁷, making a case that the limitations to political power reside in the private sphere – with the legitimacy of a tax benefit beginning where the legitimacy to tax ends. The underlying idea is that citizens should only contribute to the satisfaction of public needs in view of their economic and social benefit. This means that the moment in which the State imposes a tax that has no relationship whatsoever with the taxpayer's ability to pay is the moment in which the State enters the private sphere in an illegitimate way, which should be safe from public intervention. Ultimately, this is a matter of social responsibility of the State⁸.

Thus, tax benefits as such are outside the traditional unavailability framework of taxation regulation and enter the field of availability that resides outside that regulation's core⁹.

⁷ On the doctrine of limitations to instruments of political power see, among others, the work of ANTÓNIO MANUEL HESPANHA, *AS VÉSPERAS DO LEVIATHAN – INSTITUIÇÕES E PODER POLÍTICO, PORTUGAL, SÉCULO XVII*, COIMBRA, ALMEDINA, 1994, PAGES 472-487.

⁸ On the evolution and actual meaning of the idea of Welfare State see, among others, HAROLD L. WILENSKY, *RICH DEMOCRATIES – POLITICAL ECONOMY, PUBLIC POLICY AND PERFORMANCE*, LONDON, UNIVERSITY OF CALIFORNIA PRESS, 2002, PAGES 430-493, AND, MORE GENERALLY, ROBERT NOZICK, *ANARCHY STATE AND UTOPIA*, BASIC BOOKS, 1974, C MURRAY, *LOSING GROUND*, BASIC BOOKS, 1974, LUTZ LEISERING, ROBERT WALKER (EDS), *THE DYNAMICS OF MODERN SOCIETY*, POLICY PRESS, 1988, GOSTA ESPING-ANDERSEN, *THE THREE WORLDS OF WELFARE CAPITALISM*, POLITY, 1990, P. SPICKER, *SOCIAL POLICY: THEMES AND APPROACHES*, PRENTICE HALL, 1995, P. ALCOCK, A. ERSKINE, M MAY (EDS), *THE STUDENT'S COMPANION TO SOCIAL POLICY*, BLACKWELL 2003, R. M. TITMUS, *ESSAYS ON THE WELFARE STATE*, ALLEN AND UNWIN, 1963, J. LEGRAND/C. PROPPER/R. ROBINSON, *THE ECONOMICS OF SOCIAL PROBLEMS*, MACMILLAN 1992, PAUL PIERSON (ED.), *THE NEW POLITICS OF THE WELFARE STATE*, OXFORD, 2001.

⁹ The Portuguese legislator, in a somehow unclear way, prefers to talk about "rule-taxation" or "normal-

From this perspective, the concept of tax benefit may well be considered as the result of a semantic evolution of the concept of privilege over time, one that had its beginning with Roman law, where there was a certain terminological vagueness around the two concepts that made it difficult to distinguish between them. Today, we can say that the concept of privilege refers to a form of private law, whether individual or collective, which derogates the general law, while the concept of benefit relates to a privilege granted by grace or liberality, in addition to general law¹⁰.

In Portugal, the notion of privilege exists since what is usually called the “tax revolution”, which occurred in 1249¹¹ - the year that marks the end of taxation policy stemming from predatory borders -, since it was in the Spring of that year that the last Muslim square was occupied in the Algarve. On the other hand, it began to be seriously challenged with the advent of nineteenth-century liberal revolutions, although back then only on the grounds of a principle of formal equality (*i.e.*, equality before the law) which was very far from the material concept of equality that is now recognized¹². It is thus in the realm of the principle of equality that the notion of privilege begins its approximation to the notion of benefit as a “special right that the law grants in favor of certain people or things, as an exception or exemption from the general law”¹³. At that time, though, that still didn't mean that the notion of tax equality was being born (since the idea stemmed solely from a formal concept of equality, one which was very dear to that period of history).

taxation” (see Article 12 of Tax Benefits Code - EBF) without ever specifying of that is. However, we were able to put together a few clues, which allow us to highlight the following circumstance: the legislator wants to keep that concept because certain types of tax benefits contemplate partial reliefs, which could become problematic at the time of their revocation. Let us imagine a certain tax benefit that provided for a lower tax rate to certain entities (say 20% instead of 25%). If that benefit was revoked it would not be enough to establish that the revocation of such benefit would simply reinstate the application of that tax to those entities, since they were already taxed, only in a smaller rate. Therefore, what the legislator means by “rule-taxation” is that the reinstatement of the “rule-taxation” means the reinstatement of the taxation that is usually applicable to similar entities, if no discrimination is applied. This concept of “rule-taxation” does not match, however, the essential core of the tax that we hereby present, as the latter has an evaluative element that the first doesn't have as it refers to the mere disappearance of partial reliefs from the legal order.

¹⁰ See the terminological clues identified with reference to the study of the Modern State, in ANTÓNIO PEDRO BARBAS HOMEM, *O ESPÍRITO DAS INSTITUIÇÕES – UM ESTUDO DE HISTÓRIA DO ESTADO*, COIMBRA, ALMEDINA, 2006, PAGES 203-224.

¹¹ See RICHARD BONNEY/W. M. ORMROD, «CRISIS, REVOLUTIONS AND SELF-SUSTAINED GROWTH: TOWARDS A CONCEPTUAL MODEL OF CHANGE IN FISCAL HISTORY», IN, W. M. ORMROD, MARGARET BONNEY AND RICHARD BONNEY (EDS.), *CRISIS, REVOLUTIONS AND SELF-SUSTAINED GROWTH. ESSAYS IN EUROPEAN FISCAL HISTORY, 1130-1830*, STAMFORD, 1999, PAGES 1-21.

¹² ANTÓNIO PEDRO BARBAS HOMEM, *O ESPÍRITO...*, *OP. CIT.*, PAGES 230-231.

¹³ The statement belongs to ANTÓNIO PEDRO BARBAS HOMEM, IN *O ESPÍRITO...*, *OP. CIT.*, P. 231.

The idea of benefit as a mere exception or exemption from general law would undergo a serious change in the beginning of the welfare state¹⁴. It is only then that the principle of tax equality arises *per se*, understood in a material sense and embodied in two important corollaries: generality and equality of taxes¹⁵. Generality means that no one can be excluded from the duty to pay taxes, while equality demands that the payment of taxes meets the same condition. That is also the moment in which the ability to pay begins to be understood as something unavailable, working as a standardizing criteria for the payment of taxes.

This nature is only considered, however, in a jusnaturalistic economical and sociological fashion¹⁶ as it is only in that plan that the fair distribution of the duty to contribute can be designed in terms of equality, proportionality and progressivity or regressivity. Out of these parameters, the legislator / decision maker may decide within the limits provided by the financial functions of the State. And this is where other indirect goals of taxation step into action since outside the field of unavailability that characterizes the very essence of any taxation policy, the main constraint isn't the one of tax equality, but the one of policy options which are determined by the government or the legislator.

It should, however, be noted that not all tax reliefs show the existence of a tax benefit, since the latter implies a certain positioning of the taxpayer as to the satisfaction of his needs, in a public-private duality. Furthermore, the derogation implicated in a tax benefit results from a decision making process that is focused in encouraging certain economic, social or cultural behavior of taxpayers. We will try, therefore, to disentangle the various elements of the concept in the following paragraphs.

2. Tax benefits as a derogation to the principle of tax equality

2.1. Tax benefits as a derogation to the principle of tax equality

A rule that creates a tax benefit derogates the principle of tax equality, however being legitimized or even required by a particular constitutional

¹⁴ The moment in which the Welfare State had its beginning is not consensual. However, an important milestone of its founding process in England is attributed to the commonly known "Beverige Report" ("The Report of the Inter-Departmental Committee on Social Insurance and Allied Services"), dated 1942, which formed the basis for the post-war reforms that would become known as the Welfare State, which include the expansion of National Insurance and the creation of the National Health Service. The Welfare State went on from 1945 until 1980, when a new wave of monetarism was promoted as an alternative macroeconomic theory based on a free market with minimal intervention, namely in the United Kingdom.

¹⁵ For further developments see JOSÉ CASALTA NABAIS, *O DEVER...*, OP. CIT., PAGES 438-443.

¹⁶ VÍTOR FAVEIRO, *O ESTATUTO DO CONTRIBUINTE - A PESSOA DO CONTRIBUINTE NO ESTADO SOCIAL DE DIREITO*, COIMBRA, COIMBRA EDITORA, 2002, PAGES 154-155.

requirement. From this perspective, it is of utmost importance to focus both on the concept and on the extension of tax equality.

Whether in an alternative or cumulative fashion, the State can only tax and spend:

- a) According to the so-called benefit logic (which we would call *quid pro quo* logic), by taking into account what the taxpayer receives, that is, the public services of which he can enjoy¹⁷;
- or
- b) According to the so-called “ability to pay logic” (following the ideas presented by Guicciardini in the 16th century, who advocated the ideal of progressive taxation on the ability to pay, or even the thought of Bodin, who argued the idea of contributive faculty as a basis for taxation under the rule of proportionality), the State can only tax within certain limits which are defined with reference to degrees of wealth, income or expenditure.

According to the principle of benefit, taxation should be defined in terms of consideration as tax justice should be understood under a reciprocity logic. In accordance, taxes should be regarded as prices for the protection and coordination functions attributed to the State, whenever they are needed or requested by the individual. Under this logic, there is obviously no space to tax an individual who does not benefit from public services.

However, the principle subsides when one takes into account certain public goods or services which cannot be waived by citizens (although under the logic of the Social State this ability to waive public services should not be mistaken for the non-enjoyment of public goods or services – this would lead us to the discussion as to the notion of pure public goods which is outside the scope of this work)¹⁸. The principle of benefit or equivalence is, thus, overridden by the fact that there are functions pursued by the State which may not be waived voluntarily by the taxpayer.

On the other hand, the unilateral nature of the tax concept¹⁹, which

¹⁷ According to GRIZIOTTI, in “IL POTERE FINANZIARIO”, in SAGGI SUL RINNOVAMENTO DEGLI STUDI DI SCIENZA DELLE FINANZE E DI DIRITTO FINANZIARIO, MILANO, 1953, PÁGS. 289 e SS..

¹⁸ Public goods are goods that are both non-excludable and non-rivalrous in that individuals cannot be effectively excluded from use and where use by one individual does not reduce availability to others. Pure public goods (or services) are *equally available* to all members of the relevant community. A single unit of the good, as produced, provides a multiplicity of consumption units, all of which are somehow identical. Impure public goods are goods that are neither purely private nor purely public. Impurity or imperfect publicness in this respect has been defined as any departure from the availability of “equal quantities of homogeneous-quality consumption units” to all customers.

¹⁹ On the concept of tax see, in Portugal, PEDRO SOARES MARTINEZ, *DIREITO FISCAL*, COIMBRA, ALMEDINA, 1995, PAGES 26-57, JOSÉ CASALTA NABAIS, *DIREITO FISCAL* (4TH ED.), COIMBRA, ALMEDINA, 2006, PAGES 10-66,

distinguishes it from other kinds of public charges, is a stranger to the idea of consideration implied in the principle of benefit, allowing us to put forward the following assertion: all tax benefits, because they are located in the field of taxes, constitute a derogation to the ability to pay and not to the principle of benefit.

According to the ability to pay principle, taxation should be designed to meet every taxpayer's personal situation. In fact, the fair tax²⁰ is one that ensures the substantive equality in the distribution of tax burdens, *i.e.*, that ensures that those who have the same ability to pay are charged with the same tax (horizontal equity) and that those who have different abilities to pay are charged differently (vertical equity).

Furthermore, the ability to pay principle does not require an autonomous constitutional support since it stems from the general principle of equality in articulation "with the constitutional rules and principles relating to taxes or even to fundamental rights"²¹.

2.2. The essential core of a tax, tax benefits and the derogation to the ability to pay principle

The starting point of this analysis is, in our view, the rehabilitation of the doctrinal principle of the ability to pay (or of economic capacity)²². Recently, the importance of the ability to pay as a measure of taxation and even as a criterion for the allocation of certain public benefits has become a focal point in the debate on taxes and measures of taxation. In fact, the importance of that principle has allowed for the construction of a new fundamental right to "an adequate contribution", one that certainly binds the legislator namely by forcing him to

JOSÉ LUÍS SALDANHA SANCHES, *MANUAL DE DIREITO FISCAL* (2ND ED.), COIMBRA, COIMBRA EDITORA, 2002, PAGES 13-16.

²⁰ On tax justice see KLAUS TIPKE, *DIE STEUERRECHTSORDNUNG, ...*, 1993, PAGES 260-261 AND, FROM THE SAME AUTHOR, *BESTEuerungSMORAL UND STEUER MORAL*, KÖLN, WESTDEUTSCHER VERLAG GMBH.

²¹ JOSÉ CASALTA NABAIS, *O DEVER...*, *OP. CIT.*, P. 449.

²² We assume the conceptual identity of the two concepts. Although one could argue in favor of their distinction, there's no relevant normative reason to do it. About this subject see F. MOSCHETTI ("LA CAPACITÀ CONTRIBUTIVA - PROFILI GENERALI", IN F. MOSCHETTI ET AL., *LA CAPACITÀ CONTRIBUTIVA*, MILANO, CEDAM, 1993, PAGES 25-26) TO WHOM THE EVALUATION OF THE ABILITY TO PAY IS A SYNTHESIS OF THE FOLLOWING ELEMENTS: "A) ARTICLE 53 [OF THE ITALIAN CONSTITUTION] AIMS AT ESTABLISHING A JUSTICE CRITERION IN TAXATION ISSUES; B) THE MENTIONED CRITERION IS DIFFERENT FROM THE PRINCIPLE OF EQUALITY AND FROM FORMAL STANDARDS LIKE SIMPLE RATIONALITY AND LEGISLATIVE COHERENCE; C) THE SAME CRITERION ASSUMES, AS A NECESSARY BUT NON-SUFFICIENT CONDITION, THE ECONOMIC CAPACITY OF THE TAXPAYER; D) THE ECONOMIC CAPACITY SHOULD BE ABOVE A MINIMUM AND SHOULD BE CONSIDERED AS ADEQUATE CONSIDERING THE LEVEL OF PUBLIC EXPENSES AND GIVEN THE VALUES ESTABLISHED IN THE CONSTITUTION; E) THE AFOREMENTIONED PARITY MAY THEREFORE RESULT IN A CONCEPTUAL DIFFERENCE BETWEEN THE ABILITY TO PAY AND THE ECONOMIC CAPACITY". FROM THIS PERSPECTIVE, THE ABILITY TO PAY REFERS ONLY TO A MEANS OF FINANCING AND CAN BE COMPOSED OF SEVERAL DEGREES ACCORDING TO THE EVIDENCED ECONOMIC CAPACITY.

balance that principle with others that, in a given situation, point to a different direction²³.

The general principle of equality claims, according to Leibholz, for a particular set of individual rights, which are directed at omissions, *i.e.*, “omissions or arbitrary disruptions of the *de jure* equality”.^{24 25} From this perspective, we can identify three different types of rights: definitive and abstract equality rights, definitive and concrete equality rights and *prima facie* abstract equality rights. All abstract rights lead to a set of concrete and very different rights that are usually called “defense rights”. It is this dialogic relationship that explains the failure of the State, which, in turn, can lead to a demand for factual protection whether of a positive status (requiring public action) or of a negative one (requirement not public performance)²⁶.

2.3. Indirect goals for taxation and the ability to pay principle

According to Maffezzoni²⁷, the legislator is entitled with a significant degree of freedom in shaping the content of the ability to pay principle, *i.e.*, in defining the most suitable way to finance public expenditure through various normative schemes that define the amount of revenue necessary to afford the proper mix of public services²⁸.

²³ On the rehabilitation of the ability to pay principle and its double standard as a measure of taxation and as a fundamental right see PEDRO M. HERRERA MOLINA, *CAPACIDAD ECONÓMICA Y SISTEMA FISCAL – ANÁLISIS DEL ORDENAMIENTO ESPAÑOL A LA LUZ DEL DERECHO ALEMÁN*, MADRID, MARCIAL PONS, 1998, PAGES 23-80 AND, MORE RECENTLY, SÉRGIO VASQUES, “CAPACIDADE CONTRIBUTIVA, RENDIMENTO E PATRIMÓNIO”, IN *FÓRUM DE DIREITO TRIBUTÁRIO*, BRASIL, NR. 11, 2004.

²⁴ Cfr. GERHARD LEIBHOLZ, *DIE GLEICHHEIT VOR DEM GESETZ. EINE STUDIE AUF RECHTSVERGLEICHENDER UND RECHTSPHILOSOPHISCHER GRUNDLAGE* (2ND ED.), MUNICH/BERLIN, 1959, P. 235.

²⁵ *Legal equality is a product of a collision of principles and therefore is different from factual equality – hence the “equality-paradox” (since what is equal treatment according to one is unequal treatment according to the other, and vice versa, if both equalities are put together under a single principle of equality that principle would contain an equality-paradox)* [ROBERT ALEXY, *TEORIA DE LOS DERECHOS FUNDAMENTALES* (TRAD. ERNESTO GARZÓN VALDÉS), MADRID, CENTRO DE ESTUDIOS POLÍTICOS Y CONSTITUCIONALES, 2002, P. 404]. FOR EXAMPLE, UNTIL 2010, ARTICLE 31/2 OF CIRS, WHICH CREATES A SIMPLIFIED REGIME OF TAXATION ON PROFESSIONAL INCOME ESTABLISHED THAT THE DETERMINATION OF NET INCOME IN THE CASE OF PROFESSIONAL INCOME DEPENDED ON THE APPLICATION OF THE RATIOS PROVIDED FOR THAT LEGAL RULE AS LONG AS A MINIMUM OF TAXABLE INCOME WAS PRESERVED. THIS MINIMUM TAXABLE INCOME ENSURED LEGAL EQUALITY OF ALL TAXPAYERS FOR AS LONG AS THEIR INCOME WAS BELOW THAT MINIMUM THEY ALL HAD TO PAY THE SAME AMOUNT OF TAX. HOWEVER, IT DID NOT GUARANTEE FACTUAL EQUALITY SINCE MANY TAXPAYERS HAD TO PAY THAT MINIMUM DESPITE THE FACT THAT THEY DID NOT RAISE INCOME AT ALL.

²⁶ See ROBERT ALEXY, *TEORIA...*, *OP. CIT.*, PAGES 415-418.

²⁷ FEDERICO MAFFEZZONI, *IL PRINCIPIO...*, *OP. CIT.*, PAGES 325-326.

²⁸ As an example, the author refers to the fact that progressive taxes may assume several ways: taxes on real income that include several kinds of income, progressive taxes on unitary and global

However, the discretion assigned to the legislator “cannot be used arbitrarily and should be used in a way that allows for the achievement of the public purposes that have been previously defined”²⁹ such as “the expansion or contraction of investment and consumption, redistribution, etc.”. Thus, it is the previously established set of goals that defines the content and extension of the ability to pay principle.

Let us not forget, however, that the ability to pay is an instrument of taxation as a way of raising revenue to finance direct public expenditure and not public expenditure related to other indirect goals. From this perspective, the sharing of public revenue would not be possible unless some kind of modeling of the content of the ability to pay principle³⁰, whether according to the benefit deriving from public expenditure or to indicators of the taxpayer’s ability to pay, could be applied.

At this point, it should be noted that the ability to pay principle cannot be disregarded as it stands a basic principle in defining the concrete measure of taxation that can be imposed. That doesn’t mean, however, that it shouldn’t be modeled after other goals elected by the Constitution and concretely singled out by the legislator from the *ensemble* of public services and goods to be provided, as well as after the economic capacity of the taxpayers^{31 32}. So, as long as there are

income whether spread or not spread over several categories; singular income can be effective or presumed; corporate income can be determined through ordinary or accelerated depreciation, etc.

²⁹ FEDERICO MAFFEZZONI, *IL PRINCIPIO...*, *OP. CIT.*, p. 326.

³⁰ Similarly, see the economic analysis of LEONARD DUDLEY/CLAUDE MONTMARQUETTE, “IS PUBLIC SPENDING DETERMINED BY VOTER CHOICE OR FISCAL CAPACITY?”, *IN THE REVIEW OF ECONOMICS AND STATISTICS*, VOL. LXXIV, NR. 3, 1992 (AUGUST), PAGES 522-529. THE AUTHORS ARGUE THAT WHEN “TAX ABILITY IS DISTINCT FROM THE AMOUNT OF PUBLIC SPENDING DESIRED BY VOTERS, IT’S THE SIDE WITH THE LEAST COMPARATIVE FORCE (SHORT SIDE) THAT DETERMINES THE LEVEL OF EFFECTIVE SPENDING. THUS, WHEN A COMMUNITY’S OVERALL ABILITY TO PAY EXCEEDS THE AMOUNT OF SPENDING DESIRED BY THAT SAME COMMUNITY, POLITICAL COMPETITION ENSURES THAT THE VOTER’S CHOICE PREVAILS. NEVERTHELESS, WHEN THE PUBLIC DECISION MAKER IS INCAPABLE OF GENERATING ENOUGH REVENUE THROUGH TAXATION, CREDIT OR “SEIGNIORIAGE” (THUS DECREASING CONSUMER’S PURCHASING POWER THROUGH AN INCREASE IN THE MONEY SUPPLY) TO FINANCE PUBLIC SPENDING, EXPENSES SHOULD DECREASE IN REAL TERMS (...) IN ORDER TO PREVENT INFLATION”. THIS MEANS, IN SUM, THAT THE DEROGATION OF THE CONTENT OF THE ABILITY TO PAY PRINCIPLE DEPENDS ON THE LEVEL OF PUBLIC SPENDING DESIRED BY VOTERS AND EXPLORED IN ELECTIONS.

³¹ Consider the need to help a country’s least developed areas or even the ones hit by natural disasters. In each of these situations, there are different “abilities to pay”. Which allows us to argue, like F. MOSCHETTI (“LA CAPACITÀ...”, *OP. CIT.*, PAGES 42-47), THAT THE ABILITY TO PAY HAS SEVERAL DEGREES ACCORDING TO EACH OF ITS VARIABLES, THE CONTENT OF WHICH IS DENIFIED WITH REFERENCE TO THE CONSTITUTIONAL SYSTEM AT STAKE.

³² According to MOSCHETTI (F. MOSCHETTI, “LA CAPACITÀ...”, *OP. CIT.*, PAGES 46-47), THE SCOPE OF DISCRETION GRANTED TO THE ITALIAN LEGISLATOR AS TO THE ESTABLISHMENT OF INDIRECT GOALS FOR TAXATION SHOULD BE GUIDED BY THE FOLLOWING PRINCIPLES: (1) SITUATIONS OR FACTS THAT DO NOT SHOW ANY KIND OF ECONOMIC CAPACITY CANNOT BE SUBJECT TO TAXATION; (2) AS A RESULT OF A SYSTEMATIC INTERPRETATION OF ARTICLE 53 OF

other indirect goals for taxation demanding the compression of the ability to pay principle in a proportional way, there's no reason why that can't be admitted, namely by the Constitutional Court³³.

3. Tax benefits as tax policy instruments to struggle global crisis: the case of the COVID-19 pandemic

Being an economic, social or cultural incentive³⁴, the tax benefit represents all the advantages granted to taxpayers with a view to obtaining a particular behavior, which would otherwise be achieved in a smaller scale. As an incentive, the tax benefit is somehow of a dynamic nature and should always be regarded in a prospective way instead of a static one, along with the tax preferences that it creates (except for those situations in which the reliefs apply to past situations, whether for political, social, defense, diplomatic or other reasons because in that case the incentive becomes a prize)³⁵.

The material content of the incentive is variable³⁶ but ultimately related to the right to development³⁷, which is internationally recognized, not only generally in Article 28 of the Universal Declaration of Human Rights³⁸ but mainly in Article 1 of the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights³⁹, which expressly provides for a right of the peoples to freely pursue economic, social and cultural development. This right entails that the peoples may not under any circumstances be deprived of their own means of subsistence.

In this context, the COVID-19 pandemic has brought about severe concerns relating to the subsistence of taxpayers jeopardizing this right to development. As a major public-health concerns that has spread across the world, the COVID-19

THE ITALIAN CONSTITUTION AND OF OTHER CONSTITUTIONAL NORMS, ECONOMIC CAPACITY SHOULD BE CONSIDERED AS PART OF THE ABILITY TO PAY; (3) NORMATIVE PRINCIPLES INVOKED BY TAX RULES SHOULD BE RESPECTED ALONG WITH THOSE RULES; (4) THE PRINCIPLE OF COHERENCE, WHICH STATES THAT TAXES SHOULD BE USED ACCORDING TO THEIR NATURE AND THUS AVOIDING PUNITIVE GOALS SHOULD ALSO BE RESPECTED.

³³ MAFFEZZONI, *IL PRINCIPIO...*, *OP. CIT.*, p. 329.

³⁴ Cfr. HERMES DOS SANTOS, "INCENTIVOS ECONÓMICOS", *POLIS*, VOL. III, p. 460.

³⁵ As argued by JORGE BACELAR GOUVEIA, in "OS INCENTIVOS FISCAIS CONTRATUAIS...", *OP. CIT.*, p. 278. MOREOVER, THE AUTHOR RECOGNIZES THAT "IS IT OBVIOUS THAT A CERTAIN FRAILTY HAS TO BE ATTRIBUTED TO THE DISTINCTION (BETWEEN DYNAMIC AND STATIC TAX BENEFITS) WHICH IS NOT ENTIRELY SAFE IN FRONTIER SITUATIONS IN WHICH IT IS DIFFICULT TO ESTABLISH THE RELATIONSHIP WITH ONE OF THE TWO TERMS" (PAGE 278, NOTE 30).

³⁶ Because it depends on the degree of State intervention in that given system.

³⁷ For further developments see EDUARDO PAZ FERREIRA, *VALORES E INTERESSES - DESENVOLVIMENTO E POLÍTICA COMUNITÁRIA DE COOPERAÇÃO*, COIMBRA, ALMEDINA, 2004, PAGES 198-200.

³⁸ Signed in the UN in December 10th 1948 (A/RES/217).

³⁹ Both adopted and opened for signature, ratification and accession by resolution 2200-A (XXI) of the General Assembly of the UN, by December 16th 1966.

pandemic has led to a disruption of global supply chains, paralyzed economic activity resulting therefrom, particularly in the tourism and services industries, and resulted in the fall of financial markets. Stemming from this framework is the expected setback of GDP Growth in 2020 which will probably be inexistent or even reach negative values.

The main challenge lies in the shift of the economic balance underlying the ability to pay principle which has been endangered in the case of several taxpayers both natural and legal persons by the (i) severe loss of income, (ii) need for significant investments on the taxpayers' part to create the necessary biosecurity conditions to prevent the propagation of the virus, (iii) lack of liquidity for firms.

In response to this shift, most countries have sought to implement targeted measures intended to counter the economic pressure incumbent upon economic markets. Most of these measures – which have been sanctioned on an European level by the European Union – do not qualify as tax incentives *per se* (since they do not imply a waiver of tax revenues). This is the case of tax-payment and reporting deferrals, accelerated refunds, suspension of tax inspections, direct financial support, among others, which have been put in place with a special focus on industries most affected by the spread of the virus across global markets.

The actual tax incentives approved or in the course of approval being characterized by the three principal elements of a tax incentive (i.e. chargeability, economic advantage, and financing) can generally be organized around 5 main areas of concern: (i) securing employment, (ii) facilitating acquisition of materials and goods to counter the virus outbreak, (iii) economic subsistence of corporate persons, (iv) mitigation of additional expenditure connected to the prevention of the virus., and (v) financing of investments and expenses made by State, regional or local bodies as well non-profit organizations in the management of the COVID-19 emergency-response. These 5 vectors compose the public policy option adopted by the Governments in pursuance to the legal mandate granted by the people under a principle of “no taxation without representation”⁴⁰.

This having been said, one would do well to note that, in line with what has been detailed above, these options are modelled both by the ability to pay principle and the Constitutional framework imposing economic, social and cultural rights. The similitude of these objectives should therefore come as no surprise in spite of the differences in tax systems across the world and more specifically across Europe. Accordingly, the nature of the adopted measures and the manner in which they propose to mold taxpayer behaviors and prevent adverse economic consequences through the granting of economic advantages is in itself quite similar also.

Specifically on the securing employment front, actions put into effect or

⁴⁰ On the subject see GUILHERME W. D'OLIVEIRA MARTINS, “O PRINCÍPIO DA AUTOTRIBUTAÇÃO: PERSPECTIVAS E EVOLUÇÕES RECENTES”, IN *ESTUDOS JURÍDICOS E ECONÓMICOS EM HOMENAGEM AO PROFESSOR DOUTOR ANTÓNIO LUCIANO DE SOUSA FRANCO*, VOL. II, COIMBRA, COIMBRA EDITORA, 2006.

announced by governments are mainly connected at reducing the costs borne by companies with employees. This is achieved, on the one hand, by the supply of financial support in relation to a part or the entirety of the employee remuneration (which does not constitute a tax incentive in itself) and, on the other hand, with the total or partial relief in the payment of social security contributions due by employers. Inherent to both sets of actions described is the financing by the State of the preservation of employment contracts during the period of duration of the suspension of corporate activities in connection with the virus. Whereas in the first instance this financing is represented by an actual transfer of money, in the latter only by a virtual one, as represented by the waiver of public revenue (qualifying as public expense), which is in line with the very nature of the tax incentive.

On an European level for instance, Hungary has sought to temporarily modify social security rules for the period comprised between March and June 2020 in certain key-sectors affected by the virus outbreak (e.g. tourism, events, entertainment). These modified rules provide for the exemption from the social security contributions due by employers on wages paid during that period and corresponding lower social security contributions for the employees during that period. An exemption to employers has also been granted in Spain for social security contributions due under employment contracts having been temporarily suspended or subject to reduced working hours on the condition that the relevant contracts are maintained for a period of 6 months subsequent to the activity being resumed. Similarly in Croatia an exemption may apply to employers which have received subsidies intended to provide relief to the payment of salaries on the portion of the salaries that is borne by them.

In relation to the acquisition of materials and goods to counter the virus outbreak, the bulk of the adopted initiatives may be subsumed under an exemption from the VAT or customs duties due on imports of medical, sanitary and protective equipment, which is the case of France and Croatia. This is in line with the European Commission decision to temporarily waive VAT and customs duties on the importation of vital medical equipment from third countries. Adding to the above, the Greek government has approved a reduced VAT rate on products which purpose is to prevent COVID-19 propagation (e.g. masks, gloves, soap, antiseptic products, alcohol) applying until 31 December 2020.

The economic subsistence of corporate persons is one of the main priorities of government actions in view of the former's role in the driving of the economy thus justifying the number of financing mechanisms and grants put in place to tackle COVID-19 effects. The liquidity concern resulting from the halt in revenues bears a significant effect on the ability to pay principle. By way of example, whilst income received in 2019 could justify – under such principle – a given level of tax charges, such level in the context of the losses incurred in 2020 could no longer be compatible with this principle to the extent that the tax charges pertaining to 2019 would only be effectively borne in 2020 (as is typical in most tax systems despite advance payments being put in place). Enforcing the ability to pay standard as determined in 2019 could therefore lead to significant imbalances in taxpayer

accounts to the detriment of their economic survival.

With this in mind, some governments have sought to approve systems enabling the carry-back of losses. In particular, the Czech Republic, Poland or the Netherlands have approved / announced schemes permitting the total or partial offset of losses incurred in 2020 against profits obtained in 2019. Other schemes considered by European governments include the reduction of the Corporate Income Tax taxable base (notably by excluding subsidies obtained to mitigate COVID-19 effects) or the granting of tax rebates to companies facing severe difficulties as a result of the COVID-19 pandemic.

Also on the topic of economic subsistence, the mitigation of additional expenditure deriving from the virus takes on a vital role in view of the important amount of investments and additional costs incurred. To this end, Austria is planning to exempt from stamp taxes any documents and acts which have been concluded as a direct or indirect result of measures countering the COVID-19 pandemic. Italy, on the other hand, has provided for a tax credit with sanitization costs including costs with equipment and materials necessary for the protection of employees' health.

Lastly, on the financing of investments and expenses made by State, regional or local bodies as well non-profit organizations in the management of the COVID-19 emergency-response, the purpose of the tax incentives granted throughout European governments is once again that of shaping taxpayer behaviors. Adopted measures include exemption from VAT on donations of goods and services (Croatia, Portugal, Greece) and deduction for corporate income tax purposes or personal income tax purposes of such donations (Poland, Italy).

It stems from the above that tax incentives have assumed a crucial role in the legislative package approved by Governments in response to the social, health and economic crisis resulting from the COVID-19 pandemic. This role is two-fold. First, it intends to adapt taxpayer behaviors, notably by mobilizing private resources towards a concerted emergency response intending to promote healthcare and social responsibility actions, as well as securing employment conditions. Secondly, it seeks to adjust the tax charges incumbent upon taxpayers to their actual ability to pay in view of increasing needs of liquidity. The cornerstone of these policies is the core of economic, social or cultural rights which are incumbent upon the State to protect.

ANNEX 1 – EUROPEAN TAX SYSTEM RESPONSE TO COVID-19

| | Employment | Acquisition of goods and equipment | Economic subsistence | Additional Expenditure | Concerted of emergency response |
|----------------|---|---|---|---|---------------------------------|
| Austria | N/A | N/A | Possible exemption on CIT tax advance payments subject to request (also applicable to PIT). | Exemption from stamp taxes of any documents and acts which have been concluded as a direct or indirect result of measures countering the COVID-19 pandemic. | N/A |
| Belgium | N/A | N/A | Exemption from CIT of subsidies paid by Belgian Government intended to compensate for the closing down of business establishments. Increase of tax credit deriving from advance payments made during the third and fourth quarter of 2020. | N/A | N/A |
| Croatia | Exemption from social security contributions due by employers in relation to wages which are borne through subsidies. | VAT or customs duties due on imports of medical, sanitary and protective equipment. | Exemption from CIT or PIT (as applicable) on subsidies received to mitigate COVID-19 consequences | N/A | N/A |

| | Employment | Acquisition of goods and equipment | Economic subsistence | Additional Expenditure | Concerted of emergency response |
|-----------------------|--|--|--|------------------------|---------------------------------|
| Czech Republic | N/A | N/A | Loss carry-back (i.e. possibility to set-off 2020 losses - or a portion thereof - against 2019 profit) | N/A | N/A |
| Denmark | N/A | N/A | N/A | N/A | N/A |
| Finland | N/A | N/A | N/A | N/A | N/A |
| France | N/A | Exemption from customs duties and VAT on import of sanitary equipment. | Possible tax rebates for companies in serious economic difficulties in relation to CIT, Payroll Taxes, Corporate Property Tax, Contribution on corporate added value | N/A | N/A |
| Germany | N/A | N/A | Tax base reduction for trade taxes | N/A | N/A |
| Hungary | Exemption from social security contributions due by employers in relation to wages paid during March-June 2020 period. Reduced contribution rates applicable to employees. | N/A | N/A | N/A | N/A |

| | Employment | Acquisition of goods and equipment | Economic subsistence | Additional Expenditure | Concerted of emergency response |
|-------------------|------------|---|--|---|---|
| Ireland | N/A | Temporary exemption from VAT and customs duties of the import of goods to combat the effects of COVID-19 from outside the European Union. | N/A | N/A | Temporary 0% rate VAT on the supply to hospitals and other healthcare settings of personal protection and specified medical equipment for use in the treatment of patients with Covid-19. |
| Italy | N/A | N/A | Possible conversion of deferred tax assets into tax credits. | Tax credit with sanitization costs including costs with equipment and materials necessary for the protection of employees' health | Deduction for PIT purposes of donations made to state, regional, and local authorities as well as non-profit organizations in FY2020 to counter COVID-19 emergency |
| Luxembourg | N/A | N/A | Exemption on first and second quarterly CIT and municipal business tax advance payments. | N/A | N/A |

| | Employment | Acquisition of goods and equipment | Economic subsistence | Additional Expenditure | Concerted of emergency response |
|--------------------|--|------------------------------------|--|--|---|
| Netherlands | N/A | N/A | Loss carry-back (i.e. possibility to set-off 2020 losses - or a portion thereof - against 2019 profit) | N/A | VAT exemptions on business donations of medical equipment or devices to medical care providers and on the lending care personnel to hospitals and care institutions. |
| Poland | Exemption of employer social security contributions. | N/A | Suspension of CIT and PIT bad debt tax-base increase obligations | Deduction of R&D costs with the development of products necessary to address COVID-19 concerns | CIT and PIT deductions of donations made to health care providers to counteract the COVID-19 pandemic. |
| | Exemption from social security contributions due by contractors and self-employed professionals. | | Loss carry-back (i.e. possibility to set-off 2020 losses - or a portion thereof - against 2019 profit) | | |
| Portugal | N/A | N/A | N/A | N/A | Exemption from VAT on donations of goods to the government, to private social institutions, and to non-governmental non-profit organizations, even in the case that ownership is retained by donating entity. |

| | Employment | Acquisition of goods and equipment | Economic subsistence | Additional Expenditure | Concerted of emergency response |
|---------------|---|------------------------------------|----------------------|------------------------|---------------------------------|
| Spain | Exemption to employers for social security contributions due under employment contracts having been temporarily suspended or subject to reduced working hours | N/A | N/A | N/A | N/A |
| Sweden | N/A | N/A | N/A | N/A | N/A |

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