Eleonor Kristoffersson / Michael Lang /
Pasquale Pistone / Josef Schuch /
Claus Staringer / Alfred Storck (eds.)

Tax Secrecy and Tax Transparency

The Relevance of Confidentiality in Tax Law

Part 1

PL ACADEMIC RESEARCH

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Foreword

Questions of tax secrecy and tax transparency play a significant role not only in academics but also in general practice. The collection and treatment of information by tax authorities has been a highly discussed issue in recent years, both in the ambit of national legal communities and supra-national organizations, such as the OECD and the EU. The aim of the project, the final result of which is this book, aimed at creating a cross-national data-base containing the approaches of different countries to confidentiality arrangements in tax law. This book now allows the reader to get an overview of the tax treatment in 37 countries.

Tax experts from all over the world convened for a joint conference on **"Tax Secrecy and Tax Transparency – The Relevance of Confidentiality in Tax Law" in Rust (Austria) from** 5 – 7 July 2012. The knowledge shared at the conference benefited not only the participants themselves, but also is seen in the papers included in this volume, which were completed after the conference. The conference was **executed jointly by the Institute for Austrian and International Tax Law at the WU (Vienna University of Economics and Business) and Örebro University (Sweden).** The whole research project was supported by the funds of the Riksbankens jubileumsfond (Research Fund of the National Bank) and by funds of the Oesterreichische Nationalbank (Anniversary Fund, project number: 13604).

We are very grateful to all National Reporters and authors. They displayed enormous discipline in completing their National Reports, taking into account the guidelines provided. They participated in the discussions at the conference with great enthusiasm. After presenting the results at the conference, they immediately completed their National Reports.

The Peter Lang Verlag agreed to include this book in its catalogue. We would like to express our sincere thanks for their cooperation and the swift realization of this publication project. Ms Margaret Nettinga contributed greatly to the completion of this book by editing and polishing the texts for the authors, for whom English is – to a great extent – a foreign language.

Above all, we would like to thank the members of the secretariat and the assistant professors of the Institute for Austrian and International Tax Law, especially Ms Eleonor Kristoffersson, Ms Anna-Maria Hambre, Ms Ylva Larsson, Mr Joakim Nergelius, Ms Annina H. Persson, Mr Erik Pinetz, Ms Renée Pestuka, Ms Marion Stiastny, Mr Yinon Tzubery and Mr Filippo Valguarnera who were responsible for the organization and preparation of the conference in Rust as well as the publication of this book. Without their dedication and talent for organization, the success of the conference and the swift completion of this book would not have been possible.

Michael Lang
Pasquale Pistone
Josef Schuch
Claus Staringer
Alfred Storck

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General Report

Eleonor Kristoffersson and Pasquale Pistone

1. Policy issues, historical development, general legal framework[1]

1.1. General issues

The levying of taxes is essential to fund the activities of a state and is therefore regarded as a matter directly affecting the general interest of a community. However, it also directly touches upon the private sphere of taxpayers, producing an impact on their property and basic rights. From a tax policy perspective, a general trend may be seen across tax systems, namely the fact that a broad framework of cooperation between taxpayers and the tax authorities preserves the effective levying of taxes without harming basic rights of taxpayers - two otherwise conflicting interests.

Our work focuses on areas where frictions arise between taxpayers and the tax authorities as to how such cooperation is concretely implemented. In particular, the emphasis is put on the right to preserve confidentiality in the treatment of tax-relevant information in a way that does not harm the effective levying of taxes. Tax literature and practice have mainly addressed such issues in domestic scenarios, reaching different balances between the conflicting interests across the various tax systems. Significant discrepancies can be recorded from a comparative tax law perspective, ranging from a fairly intensive protection of tax secrecy to a dimension in which the interest in collecting taxes puts taxpayers' rights in the background. When starting this research project we assumed that such areas were either left in a limbo, where the exercise of fiscal supervision was rather deficient, or addressed in a way that significantly compressed taxpayers' rights. In some cases this deficiency is enhanced in cross-border situations.

Our study has therefore put together reporters from a fairly high number of countries (37 countries) in order to:

- identify the differences and similarities;
- give suggestions on best practices; and
- analyse the cross-border dimension of the problem.

The information collected about transparency and secrecy is used in order to understand the differences and similarities. The ultimate goal is to produce an innovative mapping of the existing situation, highlighting best practices and deficiencies on the basis of empirical data.

1 We would like to thank Prof. Dr Joakim Nergelius and Prof. Dr Annina H Persson, both at Örebro University, Sweden, for their comments on and proofreading of this general report.

A recent criminal case - where similar to tax la there is no general rule dealing with the use of illegally obtained information - tends to restrict the exclusion of illegally obtained information to cases where the reliability of the information cannot be assured or the use of that information would lead to be breach of the principle of a fair trial. Currently, it is still debated whether this criminal case law is to be applied in tax matters as well.

Case law exists in tax matters with respect facts similar to the case at hand (*KB-Lux* cases), where tax courts decided that to the extent that the tax administration had validly, i.e. with respect of procedure, acquired information from a criminal file, could use that information to levy taxes, notwithstanding the fact that such information concerned stolen data. This case law is, however, severely criticized among legal scholars. Further case is to be expected (if the pending HSBC investigations result in tax assessments and criminal prosecution).

Brazil

Luis Eduardo Schoueri and Mateus Calicchio Barbosa[1]

1. Secrecy and transparency: an overview of the Brazilian experience

1.1. Secrecy

On a worldwide level, the protection of individual privacy dates back to the 1940s, when the Universal Declaration of Human Rights was proclaimed by the General Assembly of the United Nations. Accordingly, Article 12 of the Declaration provides that "no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation", being ensured "the right to the protection of the law against such interference or attacks".

This clause may be considered to be a general fundamental privacy right, which comprises the right of the individual to exclude from the knowledge of third persons what only relates to him/her and to his/her exclusive personal way of being in the ambit of his/her private life[2].

Nowadays, in the era of globalization and mobility of capital, secrecy issues have drawn the attention of the OECD, whose Committee on Fiscal Affaires released, in 2000, a Report on "Improving Access to Bank Information for Tax Purpose", describing the positions of Member countries towards access to bank information and suggesting measures to improve access to such information for tax purposes[3]. This Report followed the 1985 Report on "Taxation and the Abuse of Bank Secrecy", which already suggested a breach of secrecy with regard to the tax authorities[4]. This development is especially relevant if one takes into consideration several other aspects concerning secrecy, which would include international criminal matters (money laundering, terrorism financing, etc.).

The main concern of the 2000 Report was as to the extent secrecy could allow taxpayers to hide illegal activities from authorities and encourage tax evasion. Although the Report ends by recommending a relaxation of secrecy rules, it tries not to diminish their importance by stressing that access to information by tax authorities "should not be unfettered" and that the disclosure should always be "coupled with

1 The authors acknowledge the excellent research conducted by the graduate student Mariana Duprat Ruggeri, which was the basis for this report.

2 T. S. Ferraz Jr., 'Sigilo bancário', *Revista de Direito Bancário e do Mercado de Capitais*, No. 14 (2001).

3 OECD, *Improving access to bank information for tax purposes*, (Paris: OECD Publications Service, 2000).

4 Concerns with secrecy may also be noted in OECD, *Harmful tax competition: an emerging global issue*, (Paris: OECD Publications Service, 1998), which recommends that countries should remove impediments to the access of banking information by the tax authorities.

stringent safeguards", such as by the existence of a "judicial or other formal process for obtaining the information"[5].

In the context of the Organization of American States ("OAS"), the American Convention on Human Rights (the "Pact of San Jose, Costa Rica"), clearly inspired by the provisions of the 1948 UN Declaration, established, in its Article 11, a right to privacy providing that "no one may be the object of arbitrary or abusive interference with his private life", also ensuring the "the right to the protection of the law against such interference or attacks".

When it comes to the Brazilian perspective, the protection of privacy has been a relevant issue since the country's very first Constitution dating from 1824. As a matter of fact, "private life" itself was not referred to, but rather some individual rights which should be under protection, as a way to reach such a target. Under the provisions of items VII and XXVII of Article 179 of the 1824 Constitution, the inviolability of the individual's home, as well as of his mail (the "Letters' Secret"), was guaranteed. The following Constitution of 1891 adopted a very similar provision in its Article 72, paragraph 11.

Likewise, the Brazilian constitutions of the 20th century contained a provision dealing with the inviolability of the individual's privacy and the secrecy of his mail, as one may see in Article 113 of the 1934 Constitution, Article 122 of the 1937 Constitution, Article 141 of the 1946 Constitution and Article 150 of the 1967 Constitution (where an explicit reference to telephone communication secrecy was added alongside the mail one).

In the current 1988 Constitution, privacy is referred to in particular in item X of Article 5[6]. As an extension thereof[7], item XII of Article 5 provides not only for the secrecy of correspondence, but also expressly mentions data secrecy. The provision reads as follows:

> The secrecy of mailing and telegraphic communications, of data and of telephone communications is inviolable, except, in the latter case, by judicial order, in the cases and in the manner prescribed by law for purposes of criminal investigation or criminal procedural finding of facts. (Authors' translation)

Thus, one may say that, in 1988, for the first time in Brazilian constitutional history, data secrecy was linked by the Constitution to the set of individual rights and guarantees. The importance of expressly referring to such protection should not be underestimated if one takes into consideration that the Brazilian Constitution provides that fundamental rights foreseen therein are considered hard clauses, i.e., may not be subject to any deliberation of the Congress intending to extinguish them[8].

It is debated whether fundamental rights should be extended to legal entities, or are inherent to the quality of a human being. It seems correct, however, to follow the interpretation that in any case, one finds human beings behind any legal entity and the rights assigned to the former should not be jeopardized due to the existence of the latter. One should therefore understand that the inviolability of data secrecy is a fundamental right assigned to every person, whether an individual or a legal entity, Brazilian or foreign, whose object would not be the secrecy itself, but the capacity granted to the person to act in a way that maintains secrecy and does not permit disclosure[9]. Bank secrecy, as well as tax secrecy, would be comprised in the constitutional notion of the guarantee of data secrecy[10].

Taking into account that data secrecy was established as an individual right by the 1988 Constitution, doubt rises as to what would be the limits of such a guarantee in respect of the state's (public) interest in accessing individuals' information, since it would seem to be common sense that no personal freedom could be absolute or unlimited[11]. To this effect the Supreme Court has already held, in a case dealing with the breach of data secrecy by a Parliamentary Investigation Committee, that[12]:

> In the Brazilian constitutional system, there are no rights or guarantees which have absolute character, even because reasons of relevant public interest or requirements derived from the principle of the coexistence of liberties legitimate, yet extraordinarily, the adoption, by public bodies, of restrictive measures of individual or collective prerogatives, provided that the terms established by the Constitution are met. (Authors' translation)

In this respect, one may claim that secrecy is relative, i.e., in the event of a proper justification, it would be reasonable to accept the revealing of the information by the entity which is obliged to keep secrecy, since such an individual right should not be used as a protection by those who break the law[13]. Nevertheless, relaxation of secrecy can only be acceptable when required by another provision of the same (constitutional) hierarchy, since a conflict between constitutional principles should

5 OECD, *Improving access to bank information for tax purposes* (Paris: OECD Publications Service, 2000), p. 19.

6 "X. The privacy, private life, honour and image of persons are inviolable, and the right to compensation for property or moral damages resulting from their violation is ensured".

7 M. A. M. Derzi, 'O sigilo bancário e a guerra pelo capital', *Revista de Direito Tributário*, No. 81 (2001) p. 261.

8 "Article 60, paragraph 4. No proposal of amendment shall be considered which is aimed at abolishing: (...) IV - the individual rights and guarantees".

9 T. S. Ferraz Jr., 'Sigilo de dados: direito à privacidade e os limites à função fiscalizadora do Estado', *Revista tributário e de finanças públicas*, No. 1 (1992) p. 143.

10 E. A. Silva, 'Considerações a respeito do sigilo de dados', *Revista Dialética de Direito Tributário*, No. 61 (2000) p. 31.

11 E. Calmon, 'Sigilo bancário', *Revista de direito bancário e do mercado de capitais*, No. 33 (2006).

12 See Supreme Court, Mandado de Segurança no. 23.452-1, judgment on 16.09.1999.

13 R. Q. Mosquera, *Direito Monetário e Tributação da Moeda* (São Paulo: Dialética, 2006), pp. 267-268.

be dealt with by means of harmonization, without any mutual derogation; thus, in order to ensure the full exercise of the tax jurisdiction granted by the Constitution to each federal subdivision, it would be reasonable to recognize the right of the tax authorities to have access, in some circumstances, to bank data of taxpayers, for instance[14].

To this effect, when addressing the issues derived from the confrontation between an individual right and the public interest, Gilmar Mendes, who is presently Justice in the Brazilian Supreme Court, correctly states that no preference could be given, a priori, to either of them; the solution to this confrontation would lie in the adoption of the proportionality principle, through which the breaching of a principle could be justified, on a case-by-case basis, in light of public needs[15].

Taking into account such considerations, it is not difficult to note, among Brazilian scholars, the influence of the thoughts developed by Robert Alexy, according to whom conflicts between principles occur on the basis of their weight, i.e., in the concrete circumstances, one principle will prevail over the other without making the latter invalid[16]. Effectively, one must recognize that constitutional guarantees and principles should be viewed as vectors the combination of which, in light of the concrete situation, indicates the direction to be followed by the body.

1.1.1. Legal provisions on secrecy

Despite the fact that the 1988 Constitution was the first statute to raise the data secrecy to the level of (constitutional) individual rights and guarantees, one must bear in mind that, way before the current Constitution, data secrecy was already dealt with at the ordinary law level. For instance, one could mention the 1916 Civil Code[17] (Código Civil), the 1964 Law on financial institutions (Lei sobre instituições financeiras)[18], the Tax Code[19] (Código Tributário) and the 1986 Law on

14 R. Q. Mosquera, *Direito Monetário e Tributação da Moeda* (São Paulo: Dialética, 2006), p. 268.

15 G. F. Mendes, *Hermenêutica constitucional e direitos fundamentais* (Brasília: Brasília Jurídica, 2000), pp.250-251.

16 R. Alexy, *Teoria dos direitos fundamentais* (São Paulo: Malheiros, 2008), p. 93.

17 "Art. 144. No one shall be compelled to testify on facts about which one must keep secret due to his status or profession".

18 Law no. 4595/65. "Art. 38. The financial institutions shall keep secrecy in their active and passive transactions and services rendered".

19 "Art. 197. Upon written intimation, the following are obliged to provide the administrative authority with all the information which they have regarding goods, business or activities of third persons: (...)".

crimes against the national financial system[20] (Lei sobre crimes contra o sistema financeiro nacional).

1.1.1. Historical background: conflict of statutes

The first law to address the issue was the 1850 Commercial Code (Código Comercial), where one can find a general rule concerning secrecy in Article 17:

> Art. 17. No authority, judge or court, under any justification, however compelling it is, is allowed to undertake or order a verification to examine if the merchant keeps or does not keep in due order its business records or if he has committed some mistake regarding them.

The only exception to this rule was provided by Article 18 of the 1850 Code, where the exhibition of business records was allowed in the ambit of judicial proceedings regarding the management of business or partnerships, as well as bankruptcy.

A rule on (professional) secrecy can also be found in Article 144 of the 1916 Civil Code, where it was established that no one could be compelled to testify on facts about which one must maintain secrecy due to his status or profession. This rule was much wider than the one of the Commercial Code, as it was not restricted to business records and books, but rather applicable to any information which should be kept secret for professional reasons.

Despite the rigidity of the above provisions, secrecy was gradually relaxed with respect to laws and regulations concerning consumption taxation, income taxation and stamp duties[21]. One may note, for instance, Decree no. 385, enacted in 1938 during Getulio Vargas' dictatorship, which established that "for purposes of inspection of the consumption tax due to the Union, Article 17 of the Commercial Code is revoked". In this respect, the Supreme Court ended up, already in 1964, enacting Ruling no. 439, holding that "commercial records are subject to tax inspection, provided the examination is limited to the issues which are object of the investigation".

In this respect, perhaps the most interesting and controversial case found in the Brazilian experience on the relaxation of secrecy towards the tax authorities concerns the issues deriving from the protection of bank secrecy vis-à-vis the provisions of the Tax Code.

Accordingly, under the provisions of Article 38 of the 1964 Law on financial institutions, transactions performed and services rendered by banks would be protected by secrecy against any kind of disclosure, and those who breach such secrecy could be sentenced to a penalty of imprisonment from one to four years. It is

20 "Art. 18. To violate the secrecy of a transaction or serviced rendered by a financial institution or by an integrant of the system of distribution of securities which one have knowledge by virtue of his occupation: penalty – imprisonment, from 1 (one) to 4 (four) years, and a fine".

21 See A. Balceiro, *Direito tributário brasileiro* (Rio de Janeiro: Forense, 2004), p. 990.

important to clarify that this was not an absolute protection, since in the case of requests made by the Judiciary and by Parliamentary Investigation Committees the protection would be overruled.

In this statute, an exception to the secrecy rule was also made in the case of examination of documents, books or deposit records by the tax authorities. Nevertheless, under the provisions of Article 38 of the 1964 Law, such an exception was only applicable if the documents were deemed "indispensable" by the competent authority and, moreover, only if a "proceeding" was established.

Doubt rose, then, on the interpretation of the expression "proceeding": while the tax authorities understood that an administrative fiscal proceeding (formal tax inspection) would be enough to allow the relaxation of secrecy, financial institutions, on the other hand, argued that a judicial proceeding would be needed.

In such a context and despite the conditions required by the provision of the 1964 statute for secrecy relaxation, the Tax Code, enacted two years later (1966), established, in item II of its Article 197, that banks and other financial institutions would be obliged, upon written notice to provide the tax authority with the information they might have regarding goods, business or activities of their clients.

The contradictory wording of the provisions of the Law on financial institutions and of the Tax Code led to new debates and controversies between taxpayers and tax authorities. While the tax authorities resorted to the Tax Code to argue the non-existence of bank secrecy before the tax administration, the financial institutions argued that the Code had not revoked the provisions of the 1964 Law, nor would it have authorized any specific exception to the secrecy rule before tax agents; the Brazilian Central Bank, in its turn, refused to subject the financial institutions to the requests made by the tax authorities[22].

The issue was brought before the Supreme Court, which position may be seen in the interpretation adopted by Justice Djaci Falcão on occasion of the judgment of a case in which the tax authorities of the Municipality of Salvador required access to documents kept by Bank of Bahia[23]. According to Justice Falcão, whose opinion was followed by the other justices, the provisions of the Tax Code were not contrary to the ones of the 1964 Law on financial institutions, and both statutes would coexist; nevertheless, the Tax Code restricted the guarantee of secrecy provided by the latter with respect to the tax inspection, without revoking the rule of Article 38 of the Law on financial institutions.

Notwithstanding the position adopted by the Supreme Court, the Central Bank issued a formal opinion ("Parecer DEJUR 453/88"), in which the entity, after an extensive analysis of the basis and importance of bank secrecy (pointed to as a practice which, despite being born to protect private interests, ended up simultaneously satisfying the public and social interests as a cornerstone of the credit system), concluded that:

> Any requests for information and documents made by tax agents and tax authorities to the Central Bank may be answered, provided such requests observe the provisions of paragraphs 5 and 6 of Article 38 of Law n. 4.595 (established proceeding and declaration of necessity), being understood that such provisions were not revoked by the Tax Code. (Authors' translation)

As one may see, similarly to the interpretation of the Supreme Court, the regulatory authority of the Brazilian financial market concluded that the secrecy rule of Article 38 of the 1964 Law on financial institutions would not have been revoked by the Tax Code. However, according to the Central Bank's opinion, the tax authorities would still need to observe the conditions set by the 1964 Law in order to have access to information kept by banks.

As a matter of fact, it is hard to understand that the provisions of the Tax Code would have ensured to the tax authorities wide and unlimited access to taxpayers' bank data despite the provisions of the 1964 Law. To this effect, one must not ignore that the Tax Code itself established, in the sole paragraph of its Article 197, that the obligations provided therein would "not cover the information regarding facts about which the informer is legally obliged to observe secrecy due to his position, function, activity or profession".

1.1.1.2. Scenario under the present Constitution: bank secrecy would only be broken under a judicial procedure

Under the provisions of the current 1988 Constitution which, as mentioned, raised data secrecy to an individual guarantee, the debate regarding the interpretation of the provisions of the 1964 Law on financial institutions vis-à-vis the Tax Code led to new interpretations by Brazilian courts.

Accordingly, the Superior Court of Justice faced the issue in a case where the lower court denied the right of the tax authorities of the State of Rio Grande do Sul to have access to taxpayers' information kept by banks[24]. While the state argued that a simple administrative tax proceeding would be enough to allow the relaxation of secrecy, the banks argued that a judicial proceeding followed by the authorization of a judge would be required. In such a context, Judge Demócrito Reinaldo, after addressing the provisions of the 1964 Law on financial institutions and of the Tax Code, stated that:

> The controversy, thus, must be solved through the integrated interpretation of the ordinary laws concerned (...). As I understand, the integrated interpretation of Articles 197, II and paragraph 1 of the Tax Code, grants to the tax authority the power of requiring

22 See M. A. M. Derzi, 'O sigilo bancário e a guerra pelo capital', *Revista de Direito Tributário*, No. 81 (2001) p. 259.

23 See Supreme Court, Extraordinary Appeal no. 71.640/BA, decided on 17.09.71.

24 See Superior Court of Justice, Extraordinary Appeal no. 37.566-5/RS, decided on 02.02.94.

> the information which it deems necessary to the calculation of the tax debt, provided that this is not covered by the inviolable mantle of bank secrecy. In other words: the financial institutions must satisfy the request for information sent by the tax authority, though refusing to furnish any kind of notice or document regarding the active or passive movements of the accountholder/taxpayer, as well as the services rendered to him. (...) I understand as indispensable the previous authorization of the competent judicial authority for access to the taxpayer's bank information to be allowed to the tax authorities.

As one may see, in the interpretation adopted by the Superior Court of Justice, the Tax Code would not have revoked or restricted the provisions of the secrecy rule established by the 1964 Law on financial institutions: the relaxation of secrecy towards tax authorities would still require judicial authorization and due process of law.

In such a context, the secrecy issue was also faced by the Supreme Court, which held, in a famous case regarding the request of a police officer for the relaxation of bank secrecy of a former Minister of Labour for purposes of criminal investigation, that the 1964 Law on financial institutions and its secrecy rule was in line with the 1988 Constitution[25]. As stated by the Court on this occasion, the secrecy breach would not only require judicial authorization in a formal judicial proceeding, but also, as observed by Justice Sepúlveda Pertence, that the applicant demonstrate before court the relation of relevance between the proof intended with the bank information and the object of the investigations.

Thus, one can understand from such judgment that bank secrecy was not absolute in Brazil; on the other hand, authorities would not be able to directly breach secrecy; a request to the judiciary would be mandatory and moreover, the request should bring enough evidence as to demonstrate a link of relevance with the investigations.

1.1.1.3. New scenario upon 2001 amendment to the Tax Code: possible breach by administrative authorities?

Notwithstanding the interpretation adopted by the Supreme Court and by the Superior Court of Justice in light of the 1988 Constitution, the secrecy rule contained by Article 38 of the 1964 Law on financial institutions was revoked in 2001 by Complementary Law no. 105 (Lei Complementar no. 105).

When it comes to bank secrecy vis-à-vis tax authorities, Article 6 of this Complementary Law provides:

> Art. 6. The tax agents and authorities of the Union, States, Federal District and Municipalities shall only examine documents, books and records of financial institutions, including those regarding deposit accounts and financial investments, when an administrative proceeding is established or a tax inspection is in progress and such examinations are deemed indispensable by the competent administrative authority. (Authors' translation)

25 See Supreme Court, Petition no. 00005775/170, decided on 25.03.92.

As one may note from its wording, Article 6 of the Complementary Law no. 105, unlike the previous rule of Article 38 of the 1964 Law on financial institutions, expressly states that a mere administrative proceeding would be sufficient to allow the relaxation of secrecy with regard to the tax authorities. Thus, under the literal provisions of this article, there would be no more room for the debate which has occupied taxpayers, tax agents and courts for decades: the need of a formal judicial proceeding on a due process of law basis for bank secrecy relaxation; provided that the tax authority declares that such an examination is indispensable, a simple tax inspection would be enough.

One should not be surprised, then, that Brazil was listed in 2010 by the OECD as a country which has implemented an "internationally agreed tax standard" in a report first issued in conjunction with the G20 (of which Brazil is a member) summit in 2009, due to the details provided by it to the Global Forum on Transparency and Exchange of Information for Tax Purposes (of which Brazil is a member of the Steering and Peer Review Groups).

As one may recall, the 2009 G20 summit announced that "the era of bank secrecy is over", making transparency a key issue of international stability, and made a call "to make it easier for developing countries to secure the benefits of the new cooperative tax environment, including a multilateral approach for the exchange of information." As a response, the OECD and the Council of Europe opened up the Convention on Mutual Administrative Assistance in Tax Matters to all countries. It is a fact that Brazil signed this Convention in November 2011, but one should also take into account that it is pending before the Congress for ratification. According to Brazilian law, a treaty is only recognized after such ratification. From a technical viewpoint, therefore, the Convention is not yet mandatory for Brazil. If one considers the constitutional issues to be examined below, this ratification should not be deemed to be immediate.

The Superior Court of Justice not only validated the application of Article 6 of the Complementary Law no. 105, whereby judicial authorization would not be necessary for tax authorities to have access to taxpayers' bank data, but also understood that such a rule could be applied to facts which took place before its enactment and which would still be comprised by the statute of limitation period[26]. To this effect, Judge Luiz Fux observed that:

> However, under Article 144, §1 of the Tax Code, the legislation which, after the occurrence of the tax event, has established new criteria of calculation or inspection processes, broadened the investigation powers of the administrative authorities (...)is immediately applicable to the tax assessment. Consequently (...) Complementary Law no.

26 See Superior Court of Justice, Special Appeal no. 1.134.665/SP, decided on 25.09.09.

> 105/2001, having such a nature, legitimates the surveillance/investigative acts of the Tax Administration, even if the tax events to be assessed predate it. (Authors' translation)

According to the Brazilian system, however, the Superior Court of Justice is not the final instance for constitutional matters: the Supreme Court has the final word in such cases.

Accordingly, the issue of the constitutionality of the provisions of Article 6 of the Complementary Law no. 105 is currently pending before the Supreme Court by means of the Extraordinary Appeal no. 601.314/SP, from 2009, in which it is asked whether the possibility of furnishing of taxpayers' information by banks directly to the tax authorities and without previous judicial authorization would imply violation to the constitutional individual rights of privacy and data secrecy.

Although the above appeal is yet to be decided, one may see decisions which have already been handed down by the Supreme Court on the matter. In this respect, the Supreme Court has already held that the provisions of the Complementary Law no. 105/01, according to which the tax authorities may have direct access to taxpayers' bank information, are not consistent with the 1988 Constitution[27]. On the occasion of the above judgment, Justice Celso de Mello observed that:

> The State bodies of the tax administration do not have, regarding the taxpayer, a position of equidistance (...). As a matter of fact, the circumstance of the State administration be vested of exceptional powers allowing it to exercise the tax inspection does not relieve it from the duty of observing, for purposes of the correct exercise of such prerogatives, the limits established by the Constitution and by the Republic's laws, under the risk of the government bodies frontally disrespecting the constitutional guarantees ensured to citizens in general and to taxpayers, in particular.(...) When it comes to bank secrecy breach, only the bodies of the Judiciary Branch have the power to establish such extraordinary measure, under penalty of the administrative authority unduly interfere in the privacy sphere which was constitutionally ensured to persons. (Authors' translation)

The same interpretation was adopted in a single decision handed down by Justice Marco Aurélio, of the Supreme Court, whereby the access of tax authorities to taxpayers' bank data without previous judicial authorization was deemed illegitimate[28]. In a lower court, the taxpayer's bank data presented by the tax authorities as evidence was disregarded and deemed illegal due to the absence of previous judicial authorization[29].

The mere fact that the constitutionality of Complementary Law no. 105 is under debate should be taken into consideration in order to determine whether Congress will, or will not, ratify the Convention on Mutual Administrative Assistance in Tax Matters.

27 See Supreme Court, Extraordinary Appeal no. 389.808/PR, decided on 15.10.10.

28 See Supreme Court, Bill of Review no. 783389, decided on 22.11.11.

29 See Federal Court of the 3rd Region, Criminal Appeal no. 200003990473464, decided on 01.12.03.

Accordingly, if one reads Article 21 of this Convention, one finds the following provision:

> In no case shall the provisions of this Convention, including in particular those of paragraphs 1 and 2, be construed to permit a requested State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.

Of course, one could claim that the obligation inserted therein is dependent on the availability of the information. In this sense, Brazilian authorities would not be obliged to supply their counterparts with information which is not available to them. As already explained, the jurisprudence tends to say that bank information will only be available to authorities upon a judicial authorization. Should this interpretation be confirmed in future decisions, then the Convention on Mutual Administrative Assistance in Tax Matters would contain an obligation which may not be fulfilled by Brazilian authorities (or at least, would only be fulfilled based on a judicial authorization on a case-by-case basis).

Despite the above-mentioned decisions handed down by the Supreme Court on the matter, the relaxation of bank secrecy towards tax authorities and the provisions of Complementary Law no. 105 is a very polemical issue among the justices. One should note a peculiarity of Brazilian judiciary: judges (and also justices at the Supreme Court) are not required to reach a common interpretation; very frequently they disagree upon an interpretation and a final decision is reached based on the votes (publicly) declared by each single justice. In the case of the Supreme Court, there are 11 justices, but during the judgment of the Extraordinary Appeal no. 389.808/PR, two justices were missing, and the decision was reached by a tight majority of five out of nine (present) justices. An example of such controversy may be found in the opinion of the former Justice Ellen Gracie, according to whom the direct access of tax authorities to taxpayers' bank information would not imply relaxation of secrecy, but only the transfer of the secrecy from the banks to the hands of the tax administration. In such a context, one may expect the possibility of a different interpretation by occasion of the judgment of the Extraordinary Appeal no. 601.314/SP, since there may be 11 justices, and moreover, some justices have retired and been replaced in the meantime.

Moreover, the provisions of Complementary Law no. 105 are also controversial among Brazilian scholars. In the interpretation of Marco Aurélio Greco, previous judicial authorization would be necessary, since in its absence there would be no way to check whether the data concerned is related to the private life and privacy of the taxpayer being inspected[30]. Eliana Calmon, in turn, observes that exclud-

30 M. A. Greco, 'Sigilo do Fisco e perante o Fisco' in: R. Pizolio, J. Viegas Jr. (eds.) *Sigilo Fiscal e Bancário* (São Paulo: Quartier Latin, 2005), p. 87.

ing the relaxation of a fundamental right from the judicial analysis would amount to disrespect of the Constitution[31].

Likewise, Ives Gandra da Silva Martins understands that the Complementary Law would withdraw taxpayers' fundamental rights and forbid the judiciary branch (which is the "neutral branch") from exercising its function of defending both the taxpayer against the tax authorities and the tax authorities against the tax evader, in a setting aside of the judiciary[32]. José Eduardo Soares de Melo, in turn, shares the opinion according to which it is up to the judiciary, when analysing each concrete situation, to establish how much secrecy may be relaxed, as this branch is expected to proceed with transparency and respecting the due process of law[33].

Despite the above authors' interpretation, it is also possible to find some who argue in favour of the legitimacy of Complementary Law no. 105. An example may be found in the writings of Eurico de Santi, whereby the transfer of bank data to the tax administration would not infringe the rights to intimacy and to privacy; bank information, in spite of being covered by constitutional secrecy, could be subject to legitimate regulation by the government in order to satisfy other constitutional provisions[34]. As observed by Eurico de Santi, the above Complementary Law protects bank secrecy and ensures the right to privacy, since only the abuse or misuse of the administrative prerogative granted by it would result in violation of rights; in this author's opinion, it would be legal formalism to assume that the application of the statute would be undertaken in an abusive manner.

1.1.2. Summary

In the Brazilian legal experience, secrecy has never been absolute: despite the rigidity of the rules established in the 19th century, as one may see from the 1850 Commercial Code, the tax legislation and the Supreme Court ended up decreasing the secrecy taxpayers enjoyed with respect to the tax authorities.

Taxpayers' bank secrecy is an example thereof. On the one hand, the 1964 Law on financial institutions established severe penalties for the breach of secrecy and, on the other hand, it expressly provided for the access of tax authorities to bank

31 E. Calmon, 'Sigilo Bancário', *Revista de Direito Bancário e do Mercado de Capitais*, No. 33 (2006) p. 7.

32 I. G. S. Martins, 'Inconstitucionalidades da Lei Complementar 105/2001', *Revista de Direito Bancário e do Mercado de Capitais*, No. 11 (2001).

33 J. E. S. Melo, 'Sigilo de dados bancários – limites da fiscalização – presunções tributárias' in: A. F. Barreto (ed.) *Direito Tributário Contemporâneo – Estudos em homenagem a Geraldo Ataliba* (São Paulo: Malheiros Editores, 2011), pp. 365-381.

34 E. M. D. Santi, 'O Sigilo e a lei tributária: Transparência, controle da legalidade, direito à prova e a transferência do sigilo bancário na LC 105' in: A. F. Barreto (ed.) *Direito Tributário Contemporâneo – Estudos em homenagem a Geraldo Ataliba* (São Paulo: Malheiros Editores, 2011), pp. 183-249.

data. In this context, the debate was restricted to whether such relaxation would require judicial authorization or not.

While the controversy was raging among the tax authorities, whose argument on the secrecy relaxation based on the Tax Code was accepted by the Supreme Court, and the financial institutions, which resorted to the Central Bank's interpretation, the 1988 Constitution was enacted and data secrecy was raised to the level of individual guarantees. In this context, both the Supreme Court and the Superior Court of Justice confirmed that bank secrecy was not absolute; however, they took the position that authorities would only be allowed to breach secrecy when previously authorized by the judiciary.

Nevertheless, Complementary Law no. 105 was enacted in 2001; under its provisions, the tax authorities are enabled to have access to taxpayers' bank data regardless of judicial authorization. This is criticized by the majority of Brazilian scholars, and the Supreme Court has already handed down decisions in which the statute was deemed incompatible with the Constitution. These decisions, however, should not be considered to be a final position of the Supreme Court, due to changes in its composition and to the tight majority reached on such occasions.

On the other hand, Brazil seems to be committing itself to the OECD's and the G20's position towards the relaxation of secrecy. In this respect, Brazil has already signed the Convention on Mutual Administrative Assistance in Tax Matters, and Brazilian most recent tax treaties are gradually getting in line with the provisions of the OECD Model Convention. In this context, one should ask to which extent a decision of the Supreme Court on the unconstitutionality of Complementary Law no. 105 would jeopardize the Brazilian position vis-à-vis these international organs.

As a matter of fact, one should not view secrecy as an absolute guarantee, since in such circumstances it would not only ensure privacy, but also leave room for tax evasion and criminal activities. Nevertheless, one must keep in mind the provisions of paragraph 1 of Article 145 of the 1988 Constitution, whereby individual rights are expected to prevail over the interests of the tax administration. Thus, it is not reasonable to accept that authorities have wide access to bank data regardless of the authorization of a body which is able to verify the existence of evidence backing the authorities' request and the link of relevance with the investigations; the judiciary becomes important in the secrecy relaxation insofar as it is able to undertake such role.

1.2. Transparency

Taking into account the contemporary meaning of the notions of "public" and "private", one may recognize that the public-political ambit must be governed by trans-

parency and equality[35]. Nevertheless, when it comes to transparency, it is interesting to note that, unlike the case of secrecy, no explicit reference may be found to it in the constitutions which were previous to the 1988 one. To this effect, one must not ignore the relevance of Article 37 of the current Constitution, whereby publicity has been explicitly raised as a principle which should guide the activities of the government[36] (although publicity has always been held as a constitutional requirement, even if not written in the text of the Constitution).

The idea of transparency may be found in item XXXIII of Article 5, a provision ensuring the right of every person to receive from public bodies information in their personal interest, or of collective or general interest, unless the secrecy of such information is essential to the safety of the state[37]; likewise, item LX of this article establishes that a law may only restrict the publicity of procedural acts when privacy or social interests so require. Item LXXII of Article 5, in turn, provides for the constitutional writ of *habeas data*, assigned to ensure to the petitioner access to information related to him in the databases of public bodies[38]. In brief, one can conclude that the state is supposed to be transparent in its acts and special attention was given to make sure that citizens will be aware of any state information which may concern them.

When it comes to tax transparency, it is interesting to see the words of Ricardo Lobo Torres, who defines the institute as follows[39]:

> Tax transparency is an implicit constitutional principle. It indicates that the financial activity must develop itself according to the requirements of clarity, access and simplicity. It is assigned both to the State and society, to supranational financial organisms and to non-governmental entities. It highlights and modulates the problematic of the elaboration of the public budget and its responsible management, of the creation of anti-abuse rules, of the breach of the bank secrecy and of the engagement against corruption. (Authors' translation)

35 T. S. Ferraz Júnior, 'Sigilo de dados: direito à privacidade e os limites à função fiscalizadora do Estado', *Revista tributário e de finanças públicas*, No. 1 (1992) p. 142.

36 "Article 37. The direct and indirect public administration of any of the Branches of the Union, the States, the Federal District and the Municipalities shall obey the principles of legality, impersonality, morality, publicity and efficiency (...)".

37 "XXXIII. All persons have the right to receive, from public bodies, information of private interest to such persons, or of collective or general interest, which shall be provided within the period established by law, subject to liability, except for the information whose secrecy is essential to the security of society and of the State".

38 "LXXII. Habeas-data shall be granted: a) to ensure the knowledge of information related to the person of the petitioner, contained in records or databases of government agencies or agencies of public character; b) for the correction of data, when the petitioner does not prefer to do so through a confidential process, either judicial or administrative".

39 R. L. Torres, 'O princípio da transparência no direito financeiro', *Revista de direito da Associação dos Procuradores do novo Estado do Rio de Janeiro*, No. 8. (2001) pp. 133-156.

According to the above author, tax transparency would be a mechanism to minimize "tax risks"; thus, transparency would be assigned to combat the breach of the taxpayers' rights, the runaway budget, the corruption of the state's agents and the irresponsible management of public resources, as well as bad behaviour by taxpayers themselves. It would not only be linked to clarity, but also to simplicity.

A clear reference to tax transparency may be found in paragraph 5 of Article 150 of the Constitution. Such a provision, included among the limitations to the state's power to tax, states that the law must establish measures through which consumers be clarified about the taxes levied on goods and services[40]. One should not ignore the relevance of this provision in the ambit of transparency: Brazilian consumption taxation comprises an undesirable multiplicity of taxes, distributed between the three federal subdivisions (the Union tax on industrialized products, the state sales tax and the municipal tax on services, which are cumulative, do not generate reciprocal credits and may be levied in the same production chain). Despite the relevance of paragraph 5 of Article 150 towards tax transparency, the law required by this provision took years to be approved and was only enacted on late 2012, with its effects postponed to June 2013.

Accordingly, Law no. 12.741 establishes that invoices issued "by occasion of the sale of goods and services to the consumer" must contain "information on the approximate amount corresponding to the federal, state and municipal taxes the levy of which influences the respective sale pricing". Although mentioning the need of such influence (to which, as shown by economic literature, there is no definitive and easy rule, since the transfer of the tax burden depends on facts such as the demand and supply rather than on the formal profile of the tax), the above statute provides for an extensive list of taxes which "must be computed". Those who do not disclose on the invoice the "approximate amount" of the listed taxes shall be subject to the penalties provided by the Consumer Code, comprising fines and repeal of operation licenses.

The enactment of Law no. 12.741 was followed by a lot of dispute among the business community, concerned with the costs and complexities related to the new obligation[41]. Difficulties were recognized by the government itself, which ended up partially vetoing the original bill as to exclude the Income Tax and the Social Contribution on Net Profits from the list of taxes to be disclosed. In the veto message, the executive branch explained that the inclusion of the above taxes in the list would "lead to the presentation of values which are very discrepant from those effectively collected, affronting the very purpose of bringing appropriate information to the end consumer".

40 "Paragraph 5. The law shall determine measures for consumers to be informed about taxes levied on goods and services".

41 M. da Nóbrega, 'Impostos na nota fiscal – ilusão e custos', O Estado de São Paulo (Newspaper, dated 22.11.12).

Taking into account such considerations, one may easily conclude that tax transparency is a delicate issue in Brazil. The Brazilian tax law is well known due to its high level of complexity: Brazil was ranked by the World Bank and PwC in their 2012 Paying Taxes study as the country where enterprises spend the most time to fulfil their tax obligations. The large number of tax rules (which are constantly modified), along with the several kinds of taxes distributed among the federal subdivisions, makes it hard for the layman taxpayer to have access to tax information he should know. Although it is common sense that the Brazilian tax burden is high and that the expected relation between the tax burden and the quality of public services does not exist, one may not find in the Brazilian legal system the elements which would be necessary to allow society to fully understand in which situations, manner and amount it is being taxed by each of the several types of taxes.

Notwithstanding the fact that some provisions on transparency, in one way or the other, may be found in the Constitution and in the ordinary law (addressed below), namely that dealing with public budget issues, one must bear in mind that, in order to achieve effective tax transparency, it is of utmost importance that not only is simplicity and full access to information ensured, but also that such information is disclosed by means of a common language, in a way that the interpretation of said data and the ability to police public tax management do not require specific technical knowledge on the matter[42].

1.2.1. Legal provisions on transparency

Regarding transparency, one may find in the Constitution, besides paragraph 5 of Article 150, the provision of paragraph 3 of Article 31, which provides that the budget accounts of municipalities will remain available for a period of sixty days per year to taxpayers[43]. Transparency concerns may also be noted in the provisions of Article 70[44], according to which the financial supervision of the Union must be done through external control performed by the Congress, or in the provisions of paragraph 6 of Article 165[45], where it is established that a bill of a budgetary law

42 M. A. V. Catão, 'Tributação sobre o consumo e transparência fiscal. O art. 150, §5° da CF/88', *Revista Tributária e de Finanças Públicas*, No. 75 (2007).

43 "Paragraph 3. The accounts of the municipalities shall remain, for sixty days annually, at the disposal, for examination and consideration, of any taxpayer, who may question their legitimacy, as the law provides".

44 "Article 70. Control of accounts, finances, budget, operations and property of the Union and of the agencies of the direct and indirect administration, as to lawfulness, legitimacy, economic efficiency, application of subsidies and waiver of revenues, shall be exercised by the National Congress, by means of external control and of the internal control system of each Power".

45 "Paragraph 6. The budget bill shall be accompanied by a regionalized statement on the effect on revenues and expenses, deriving from exemptions, amnesties, remissions, subsidies and benefits of a financial, tributary and credit nature".

must be followed by a statement on the regional effects on revenues and expenses deriving from exemptions, amnesties and subsidies of a financial or tax nature.

At the ordinary law level, transparency issues may be seen somehow in the provisions of the Complementary Law n. 101, from 2000 (the "Fiscal Responsibility Law" – Lei de Responsabilidade Fiscal). In its very first article, the above statute provides that responsible public management calls for transparent and planned action, in which the risks of affecting the equilibrium of public accounts must be considered and the deviations capable of affecting such equilibrium must be corrected. To this effect, Ricardo Lobo Torres states that transparency would be a subprinciple of the principle of fiscal responsibility, linked to the notion of accountability; transparency, thus, would be closely related to the efficiency in the management of public resources[46].

In the Fiscal Responsibility Law one may also see in its Articles 48 and 49 provisions concerned with transparency, as the incentive to public participation and the realization of public hearings during the process of elaboration of the public budget, or the obligation of the federal subdivisions to allow access to information on public revenues and expenses by every person. It was established, moreover, that the accounts presented by the chief of the executive branch (which include tax and social security budgets) should remain available during the whole calendar year for consulting and appreciation by individuals and entities.

In the ambit of the State of São Paulo, one should also mention Complementary Law no. 939, from 2003, which establishes the Code of Protection of Taxpayers (Código de Defesa do Contribuinte). This Code, intended to improve the relationship between taxpayers and tax authorities on a basis of cooperation and mutual respect, provides for, in its Article 4, the right of the taxpayers to have access to their personal or economic data and information contained by any record of the tax administration, as well as the right to require the complete exclusion from such records of data which was found to be false or obtained through illegal means.

The provisions of Law no. 12.527, from 2011, (Lei de acesso à informação) are also worth mentioning, which regulates the constitutional writ of *habeas data* and whose Article 31 provides that the government, when dealing with individuals' information, does it in a transparent way and respects people's privacy, honour, as well as the individual liberties and guarantees. Moreover, the above statute provides that the access to personal information must be restricted to authorized public agents and to the persons concerned, up to a maximum period of 100 years from the date of the production of the information. One may also note that, according to item I of Article 3 of this statute, access to information would have as guideline "the observance of transparency as a general rule and of the secrecy as an exception".

46 R. L. Torres, 'O Princípio da transparência no Direito Financeiro', *Revista de direito da Associação dos Procuradores do novo Estado do Rio de Janeiro*, No. 8 (2001), pp. 133-156.

2. Collection of data

2.1. Collection of data and the limits of tax inspection: general remarks

As a corollary to the taxing power itself, one may find the attribution of power of supervision. Under the Brazilian constitutional system, the inspection activity was provided as a corollary of the ability-to-pay principle in paragraph 1 of Article 145, which reads as follows:

> Whenever possible, taxes shall have an individual character and shall be graded according to the economic ability of the taxpayer, and the tax administration may, especially to confer effectiveness upon such objectives, with due respect to individual rights and under the terms of the law, identify the property, the income and the economic activities of the taxpayer. (Authors' translation)

If the power of inspection derives from the power to tax, the content of the above-mentioned paragraph should not be considered redundant. Accordingly, this provision assures that tax inspection has an object, finality and is limited.

The object of a tax inspection is the identification of the property, the income and the economic activities of the taxpayer. Depending on the jurisdiction granted to each of the federal subdivisions, one or the other of these elements has greater or lesser relevance.

For instance, it is not reasonable that the tax inspection of the municipal tax on real estate property checks whether the taxpayer has automotive vehicles, which is a concern of the state tax on vehicles. The power of inspection derives from the power to tax and thus must be in harmony with the latter. After all, due to the division of tax jurisdiction between the federal subdivisions, the taxes on each objective manifestation of ability to pay were distributed between the Union, states and municipalities: each one has a part of its interest. Therefore, the object of the tax inspection, which is the identification of the property, income and economic activity of the taxpayer, is allocated to the respective tax authority.

Such harmonization does not imply that the power of inspection is limited by the power to tax: the existence of a tax debt is not necessary for the outcome of the power of inspection; on the contrary, from the inspection one may conclude that no tax is due – the inspection is just assigned to verify such a circumstance. To this effect, even an entity which is constitutionally exempted (immune) from taxes may be subject to the tax inspection, which must verify whether the constitutional requirements for the immunity were met. On the other hand, this harmonization has to indicate the limits of the inspection: the more the inspected situation is distant from the jurisdiction of the federal subdivision, the less will be justification for the acting of the tax administration.

The finality of the tax inspection, in its turn, appears as the effectiveness of the "objectives" of the ability to pay. More than "objectives", they are standards assigned by the Constitution for taxes, beacons which should guide the legislator and

be the basis for the interpretation of law: tax inspection must act in such a way that the ability to pay is identified in each concrete case and attributed to the respective taxpayer.

Finally, there is the limitation to tax inspection: it must respect "the individual rights and under the terms of the law". It is not possible for the government, even in the name of the "public interest" in collection, to set aside individual rights; despite the fact that such rights, as mentioned, are not absolute, it is not acceptable that tax authorities, for instance, invade a dwelling or arrest a taxpayer without judicial authorization. When faced with the interests of tax administration, individual rights are expected to prevail.

2.2. Legal provisions on the collection of data

As observed by Marco Aurélio Greco, one could consider three different ways through which the tax authorities may have knowledge of the taxpayers' information which they need: (i) inspections carried out by the authorities themselves on companies or on other tax authorities, whether municipal, state or federal; (ii) communications made by third parties to the tax administration about transactions made by the taxpayer and (iii) information provided by the taxpayer itself due to a legal obligation[47].

2.2.1. Tax inspections

Regarding item (i), it is interesting to address the provisions of Article 195 of the Tax Code (the exchange of information within the tax administration is dealt with in section IV), which reads as follows:

> Article 195. For purposes of the tax legislation, it is not applicable any legal provisions excluding or limiting the right of examining goods, books, files, documents, papers and tax or commercial effects, of industrial marketers or producers, or their obligation to show them. (Authors' translation)

When read alone, the provision mentioned above seems to remove any limitation on the activity of tax inspection. Nevertheless, one must bear in mind the rule of paragraph 1 of Article 145 of the Constitution, whereby one must respect individual rights. Thus, notwithstanding the fact that access to records and documents by the tax authorities is allowed by the Tax Code, the provisions of Article 195 do not support, for instance, the investigation of the taxpayers' premises by the tax administration without judicial authorization.

47 M. A. Greco, 'Arrolamento Fiscal e Quebra de Sigilo' in: V. O. Rocha (ed.), *Processo Administrativo Fiscal* (São Paulo: Dialética, 1998), p. 166.

On the other hand, Article 195 is sufficient authorization for the tax authority to require the exhibition of records without the need for following the ordinary proceeding established by Articles 381 and 382 of the Code of Civil Procedure (Código de Processo Civil). Moreover, provided that the tax agent acts within the strict limits of his inspection powers, no judicial authorization is required, and the assistance of the police force may be called upon, in the case of unjustified refusal of the taxpayer, as set out by Article 200 of the Tax Code.

Article 196 of the Tax Code is relevant concerning to the formalization of the tax inspection procedure. Under the provisions of this article, the formalization of the inspection must be done through written documents. By means of such a requirement, the Code imposes control on the activity of the tax administration: through the written form, the taxpayers have the means to demonstrate what was required and at what time, and the tax authorities are able to show that they have requested some information from the taxpayer and under what conditions.

2.2.2. Communications made by third parties

The tax authorities may have access to taxpayers' information not only through the records of the latter, but also by means of data kept by third parties (ii). This subject is governed by Article 197 of the Tax Code, which reads as follows:

> Article 197. Upon written intimation, are obliged to provide the administrative authority with all the information which they have regarding goods, business or activities of third persons:
>
> I. Notaries, registers and other officers;
> II. Banks and other financial institutions;
> III. Asset management companies;
> IV. Brokers, auctioneers and official forwarding agents;
> V. Inventory executors;
> VI. Condominium managers, commissioners and liquidators;
> VII. Any other entities or persons assigned by the law due to their post, function, activity or profession.
>
> Sole paragraph. The obligation provided in this article does not cover the information regarding facts about which the informer is legally obliged to observe secrecy due to his post, function, activity or profession. (Authors' translation)

As one may see, under the provisions of Article 197 of the Tax Code, three elements must be observed by the tax authority in order to require information from third parties: written form; information on goods, business or activities; and the limitation regarding professional secrecy. It would also be reasonable to expect the relevance of the required information with respect to the tax administration's needs and its compatibility with the activity undertaken by the person giving the information[48].

In the Brazilian experience, the majority of the controversies regarding the provisions of the article mentioned above concern the content of item II vis-à-vis the bank secrecy rule provided for by the 1964 Law on financial institutions, already addressed in section I.

Law no. 10.174, of 2001, closely linked with Complementary Law no. 105, is also worth mentioning. This law authorized the utilization, by the Revenue Service, of information obtained by the levy of a specific tax (the provisional contribution on financial transactions) for the establishment of tax inspections regarding other taxes.

Accordingly, this contribution was owed by taxpayers according to their bank movement; this means that the tax authorities would need to know the amounts of bank movements, in order to confirm whether the contribution itself was paid. Law no. 9.311 of 1996, which created this contribution, established the obligation of the financial institutions responsible for the collection of the above tax of providing information about the identification of the taxpayers and about the global values of the respective transactions, the utilization of such information for the tax assessment regarding other contributions or taxes being expressly forbidden. Nevertheless, with the outcome of Law no. 10.174, this prohibition was removed and the utilization of data obtained through the levy of the contribution for purposes of inspection and assessment of other taxes was allowed.

The provisions of Law no. 10.174 on this issue ended up being deemed inconsistent with the 1988 Constitution by the Supreme Court in the same judgment in which the provisions of the Complementary Law no. 105 were questioned[49].

2.2.3. Information provided by the taxpayer due to legal obligation

Within the ambit of the income tax, the taxpayers are obliged to provide the tax authorities with information regarding their property and assets (iii).

In this respect, the Income Tax Ruling (Regulamento do Imposto de Renda) provides, in its Article 798, that individuals must deliver, as a part of their annual income tax return, a detailed list of the rights, movable and immovable goods which, in the country or abroad, constitute their and their dependent's property by 31 December of the calendar year, as well as the goods or rights acquired and sold in that year.

The following articles of the Income Tax Ruling provide for an extensive list of the goods and rights which must be declared by the taxpayers. Such list comprises,

48 A. Portella, 'Direito de privacidade em matéria tributária. Intercâmbio administrativo de dados, dever de informação sobre terceiros e sigilo bancário', *Revista Tributária e de Finanças Públicas*, No. 77 (2007).

49 See Supreme Court, Extraordinary Appeal no. 389.808/PR, decided on 15.10.10.

for instance, real estate, vehicles, ships, aircrafts, balance of bank accounts exceeding BRL 140, movable goods (such as art pieces and goods of personal use) exceeding the value of BRL 5000, as well as investments in stocks, equity participation or gold which unitary acquisition value is equal or superior to BRL 1000. Due to the worldwide income tax base and anti-evasion concerns, also goods and balance of bank accounts kept abroad must be declared.

Article 806 of the Income Tax Ruling allows the tax authority to require clarifications from the taxpayer about the origin and destination of the resources, whenever the changes that have been declared imply an increase or decrease of the taxpayers' wealth. The penalty for the lack of declaration or "inaccurate declaration" is laid down by Article 957 of the Income Tax Ruling as seventy five per cent calculated on the amount or on the difference of tax due.

Based on Article 16 of Law no. 9.779[50], of 1999, the Revenue Service enacts, on an annual basis, a Normative Ruling (Instrução Normativa) establishing the proceedings for the delivery of the tax return (accompanied, as mentioned, by a list of goods and rights) by individuals resident in Brazil. In this respect, Normative Ruling no. 1,246, of 2012, establishes, as a general rule, the obligation of declaration of those who have received taxable income in an amount superior to BRL 23,499.15 in the previous year, as well as of those who had, on 31 December of the previous year, ownership of goods and rights totalling more than BRL 300,000.00.

When it comes to legal entities, one should mention the Declaration of Tax and Economic Information of Legal Entities (the "DIPJ" – Declaração de Informações Econômico-fiscais da Pessoa Jurídica), which replaced the former income declaration provided for by Article 808 of the Income Tax Ruling[51], where the assets and transactions performed by legal entities are described in a very detailed way.

Both the individuals' and legal entities' declarations may be delivered through the internet on the Revenue Service website.

When it comes to information provided by the taxpayer himself, the Public System of Digital Bookkeeping ("SPED" – Sistema Público de Escrituração Digital) deserves mention. This system, created in 2007 by Decree no. 6.022 and administered by the Federal Revenue, provides, among other issues (see section IV), for "digital bookkeeping".

Accordingly, as laid down by Normative Ruling no. 787/07, taxpayers who assess income tax under the "actual profit" tax base[52] are obliged to provide the Revenue Service on an annual basis with a standard electronic file containing digitally signed and validated versions of their accounting books and balance sheets.

Moreover, the SPED also comprises the "digital tax bookkeeping", applicable to taxes on consumption (namely, the Federal Excise Tax and the State Sales Tax). Under this system, taxpayers are obliged to provide the tax authorities, usually on a monthly basis, with a standardized digital file containing electronic versions of tax records such as the entry and exit books, the inventory book and the records of calculation of the excise tax and the sales tax.

Regarding consumption taxation, the SPED also provides for the electronic invoice which, without a physical existence and being issued digitally and immediately stored by the tax authorities, registers sales and services performed by the taxpayers, thus allowing the tax authorities to monitor commercial transactions as they are being undertaken. Moreover, whenever a good is sold and the corresponding invoice is digitally issued by the seller in the system, not only the tax authorities will be aware of the transaction; also the purchaser indicated by the issuer may have access to this information. Thus, whether the issuer points to the wrong purchaser, the latter has means to promptly access such information.

The wide power of inspection which may derive from the monthly (or annual) digital provision of balance sheets, accounting books and tax records to the tax authorities, who also have immediate information on the taxpayers' transactions through the electronic invoice, may reasonably lead one to point out a threat to the taxpayer's right of privacy. Accordingly, as one may remember, individual rights are found as a limitation to the tax inspection in paragraph 1 of Article 145.

3. Specific relationships

Professional relationships, which may involve information on the private life of the individuals concerned, are covered, as a rule, by professional secrecy. One may say that, in the Brazilian legal system, professional secrecy is a constitutional guarantee: item XIV of Article 5 of the 1988 Constitution establishes that secrecy is ensured whenever necessary to the exercise of a profession[53].

The current 2002 Civil Code, following that already provided by Article 144 of the former 1916 Civil Code, establishes, in item I of its Article 229, that no one may be compelled to testify on facts about which one should keep secret due to his

50 "Article 16. It competes to the Revenue Service provide for the accessory obligations regarding taxes and contributions managed by it, establishing the way, period and conditions for their fulfillment and the respective responsible".

51 "Article 808. The legal entities shall deliver, until the last business day of March, the income declaration showing the results earned in the previous calendar-year".

52 Brazilian tax law establishes types of profits – the actual profit, deemed profit and arbitrated profit – which are methods to determine the tax base of a company. The actual profit derives from adjustments in companies' books, considering all items of revenues and expenses; deemed profit derives from the application of a fixed margin on companies' revenues; arbitrated profit is calculated by the tax authorities when the two former profits cannot be accurately calculated (for instance, due to the fact that books are not reliable). Taxpayers which have a annual receipt superior to BRL 48,000,000.00, financial institutions or which receive income from abroad, for instance, are obliged to adopt the actual profit regime.

53 "XIV – access to information is ensured to everyone and the confidentiality of the source shall be safeguarded, whenever necessary to the professional activity".

status or profession. An equivalent provision may also be found in item II of Article 347 of the Code of Civil Procedure, which also states, in item IV of Article 363, that the litigant or third party may prevent display to the court of documents which may lead to the knowledge of facts about which the person should keep secret due to his status or profession.

The Tax Code, in spite of listing, in its Article 197 (already addressed in section 2.2.2), a number of persons which are obliged, upon written summons, to provide the tax authorities with information they have concerning goods, business or activities of third persons, makes an exception to such a rule in the sole paragraph stating that such obligation "does not cover the information regarding facts about which the informer is legally obliged to observe secrecy due to his post, function, activity or profession". Such an exception is namely assigned to the "any other persons or entities" provided for by item VII of this article[54].

Due to their relevance for tax purposes, the specific cases of banks and lawyers/tax advisors will be addressed in more detail.

3.1. Banks

Bank secrecy is currently governed by Complementary Law no. 105. The controversies concerning the constitutionality of its provisions, namely regarding the direct access of tax authorities to bank data, as well as the historical development of the issue in Brazil were already addressed in section I. The purpose of the present section is to go into more detail on the provisions of this statute, which was enacted as an attempt to combat organized crime and money laundering, as well as offenses against the tax system[55].

As laid down by Article 1 of this statute, "the financial institutions shall keep secrecy in their active and passive transactions and services rendered". There one may find a duty of negative behaviour of the financial institution: it must refrain from revealing to third parties the facts obtained by it in the exercise of its peculiar activity[56].

In paragraph 3 of the above article, exceptions to the secrecy rule are listed. This list comprises, for instance, the exchange of information between financial institutions for file purposes, the communication of criminal or administrative offenses to the competent authorities or the revealing of secret information with the explicit permission of the persons concerned. Paragraph 4, in turn, establishes the possibility of secrecy relaxation in the ambit of criminal investigations, namely concerning terrorism, drugs and gun trafficking, money laundering and infringements of the tax system.

54 A. Baleeiro, *Direito tributário brasileiro* (Rio de Janeiro: Forense, 2004), p. 993.
55 N. Abrão, *Direito bancário* (São Paulo: Saraiva, 2009), pp. 83-84.
56 S. C. Covello, *O sigilo bancário* (São Paulo: Editora Universitária de Direito, 2001), p. 89.

Moreover, Article 2 of the above law provides that bank secrecy should not block the supervision activities undertaken by the Central Bank and by the Securities Commission. As observed by Roberto Quiroga Mosquera, such permission granted to both entities is justified insofar as one cannot conceive an effective surveillance activity without the proper means to do so[57].

Exceptions to the secrecy rule of Article 1 are also established for requests made by the judiciary (Article 3), when the access to the information provided is restricted to the litigants, and for requests made by the legislative branch in the ambit of Parliamentary Investigation Committees (Article 4).

Regarding the tax authorities, besides the provision of Article 6 (which, as already mentioned in section 1.1.1, grants to the tax authorities access to taxpayers' bank data regardless of judicial authorization), one may note Article 5, which reads as follows:

> Article 5. The Executive Branch shall rule, including what concerns the periodicity and the limits of value, the criteria according to which the financial institutions shall inform to the Union tax administration the financial transactions undertaken by the users of their services. (Authors' translation)

Paragraph 2 of the article mentioned above clarifies that such information is restricted to the identification of the owners of the transactions and of the global amounts transferred monthly, the presence of any element indicating the origin of the values or the nature of the expenditures made with them being prohibited. As laid down by paragraph 4, whenever the authority finds any evidence of inaccuracies or of a tax offense in the information provided, it may request additional information or documents, "as well as undertake inspection for the proper investigation of facts". The wording of this provision may lead one to understand that mere evidence or inaccuracies may allow a full examination of bank data by the tax authorities without the authorization of the judiciary.

The provision of Article 5 of Complementary Law no. 105 is governed by Decree no. 4.489, of 2002, Article 4 of which establishes that financial institutions are obliged to report financial transactions whose global month amount exceeds BRL 5,000.00 (for individuals) or BRL 10,000.00 (for legal entities). According to Article 2 of the above Decree, the financial institution should keep all the tax and accounting documents related to the transactions until the extinction of the statute of limitations.

Article 7 of this Decree, in its turn, provides that the Revenue Service must maintain secrecy regarding the information received, as well as that it is possible to use such data for purposes of establishing tax inspection intended to verify the existence of tax debts.

57 R. Q. Mosquera, *Tributação no Mercado Financeiro e de Capitais* (São Paulo: Dialética, 1998), p. 79.

Under Article 30 of Law no. 10.637, of 2002, if a financial institution does not provide the information mentioned by Article 5 of Complementary Law no. 105 (or provides it in an inaccurate way), it will be subject to a fine of BRL 50.00 per each group of five incorrect or omitted information and of BRL 5,000.00 per month of delay in the delivery of this information.

The access of tax authorities to taxpayers' bank data, as prescribed by Article 6 of Complementary Law no. 105 (addressed in section 1.1.1) is governed by Decree no. 3.724, from 2001. The above Decree provides for the Writ of Fiscal Procedure (Article 2), which is the formal tool through which tax authorities may request information of banks. Such a writ is supposed to be sent to the president of the institution whose information is expected to be accessed or to the manager of the bank agency.

As one may remember, under the provisions of Article 6 of Complementary Law no. 105, the tax authorities may only examine taxpayers' bank information when such an examination is deemed to be "indispensable". To this effect, one may find in Article 3 of this decree the cases in which the data may be deemed to be indispensable and, thus, available to the tax agents. The list comprises, for instance, loans obtained without evidence of the effective receipt of the resources, transactions undertaken with tax havens or expenditures or investments made in a value superior to the available income.

It also worth mentioning that Article 12 of Decree no. 3.724 allows the taxpayer who considers himself jeopardized by the undue utilization of the requested information or by abuse of the requesting authority to appeal to the General Inspector of the Revenue Service. Since such a circumstance implies infringement of the constitutional individual right of bank secrecy, a claim to the judiciary would naturally also be possible.

As laid down by Article 31 of Law no. 10.637, whether the information requested by tax authorities under the provisions of Article 6 of Complementary Law no. 105 is not delivered or is incorrect, the financial institution may be subject to a fine corresponding to two per cent of the value of the transactions which information was requested per month of delay in its correction, under a maximum limit of ten per cent and a minimum limit of BRL 50,000.00.

3.2. *Lawyers/tax advisors*

Professional secrecy may be described as a basic characteristic of advocacy. The issue is not less relevant in the ambit of tax advisory, where the advisor usually has wide access to private information of his client, namely concerning his property and business. The relevance of secrecy becomes even more evident when it comes to legal entities, since the advisor may have information considered vital to the company's strategies and thus valuable to its competitors. One should note that tax

advisory is not a recognized profession in Brazil; lawyers and accountants usually fulfill *de facto* act as tax advisors.

Taking into account the relevance of the property and rights dealt with through the actions of the lawyer, one may see that the importance of maintaining confidentiality does not regard only the private relation between the lawyer and his client, but also society as a whole[58]. Therefore, the duty to maintain secrecy is not only relevant when ensuring the personal credibility of the client, of the lawyer and of the Bar Association of which he is a part of; it is a matter of social interest. One should not be surprised, then, when Article 25 of the Code of Ethics and Discipline of the Brazilian Bar Association (Código de Ética e Disciplina da Ordem dos Advogados do Brasil) describes secrecy as inherent to the profession of lawyer, as follows:

> Article 25. The professional secrecy is inherent to the profession, being obliged its respect, unless in the case of serious threat to the right to life, to honour, or when the lawyer is faced by the client himself and, in his self defence, has to reveal secret, though always restricted to the interest of the cause. (Authors' translation)

To this effect, the Court of Ethics and Discipline of the Brazilian Bar Association has already deemed secrecy as indispensable for the effective defence and advisory of the client, which is the basis of its nature as a matter of public order[59]. On this occasion, the Court also held that the lawyer should keep secrecy "eternally". Naturally, as laid down by Article 19 of the Code of Ethics and Discipline of the Brazilian Bar Association, the duty of secrecy remains even when the services rendered by the lawyer are over.

The position of the Court is understandable: in the absence of secrecy, the client would be unlikely to provide his legal advisor with the necessary information. In this respect, the Court has already held that secrecy should be kept by the lawyer even when the client authorizes its relaxation[60].

Nevertheless, the right of secrecy, as every guarantee, is not absolute: as provided by Article 25 of the Code itself, its relaxation would be justified when the lawyer needs to defend himself against charges from his client, provided that the information is restricted to the interest of the cause. As already stated by the Court, in such circumstances the legal advisor's right of defence would prevail over ethical precepts[61].

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58 E. Farah, 'O advogado e Reflexões sobre o Sigilo Profissional', *Revista do Instituto dos Advogados de São Paulo*, No. 15 (2005), p. 82.

59 See Court of Ethics and Discipline of the Brazilian Bar Association, Procedure no. E-3.965/2010, decided on 17.03.11.

60 See Court of Ethics and Discipline of the Brazilian Bar Association, Procedure no. E-1.797/98, decided on 11.02.99.

61 See Court of Ethics and Discipline of the Brazilian Bar Association, Procedure no. E-3.965/2010, decided on 17.03.11.

In such a context, attempting to enforce professional secrecy in the ambit of advocacy, Law no. 8.906, of 1994, establishes as a right of the lawyer, in item II of its Article 7, the inviolability of his office or work place, as well as his work tools and his written, electronic and telephone correspondence, provided they are related to the exercise of advocacy.

Regarding the lawyers' position towards information requests made by authorities, item XIX of Article 7 of the above law states that the lawyer has the right to refuse to testify about facts which constitute professional secrecy. A similar provision is contained in Article 26 of the Code of Ethics and Discipline of the Brazilian Bar Association. Thus, as already stated by the Court, the lawyer would be allowed to conceal the revelation before the authorities of any fact which may imply potential harm to his client, even if he knows that the authorities' suspicions are true[62].

When it comes to requests made by the tax authorities, the opinion of the Court of Ethics and Discipline is no different. To this effect, the Court held that[63]:

> As a general rule, the lawyer is prohibited from providing the Revenue Service with information about the business and the financial situation of his client or former clients, under the penalty of violating the professional secrecy, of ethics and statutory rules, being subjected to the disciplinary sanctions. (...) As an exception, when the lawyer is under inspection by the Revenue Service and the information is necessary to prove that the values credited in his bank account are not taxable income, there is no ethical prohibition in giving such information, provided that he discloses only the values transferred to the clients and derived from judicial procedures in which an agreement was reached or in which there is a final decision. (Authors' translation)

The violation of the secrecy duty by the lawyer corresponds to disciplinary offense under the provisions of Article 34, item VII of the Law no. 8.906. Moreover, this violation is dealt with as a crime by the Criminal Code, the penalty for which is set as confinement from three months to a year, or a fine (addressed in section VIII).

Due to his wide access to the tax information of the client, it is worth mentioning that the accountant is subject to a similar ethical duty of secrecy. Accordingly, the professional secrecy of accountants is governed by Resolution no. 1.100/2007, enacted by the Federal Council of Accountancy, where one may find similar provisions to the ones concerning lawyers' duty of confidentiality.

In this respect, the Superior Court of Justice has already held that information obtained by accountants in the exercise of their activity may be disclosed without violation of professional secrecy, provided such disclosure is restricted to the litigators themselves and not extended to third parties; as held by the Court, "professional secrecy is not absolute and thus allows exceptions"[64].

62 See Court of Ethics and Discipline of the Brazilian Bar Association, Procedure no. E - 1.278, decided on 19.10.95.

63 See Court of Ethics and Discipline of the Brazilian Bar Association, Procedure no. E-3.838/2009, decided on 10.12.09.

4. Sharing information domestically

Insofar as technological developments allow transactions to be performed at an astonishing speed, they also make their processing easier by tax agents. In such a context, the sharing of information between tax authorities gains in relevance.

In Brazilian federalism, tax jurisdiction is distributed between the three federal subdivisions (Union, states and municipalities), each one being granted exclusive spheres of jurisdiction in an attempt to avoid internal double taxation. Each of the subdivisions have its own Revenue Service, with an autonomous administration and concerned with the collection and inspection of the taxes granted to their jurisdiction.

The Federal Revenue Service, for instance, is comprised of bodies spread over all the Brazilian territory: 10 regional intendancies, 16 bodies of trial, 103 delegacies, 26 customs offices, 59 inspectorates and 27 taxpayers' attendance services. Each of the state's and municipality's Revenue Services has its own administrative framework.

In this context, the sharing of information between the federal subdivisions' tax administration is provided by item XXII of Article 37 of the Constitution, which reads as follows:

> XXII. The tax administrations of the Union, States, Federal District and Municipalities, which activities are essential to the State's functioning and are undertaken by officers of specific careers, shall have priority resources to undertake their activities and shall act in an integrated way, including the share of records and tax information, as established by law or agreement.

A provision concerned with the exchange of information between tax authorities is also established by the Tax Code in its Article 199, which states that:

> Article 199. The Public Treasury of the Union, States, Federal District and Municipalities shall provide mutual assistance in the inspection of the respective taxes and exchange of information, as established, in a general or specific character, by law or agreement. (Authors' translation)

As observed by Aliomar Baleeiro, the tax administrations mentioned by the provision would correspond, when considered together, to the nation itself, thus their mutual cooperation would be reasonable[65].

64 See Superior Court of Justice, Appeal in Writ of Mandamus no. 28.456/SP, decided on 16.08.11.

65 A. Balceiro, *Direito Tributário Brasileiro* (Rio de Janeiro: Forense, 2001), p. 1003.

An outcome of the provision of item XXII of Article 37 of the Constitution may be found in the Public System of Digital Bookkeeping (the "SPED"). This system was established by Decree no. 6.022, of 2007, in an attempt to improve, by means of the computerization of the relationship between taxpayers and tax authorities, the integration among the Union's, the states' and the municipalities' tax administration.

As laid down by Article 2 of the above Decree, "SPED is the tool which unifies the activities of reception, validation, storage and authentication of books and documents which integrate the commercial and tax bookkeeping of entrepreneurs and enterprises through a single computerized flow of information". In other words, tax information which had to be provided by taxpayers to Federal, State and Municipal Revenue Services through printed documents must be provided electronically in a single standard file.

The system is administered by the Federal Revenue. Provided an agreement has been signed with the latter, both the State and the Municipal Revenues concerned may have access to the information provided electronically by the taxpayer.

As one may see in the provision of Article 199 of the Tax Code, agreements may be concluded between the federal subdivisions for assistance in tax inspection or exchange of information. Accordingly, in the Brazilian legal system, agreements are a source of tax law, and their importance may be seen namely in the ambit of the sales tax[66].

An example of agreement between states concerned with the exchange of information may be found in Agreement ICMS no. 78/97, through which was allowed the implementation of the so-called Integrated System of Information on Inter-state Transactions with Goods ("SINTEGRA"). According to this agreement, the implementation of such a system is assigned to establish an information mechanism facilitating the inspection and inter-state control and reducing the administrations' costs through simplification of the procedures.

Besides the agreement, Article 199 of the Tax Code provides the law as a tool for exchange of information. Nevertheless, one may hardly find a statute which effectively deals with the matter: taking into account the autonomy granted to each of the federal subdivisions, it would not be possible for a law enacted by a subdivision to oblige another subdivision to help it in the inspection or exchange of information. Thus, the role of the law in this issue is restricted to allowing the authorities of the respective subdivision in assisting the other tax administrations, regardless of an agreement.

66 Although this tax is a tax on consumption in a national market, its jurisdiction belongs to each state, and not to the Union. In such context, the Constitution, attempting to prohibit a state from unilaterally granting tax benefits to producers located therein (who would have an undue competitive advantage in their inter-state transactions), establishes in Article 155, XII, "g" that complementary law will govern the way in which, through deliberation of the states and of the Federal District (agreements), exemptions, incentives and tax benefits are granted and revoked.

In the context of Article 199 of the Tax Code, courts tend to accept the "lent proof" (i.e., a proof obtained in an assessment carried out by agents of other subdivision's Treasury) for the calculation of the tax debt[67]. To this effect, the Federal Court of the 4th Region stated that the utilization, by the Federal Treasury, of a proof obtained by the State Treasury would be acceptable for purposes of the calculation of the (federal) income tax due[68].

It also worth mentioning paragraph 2 of Article 198 of the Tax Code, concerned with the exchange of secret information, which reads as follows:

> § 2. The exchange of secret information, in the ambit of the public administration, shall be undertaken through a formally established procedure, and the delivery shall be made personally to the requesting authority, by means of receipt which formalizes the transfer and assures the preservation of secrecy.

This provision is currently governed by Ordinance no. 580, of 2001, of the Revenue Service. This ordinance establishes the procedures which must be observed in the furnishing, by the tax authorities, of information covered by secrecy. Its Article 2, for instance, establishes that information may only be provided when an agreement allows it, while Article 1 provides that the remittance of this information must be followed by the expression "information covered by tax secrecy". The ordinance mentioned also provides for a model receipt to be used within the exchange of secret information.

5. Sharing information internationally

When looking for grounds on which a provision concerning co-operation between the tax administrations of the two contracting states could be included in a tax treaty, the OECD Commentaries on the Model Convention points out that, in view of the increasing internationalization of the economic relations, there would be a growing interest of the contracting states in "the reciprocal supply of information on the basis of which domestic taxation laws have to be administered"[69].

In this respect, Brazil is not different: all Brazilian tax treaties provide for a rule on exchange of information, inspired by Article 26 of the OECD Model Convention, but some deviations may be noted, as explained below.

67 B. C. Lorencini, 'Sigilo Bancário e Fiscal à luz do direito à privacidade e hipóteses de relativização', *Revista Tributária e de Finanças Públicas*, No. 94 (2010) p. 67.

68 See Federal Court of the 4th Region, Civil Appelation no. 96.04.47103-1, decided on 14.02.01.

69 See paragraph 1 of the July 2010 OECD Commentaries on Article 26 of the Model Convention.

Moreover, the Tax Code establishes a provision on international cooperation, though limiting the exchange of information to matters on the Union jurisdiction and through tools of international law (treaties, agreements and conventions). To this effect, the sole paragraph of Article 199 of the Code reads as follows:

> The State Treasury of the Union, as established in treaties, agreements or conventions, may exchange information with foreign States in the interest of collection and inspection of taxes.

Accordingly, Brazil only started to enter into the negotiation of tax treaties in the late 1960s. One may note that, until 1977 (when a new version of the OECD Model Convention was released), Brazilian tax treaties adopted the provisions of Article 26 of the 1963 OECD Draft Convention.

Nevertheless, some minor deviations may be found. The treaty signed with Japan, for instance, does not mention the term "domestic laws of the contracting state" in its paragraph 1, and also adds a paragraph regarding exchange of information for the prevention of fiscal evasion in the contracting states. The treaties with Denmark and Sweden, in turn, also made reference to "courts" besides "persons and authorities" in paragraph 1, which would only be done in the forthcoming 1977 OECD Model Convention.

After 1977, notwithstanding the fact that some treaties still adopted the 1963 OECD Draft Convention's Article 26 as a whole (for example, the treaties with Luxembourg and Canada), Brazilian tax treaties (such as those signed with Italy, Norway and the Philippines) continued to adopt the provisions of the 1963 OECD Draft Convention with deviations, for example the exclusion of the reference to domestic laws of the contracting states in paragraph 1 and the addition, in the same paragraph, of authorities concerned with "the prosecution of offences or the determination of appeals in relation thereto" (the treaties with Hungary, Czech Republic, Korea and the Netherlands also mentioned the courts).

The treaties signed with Finland and China adopted the provisions of Article 26 of the 1977 OECD Model Convention (the treaty with China added, in paragraph 1, a reference to the prevention of tax evasion). The treaty with Israel also adopted the provisions of Article 26 of the 1977 OECD Model Convention; however, not mentioning the possibility of disclosing the information in public court proceedings or in judicial decisions. The treaties signed with Portugal and Ukraine are the only ones which, regarding the exchange of information, adopt the wording of the UN Model Convention.

It is interesting to note that in the treaty with Mexico, the exchange of information is applicable to "federal taxes of any class or denomination". In the treaties signed with South Africa and Peru, it is applicable to taxes of any kind and description, just as is currently provided by the OECD Model Convention. In these three treaties, the exchange of information is also not limited by Article 2, besides Article 1, as is also currently provided by the OECD Model Convention.

The treaties signed with Peru and Chile add a provision whereby if the information is requested by a contracting state pursuant to the article, the other contracting state must obtain the information requested in the same way as if it concerned its own taxation, regardless of the fact that the other state may not need such information at that moment. Such a provision, as one may see, is close to what paragraph 4 of the OECD Model Convention provides for.

These two treaties also add a paragraph in respect of information owned by the financial institutions, legal representatives or persons that act as representatives, agents or trustees, similar to the current paragraph 5 of Article 26 of the OECD Model Convention. Nevertheless, it is interesting to note that, in both treaties, this provision establishes that the authority, when providing information kept by the above persons, must observe the "constitutional and legal limitations", as well as reciprocity. Taking into account the constitutional issues regarding bank secrecy in Brazil, the application of this provision may face difficulties, especially if Complementary Law no. 105 is deemed unconstitutional by the Supreme Court.

5.1. Brazilian treaty policy: trends

When comparing Brazilian tax treaties with the provisions of the OECD Model Convention regarding exchange of information, one may see that the most constant and relevant deviation concerns the limitation of the article to the residents of the contracting states (Article 1) and to the taxes covered by the convention (Article 2).

Accordingly, this limitation is expressly excluded by the current wording of the OECD Model Convention. In this respect, the OECD Commentaries state that under Article 26 "information may be exchanged to the widest possible extent", being "clear that the exchange of information is not restricted by Articles 1 and 2, so that the information may include particulars about non-residents and may relate to the administration or enforcement of taxes not referred to in Article 2"[70].

The application of Article 26 to non-residents was already established by the 1977 OECD Model Convention, but only a few treaties concluded by Brazil after such amendment adopted it (the case of the treaties with Israel, Finland and China). As a rule, under Brazilian tax treaties information may only be exchanged when related to residents of the contracting states and to the taxes covered by the treaty.

Nevertheless, treaties signed in more recent times (with Belgium, Mexico, South Africa and Peru, concluded in 2002, 2003, 2003 and 2006, respectively) adopted the provisions of the OECD Model Convention whereby the exchange of information is not limited by Articles 1 and 2. Moreover, the growing influence of the OECD Model Convention may also be seen in the treaties signed with Peru, which is the most recent treaty currently in force, and with Chile, which provides for a similar clause to paragraph 5 of Article 26 of the Model Convention (though,

70 See paragraph 2 of the July 2010 OECD Commentaries on Article 26.

as mentioned, making the delivery of bank information conditional on the observation of "constitutional and legal limitations").

6. Published decisions and the access to taxpayer's data by the public

Under the current Brazilian constitutional system, every judgment given by the judiciary branch must be public, as rule. To this effect, item IX of the Article 93 of the Constitution reads as follows:

> IX – all the judgments of the bodies of the Judiciary Branch shall be public, and their decisions reasoned, under the penalty of nullity, and the law may limit the presence, in certain acts, to the parties themselves and their lawyers, or only the latter, in cases in which the preservation of the right to privacy of the one interested in the secrecy does not harm the public interest in information.

As one may see, access to the judgments given by the judiciary and to the decisions handed down must be wide and public. The exception lies in cases involving family or minors – one may not expect tax cases to be an exception to the publicity rule.

The decisions handed down by the judiciary may be found in several search websites, including the websites of the courts themselves, such as the website of the Supreme Court[71], of the Superior Court of Justice[72] and of the Regional Federal Courts, among others. Moreover, one must bear in mind that, as laid down by Article 564 of the Code of Civil Procedure, the conclusion of the decisions must, within a period of ten days, also be published in the respective official body.

As the reader may know, Brazilian law has an administrative review procedure, whereby taxpayers may bring their claims to the Administrative Council of Administrative Appeals ("CARF" – Conselho Administrativo de Recursos Fiscais), which replaced the Taxpayers' Council that existed until 2009. The CARF comprises a specialized group of experts, both chosen among tax authorities and taxpayers, which is supposed to review tax assessment in a way similar to a judicial procedure.

Like the case of the judiciary, not only judgments themselves are open to public access, but also the decisions handed down by CARF are published. Accordingly, Article 2 of Law no. 9.784, of 1999 which governs the administrative procedure before the federal public administration, provides that the administration must officially publish its acts, except in the cases of secrecy generally established by the Constitution. Nevertheless, there is no period in which the administration would be obliged to publish its acts and decisions: the publicity is thus conditioned on a reasonable time which the administration may need. In this respect, Article 3 of the

71 See the Court's website on www.stf.jus.br.

72 See the Court's website on www.stj.jus.br.

above law establishes as a right of the citizens knowledge of the existence of proceedings in which they may be interested[73], access to the documents, copy of the documents and knowledge of the decisions handed down.

Similar to the case of the judicial procedure, the administrative procedure has publicity as a general rule, and secrecy as an exception; in the absence of a law dealing with the secrecy cases in a more detailed way, it is up to the authority to restrict the access of secrecy data in the ambit of administrative procedure to the interested parties, such as, for instance, proceedings concerned with tax returns, where one may find personal economic data of the taxpayer[74].

Both in the decisions handed down by the judiciary or by the CARF, one may identify the taxpayer concerned as well as the legal issue discussed and even the amount involved.

7. Access to taxpayers' data by individuals and tax secrecy duty

In the era of major technological developments and massive access and utilization of information through the virtual environment, one may note the substantial increase of the risk of violation of one's privacy and of the undue utilization of personal data[75]. In such a context, the responsibility of the institutions – whether governmental or not – which deal with private information becomes increasingly important. In the case of professionals, banks or tax authorities (addressed below), secrecy is an explicit legal obligation: one may thus infer a secrecy duty[76].

To this effect, the wide access of tax authorities to information concerning taxpayers, whether obtained directly from them or through third parties, is limited by the duty of tax secrecy: if the tax authority obtains information due to its activity, such information should only be used within the exercise of this activity. In this respect, Article 198 of the Tax Code establishes that:

> Article 198. Without prejudice to the provisions of criminal law, it is prohibited the disclosure, by the Public Treasury or its officers, of information obtained due to the activi-

73 According to Article 9 of Law no. 9.784, the following may be deemed as "interested": those who (i) start the procedure as claimants, (ii) have rights or interests which may be affected by the decision, (iii) organization representing collective rights or (iv) persons legally concerned with collective rights.

74 See S. G. Hoffmann, 'Princípio Constitucional da Publicidade aplicado ao Processo Administrativo Fiscal e Garantia Constitucional do Sigilo de Dados' in V. O. Rocha (ed.), *Processo Administrativo Fiscal* (São Paulo, Dialética: 2000).

75 See L. S. Mendes, 'O Direito Fundamental à Proteção de Dados Pessoais', *Revista de Direito do Consumidor*, No. 79 (2011).

76 See R. Q. Mosquera, *Direito Monetário e Tributação da Moeda* (São Paulo: Dialética, 2006), pp. 266-267.

ty about the financial or economic situation of the taxpayer or third parties and about the nature and status of their business or activities.

§ 1. Besides the cases provided by Article 199, the following are exceptions to the rule of this article:

I – request from judicial authority in the interest of justice;
II – requests from administrative authority in the interest of the Public Administration, provided that one proves the formal establishment of administrative procedure, in the respective body or entity, with the purpose of investigating the taxpayer about who the information is concerned due to the practice of administrative offense.

§ 2. The exchange of secret information, in the ambit of the public administration, shall be undertaken through a formally established procedure, and the deliver shall be made personally to the requesting authority, by means of receipt which formalizes the transfer and assures the preservation of secrecy.

§ 3. It is not prohibited the disclosure of information regarding:

I – tax representation for criminal purposes;
II – registration in Treasury's executable tax debts;
III – subdivisions or moratorium. (Authors' translation)

As has been noted, the tax authorities' secrecy duty is not absolute; Article 198 of the Tax Code, when balancing the right to privacy and the public interest, ends up mitigating such a duty.

Accordingly, the wording of the article mentioned above was established by Complementary Law no. 104, of 2001. In the explanatory memorandum which followed the bill of this statute, the purpose of its provisions was described as an increase of the flexibility of tax secrecy, through the exclusion from its ambit of "situations in which it would not be justified, including exchange of information within the Public Administration, as well as the situations of tax representation for criminal purposes, inscription in the debt of the Public Treasury and subdivisions granted, in which the transparency of the government activity would prevail over individual interests".

The hypothesis of item I of paragraph 1 is reasonable and its explicit provision would not be necessary: naturally, the administrative authority could not refuse to comply with a judicial order "in the interest of justice".

The situation provided for by item II of the above paragraph, in turn, may lead to greater concerns, what requires its joint analysis with paragraph 2, showing that the existence of a formal administrative proceeding would not be sufficient, and that personal delivery of the information and a receipt assuring the secrecy maintenance would also be needed. Under such a rule, the requesting authority would have a personal obligation of keeping the secrecy.

The extension of paragraph 3, nevertheless, may be serious. The notion of "disclosure" is not compatible with the idea of secrecy. As pointed out in section 2.1, the power of inspection which was constitutionally granted to the public administration must observe and respect individual rights, among which data secrecy and the right to privacy. The disclosure of information removes the protection of privacy in such a way that one could hardly view such provision as constitutional, under the wide breach that it seems to establish.

Thus, one needs to read paragraph 3 with caution: the delivery of certificates with the subjects concerned therein may be justified by the interest of third parties. After all, taking into account the guarantees backing the tax debt, one must recognize the burdens that people with whom one does business bear. In such a context, access to such information seems reasonable; what one should not accept is the mere disclosure of information, which reveals itself as a way of constraining the taxpayer in an indirect manner of levying taxes.

When it comes to the duty of secrecy, it may be interesting to note that in a case of disclosure by the tax authorities of information concerning a taxpayer to the press, the Federal Court of the 1st Region held that such authorities had not only violated their secrecy duty but also the taxpayer's right to honour and to his image, as well as the constitutional principle of administrative morality[77].

8. Consequences of infringements

Severe penalties for the breach of secrecy, whether concerning the tax authorities' secrecy duty, the professional secrecy or the bank secrecy, may be found in the Brazilian legal system. Accordingly, the violation of secrecy rules is dealt with by criminal law. The consequences of infringements must be analysed in the context of the following cases.

Case 1

John A is an employee at the national tax administration. One day John is reviewing the tax declaration of Steven B, sole proprietor of a locally very popular furniture store, Smiling Homes. John discovers that during 2010 Smiling Homes has bought furniture from non-European companies known for their intense use of child labour. John decides to reveal this information to a local newspaper by sending a copy of Steven's tax declaration (or a copy of both Steven's and Smiling Homes' declaration, if those are kept separate in your legal system). The newspaper publishes a series of articles on Steven B's lack of social sensitivity. Steven, in the year following the revelations, experiences a sharp decrease in sales, estimated at EUR 500,000. Moreover, Steven and his family are regularly harassed by activists picketing in front of their home.

77 See Federal Court of the 1st Region, Civil Apellation no. 199834000245820, decided on 30.02.05.

When it comes to the secrecy duty assigned to tax authorities by the Tax Code (see section VII), one may recall that Article 198 of the Code prohibits the disclosure of information "without prejudice to the provisions of criminal law". In such a context, when faced with the breach of secrecy by a tax agent, one may expect this authority to be committing the crime prescribed by Article 325 of the Criminal Code:

> Article 325. To reveal fact about which one is aware due to his position and which must remain secret, or facilitate its disclosure:
>
> Penalty – confinement, from six months to two years, or fine, if the fact does not constitute a worse crime.
>
> § 1. In the same penalties of this article incurs who:
>
> I – permits or facilitates, through attribution, furnishing or borrowing of password or any other way, the access of non-authorized personnel to information systems or databases of the Public Administration;
>
> II – uses the restrict access in an improper way. (Authors' translation)

Under the provision mentioned above, the criminal behaviour consists in revealing or facilitating the disclosure of facts about which the (tax) authority have knowledge due to its activity and which must remain secret. Obviously, this article is not only concerned with the government's interest in the secrecy of relevant information for its actions, but also with the private interest of persons which could be harmed by the undue disclosure of private data which may be in the hands of authorities[78].

Hence, in the case mentioned above, Mr John A could be subject to criminal prosecution under the provisions of Article 198 of the Tax Code combined with Article 325 of the Criminal Code.

Moreover, the disclosure of the information by the tax agent would trigger the state's liability to compensate Mr Steven B for his losses, who would then be entitled to claim compensation through an ordinary civil proceeding. One should point out that the state's liability would not be limited to the monetary losses: indemnity may also be claimed by the taxpayer due to the moral damages derived from the disturbance of his private life and reputation[79]. After compensating Mr Steven, the state would have a right of recourse *vis-à-vis* Mr John A.

The consequences of infringement of the secrecy duty by the tax agent would remain the same regardless of the media (which could be a blog on the internet) through which the disclosure would have been undertaken. Likewise, the same scenario would rise if Mr John A had revealed the information about Smiling Homes without giving away a copy of the tax declaration.

78 L. R. Prado, *Curso de direito penal brasileiro*, v. 3 (São Paulo: Revista dos Tribunais, 2008), p. 520.

79 S. C. N. Coêlho, *Curso de direito tributário brasileiro* (Rio de Janeiro: Forense, 2005), p. 905.

Case 3

> Amanda F is an employee at Pecunia Bank located in Country A. On 3 May 2011 she is approached by a person, Henry G, an agent of Country A's tax authority, who asks her to provide a memory stick containing information on all the bank's account holders. Henry G claims that several citizens of Country B use Pecunia Bank's accounts to screen their tax evasion and that the government of Country B has asked Country A for help in order to recover hundreds of millions of euros in taxes. Amanda agrees and downloads all the required information on a memory stick that she then gives to Henry G. The information is then provided to Country B's tax authority.

In respect of bank secrecy, Complementary Law no. 105 (see section 3.1) establishes specific penalties for the breach of secrecy by banks and its agents, as laid down in its Article 10[80]:

> Article 10. The breach of secrecy, outside the situations authorized in this Complementary Law, constitutes a crime and subjects the responsible to the penalty of confinement, from one to four years, and fine, applying, where applicable, the Criminal Code, without prejudice to other applicable sanctions.
>
> Sole paragraph. In the same penalties are incurred by those who omit, delay without justification or provide false information requested under the rules of this Complementary Law. (Authors' translation)

In the above-mentioned case, one may reasonably argue that Amanda F would not be committing a criminal offense since, under the provision of Article 10, a crime is only committed insofar as the secrecy breach takes place outside the authorized situations (and the requirement from a tax agent is, according to Article 6 of this law, one of the situations in which banks are allowed to disclose their account holders' information).

As a matter of fact, criminal liability requires, as a rule, the intent (malice) to commit a punishable act. In this respect, Article 18 of the Criminal Code establishes that "except in the cases provided by law, no one can be punished by a fact referred to as a crime, unless when one practices it intentionally"; thus, under Brazilian law, in the absence of duly proved intention, one should not commit, as a rule, a criminal offense. In the case, one can hardly argue Amanda F's intention to illegally disclose bank information to the tax agent. No crime seems to have been committed.

On the other hand, despite the absence of the need of judicial authorization, a formal administrative proceeding is always required in order for tax agents to have legitimate access to bank data. Accordingly, tax authorities may only request information from banks through a Writ of Fiscal Procedure sent to the president of

80 A similar penalty is established for those who violate bank secrecy by Article 18 of Law no. 7.492, which provides for the crimes against the national financial system.

the institution or to the manager of the bank agency; moreover, the request must be backed by a declaration attesting this information to be "indispensable" within the context of Article 3 of Decree no. 3.724 of 2001 (already addressed in section 3.1), which governs the access by tax authorities to taxpayers' bank information authorized by Article 6 of Complementary Law no. 105.

The circumstances of the case – in which the tax agent (Henry G) directly approaches an employee of the bank (Amanda F) asking for information to be inserted in a memory stick – lead one to conclude the absence of a formal tax inspection. In such a case, one may consider to claim the application of Article 12 of Decree no. 3.724, which enables both the bank and the accountholder whose information was accessed to appeal to the General Inspector of the Revenue Service in the case of "abuse of the requesting authority" (without prejudice to a claim to the judiciary, as the constitutional individual right of bank secrecy would be at stake).

Complementary Law no. 105 establishes the personal responsibility of the authority (which may be a tax agent) or of the respective public entity (which may be the Revenue Service) for the damages arising from the undue utilization of information obtained under its provisions, as one may see:

> Article 11. The public officer which uses or enables the utilization of any information obtained from the secrecy relaxation provided by this Complementary Law is personal and directly liable to the respective damages, without prejudice of the objective responsibility of the public entity, when proved that the officer has acted according to official command. (Authors' translation)

In this respect, Decree no. 3.724 enforces, in its Articles 8, 9, 10 and 11, the administrative responsibility of tax agents who disclose information obtained by means of this statute (dismissal, without prejudice of criminal responsibility under the rule of Article 325 of the Criminal Code, addressed above).

Nevertheless, one must bear in mind the provisions of Article 199 of the Tax Code, which enables the exchange of information with foreign states whenever it is "established in treaties, agreements or conventions". Thus, in the case described, provided a tax treaty or a tax information exchange agreement (TIEA) is in force between both countries, Henry G would not be committing an offense under the current legislation by providing the bank information to the other countries' authorities in accordance with the provisions of the applicable treaty[81].

81 Despite the fact that the exchange of information is allowed within the legislation currently in force, one should not ignore that constitutional and sovereignty issues may come into play regarding the issue. Accordingly, one may reasonably argue that whenever a state concludes a treaty (for political reasons of any kind), it delivers its citizen's privacy to the other state, whilst one should expect a taxpayer to be subject solely to his state's sovereignty (said jurisdiction is what ultimately justifies the state's access to his personal data).

Canada

Allison Christians

1. Overview

1.1. Policy Issues

Canada ranks 24th of 73 countries in terms of tax transparency, according to the 2011 Financial Secrecy Index.[1] The index suggests that Canada accounts for less than one per cent of the global market for offshore financial services, "making it a tiny player compared with other secrecy jurisdictions." On the one hand, Canada is viewed as lacking transparency in some respects because it does not maintain company ownership details in official records, require that company accounts be available on public record, or put details of trusts on public record, among other practices. On the other hand, Canada is transparent in that it requires resident paying agents to disclose payments to non-residents to the domestic tax authorities, complies with international anti-money laundering standards, has more than ninety bilateral tax treaties and information-sharing agreements, and is a party to a number of other international transparency agreements. Overall, Canada's tax regime attempts to strike a balance between protecting taxpayer rights to privacy and confidentiality, and ensuring that the government has sufficient information about taxpayers in order to enforce its own laws, as well as to cooperate with efforts by other countries to enforce their tax laws in respect of their residents who invest in Canada.

1.2. Historical Development

The Canadian income tax system is based on voluntary compliance through self-assessment and reporting. The tax is administered by the Canada Revenue Agency (CRA).[2] The CRA collects information from taxpayers pursuant to annual tax returns under s. 150 of the *Income Tax Act*,[3] as well as from information returns filed by third parties, such as employers in respect of compensation paid to employees, payors of dividends to shareholders, interest to creditors or account holders, and

1 See Tax Justice Network, "Mapping Financial Secrecy: Canada", online: <http://www.secrecyjurisdictions.com/PDF/Canada.pdf> (accessed 2 February 2013). The Financial Secrecy Index is a ranking system created by the Tax Justice Network to track national policies on the topic.

2 Canada, *Income Tax Act*, RSC 1985, c 1, s 220(1) [ITA or Act].

3 Individuals must generally file only if they are liable to pay a tax under s. 150(1)(d), while corporations, trusts, and estates must generally file regardless of whether any tax is payable under s.150(1)(a) and (c). Section 150(2) also enables the Minister to demand a filing of any person whether or not the person is liable to pay tax.