

1.3. International tax law

1.3.1. Taxes and charges

Taxes are general sources of revenue for public spending. In the OECD classification they are characterized as “... compulsory, unrequited payments to general government”.³⁰ They should not be earmarked for certain aims, and the benefits for taxpayers should not be in proportion to the tax burden.³¹ Taxes are payments for the supply of collective goods and services, raised irrespective of the exact volume of services rendered.³² However, the above definition has been criticized. “Tax competition will force governments to levy taxes which closely correspond to the quantity and quality of public goods and services demanded by, and supplied to, those whom the taxes are to be levied upon.”³³

If the receipt of social security benefits for an individual depends on his contributions, I do not consider such payments to be taxes, although they are included under that heading in the OECD statistics. From the point of view of principle, they are to be considered a form of charge or fee. A charge³⁴ or fee is normally levied in connection with a specific service. However, the link between the service provided and the charge may vary considerably. The cost for providing the service may be lower than the amount of the levy. The difference may be considered a tax.

30. Revenue Statistics of OECD Member Countries 1965-1995 (OECD 1996), p. 30; see also pp. 31 and 34-41.

31. See e.g. the German *Abgabenordnung* sec. 3(1); Arndt, Hans-Wolfgang, *Grundzüge des allgemeinen Steuerrechts* (1988), pp. 6-7; Schwarz, Bernhard, AO (1998), Sec. 3 Rz. 7; Tipke, Klaus, and Lang, Joachim, *Steuerrecht* (1998), pp. 48-54.

32. Dalton, Hugh, *Principles of Public Finance* (1939), p. 32; Hansson, Ingemar, and Norrman, Erik, *Skatter* (1996), pp. 83-85.

33. Braestrup, Jacob W., *Simpler Taxes. A guide to the simplification of the British tax system* (2000), Chap. 5.

34. Regarding environmental charges, see e.g. *Taxation and the Environment* (OECD 1993), pp. 22-27.

I define certain concepts in order to make my analyses more precise, to facilitate the comparison of legislation in different countries and to achieve a common understanding of legal texts. Nevertheless, we must be very careful not to link certain legal consequences to a given term or concept. When a term occurs in a law, whether this is a treaty or otherwise, it must be interpreted in accordance with the applicable jurisprudence. In this context, the label “*tax*” means nothing, unless the actual description corresponds to the legal requirements for a certain income tax, capital tax, etc.

Although the revenue purpose dominates, taxation has additional political goals.³⁵ In many countries the redistribution of income is considered the second purpose of taxation. Tax policy as an ingredient in a stabilization policy might be considered a third one. A fourth purpose might be to influence human behaviour with respect to the protection of environment and health (discouragement of the use of alcoholic beverages, etc.). Such corrective taxes raise revenue but may also lead to a more effective allocation of resources. Tax incentives may be used to stimulate investments in a certain branch or a certain region, too.

In this book I discuss taxes directly influenced by electronic commerce. These are mainly income taxes on the profit from electronic commerce and consumption taxes calculated on the turnover on transactions by electronic means or on traditional supplies competing with electronic trade. The basic concepts relating to taxes on income will be used in accordance with Art. 2 of the OECD Model Convention. Taxes on goods and services include general turnover taxes like VAT and US sales and use taxes on, as a rule, tangible property, as well as taxes on specific goods and services like transaction taxes on telecommunication, excise duties³⁶, and customs and import duties. I make no distinction between taxes on goods and services and the term “consumption taxes”, although customs and import duties, unlike excises, are not charged on domestic products. Customs and import duties are interesting to the extent they might

35. See e.g. Brown, C. V., and Jackson, P. M. (1990), pp. 297-298.

36. On excise duties, see Consumption Tax Trends (OECD 2001), p. 25.

be a burden on traditional means of supply compared to digitized supply.

Broadly speaking, tax systems worldwide consist of tax on income and on consumption. From an economist's point of view, a uniform consumption tax is equivalent to a single rate tax on all income, except for interest and other income on capital.³⁷ There are many options for the taxation of consumption. A general flat rate sales tax charged at the retail stage combined with a use tax is, in principle, equivalent to a corresponding general flat rate value added tax charged in all stages of the production.

A sales tax is currently imposed by all the states in the US except Alaska, Delaware, Montana, New Hampshire and Oregon. Although it may often be characterized as a general sales tax, it is mainly limited to the taxation on the supply of goods. Many states charge a use tax on the residents' purchases of goods from other states. About 7600 jurisdictions³⁸ impose local sales taxes, mostly in the form of a surtax added to the state sales tax.

1.3.2. Does international taxation exist?

International taxation is neither more nor less than national taxation of cross-border transactions or of individuals or legal persons with cross-border relations. Such taxation takes into account bilateral or multilateral agreements between nations directly related to taxation or at least with tax consequences. The development of the European Union, free trade areas and other more or less integrated markets is important. So far, there are no real international taxes determined by an international body and collected by an international tax authority.

Taxation is not limited by national borders. The tax environment is global. Thus, it is not appropriate to continue to use the traditional, clear distinction between national and international taxation. Which

37. Stiglitz, Joseph E., *Economics of the Public Sector* (1988), pp. 427, 432-433, 493 and 620-621; see also 9.2. *infra*.

38. Final Report (NTA 1999), p. 12.

taxes are purely domestic? Even if we can find examples in a limited area, the taxpayer may move across a border. The income may arise in the home country or abroad. Consumption may take place anywhere. Almost all tax rules have international implications. International issues are becoming more and more intertwined with national ones.³⁹

Although the EU in many respects might be considered a federal state, no Union taxes exist. The Member States have not given up their sovereignty in this respect. The EU membership fee is mainly calculated on the same basis as the value added tax in the Member States but cannot be considered a federal tax. From a tax point of view, it is more important that the EC Treaty has essential, direct implications for the taxation of its nationals, including legal as well as natural persons.

All regulations and directives in tax matters in the EU must, in accordance with the EC Treaty, be decided unanimously. The EU is in an ongoing process of developing a higher degree of integration than might be applicable to other countries or regions. Many tax directives and regulations are related to the single market and cannot directly serve as a general model for international cooperation. Nevertheless, EU solutions must be considered in forming international tax policies for electronic commerce.

Without a network of double tax conventions (DTCs), the risk of double or multiple taxation could be an obstacle to international trade. There are more than 1500 such agreements, most of them based on the OECD Model Tax Convention on Income and on Capital.⁴⁰ Except for the multinational conventions in the Caribbean Community⁴¹ and between the Nordic coun-

39. See e.g. Carmody, Michael, *International Business Taxation – An Administrator’s Perspective “A Brave New World”* (Australia 1997), p. 10.

40. The Centre for Tax Policy and Administration, (OECD 2001), p. 40.

41. Agreement Among the Governments of the Member States of the Caribbean Community for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Profits or Gains and Capital Gains and for the Encouragement of Regional Trade and Investment (CARICOM 1994).

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tries⁴² the treaties are mostly bilateral. Multilateral conventions are best suited to cross-border business involving more than two states.⁴³ Tax treaties are also important for the exchange of information between tax authorities. For the development of electronic commerce, that cooperation might be one way of securing the tax compliance required by a joint multilingual choir of tax authorities and finance ministries.

As there are many parallels in jurisdictional matters between US state taxation and Canadian provincial taxation,⁴⁴ on the one hand and international taxation, on the other, I am going to consider income and sales taxation in those countries. Many of the problems that might arise in connection with electronic commerce have already been analysed, mainly in US case law. Besides, out-of-state trade in the US illustrates compliance matters that are of relevance for international trade as well.

In many respects, the taxation of income is far more international than the taxation of consumption. The development of DTCs based on the OECD and UN Models has influenced tax legislation worldwide. A common understanding of basic concepts such as permanent establishment, transfer pricing, etc. has been achieved. The legislation on taxation of consumption is far more national or at least is limited to a single market like that in the EU⁴⁵ or the US. The OECD envisages a closer international cooperation also in relation to consumption taxes, mainly in order to combat tax avoidance and tax evasion.⁴⁶

42. The Swedish Implementation of The Nordic Multilateral Tax Convention (Nordic Conventions 1996).

43. Mattsson, Nils, *Multilateral Tax Treaties – A Model for the Future?* (Intertax 2000), p. 308.

44. *Electronic Commerce and Canada's Tax Administration* (Canada 1998), pp. 73-76.

45. With certain implications for the EEA as well.

46. *Electronic Commerce: The Challenges to Tax Authorities and Taxpayers* (OECD 1997), para. 141.