

RESEARCH ARTICLE:

Principle of equity in the Romanian Constitution and tax law

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ABSTRACT

The principles applicable to a tax system are under intense scrutiny of all tax scholars as the practical utility of this type of analysis was proven useful in many cases. Adam Smith in “The Wealth of Nations” proposed four principles in 1776. The very first principle deals with tax equality and it is still subject of many papers.

The article proposes twofold analysis. In the first part is included a presentation of the principles of tax law and taxation as division of the public law and also of the taxation principles as established at the international level as appropriate to be used by all states for the design of a tax system and subsequently a short analysis of the principle of equity in the Romanian Constitution and Tax Code and also in other European regulations.

KEYWORDS: *Romanian Constitution, tax law, principles of tax law, principles of taxation, principle of equity*

1.Introduction

Starting 1st of January 2016 a new “Tax Code”¹ and “Tax Procedure Code”² are in force. Even from the publication, these new laws generated vivid debates as the new rules brought both positive and not so positive measures. One of the modifications introduced by the new Tax Code refers to the definitions of the taxations principles including the equity principle, subject to this analysis.

It is clear that any discussion regarding taxation system in any democratic state must begin with the clarification of the principles applicable to the tax system as well as of the modality of interpretation, in order to perform a correct enforcement both by the citizens as well as by the tax authority.

In order to frame within a proper scientific endeavour, in the first part of the article it is included a review of the principles of tax law and tax system (taxation) as identified in the doctrine, following the briefly analyze in the second part of the equity principle as resulted from the interpretation of the provisions in force of the Romanian Constitution and the Tax Code.

2.About principles of tax law and principles of taxation

2.1Principles of tax law

In the legal doctrine, tax law is defined as a branch of the public law, dealing with the legal relations “*arising out in the process of administration of the taxes,*

charges and contributions collected from individuals or legal persons obtaining taxable incomes or holding taxable goods or making expenses which can be framed within the scope of taxes”³. In the Romanian doctrine there are authors⁴ who consider that the tax law is a sub-branch of the public financial law, other authors consider that there is a distinct branch of the public law, the tax law⁵, different than public finance law and other authors consider the tax law as being an interdisciplinary branch⁶ under the big umbrella of public law.

Regardless the framing within a certain sub-branch of the law, it is obvious that “the tax law represents an ensemble of legal norms governing the patrimonial or non-patrimonial legal relations arising out in relation with the establishment, collection and administration of taxes, charges and contributions which constitute income to the national public budget”⁷.

Tax law is a one area of law governed by a set of principles that are derived from public law included in the Romanian Constitution that are different than the principles applicable to the tax system. This subject is analysed differently in the Romanian doctrine and it is useful for the scholars and practitioners to establish a clear demarcation between these two sets

¹Law on Tax Code no. 227 of September 8th 2015, published in the Official Gazette of Romania, Part I, no. 688 of September 10th 2015

²Law on the Tax Procedure Code no. 207 of July 20th 2015, published in the Official Gazette of Romania, Part I, no. 547 of July 23rd 2015

³Șova,C., Dan. 2015. *Drept Fiscal*, edition 2, Bucharest, Romania: Publishing House Solomon, p. 28.

⁴Bălan, E. 2007. *Drept financiar*, edition 4, Bucharest, Romania: Publishing House C.H. Beck, p. 35.

⁵It is about authors within the Faculty of Law of the University of Bucharest.

⁶Șova,C., Dan. cited work, p.28.

⁷Art. 138 par. (1) of the Constitution of Romania, republished, “*The national public budget comprises the state budget, the state social securities budgets and the local budgets of the communes, cities and counties*”.

of principles. In practice the courts of law are using the principles of tax law for the interpretation of a case when the law is silent.

As Romania is an EU member state it is important to take into consideration also the principles applicable to the European tax law as resulted from the Treaty on European Union (TEU) and Treaty on the Functioning of the European Union (TFEU) and also from the decisions of the Court of Justice of the European Union (CJEU).

The doctrine⁸ is dividing the principles applicable to European tax law into:

(i) fundamental legal principles resulted from TEU, TFEU and of the Charter of Fundamental Rights of the European Union,

(ii) fundamental rights according to the Charter of Fundamental Rights of the European Union and European Convention for the Protection of Human Rights and Fundamental Freedoms⁹, and

(iii) general principles of the Union law which are resulting from “the rule of law”¹⁰.

The principle of fiscal neutrality was introduced in the European tax law in relation with value added tax (VAT) initially in Article 2 of the First Council Directive 67/227/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes (“First VAT Directive”)¹¹. CJEU mentioned in

one decision¹² that this principle of fiscal neutrality represents the transposition of the principle of equal treatment that is a general principle applicable to tax system. The Court of Justice has reached the conclusion that the general principles of law resulted from the interpretation of the TFEU may be applied on an actual tax case and may help the judge to solve it properly¹³. Even if the principle of fiscal neutrality was considered to be a specific principle applicable only to VAT, further to interpretation of CJEU this principle is currently considered to have a general application to the EU tax law.

In the Romanian Constitution, the following principles applicable to the tax law are included:

a) principle of legality, which is to be found in various systems of tax law. As mentioned above, one principle identified also at EU level is the “rule of law”. In the Romanian Constitution this principle derives from the corroborated interpretation of the provisions included in Article 56 par. (3), Article 137 par. (1) and

place in the production and distribution process before the stage at which tax is charged.

On each transaction, value added tax, calculated on the price of the goods or services at the rate applicable to such goods or services, shall be chargeable after deduction of the amount of value added tax borne directly by the various cost components”.

¹²Case C 174/08 *NCC Construction Denmark*, paragraph 41: “That principle of fiscal neutrality was intended by the Community legislature to reflect, in matters relating to VAT, the general principle of equal treatment (see, to that effect, Case C309/06 *Marks & Spencer* [2008] ECR I- 2283, paragraph 49, and the case-law cited)”.

¹³Case C-309/06 *Marks & Spencer plc versus Commissioners of Customs & Excise*, paragraph 49.

⁸Terra, B., Kajus, J., 2018. *Introduction to European VAT 2018, volume 1*, Amsterdam, Netherlands, IBFD, p. 50.

⁹Terra, B., Kajus, J., 2018. *Introduction to European VAT 2018, volume 1*, p. 58.

¹⁰Terra, B., Kajus, J., 2018. *Introduction to European VAT 2018, volume 1*, p. 68.

¹¹“The principle of the common system of value added tax involves the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services, whatever the number of transactions which take

Article 139 par. (1). Based on this interpretation it is clear that the taxes, charges and contributions can only be established by law.

A new tax, charge or contribution cannot be included in the current legal system unless is regulated by law. It is important to mention that “law” in the Romanian legal system means law approved by the Parliament¹⁴ or government ordinance approved by the Government¹⁵.

b) principle of contributing to the public budget mentioned in Article 56 par. (1) Romanian Constitution, which provides for the citizens’ obligation to contribute to the public expenses through taxes and charges. This principle should be analysed also from the perspective of a fundamental right of citizens, but in strict relation with the citizen’s ability to pay principle¹⁶. This means that the obligation of the citizens to contribute to the public budget has to be interpreted taking into consideration the rights of the citizens stipulated in the Romanian Constitution but also in the Charter of Fundamental Rights of the European Union and European Convention for the Protection of Human Rights and Fundamental Freedoms. The Romanian Constitution does not have a clear reference to the ability to pay principle and the Romanian doctrine did not develop on this aspect. One comment should be made on this principle that was under intense analysis by the US and Western European scholars for many years found in an article¹⁷ published in 1939: “*ability to pay*,

the dominant theory of taxation is usually interpreted in terms of sacrifice”.

c) principle of fairness included in Article 56 par. (2) Romanian Constitution providing that “the tax system must provide the fair burden of the taxing obligations”. Details on this principle are included in the following paragraphs.

These basic principles of the tax law are applicable to all tax regulations including but not limited to Tax Code and Tax Procedure Code.

2.2.Principles of taxation

In any official document published by OECD¹⁸, IMF¹⁹ or European Union written in English language it is used the concept of “taxation”, which is not and cannot be identical with the concept of “tax law”. Although not having a legal definition, as necessary as it would be for the law practitioners, however a definition has been tried in the legal doctrine.

American Economic Review, Vol. 29, No. 1, p. 92.

¹⁸The Organisation for Economic Co-operation and Development was established in 1948 under the name Organisation for European Economic Cooperation (OEEC) to run the US-financed Marshall Plan. Canada and the US joined OEEC members in signing the new OECD Convention on 14 December 1960. OECD was officially established on 30 September 1961, when the OECD Convention entered into force, www.oecd.org.

¹⁹International Monetary Fund was created in 1945 and currently is an organization of 189 countries, “working to foster global monetary cooperation, secure financial stability, facilitate international trade, promote high employment and sustainable economic growth, and reduce poverty around the world”, www.imf.org.

¹⁴Article 73 Romanian Constitution.

¹⁵Article 115 Romanian Constitution, Legislative delegation.

¹⁶Dominquez Crespo, C.A., *The “ability to pay” as a fundamental right: rethinking the foundations of tax law*, *Mexican Law Review*, New series, vol. III, no. 1, p. 57.

¹⁷Slade Kendrick, M., (Mar., 1939), *The Ability-to-Pay Theory of Taxation*, *The*

Taxation is defined as representing “all the taxes and charges regulated by law”²⁰. In Romanian finance doctrine this concept is more frequently used and defined, for example as being the “connection between the state on one side and the individuals and legal persons on the other side”²¹.

Taxation or tax system represents all taxes, charges and contributions as defined by law, at a certain moment in time.

The analysis of the tax system could be performed twofold. From a legal perspective and in this case it is possible to have an analysis of the legislation in force and a legal comparison between laws of different states. Another perspective is economic, in which case the specialists review the calculation rules for each tax. In addition, economists are analysing the optimality of the tax system²², based on mathematical calculations.

Therefore, if the taxation represents all the taxes, charges and contributions as defined by law, at a certain moment in time, then the taxation principles are those rules of general applicability which govern the entire tax system, and which have to be considered when interpreting the tax norms in practice.

In the Tax Code of 2003 in article 3 referred to as the “Principles of taxation” were included four principles governing the tax system:

(i) Principle of neutrality of tax measures²³;

²⁰Drosu Șaguna, D. 2013. *Drept fiscal, edition 5*, Bucharest, Romania: Publishing House C.H. Beck, p. 12.

²¹Țățu, L., Șerbănescu, C., Nica, A., Cataramă, D., Ștefan, D., Miricescu, E., 2009. *Fiscalitate. De la lege la practică, edition 6*, Bucharest, Romania: Publishing House C.H. Beck, p.1.

²²Brezeanu, P. 2009. *Fiscalitate. Concepte, teorii, politici și abordări practice*, Bucharest, Romania: Publishing House Wolters Kluwer, p. 20.

²³“a) neutrality of the tax measures in relation to the various categories of

(ii) Principle of certainty²⁴;
(iii) Principle of equity²⁵;
(iv) Principle of efficiency²⁶.

It is obviously necessary to make a distinction between the principles of the tax law, as analysed in the first section above and the principles of taxation, which are the principles taken into consideration by the lawmaker while drafting the Romanian tax system.

In Article 3 Tax Code 2015 are included five principles of taxation that are similar to the previous ones:

(i) Principle of neutrality;
(ii) Principle of certainty;
(iii) Principle of equity;
(iv) Principle of efficiency;
(v) Principle of predictability.

Two principles are identical to those of the Tax Code 2003, *i.e.* principle of neutrality and principle of certainty.

investors and capitals, with the form of property, providing equal conditions for the investors, the Romanian and foreign capital”.

²⁴“b) the certainty of imposition, by drafting clear legal norms, which not to lead to arbitrary interpretations, and the terms, modality and amounts to pay to be clearly established for each payer, respectively these ones to be able to follow and understand the tax burden incumbent upon them, as well as to be able to determine the influence of their decisions of financial management on their tax burden”.

²⁵“c) tax equity at the level of natural persons, by different taxation of incomes, depending on the size thereof”.

²⁶“d) the effectiveness of taxation by ensuring the long-term stability of the provisions of the Fiscal Code so that these provisions do not lead to unfavorable retroactive effects for natural and legal persons in relation to taxation in force at the date of their adoption of major investment decisions”.

The principle of equity is defined differently in the Article 3 par. c) Tax Code 2015 as “*fairness of taxation or tax equity ensures that the tax burden of each taxpayer to be established based on the ability to pay, respectively on the size of incomes or his/her properties*”.

In the Tax Code 2003 the equity principle was defined only by reference to individuals and this principle was interpreted by the Romanian doctrine to be applicable only to income tax. Basically, it was considered that income tax should be governed by the equity. Nevertheless, as resulted from the international doctrine and official documents, the equity principle has a much broader interpretation and should be applicable to the tax system not only to a type of tax. The principle of equity in the current provision is in line with the international guidelines published by OECD and IMF.

In the new Tax Code, the principle of efficiency is defined:

“*d) efficiency of taxation ensures similar levels of the budgetary incomes from one budget year to another by maintaining the efficiency of the taxes, charges and contributions in all the stages of the economic cycle, both in the periods of economic boom, as well as in those of crises*”.

The new definition of efficiency is much more accurate and is related to the economic characteristic of tax system. The role of the taxes should be to cover public expenses that should be similar in any period of time and should not be increased when the economy is growing. Increase in public expenses is considered to be a bad decision in any moment but the economists consider that the fiscal policy should not be procyclical²⁷. This principle should be

²⁷Manasse, P. 2006. *Procyclical Fiscal Policy: Shocks, Rules, and Institutions—A View From MARS, IMF Working Paper, WP/06/27*, “*Procyclical fiscal policies, that*

followed in the fiscal policy in the sense that the taxes should not be increased or decreased based on the economic cycles. European Commission mentions in its annual survey²⁸ that the efficiency of a tax system is twofold, its design and its implementation. The tax system is efficient if “*supports jobs, investment and innovation and avoids undesired tax-induced distortions in economic decisions*” and also if “*raises revenue without creating high costs for taxpayers or the tax administration*”.

The principle of predictability is new introduced in the current legislation, it is not subject of this analysis but it is important step in our legislation even if it is not followed in practice:

“*e) predictability of taxation provides for the stability of the mandatory taxes, charges and contributions, for a period of time of at least one year, in which no modifications may occur for the purpose of increasing or introducing new mandatory the taxes, charges and contributions*”.

The current principles governing Romanian tax system included in the Romanian Tax Code are not much different than the ones mentioned by OECD in the Report on the Taxation of Electronic Commerce²⁹ BEPS published in 1998.

is policies that are expansionary in booms and contractionary in recessions, are generally regarded as potentially damaging for welfare: they raise macroeconomic volatility, depress investment in real and human capital, hamper growth, and harm the poor”.

²⁸European Commission, 2016, *Tax policies in the European Union, 2016 Survey*, Luxembourg: Publications Office the European Union, p. 9.

²⁹ OECD, *Electronic commerce: taxation framework conditions*, A Report by the Committee on Fiscal Affairs, as presented to Ministers at the OECD Ministerial Conference, “*A Borderless World:*

In the next chapter is included a review of the concept of equity in taxation and the connection between the citizens' obligation to contribute to public spending through taxes and charges and the obligation of the state to design a tax system that ensure a "fair burden of the taxing obligations" of the citizens, both mentioned in the Romanian Constitution.

3.Principle of equity

The analysis of the fairness of the tax system is twofold. Firstly it is necessary to review the applicable constitutional provisions and furthermore the current provision of the Tax Code.

Article 56 par. (2) Romanian Constitution provides for a very simple definition of the principle of fairness of the tax system, respectively that the "the tax system must provide the fair burden of the taxing obligations". It is interesting to notice that the English translation of the Romanian version of this provision is much more accurate than the original in Romanian language.

The Romanian Constitution uses words that do not appear as such in the Tax Code or in the Tax Procedure Code. Nevertheless it should be clear for any scholar or practitioner that Article 56 par. (2) Romanian Constitution refers to the entire tax system, comprising both the regulations from the Tax Code, as well as from any other laws establishing taxes, charges or contributions.

Regarding the fairness of taxes, the constitutional doctrine construes this concept³⁰ in close relation to the principles

of equality, proportionality and equity, which are at the basis of any democratic legal system. Without performing a detailed analysis of these principles, it is necessary to examine the connection between "fairness" and equality, proportionality and equity, at constitutional level, to be able to understand the principle of fairness of taxation from the Tax Code.

One cannot ignore also the interpretation provided by the European Commission³¹ related to the fairness of a tax system which should be address from several perspectives such as the fight against tax fraud and evasion, to decrease inequalities in the society and to promote social justice. Member states have the obligation to develop tax compliance by combating tax fraud and evasion because this will show citizens that the tax system is fair. European Commission analysed the tax compliance impact on the total revenue of the member states and it looks like the value of "non-observed economy" represents about 21.5% of the GDP in Romania. This issue has an important impact on the behaviour of the citizens who may consider that is not compulsory to pay taxes!

The principle of proportionality involves that the measures taken by the state cannot exceed what is necessary in order to achieve the objectives of the constitutional, democratic and social state, within the limits of the provisions of the Constitution. This principle is expressly provided for in Article 5 par. (4) TEU. Any tax measures passed by the state must be proportional.

As the equality is concerned, from a constitutional perspective, all persons are equal before the law³², this principle being extensively debated in doctrine. From the

Realising the Potential of Electronic Commerce" on 8 October 1998.

³⁰Muraru, I., Tănăsescu, S. 2003. *Drept constituțional și instituții politice, edition 11*, Bucharest, Romania: Publishing House All Beck, p. 226; Deaconu, S. 2013. *Drept Constituțional, edition 2*, Bucharest,

Romania: Publishing House C.H. Beck, p. 261.

³¹European Commission, *Tax policies in the European Union, 2016 Survey*, p. 40.

³²Article 16 Romanian Constitution .

perspective of taxation³³, equality is equivalent with equity. The equality can be vertical in which case the income is taxed on a progressive rate, but the concept varies from country to country. Horizontal equity is a simpler concept in the sense that taxpayers in equivalent circumstances will bear the same tax rate, regardless the total income gained.

The Romanian tax system must be fair, namely to be equitable and proportional for all its citizens.

Regarding the equity principle, as mentioned above, the Romanian Constitution has a very general provision regarding this principle that allows either vertical or horizontal equity.

In other fundamental laws the vertical equity is clearly regulated. For instance, in the article 53 of the Italian Constitution³⁴ is mentioned both the principle of the power (ability) to pay, as well as the principle of progressing system of taxation. From the progressivity principle results the obligation of the state to limit the quantity of tax, basically the ability to pay principle being one of the most relevant principles of taxation in the Italian Constitution³⁵.

The Romanian Constitution does not provide for that the citizens' participation in the expenses to be proportional with the incomes obtained (ability to pay principle) but only that the citizens have the obligation to contribute to the public expenses. In the doctrine, the ability to pay principle is considered valid only if the taxes are progressive.

It is worth to mention that in one decision³⁶ of the Constitutional Court published on 20 March 2018 it was invoked that a tax is breaching the fairness principle provided in Article 56 par. (2) Romanian Constitution and a similar case from the Italian Constitutional Court were cited. The Romanian Constitutional Court decided that the Italian decision invoked was not applicable as the Romanian law contested was not similar to the Italian one in any circumstance and it is not a case of breaching the fairness and/ or equity principle.

Regarding the provisions of the current Tax Code it is interesting to mention the definition of the principle of equity of taxation (or the fairness of taxation). The Tax Code provides that equity principle is ensuring that the "*tax obligation of each taxpayer is established based on the ability to pay, respectively depending on the size of the incomes or of his/her properties*".

In the Tax Code 2003 the principle of tax equity was applicable only for natural persons (individuals) and provides that each individual will pay different tax rates, depending on the amount of income obtained. As already written in the doctrine, this principle was valid for the tax system designed by the Tax Code 2003, when individuals were subject to income tax³⁷ with progressive rates.

The provision of the current Tax Code seems to be of a broader application, meaning that it refers to all the categories of taxpayers, both natural as well as legal persons, unlike the old provision which only refers to the natural persons' tax equity.

The supplement included in the new Tax Code that each taxpayer must bear the tax duty based on the principle of the

³³Brezeanu, P. cited work p. 35.

³⁴"*Tutti sono tenuti a concorrere alle spese pubbliche in ragione della loro capacità contributiva. Il sistema tributario è informato a criteri di progressività.*".

³⁵Giovani, G. 2013. *Capacità contributiva, Diritto on line*, p. 4.

³⁶Decision no. 46 of 1 February 2018 published in the Official Gazette no. 242 of 20 March 2018.

³⁷Șova, D.cited work, p. 36.

ability to pay has no impact on the current tax system.

Even if the current rate applicable to income tax is fixed so the current system provides for horizontal equity the ability to pay principle is partially valid. The Tax Code in force comprises provisions aiming to establish certain taxes depending on the persons' ability to pay. Thus, the provisions related to the income tax provide for the possibility of a personal deduction for the persons having an income of up to RON 3000.

In the field of the value added tax, special provisions were adopted (reduced rate) for food products. In the doctrine³⁸ the introduction of a reduced rate for food is considered to be a fair fiscal policy measure because poor people spend large amount of their income on food. Other specialists³⁹ consider that this fairness goal is not achieved by applying reduced VAT rate as rich people "spend a larger absolute amount" of their income on food so basically the rich are better off.

4. Conclusions

The necessity to perform a legal analysis of the taxation principles is obvious, especially in a state in which the Tax Code is often modified. The tax scholars should analyse and explain each of the taxation principles taking into consideration the international doctrines. This approach will help also the lawmakers that could have important information about general principles and guidelines.

Even if the Romanian tax system is still quite simple and the rules are drafted following the simplicity principle as defined by OECD still the real meaning of each principle should be construed based on international and EU doctrines and practices.

In practice, judges from administrative courts of law and also from the Constitutional Court are using more and more international documents and cases. In tax cases one important source that it is compulsory to be included is the database of the Court of Justice of the European Union. A well written tax judgment should be based on CJEU practice and, if applicable, the decisions of the European Court of Human Rights.

³⁸Musgrave, R., Musgrave, P. 1989. *Public Finance in Theory and Practice, edition 5*, New York, USA: Publishing House McGraw Hill; Auerbach, Alan J. 2009. *Public Finance in Practice and Theory*, Musgrave, R. May 25, 2009. *Lecture, CESifo*, Munich.

³⁹De Mooij, R., Keen, M. March 2015. *Taxes in Practice, Finance & Development*, IMF, p. 49.

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