

International Assistance in the Collection of Taxes

This article reviews the discussion on international assistance in the collection of taxes, which was the subject of Seminar I of the 64th Congress of the International Fiscal Association, held in Rome, Italy on 2 September 2010.

1. Introduction

International cooperation in the assessment and collection of taxes was the topic of Seminar I of the 64th Congress of the International Fiscal Association in Rome in 2010.¹ Recently, there has been an unprecedented move towards transparency in the international exchange of information, together with improvements in the recovery of taxes in cross-border scenarios. The controversy over the tax data on the Liechtenstein CD and the global financial crisis led the G20, the European Union and the OECD to decide to renew the drive against tax evasion and tax avoidance at an international level. This article describes, specifically, improvements in international cooperation in the collection of tax debts.

2. The General Framework of Mutual Assistance

There are three typical forms of mutual assistance: (1) exchange of information; (2) assistance in the recovery of taxes; and (3) notification of liabilities. The primary effect of assistance is to widen the area in which the domestic power of the tax authorities can be effective. However, mutual assistance must respect national sovereignty and the legal framework of a state. The competent authority of a state may apply or be requested to cooperate with the competent authority of another state. For the sake of simplicity, this article refers to “applicant state” or “requested state”. Each authority must act within its own set of rules and remains responsible for its own actions. Any review of its actions must also be carried out in accordance with domestic rules.

In dealing with the assessment and collection of taxes, there is a basic presumption that there is a tax debt (understood in a broad sense and including social contributions) that may be levied by the state or by a territorial subdivision (at the regional or municipal level). As a starting point, the applicant state (the country of the tax authorities requesting assistance in the collection of a tax debt) must take reasonable measures to recover the tax debt, or completely exhaust the internal means of recovery of such debt. The tax claim should also not be in dispute. In practice, this may be satisfied where the prescribed time limits for appealing against a tax assessment have expired.

If the procedure for cross-border assistance has, however, started and the taxpayer contests the claim, the procedure may be stopped in the requested state and “precautionary or conservancy” measures may be adopted. In order to ensure that there are sufficient assets to recover the debt at the end of the procedure, these measures make it impossible for the owner to conceal assets or put them out of reach of the tax authorities. The applicant state may not be satisfied with these provisional measures and may insist on enforcement. However, that state becomes liable if this action is declared to be wrongful by a court in a judgement in favour of the taxpayer. Such a liability could comprise not only reimbursement, but also compensation for damages (or compensatory damages).

Once the basic conditions for enforcement are met, the applicant state can make the request and send the instrument permitting enforcement, together with other pertinent information. A distinction must be made between an original executive title to a claim, which is usually employed in the internal recovery procedure, and an enforcement title that also allows for recovery in a foreign country. Previously, some difficulties arose regarding the latter. However, tax authorities currently agree on standard uniform documents in respect of cross-border tax claims to promote and enhance efficiency. The same uniform executive title may be valid in both countries. There is then no need to complement, convert or substitute the new uniform title in respect of the claim in the requested state, as could initially have been the situation. Translation is also no longer a problem, as multilingual forms are used.

The requested state applies its procedural rules for similar taxes in its territory or, if appropriate, rules that specifically refer to a recovery procedure.

.....

* Barrister and QC from Grays Inn Tax Chambers, United Kingdom. The author can be contacted at pb@taxbar.com.

** Head of Division, Federal Ministry of Finance, Germany. The author can be contacted at Ernst.Czakert@bmf.bund.de.

*** Senior policymaker, Ministry of Finance, the Netherlands. The author can be contacted at a.eijdsden@minfin.nl.

**** PhD, Associate Professor of Law, Universidad Complutense de Madrid, Spain. The author can be contacted at grauruz@der.ucm.es.

***** LLM, Head of Department for International Taxation, Internal Revenue Service of Chile. The author can be contacted at lkana@sii.cl.

1. The Panel Members consisted of Philip Baker (United Kingdom, Barrister and QC from Grays Inn Tax Chambers), Ernst Czakert (Germany, Head of Division, Federal Ministry of Finance), Arie van Eijdsden (the Netherlands, Senior policymaker Ministry of Finance) and María Amparo Grau Ruiz (Spain, PhD, Associate Professor of Law, Universidad Complutense de Madrid). Seminar I was chaired by Liselott Kana (LLM, Head of Department for International Taxation, Internal Revenue Service of Chile) with the help of Lino Lunardi (Italy) as Panel Secretary.

In general, foreign tax claims do not have priority in the requested state. Unless the states otherwise agree, this means that, in principle, a foreign tax claim does not have the privileges or preferences granted to domestic tax claims (in many jurisdictions revenue claims have priority over other claims).

Although the requested state must assist the applicant state in recovering the foreign tax debt, there are important limitations. Such limitations include, for example, a claim that is over a certain number of years old² (where the statute of limitations may limit the obligation), circumstances of serious economic or social difficulties (this could be a concern in the current context of crisis if a government were, for example, to try to initiate a policy based on employment protection) or a minimum threshold (this is obvious, as it would not make sense to initiate an expensive assistance procedure abroad to recover a small amount of money; an elementary cost-benefit analysis often results in the fixing of a threshold in the rules).

Once the amounts are recovered, the requested state must remit the funds to the applicant state, including interest, costs, administrative penalties, fees and surcharges. Mutual assistance is provided free, though, in special cases, the states may agree to some form of cost sharing.

The scope of the mutual assistance clauses in international agreements for the collection of taxes may be broad in terms of the subjects of recovery. In the European Union, for example, the scope is understood to include claims owed by individuals, legal persons, associations with the capacity to perform legal acts, and any other legal arrangement of whatever nature and form with or without legal personality that owns or manages assets and that derives income that, in turn, is subject to a tax covered.

Often these provisions are not restricted according to the residence or nationality of the taxpayer or other persons involved. Mutual assistance in the recovery of taxes can even apply with regard to a deceased person. In such a scenario, however, a limit may be set. With regard to the Mutual Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters, the limit is set at the value of the estate.

3. The Revenue Rule and Some Exceptions

The old established “revenue rule”, pursuant to which foreign tax debts are not enforceable in other jurisdictions, is illustrated in international jurisprudence by the 2007 Australian case of *Jamieson v. Commissioner for Internal Revenue*.³ This case dealt with a taxpayer who died after having lived for several years in the United States, but with his primary assets situated in Australia. The US Internal Revenue Service obtained a judgement of over USD 1 million against the estate for unpaid taxes. However, the New South Wales court allowed the Australian executrix to distribute the assets without regard to the US tax debt on the ground that Australia applies the revenue rule, under which foreign tax debts are not enforceable in that jurisdiction.

The revenue rule is widely recognized in international jurisprudence – for instance, in the United Kingdom, by *Government of India v. Taylor*,⁴ in the United States, by *HM the Queen in right of British Columbia v. Gilbertson*,⁵ in Italy, by *Corte d'Appello di Genova*, 1932⁶ and, in France, by *Bemberg C. Buenos Ayres, Tribunal Civil de la Seine*, 1949.⁷

However, the rule is subject to exceptions – for example, the exception found in *Pasquantino*,⁸ a US Supreme Court case from 2007 where the issue was whether or not a plot to defraud a foreign government of tax revenue violated the Federal Wire Fraud Statute. The Pasquantino brothers were indicted and convicted of federal wire fraud in the United States using interstate telephone wires in the United States to purchase and arrange the smuggling of goods (alcohol) into Canada, thereby evading Canadian taxes and duties. The Supreme Court had to decide whether or not the conviction was barred by the revenue rule as being an enforcement of foreign taxes, albeit indirectly. The wire fraud statute prohibits the use of interstate wires to defraud or obtain property by means of false or fraudulent pretences. Was there a property loss and, if so, did the revenue rule bar the enforcement of that property loss (as it was a tax claim by a foreign government)?

The US Supreme Court (by a narrow margin of five judges to four) held that the wire fraud statute is domestic criminal law in the United States and the prosecution was brought by the United States, in its sovereign capacity, to punish criminal conduct in the United States. The fact that Canada could receive restitution for the revenue lost as a result of the fraudulent behaviour was not relevant.

4. Measures for Assistance in Cross-Border Collection

Although there are exceptions to the revenue rule (as illustrated by the *Pasquantino* case considered in 3.), these are of limited application. Consequently, states concerned about the enforceability of cross-border tax claims have adopted different instruments, the main ones being:

- Art. 27 of the OECD Model Tax Convention (the “OECD Model”). The UN Committee of Experts has also decided to adopt an equivalent to Art. 27 on assistance in tax collection in its next update. The League of Nations initially planned that there would be a parallel evolution of tax treaties and mutual assistance agreements. Historically, the former have developed more rapidly than the latter; the treatment of mutual assistance has, for a long time, been reduced to a clause in most tax treaties. In recent years, mutual

-
2. Art. 14 lit b of EU Council Directive 2008/55/EC has implemented a threshold of five years.
 3. (2007) 9 ITLR 954 (Sup Crt NSW).
 4. [1955] A.C. 491.
 5. 433 F. Supp. 410, 597 F.2d 1161 (US Court of Appeals, Ninth Circuit, 1979).
 6. *Corte d'Appello di Genova*, 5 January 1932, [1932] *Giurisprudenza Italiana* 1, 2, 128.
 7. *Trib. Civ. Seine*, 24 February 1949, S. 1949, 2.101.
 8. *US v. Pasquantino* 336 F3d 321 (4th Cir 2003), (2005) 7 ITLR 774 (Sup. Crt.).

assistance has gained importance, as demonstrated by the conclusion of specific agreements on the exchange of information. In the future, these could be complemented by rules for more developed tax collection assistance;

- EU Council Directive 2008/55/EC (to be replaced from 1 January 2012 by EU Council Directive 2010/24/EU) regarding mutual assistance for the recovery of claims relating to taxes, duties and other measures; and
- the Mutual Convention, which has recently been modified by a protocol.

5. Collection of Taxes under Tax Treaties

Under the OECD Model, assistance in the collection of taxes is found in Art. 27. The inclusion of Art. 27 in existing bilateral tax treaties is not widespread. This is because Art. 27 is relatively new, having been inserted into the OECD Model in 2003. Most existing bilateral tax treaties are much older. An additional problem is that, in order to implement Art. 27, close cooperation between the tax authorities is essential. Assistance in the collection of taxes requires a decision on a range of practical details. Accordingly, Art. 27(1) of the OECD Model states that, “[t]he competent authorities of the contracting states may by mutual agreement settle the mode of application of this Article”.

Another problem is national instruments permitting enforcement. Normally, the national instrument permitting enforcement has to be transformed into an instrument accepted by the requested state. This transformation process is normally the responsibility of a court located in the requested state. This, and the need to translate all relevant documents, make the recovery assistance procedure under Art. 27 of the OECD Model ineffective and slow.

Assistance in the recovery of tax claims will become more important in the future as more states implement Art. 27 of the OECD Model in their tax treaties. A culture of trust between states must be fostered so as to allow for enforcement measures based on legal acts originating in another state. States need a common understanding of each other, especially where their legal cultures differ.

6. EU Directives and the ECJ decision in *Kyrian*⁹

An example of procedural issues that can arise with regard to cross-border enforcement is found in the recent European Court of Justice (ECJ) case of *Kyrian*. The applicant authority (Germany) sent an assessment notice to “Milan Kyrian” (in the Czech Republic) requiring him to pay excise duty. The instrument permitting enforcement subsequently sent by the applicant authority was served by the competent authority of the requested state. Subsequently, the applicant authority issued a payment notice asking the requested authority to recover the excise duty under the instrument permitting enforcement. In the recovery documents, the debtor was identified by his forename, surname, address and date of birth. Milan Kyrian brought the case to the court in the Czech Republic. He claimed

that the identification of the addressee in the instrument permitting enforcement by forename, surname and address was insufficient, as the instrument could equally apply to his father or son, all of whom were called Milan Kyrian and lived at the same address. He also complained that the documents had to be translated into the Czech language.

The Czech court referred the following questions to the ECJ for a preliminary ruling:

1. Must Article 12(3) of Council Directive [76/308] be interpreted as meaning that, where measures for enforcement of a claim are contested before the court of a Member State in which the requested authority has its seat, that court is entitled, in accordance with the legislation of that Member State, to review whether the instrument permitting enforcement ... is enforceable and has been properly served on the debtor?
2. Does it follow from general legal principles of Community law, in particular from the principles of a right to a fair trial, sound administration and the rule of law, that service of the instrument permitting enforcement ... on the debtor in a language other than one he understands, which, moreover, is not an official language of the State in which it is served on the debtor, constitutes a defect which makes it possible to refuse to enforce on the basis of such an instrument permitting enforcement?¹⁰

The ECJ (First Chamber) held as follows:

1. Article 12(3) of Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures, as amended by Council Directive 2001/44/EC of 15 June 2001, must be interpreted as meaning that the courts of the Member States where the requested authority is situated do not, in principle, have jurisdiction to review the enforceability of an instrument permitting enforcement. Conversely, where a court of that Member State hears a claim against the validity or correctness of the enforcement measures, such as the notification of the instrument permitting enforcement, that court has the power to review whether those measures were correctly effected in accordance with the laws and regulations of that Member State;
2. In the framework of the mutual assistance introduced pursuant to Directive 76/308, as amended by Directive 2001/44, in order for the addressee of an instrument permitting enforcement to be placed in a position to enforce his rights, he must receive the notification of that instrument in an official language of the Member State in which the requested authority is situated. In order to ensure compliance with that right, it is for the national court to apply national law while taking care to ensure the full effectiveness of Community law.¹¹

The primary question that the ECJ had to decide was who the correct defendant was. The situation is clear for a complaint against an instrument permitting enforcement – the correct defendant is the applicant authority, i.e. Germany. It is also obvious, with regard to a complaint against enforcement measures, that the correct defendant is the requested state (in the case in question, the Czech Republic). In this regard, the ECJ stated:

9. Case C-233/08, *Kyrian* (14 January 2010).

10. *Id.*, Para. 32.

11. *Id.*, Judgement.

- 36 In accordance with Article 8(1) of Directive 76/308, the instrument permitting enforcement is to be directly recognised and automatically treated as an instrument permitting enforcement of a claim of the Member State in which the requested authority is situated. Although, according to Article 8(2) thereof, the instrument may, where appropriate and in accordance with the provisions in force in the Member State in which the requested authority is situated, be accepted as, recognised as, supplemented with, or replaced by an instrument authorising enforcement in the territory of that Member State, such formalities may not be refused where the instrument is properly drawn up. It follows from the same provision that, if any of these formalities should give rise to a challenge concerning the claim and/or the instrument permitting enforcement thereof issued by the applicant authority, Article 12 of that directive is to apply.
- 37 Article 12 of Directive 76/308 provides for a division of powers between the bodies of the Member States where the applicant authority is situated and those of the Member State where the requested authority is situated to hear any disputes concerning the claim, the instrument permitting enforcement or the enforcement measures.
- 38 According to Article 12(1) of that directive, if the claim and/or the instrument permitting its enforcement issued in the Member State in which the applicant authority is situated are contested by an interested party, the action is to be brought by the latter before the competent body of that Member State, in accordance with the laws in force there. Article 12(2) provides that as soon as the requested authority has received the notification of such action either from the applicant authority or from the interested party, it is to suspend the enforcement procedure pending the decision of the body competent in the matter, unless the applicant authority requests otherwise.
- 39 On the other hand, under Article 12(3) of Directive 76/308, where it is the enforcement measures taken in the Member State in which the requested authority is situated that are being contested, the action is to be brought before the competent body of that Member State in accordance with its laws and regulations.
- 40 That division of powers results from the fact that the claim and the instrument permitting enforcement are established on the basis of the law in force in the Member State in which the applicant authority is situated, whilst, for enforcement measures in the Member State in which the requested authority is situated, the latter applies, pursuant to Articles 5 and 6 of Directive 76/308, the provisions which its national law lays down for corresponding measures, that authority being the best placed to judge the legality of the measure according to its national law (see, by analogy, Case C-184/05 *Twoh International* [2007] ECR I-7897, paragraph 36, and Case C-318/07 *Persche* [2009] ECR I-0000, paragraph 63).
- 41 The division of powers does not, in principle, permit the requested authority to question the validity or enforceability of the measure or the decision of which notification is sought by the applicant authority.¹²

The ECJ then held that notification constitutes one of the enforcement measures referred to in Art. 12(3) of Directive 76/308 and that, therefore, in accordance with that provision, any action challenging that notification is to be brought before the courts of the Member State in which the requested authority is situated (in this case, the Czech Republic).

This decision is not acceptable in all circumstances. Notification in the European Union depends on the relevant national law. For example, if it is permissible to notify the debtor by mail of the recovery process without making a

request to the competent authority of the requested state, a complaint can be made only at a court situated in the applicant state, as all relevant actions take place in the applicant state and under its responsibility.

7. The New Directive for Recovery

7.1. Introductory remarks

The Official Journal of the European Union of 31 March 2010 contains Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties, and other measures (the “new Directive”).¹³ The new Directive redesigns mutual assistance for the recovery of claims within the European Union. The Member States must transpose the new Directive into national law by the end of 2011.

7.2. Background

Within the European Union, close cooperation of the tax authorities in respect of the effective taxation and recovery of tax debts is essential. Cross-border transactions and the mobility of workers lead to tax claims in one Member State that can only be recovered in another Member State. The current legal basis for assistance in the recovery of debts in the European Union is Council Directive 2008/55/EC of 26 May 2008 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures.¹⁴ In 2003, 3,355 requests for recovery were made. By 2007, the number of requests had risen to 11,794, but the amount of money recovered was only 5% of the requested amount. The inefficiency of the procedure is due to its slowness, differences in implementation amongst Member States and a lack of cooperation and transparency. For this reason the Commission made a proposal on 2 February 2009 to revise Council Directive 77/799/EEC of 19 December 1977 for the Exchange of Information. Following a year of negotiations, on 16 March 2010, the Council adopted the new Directive for assistance in recovery of revenue claims within the European Union.

The new Directive should protect the financial interests of the Member States and should protect the neutrality of the Internal Market. In particular, the recovery procedure ought to be more efficient and effective. Above all, a clear and consistent legal basis for the recovery procedure in the Member States should be established.

7.3. General provisions

Art. 1 of the new Directive sets out the rules pursuant to which Member States are required to provide recovery assistance to other Member States. Art. 2 defines the scope of the Directive. It applies to claims relating to:

- taxes and duties of any kind;
- refunds, interventions and other measures forming part of the system of total or partial financing of the

12. *Id.*, Paras. 36-41.

13. Official Journal EU L 84, 31 March 2010, p. 1.

14. Official Journal EU L 150, 26 May 2008, p. 28.

European Agricultural Guarantee Fund and the European Agricultural Fund for Rural Development, including sums to be collected in connection with these actions; and

- levies and other duties provided for under the common organization of the market for the sugar sector.

Art. 2(2) of the new Directive includes administrative penalties, fines, fees and surcharges relating to claims. The new Directive does not apply to compulsory social security contributions, miscellaneous fees and criminal penalties.¹⁵

Art. 3 of the new Directive contains a list of defined terms, for example, “applicant authority”, “requested authority” and “person”. The term “person” includes not only natural and legal persons, but all other rights, irrespective of form and shape, that could be subject to tax. This should prevent assets of a debtor from falling outside the scope of the new Directive.

Art. 4 of the new Directive regulates the organization of recovery procedures. Member States must define a “Competent Authority” and a “Central Liaison Office”. Liaison offices are also to be designated as responsible for particular types or categories of taxes or levies or have a specific territorial or functional jurisdiction. Member States, therefore, can organize the recovery procedure in accordance with their specific national conditions. There is an obligation to inform the Commission of the organizational structure and responsibilities. The Commission, in turn, informs all other Member States. This ensures that each Member State knows who its partner is in another Member State.

7.4. Provision of information

Art. 5(1) of the new Directive states that, upon request of the applicant authority, the requested authority shall provide any information that is foreseeably relevant to the applicant authority in the recovery of its claims. The requested authority shall take for this purpose all necessary measures. The requested authority is not, however, required to provide information:

- which it would not be able to obtain with regard to the recovery of similar claims of its own;
- which would disclose any commercial, industrial or professional secrets; and
- which would violate their security or public order.¹⁶

However, these rules should not be interpreted to mean that the provision of information may be refused solely on the basis that the information is held by a bank, other financial institution, nominee or person acting in an agency or fiduciary capacity, or because it relates to ownership interests in a person.¹⁷ This provision implements, into the Directive, the OECD standard for an effective and transparent information exchange.

7.5. Assistance in the notification of documents

Art. 8 of the new Directive provides for the possibility to notify documents that are relevant to the recovery procedure. At the request of the applicant authority, the re-

quested authority notifies the addressee of all necessary documents. This is done with the aid of a standard electronic form that includes all relevant data related to the document. Such notification should only take place if no other means of notification is available.

7.6. Recovery or security measures

At the request of the applicant authority, the requested authority recovers claims that are the subject of an instrument permitting enforcement in the applicant Member State.¹⁸ A request for recovery is accompanied by a uniform instrument permitting enforcement in the requested Member State. This uniform instrument permitting enforcement contains the same substantive information included in the initial instrument permitting enforcement and constitutes the sole basis for the recovery and precautionary measures taken in the requested Member State. It does not require an act of recognition in that Member State and does not need to be supplemented or replaced.

7.7. Interim conclusions

The main advantage of the new Directive is the introduction of a uniform instrument permitting enforcement in the European Union. Each national instrument permitting enforcement is transformed into a uniform instrument permitting enforcement that is a standard electronic form and transmitted electronically to the requested Member State. The standard form is designed such that essential information can be entered by way of a tick, formulated in accordance with text fields. Free text is kept to a minimum. Automatic translation largely resolves one of the biggest problems with regard to the current procedure, i.e. the different languages of the Member States. Overall, it is anticipated that the new Directive will significantly enhance recovery assistance between the Member States of the European Union.

8. Council of Europe/OECD Multilateral Convention on Mutual Assistance in Tax Matters

The original Mutual Convention was opened for signature in Strasbourg on 25 January 1988. It entered into force in 1995 and was updated on 27 May 2010 by way of a protocol. The signatory status is shown in an annex to the Mutual Convention for further reference. The Mutual Convention provides for comprehensive assistance (exchange of information, service of documents and assistance in the recovery of taxes).

The amendment to the Mutual Convention was in response to the call of the G20. The objective was to allow developing countries to take advantage of the increasingly cooperative tax environment. In order to do so, the prin-

15. Art. 2(3) new Directive.

16. Art. 5(2) new Directive.

17. Art. 5(3) new Directive.

18. Art. 10 new Directive.

principle of flexibility needed to be embraced, so as to take into account asymmetrical situations. The Mutual Convention is now open to non-members of the Council of Europe and OECD. This is a powerful tool that can be applied even in the European Union, as it allows for wider cooperation than exists under EU laws and directives.

In accordance with the Explanatory Report of the Mutual Convention, competing interests must be balanced. The contracting states must apply their national laws, without undermining the object of the Mutual Convention. In order to preserve domestic rights (i.e. to a proper procedure), the contracting states must enter a declaration (i.e. the authority may inform its resident or national before transmitting data) or a reservation (i.e. for recovery purposes).

9. A Practical Example: Netherlands Policy on Collection of Taxes under Tax Treaties

9.1. General overview

Netherlands policy is to incorporate mutual assistance provisions for the collection of taxes into all tax treaties. Nevertheless, the Dutch Tax and Customs Administration (DTCA) is sometimes confronted with a situation where requested states cannot even collect their own taxes. The DTCA has made some reservations in this context.

In the Netherlands, imprisonment for up to one year is available as a sanction to coerce a tax debtor to pay his outstanding tax debt. This is a remedy of last resort and can only be used where other, less severe measures of seizure and collection are not available. The DTCA does not, however, apply this sanction with regard to foreign tax debts.

9.2. Present experience

The DTCA's staff sometimes complain about the complexity of tax treaty rules (the new Directive should partially resolve these problems). Generally, the procedures are too complicated. There is often a lack of awareness concerning existing opportunities. This implies that sometimes there are possibilities that some civil servants are not aware of. Occasionally civil servants complain that other states (Member States) are not dynamic enough. The handling of requests is also experienced as a time-consuming activity.

Within the European Union, the results of requests for mutual assistance in the recovery of taxes are relatively minimal. Some Member States are unwilling to implement rules regarding mutual assistance for the collection of taxes. The primary reason for this is simply that it is impractical for those countries to provide mutual assistance.

9.3. Are there alternatives?

A significant number of farmers live in the Netherlands. Due to the fact that the economic climate has been, and remains, rather unfavourable for farmers,¹⁹ a number of farmers have, since 1990, left to live in countries that are

more favourable to farming, such as other Member States or countries outside Europe.

A number of farmers have left the Netherlands without paying exit taxes upon winding up their activities in the Netherlands. Primarily, this relates to émigrés to countries outside the European Union. This obviously is due to the fact that the EU Directive, in general, operates well. Consequently, the DTCA has, in the last 20 years, been confronted with many farmers who, in a rather "sneaky" way, have emigrated to countries outside the European Union without paying their tax debts. As this applies to tax levied on the termination of the activities of a company, the tax claim is, in most cases, substantial. Specifically, the claims range from EUR 100,000 to millions of euro.

9.4. Formulation of the problem

With regard to some countries emigrated to, bilateral tax treaties have been concluded that include provisions on mutual assistance for tax claims. The problem is, however, that the destination countries are not necessarily keen to assist in numerous tax collection requests (between 10 and 100 requests per year). The hesitation of some destination countries is reinforced by the fact that these countries cannot file similar requests in the Netherlands, as citizens of foreign countries who move to the Netherlands do not have tax debts in the countries they lived in before emigration. It appears, therefore, that there is, in effect, no reciprocity. In other words, the requesting state asks the requested state to exert efforts to collect tax debts, whilst the latter does not have any interest with regard to mutual assistance in tax collection in the first state.

9.5. Alternative methods of collection

In order to resolve this problem, the DTCA adopted a solution pursuant to which the requested state only has to exert minimal effort, whilst the requesting state pursues an active collection policy against the émigré farmers. The starting point is that the requesting state, i.e. the Netherlands, has no jurisdiction in the territory of the other state. The DTCA is well aware of and respects this.

As a first step, the DTCA consulted with the states of residence of the émigré farmers. During the consultations, the following was agreed:

- (1) the DTCA would write a letter to the farmer/tax debtor that provided that the farmer was to pay the tax within six weeks. In the event of failure to pay the tax, all necessary collection measures would be taken;
- (2) after six weeks, the tax authorities of the state of residence of the farmer would send a letter to the farmer informing the farmer to pay the outstanding Netherlands tax debt; otherwise, under the tax treaty, mutual assistance would be requested and other measures would not be ruled out;
- (3) in the letter of the foreign tax authorities to the farmers, a second payment deadline was given;

.....
19. Such as milk quotas, high land prices, strict environmental rules and the lack of available land for expansion.

- (4) these letters were relatively successful, as they resulted in nearly half of the farmers paying their tax debts;
- (5) two Netherlands government officials visited the new states of residence of the farmers and took the following collection measures:
 - the farmers who still had not paid their tax debt were invited, during office hours, to see the officials at a hotel;
 - meetings were held with the bankers who financed the farmers and, with regard to those bankers that were not aware of the fact that the farmer still had (significant) Netherlands tax debts, it was agreed that, if a farmer applied for new credit or wanted to extend existing credit, this would only be granted once the farmer forwarded a declaration from the DTCA that proved that no tax debts were outstanding, which needed to be requested by the farmer himself;
 - with regard to farmers with a lack of funds, meetings were held with life insurers who offered insurance policies to the farmers that provided that a loan could be taken out for payment of the tax combined with a life insurance policy;
 - meetings were also held with institutes that had statistical data and analysis at their disposal that provided insight into the profitability of farming in general and those farmers who specialized in dairy, cattle, pig, agriculture and chicken farming, in particular; and
 - meetings were held with the advisers of the farmers in question;
- (6) the measures in (5) gave an accurate impression of the profitability and the payment possibilities of the farmers;
- (7) these actions also resulted in much commotion in the Netherlands émigré communities in the foreign countries in question and, therefore, many farmers decided to pay their outstanding tax debts; and
- (8) in this respect, this approach has had a strong deterrent effect.

Ultimately, more than 90% of the farmers paid their outstanding tax debts. With regard to the remaining tax debtors, mutual assistance was requested. An agreement was reached with the tax authorities of the foreign states to the effect that swift action should be taken.

The benefit of this “direct approach” is that it does not significantly impose on other states. This approach does not, however, work if there are only a small number of taxpayers abroad. In this event, the costs are too high in relation to the end result. Ultimately, however, this exercise demonstrated that, in a short period of time, it is possible to collect significant amounts of money using this approach.

9.6. Important factors for the tax authorities

The example of the Netherlands experience highlights several important factors in relation to requesting authorities:

- there is no competence abroad;
- it is not possible to enforce tax liabilities abroad without mutual assistance;
- it is necessary to seek the commitment of the foreign tax authorities;
- the foreign tax authorities should be fully informed (there should be no surprises); and
- the foreign tax authorities should be informed of the proposed actions in their state.

9.7. Collection by “wrongful act”

Another method of collecting tax debts from taxpayers who have emigrated is to convert the tax debt into a civil law claim. This can be done by establishing the tax debt before a civil court and claiming that the tax debt has arisen as a result of a wrongful act of the taxpayer that has resulted in a claim for damages by the state. The court decision can subsequently be transformed into an *executur* and can, as such, be used as a replacement for the distress warrant from the tax bailiff. By way of the *executur*, the DTCA can collect the tax debt in the foreign country via existing multilateral treaties and/or bilateral agreements, and EU directives.

10. Conclusions: Where Might This Issue Be Headed?

It is evident that requests for recovery assistance are increasing, both in number and amount, as the mobility of capital and persons grows. This trend is likely to continue. Where multiple legal instruments may apply, it is advisable to establish a single legal basis in the requests made by applicant states. This should assist in clarifying the legal regime to be followed in a particular case. In general, it is preferable to taxpayers if the implementation arrangements were published, as many details of the arrangements are often left to the agreement of the competent authorities and are, therefore, unknown to others.

Finally, if developing countries are to join this global movement, a certain degree of flexibility must be incorporated into the classical scheme relating to reciprocity, both in law and in practice. This will allow the state-building capacity of developing countries to be improved.