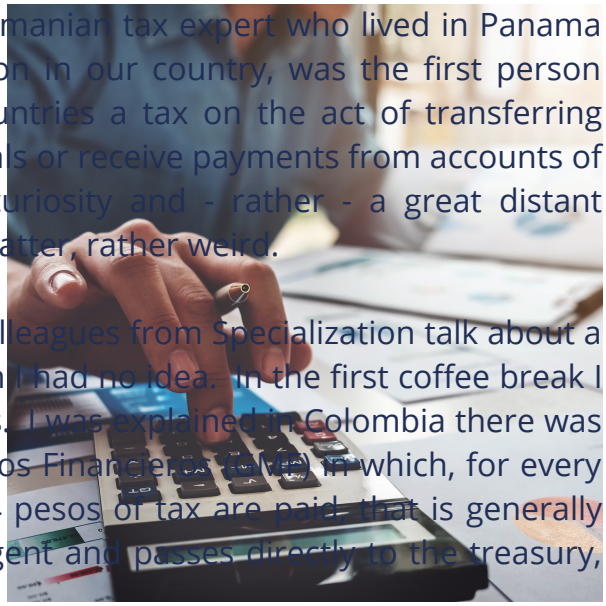
BRIEF COMMENT ON THE TAX ON FINANCIAL TRANSACTIONS, PURPOSE OF A RECENT ARGENTINE COURT RULING

BY PUBLIO CORTÉS

Edison Gnazzo (RIP), that great Uruguayan-Panamanian tax expert who lived in Panama and who was an essential reference for taxation in our country, was the first person whom I heard say that there was in other countries a tax on the act of transferring money between bank accounts, make withdrawals or receive payments from accounts of the financial system. It seemed to me as a curiosity and - rather - a great distant anomaly. In fact, I thought it was a theoretical matter, rather weird.



In 2011 in Bogotá, I listened to my Colombian colleagues from Specialization talk about a matter they called the "4 x a Thousand", of which I had no idea. In the first coffee break I saw the opportunity, I asked them what that was. I was explained that in Colombia there was a national tax called Gravamen a los Movimientos Financieros (GMF) in which, for every thousand pesos of some financial movement, 4 pesos of tax are paid, that is generally withheld by the financial entity as a collector agent and passes directly to the treasury, that there are some movements exempt from this GMF in Colombia and that this tax emerged as something temporary in 1998 when it was "2 x a Thousand", then it became "3 x a Thousand", it has been a "4 x a Thousand" for a long time and always manages to stay current.

When I heard about this Colombian GMF I told myself that it was confirmed, once again, that Edison Gnazzo always knew what he was talking about. What an honor to have been his student.

It turns out that Colombia's GMF, although it was the first I had ever

heard of, was not the only tax of this nature that exists in Latin America. If we follow what was investigated by the Argentine expert DARÍO GONZALEZ,[1] in Latin America these taxes have proliferated. This author has cleverly called these taxes “heterodox” to differentiate them from the classic classification of direct taxes (on income and capital) and indirect taxes (on sales or added value type).

This list of Latin American tax heterodoxy includes, in addition to Taxes on Financial Transfers (ITF), also Taxes on Business Assets (IA); Presumptive income taxes (IPSLR); simplified regimes for small taxpayers (RS); Flat Rate Tax (IETU); Export Rights (DE).

Not all ITFs are the same, but it is useful to jointly review some of their main characteristics, based on what was explained by the cited author:

- We speak of a tax on financial "transactions" because it has not only been applied on bank debits, but also on credits and debits from financial institutions and on other operations (deposits and cash withdrawals), as well as on organized payment systems by non-financial companies.
- Although it has lasted in many countries, the official trend is for it to be somewhat transitory to obtain resources expeditiously in times of crisis, simply and at low cost.
- There are countries such as Brazil and Peru where its use was justified as a way to overcome bank secrecy, since information on the financial movements of taxpayers was obtained through this tax.
- If the rate is very high, it causes a tendency to cash transactions and unbanking, to avoid paying the tax.
- Sometimes it is applied, totally or partially, as a credit against classic taxes such as income tax.
- There have been versions where it is "general income" and others where it is an "income with a specific destination."

With variants specific to each country, in Latin America it has been applied in Argentina, Brazil, Bolivia, Colombia, Ecuador, El Salvador, Honduras, Mexico, Peru, the Dominican Republic and Venezuela.

It is currently in force in Argentina, Bolivia, Colombia, Honduras, Peru, the Dominican Republic and Venezuela.

Despite all the explanations I have seen, I think this tribute does not seem reasonable at all. The constitutional framework in all our countries requires that there be a clear “taxable capacity” or “manifestation of wealth”, so that a tax is imposed on a taxpayer. I have never been convinced that in this tax that exists, at least not in the most common cases.

In fact, I even believe that in many

[1] GONZALEZ, Darío, “*The heterodox tax policy in Latin America*”, Economic Comission for Latin America and the Caribbean (ECLAC), United Nations, Santiago de Chile, 2009 https://www.cepal.org/es/publicaciones/7325-la-politica-tributaria-heterodoxa-paises-america-latina. See, in addition, the Blog of the same author in: https://www.ciat.org/ciatblog-el-impuesto-a-lastransacciones-financieras-itf-en-alc/

financial transactions can be signs of the contrary. For example, a company or an individual who, due to the pandemic, is lucky enough to continue billing in a reasonable way for the time in which we live, has income, however, if there are more expenses and debts that they have to pay than income, is being diluted.

During the month and the year, could be making many deposits for collections and -at the same time- many withdrawals or transfers, playing that typical tightrope number that many actors in the productive sector are doing these days (and some since before the pandemic). And on top of having to pay taxes for each bank movement? Amazing.

I can't quite understand how this handling of deposits and withdrawals can be classified as "taxable capacity". My broad mind in the lieu of the tax phenomenon does not stretch that much.

Perhaps the reader will see something that I do not see, but honestly the justifications that I have seen, seem rather a rationalization of a purely collection goal.

This distrust of the ITF was increased when I read statements such as the following from VITO TANZI: [2]

> "... The incompetence or lack of will in the countries of the region to further increase income from ISLR, together with the constant need of the countries to obtain additional income, has contributed to interesting tax innovations through the application of new taxes or new methods of taxation."

In my opinion, this comment says it all. We are witnessing, in the case of the ITF, the confession of failure, at least partial, of the Tax Administrations and the use of a mechanism where, although there is no clear sample of taxable capacity, the tax is collected anyway, just because it is easy and collections are increased. The end justifies the means. In addition, it is questionable whether it is intended that the institutional frameworks of our Political Constitutions, all designed under the domain of the orthodox vision of taxes, can shelter this new reading of the concept of "tax capacity".

To this type of argument is now added, in this era of boiling point of new technologies and tax transparency, that the Tax Administrations can make use (if there is a will) of more precise tools in matters of control and determination of

[2] "Taxation in Latin America in the Last Decade", Center for Research on Economic Development and Policy Reform, Working Paper N° 76, Stanford University, Vito Tanzi, December 2000, cited by DARÍO GONZALEZ in the afore mentioned essay.

taxes, so it seems that these types of taxes which rely on little effort from the Administration, are already quite unjustified.

Recent Court ruling of Argentina

With the understanding of the aforementioned subject, I had news of a recent ruling that passed down on April 8 of this year, by the Supreme Court of the Nation in Argentina, through the opinion article published on May 11 by the Tax Lawyer of Buenos Aires, SILVINA ÉRICA CORONELLO,[3] in which she outlined said decision. The opinion article bears the following title:

> "Operations that do not show taxable capacity are unconstitutional"

Immediately after the previous title, a kind of synthesis of the content is read with the following text:

> "The Supreme Court of Justice of the Nation has just been issued ratifying the fundamental criterion that the taxable capacity is a requirement of validity of all taxes and declares the **unconstitutionality of the tax that levies bank transactions**" (The underlining is ours).

After reading the title and the summary, especially the underlined part of the latter, I was left with the impression that the very existence of the tax levied on bank movements in Argentina, in its entirety and for all taxpayers, had been declared unconstitutional. I immediately thought that I had found a point of view that coincided with mine on the subject.

My initial impression was wrong.

Subsequently, I reviewed both the full opinion article and the Court ruling[4] and the matter was not exactly as I thought.

In summary, the ruling of the highest court of Argentina involves the following:

The plaintiff was the Bar Association of the Province of Buenos Aires (COLPROBA) in relation to the application to this professional union of the Tax on Bank Credits and Debts (ICyDB).

According to the Argentine constitutional system, much like the federal style of the United States of America, the control of constitutionality is diffuse, that is, it takes instances, until

[3] https://www.ambito.com/novedades-fiscales/corte-suprema/operaciones-que-no-exteriorizan-capacidad-contributiva-resultan-inconstitucionales-n5191417

[4] CSJN sentencia del 8/4/21 "Colegio de Abogados de la Provincia de Buenos Aires c/ P.E.N. s/ amparo ley 16.986". FLP 22100095/2011/CS1.

the case reaches the Supreme Court (in Panama it is not like that, except in the remedy device named Amparo). So it was in this case. The plaintiff had won in the previous instance and who brought the case to the control of the Supreme Court, through an extraordinary appeal, was the State, through the Ministry of Economy and Finance.

The Supreme Court, when deciding, and "for reasons of brevity," simply referred to the opinion of the Attorney General's Office, which it endorsed.

The Court rejected that COLPROBA was exempt from ICyDB, under an exemption applicable to the Provinces, since COLPROBA is a subject with its own personality, differentiated from the Province of Buenos Aires.

To review the origin of the tribute in terms of COLPROBA, the Court analyzes the Law that governs it and concludes that all its assets are aimed at fulfilling the tasks of state control over the profession of lawyers and attorneys. Said Law also obliges COLPROBA to have an account at the Bank of the Province of Buenos Aires and to make mutual transfers between COLPROBA and the Departmental Bar Associations.

The ruling finds similarity in this case with a previous one related to the "Retirement and Pension Fund", where the Supreme Court had said that:

> "the bank movements made in their accounts cannot be considered, not even incidentally, as manifestations of that particular aptitude that every subject must have in order to be a passive subject of any gabelle" [5]

Based on the aforementioned precedent, the present case is decided by saying that:

> "the bank movements made in the plaintiff's accounts [COLPROBA] cannot be considered, even incidentally, as manifestations of wealth or taxable capacity, an element that constitutes a requirement of validity all taxes".

The distinguished Lawyer CORONELLO contributes in her article the following reflection on the tax capacity in the Argentine version of the Tax on Financial Transactions (ICyDB):

> "... the ICyDB falls on transactions and therefore would be receiving a presumed tax capacity of taxpayers based on the economic circulation carried out through the operations covered by the tax."

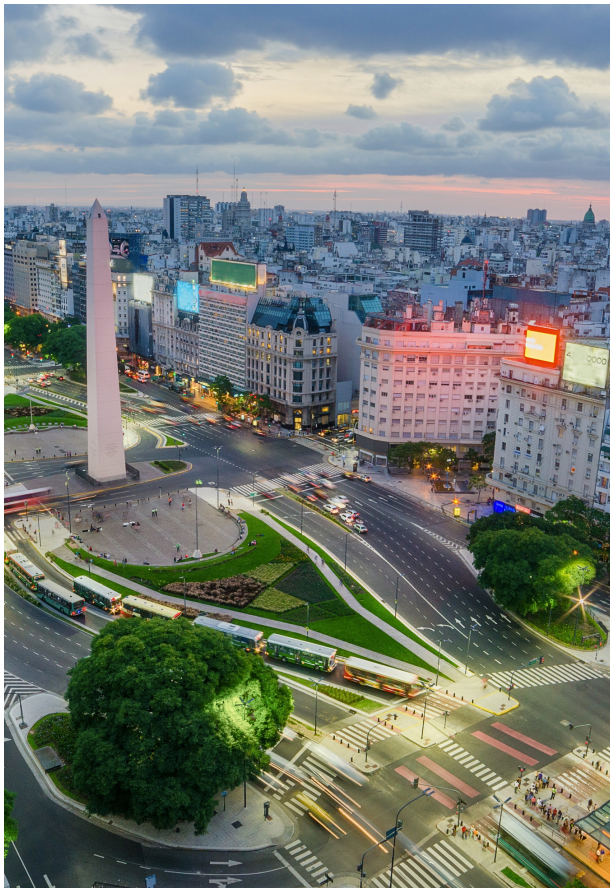
[5] Gabelle is a way to name taxes, coming from old French. See MERRIAM-WEBSTER English Dictionary.

I think that here, we get to the bottom of the matter. The author has perfectly described the premise from which the underlying hypothesis of this tax starts: it is assumed that everyone who activates the circulation of money in financial transactions, by the mere fact of doing so, expresses a taxable capacity.

However, in the case of the Bar Association of the Province of Buenos Aires, since it is an entity with a rather public function and whose banking movements are exclusively related to that task of state control over the profession of lawyers and attorneys, the Supreme Court estimated that there was no such expression of taxable capacity. Therefore, it considered that the application of the ICyDB was unconstitutional, in the specific case of COLPROBA.

In my opinion, it is totally unfair that the mere act of carrying out transactions with money is presumed to show a taxable capacity. This may be in some cases and not in others, therefore the generalization is abusive. Very different is the case of clear expressions of wealth such as the consumption of products and services in general and especially those that can be described as luxurious.

However, in a capitalist economy, making deposits, withdrawals and payments of obligations is as much as breathing, they are acts that need to be done many times without representing the enjoyment of wealth or an increase



in it. Charging a tax under that presumption is as much as charging a tax for breathing.

That would be my approach not only for cases with the peculiarities of the one mentioned about the Bar Association of the Province of Buenos Aires, but for all those affected by these Financial Transaction Taxes.

With due respect to all the Latin American countries that have had and still have some version of this tribute, it seems that in this matter the reasoning was the other way around: first they realized that it was an easy way to collect and compensate even a fraction of collection deficiencies and after that the tax theory was established to justify what has already been decided.

COMENTARIO FINAL

On previous occasions I have commented on the simplistic vision that some have in Panama, according to which they believe that by putting a tax exemption in each Law, they will attract investment. This virus is spread by contact and proliferates especially in the furniture of the Ministry of Commerce and Industries. The government in office does not matter: everyone who sits in those chairs is infected.

The reality of attracting investment is much more complex, it is known. It involves making labor regulations more flexible, complying with international standards of transparency, having fewer problems of institutional corruption and taking our educational system to better levels.

But in addition to this, the analysis on whether new tax exemptions in Panama really attract investment should begin by conducting a comparative study with the region to first determine whether or not we are competitive. Those who like to hand out tax breaks like candy on children's birthdays should do that exercise. They would come across a lot of valuable information.

A typical example of the tax advantages of Panama is that, unlike many Latin American countries, we have neither had nor have nor are we interested in establishing any variant of the Financial Transaction Tax. Such a tribute in Panama would be implausible.

If we combine the above with the natural and unforced dollarization of the economy, which brings about the non-existence of exchange controls and imperceptible inflation, we already have a phenomenal attraction that is not self-sufficient but is of great value, especially because it does not require a Law with "special regime" to be able to enjoy it.

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