ANALYSIS OF DIGITAL TAXATION OF TRANSACTIONAL COMPANIES AND THE APPLICABILITY OF THEIR TAX PLANNING

ABSTRACT: Human evolution in the world has brought the digitization of the economy. There is a strong growing digital economy that takes place in intangible environments, and therefore, when it comes to taxation, there is a great conceptual gap over the conventional economy. It is verified that tax planning in the digital world and tax planning in the digital world are so challenging that it has become a topic of the OECD and BEPS, in order to provide mechanisms to avoid tax planning evasion. Finally, it is noted that companies operating in the digital economy are able to choose a jurisdiction to be their tax residence and provide services and trade anywhere in the world, and hence the big question about the taxation of companies that do not have physical space in a jurisdiction, but generate value and income for that jurisdiction.

Keywords: Digital Tax Law; tax evasion; Tax planning; OECD/BEPS; place of taxation; Jurisdiction

INTRODUCTION

The world develops with dynamic growth and as a result, so do economic activities. As part of this economic development, the digitization of the economy is born. Which emerges to bring the Nation into a new era - the digital age.

From a digital age, economic events occur, therefore, when generating circulation of wealth, they bring the facts that give rise to taxation. Therefore, with the dynamism, especially during and now after the COVID-19 pandemic, digital economic relations have grown exponentially.

This digital age permeated by a digital infrastructure allowed giant technological companies to reach their target audience (customers) through a click, an impulse, an advertisement on the screen, much faster, easier and cheaper than the physical market.

In view of this digital revolution, a great "black hole" comes to tax law scholars and actors, as there is no regulation for many transactions, therefore, many companies, especially giant transactional companies, began to act in the digital revolution in a privileged way when we talk about taxation.

Thus, when weaving considerations and analysis on the actions of large digital companies, which are international, the limit is the exhibition of legal acts and businesses of how they were created and planned and have being used in the digital world with their consequent taxation. In contrast to this analysis of large international digital companies - Google, Apple, Alibaba, Amazon and their tax plans involving from the choice of registered office to the detriment of places with the lowest taxation or even tax havens that are different from the places where they profit, bill, have employees and literally act in the clouds.

In this line of research, it is necessary to oppose the BEPS project. The BEPS project developed by a working group that encompasses the OECD and the G20 countries, has as its main goal to suggest policies to combat abusive tax planning strategies.

The core issue to be faced is concerning the digital economy and the consequent activities arising from this new revolution, and how the large multinational companies, which operate both in

Europe and in the Brazilian jurisdiction, plan fiscally to operate, therefore pay taxes or not on their operations.

Thus, the taxation of digital trade routes needs to be investigated, also through the global technology giants known collectively as FAANGs (Facebook, Apple, Amazon, Netflix and Google) that make remote transactions of global goods and services - without the need for any significant physical resources within countries.

The primary purpose of this research is to understand exactly the taxation path for transactional companies providing digital services which do not have physical jurisdiction in the places where the profit occurs when rendering the services. Therefore, the main argument to be sought is to understand whether taxation occurs where the profit is generated, or in the place of jurisdiction of the transactional company.

Exactly, the challenge of assessing a company in the digital economy that has a residence in one jurisdiction and generates wealth in another jurisdiction, that of the source, without necessarily having a physical or permanent facility in that jurisdiction where the wealth is generated, is the topic to be covered in this article.

In order to understand how the principle of residence is treated to the detriment of the principle of wealth generation, the proposed topic will be studied from a number of perspectives:

i) The Organization for Economic Cooperation and Development (OECD) Model Convention on the principle of residence and the concept of permanent establishment;

ii) BEPS perspective, mainly Pillar 1 and Pillar 2, on digital taxation and jurisdiction;

In the changed business environment, a company or individual in the residence jurisdiction could be doing substantial business in the market jurisdiction – especially through e-commerce – without being subject to income tax in the market jurisdiction. Therefore, how to modify the international tax architecture, how to re-balance traditional tax norms, in order to allocate more taxing rights to market jurisdictions? Or more appropriately, to recognize the inherent taxing rights of market jurisdictions. That is, to permit jurisdictions to exercise taxing rights. What would be the new rules to promote and permit greater income taxation in the market jurisdiction?

1. TAX PLANNING AND THE ROLE OF THE OECD/BEPS/TFDE

Taxpayers are free to choose the structure, form and strategy of their businesses, in order to choose a model that brings them tax savings. We are talking about tax planning.

Fabretti (2005, p. 152) explains tax planning as a preventive activity that studies the legal acts and businesses the agent intends to carry out, aiming at obtaining greater tax savings, reducing the tax burden to the amount actually required by law. The analysis of the legality of tax planning is governed by anti-avoidance rules, which in the Brazilian national context are guided by the constitutional principles that limit and direct planning, in order to later bring the conceptual notion and demonstrate the right of taxpayers to plan tax savings within the law.

Villegas (1975, p. 31) and Rica (184, p. 433) call tax planning an economy of choice, which can be explicit or tacit. Aliomar Balleiro (1958, p. 62), confirms this clearly: "In principle, if the taxpayer does not violate an institution provided for the law, or does not commit ideological falsehood, he is free to choose the legal acts and instruments that, from a tax point of view, are most convenient to his interests."

According to Greco (2011, 175), when planning is mentioned, the focus of concern is someone's conduct; for this reason, the analysis of this conduct gives greater prominence to the qualities of this conduct, as well as to the elements: freedom of agreement, lawfulness of the conduct, the moment in which it occurs, etc.

Tax planning, therefore, consists of a prior study of business strategies, carried out with skill, using the legal provisions and the lack thereof, aiming at adopting the conduct that brings the least onerous tax payments.

It should also be noted that in the face of the lawful search for tax savings, before the taxable event occurs, we must consider the business purpose to which the planning serves, which would be to support prevention in all its forms, in order to provide greater security for the taxpayer.

Having considered the applicability and conceptual and applicable limitations of tax planning in both Europe and Brazil, it is important to make it clear that tax planning, whether national or international, when it comes to the digital economy, should also comply with legal requirements and limitations.

As the digital economy is new, and lacking regulation, especially with regard to taxation, it can be seen that several transactional companies have planned to act, with the purpose of tax savings - and in the absence of regulation, the viability of these tax planing a priori has happened.

Following this reasoning on the tax planning implemented by the large multinational corporations that dominate the Internet: large web multinationals such as *Google, Facebook, Amazon, AirBnB, Apple, eBay, Baidu, JD.com, Alibaba, Netflix, Samsung* and a few others who, under current conditions enjoy tax privileges which are not available to third parties and on the arrival of the digital economy, the value chain has been profoundly and radically altered.

These foreign companies have chosen tax planning to pay taxes in the countries where they have their headquarters (obviously with a considerably cheaper tax rate) than in those where they operate the production and sales activities. The issue mainly concerns to the huge market for the on-line sale of goods and services and the purchase of so-called search advertising, the advertising spaces that appear on search engine pages and, secondly, all activities related to on-line services (music, cinema, tourism and games, to name a few) and the entire e-commerce sector.

Therefore, it can be seen that large transactional players have adopted digital tax planning, using the criterion of choosing a physical headquarters with lower taxation and rendering on-line services and commercial sales throughout the world without the need for a physical presence in those locations.

It is precisely because of the unbridled growth of the digital economy that many of these transactional companies have ended up making a lot of money and, on the other hand, taxation is not high compared to the conventional economy.

In some cases, the revenue losses are enormous, such as the European Union's claim that Ireland provided tax incentives worth 13 billion euros (approximately USD 15 billion) to Apple, which allegedly constitutes illegal state aid. Recent leaks of tax haven data, including the Paradise Papers of 2017, show that in light of media attention and global tax reforms, companies such as Apple and Google have restructured their global businesses through aggressive tax planning (COCKFIELD, 2016, p. 483).

In this regard, on the global economic and financial crisis of recent years, the austerity policies adopted and the various tax scandals that have come to light concerning large transnationals (such as *Apple, Amazon* and others) have made the fight against abusive tax planning more pressing (PALMA, 2020, p. 537).

In this way, it can be said that Ottawa Interministerial Conference of October 8, 1998 - *A Bordeless World* was essentially the famous. *Realizing the potential of Electronic Commerce,* which established the basic principles that should guide the taxation of the digital economy.

The OECD (Organization for Economic Cooperation and Development), through its Committee on Fiscal Affairs, presented important conclusions in this context at the conference. Four fundamental guiding principles were also established to be observed in matters of direct taxation: a) the principle of neutrality; b) the principle of efficiency; c) the principle of certainty and simplicity; d) the principle of substance over form. Therefore, the aforementioned tax principles should also be applied to e-commerce (PALMA, 2020, p. 536).

Thus, following on from this conference, but at the request of the G20, the OECD created the *Base Erosion and Profit Shifting* (BEPS) project. The project included 15 action plans, that is Project 1 analyzing some tax issues in the digital economy. The BEPS project can largely be portrayed as a collection of past efforts (particularly in the 1960s) to inhibit such planning, such as taxing income from passive cross-border businesses on an accrual basis through controlled foreign company rules, as well as - at the time, secret - deliberations concerning the abuse of tax treaties.

While BEPS actions reveal some new approaches, such as country-by-country reporting, reform efforts generally focus on reinforcing the current environment through specific anti-evasion rules, general anti-evasion rules and other traditional mechanisms. As mentioned at the beginning, the OECD focused the BEPS project in part on how global digital trade can facilitate aggressive tax planning that leads to revenue losses in relatively high-tax countries (COCKFIELD, 2014, p. 936).

According to Brauner and Moreno (2015, p. 15), the BEPS Action 1 discussion project does not define the digital economy. They believe the ideal mechanism would be to carry out a "*smell test*" to identify digital economy problems. They argue it could be useful, especially in a preliminary investigation phase such as the one in which the BEPS Project is currently engaged; however, it would be problematic if someone were to impose a withholding tax on payments related to digital transactions.

Therefore, although BEPS, since 2013, has been implementing measures in an attempt to solve problems in the digital age, it is understood the project has not fully achieved its goal and in an attempt to tax income derived from digital goods and services, several jurisdictions around the world have been more proactive in introducing unilateral measures to include these activities in the scope of their tax systems (ZANETONI, 2021, p. 311).

On the other hand, governments or regional entities, such as the European Union, have developed, or are in the process of implementing, minimum taxes, withholding taxes and taxes on diverted profits that focus on taxing income that is not associated with the physical presence of the businesses involved in such economic activities (COCKFIELD, 2019).

In fact, large companies with global potential focus their tax planning on their place of incorporation, especially in countries that follow the worldwide income taxation system, in line with the concept of capital export neutralization (CEN), as is the case in Brazil (MONTEIRO; CASTRO, 2018, p. 960).

But the struggle to find taxation that is coherent with the digital economy does not stop and it is precisely in this sense that, after years of intense negotiations to update and fundamentally reform international tax rules, 137 members of the OECD/G20 on BEPS (Inclusive Framework) adhered to the Declaration on a two-pillar solution to address the tax challenges arising from the digitalization of the economy (the Declaration) released in October 2021.

Since that historic agreement, significant work and progress have been made in developing the technical rules of the new tax law (Amount A). These rules and procesures are now released by the document - *Progress Report on the Administration and Tax Certainty Aspects of Amount A of Pillar One – Two-Pillar Solution to the Tax Challenges of the Digitalisation of the Economy* (OECD, 2022), published on October 06, 2022.

Even the OECD, by means of a public consultation, made available the submission until November 11, 2022, on issues dealing with digital taxation (OECD, 2022).The report contains the rules on the administration of the new tax law, as well as provisions on tax security that were developed by the Working Group for the Digital Economy (TFDE).

On July 11, 2023, the OECD/G20 Inclusive Framework on BEPS approved a four-part Outcome Statement on the Two- Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy that provides updates on the two-pillar solution. A key takeaway of the Statement is the announcement that the moratorium on new digital services taxes (DST) will be extended by one year to December 31, 2024.

The OECD has included in Pillar One - which deals with the reallocation of tax rights in digital law - the application to large multi-corporate enterprises (MNEs) with a turnover of more than €20 billion and a profitability of more than 10% (income before tax/sales). This demonstrated the purpose of reallocating the right to tax to the market jurisdiction, i.e. where the money is generated through the customers of these MNEs. Therefore, this allocation will be based on the company's revenue.

In pillar two, the purpose is to establish a minimum level of taxation country-by-country. The basic framework of the proposals is the introduction of Global Rules against Base Erosion (GloBE). They apply to taxpayers with sales of €750 million.

On July 17, 2023, the OECD/20 Inclusive Framework on BEPS (“OECD inclusive framework”) published a package of documents on the implementation of the Pillar Two global minimum tax rules (“Pillar Two”). This package includes: additional administrative guidance for the implementation of OECD model rules including two new safe harbors, a finalized GloBE information return (“information return”), and model treaty articles to implement a subject to tax rule.

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On October 11, 2023, the OECD/20 announced the publication. Of the Minimum Tax Implementation Handbook. This implementation provides a overview of keys provisioned of the pillar two global minimum tax model rules that jurisdictions should implement into their domestic law, and brought some considerations for tax policy and administration officials and other stakeholders to take into account in assessing implementation options.

It can be seen that there is a global struggle by the OECD to remedy the issue of evasive tax planning in the digital economy, and Pillar 1 focused on taxing the profits earned by digital companies, and Pillar 2 focused on combating the transfer of profits to low-tax jurisdictions. Therefore, in Europe, through the Pillar 1 and Pillar 2 measures, a tax reform has being implemented with the primary purpose of bringing about a robust global minimum with a limit for multinational companies that carry out real economic activities with substance.

Putting the Brazilian scenario into context, it can be seen that Brazil is not a member of the OECD, so these deliberations on digital taxation do not apply internally. However, it turns out that tax planning for the digital economy is a major challenge that is being faced globally - mainly because there is a need to tax the wealth generated by the digital economy that circulates throughout modern life.

2. THE CHOICE OF TAX ADDRESS FOR COMPANIES IN THE DIGITAL ECONOMY

Starting to bring the OECD findings (2013, p. 23) that

> [...] various studies and data indicate that there is a growing split between the location where actual business activities and investments take place and the location where profits are declared for tax purposes. Actual business activities are usually identified by elements such as sales, staff, payroll and fixed assets. Studies that analyze aggregate data on global investment positions between countries show this split is indeed taking place, especially with a growing transfer of profits generated by mobile activities to jurisdictions that offer favorable tax treatment. However, as the underlying accounting data does not always reflect some very important assets, especially movable assets, these studies only provide indirect evidence of the existence of tax base erosion and profit transfer practices.

The OECD's findings aforementioned shows the choice of tax address for companies in the digital economy has been preferred to those jurisdictions that offer favorable treatment, regardless of whether the profit occurs in that jurisdiction.

DAGAN(20217) says that is, jurisdictions use their tax systems and reduce their tax burdens below those of jurisdictions competing for the same investment or activity to encourage and affect the economic decisions of taxpayers with the aim of attracting investments, residents and tax revenue to their territories.

On the nexus of where to pay taxes, BRUCE(2022,p.24) says that According to current cross-border tax legislation, a firm is liable for taxes based on its location. There is barely a need for a visible presence in the country of business in the digital era, since intermediate platforms facilitate on-line transactions. For instance, a customer from the United States may purchase a mobile phone cover from Alibaba, a Chinese on-line marketplace with shipping to India. Because of the economic presence of digitalized business models, major changes have occurred in the way taxes are levied. Instead of taxing the country of origin, which is where the companies are based, taxes are now levied in the country of destination, which is where the user is located.

For JHongler & P. Pistone (2015), the solution to these issues is not easy and requires a thorough analysis of the role of risk, functions and people. They say that as the role of users becomes that of active customers of a digitized business, attracting at least part of that revenue to the users' country would be reasonable. It would also establish a reasonable degree of neutrality with the situation in which conventional business creates value in the territory of the country of such users therefore should necessarily promote efficiency.

For Brauner and Pistone (2018) the real value generator does not lie in each piece of data, but in the huge amount of combined data that makes reclassification much more reliable, even in the absence of human intervention and intuition. Based on this hypothesis, the generated value can be split, attributing it to the processing activities carried out through the use of hardware and software. Furthermore, they assert that now is the time for permanent digital establishment before the flourishing of unilateral taxes on the digital economy around the world takes over the delicate balance of international tax coordination.

On the other hand, Sapirie (2018) brings up another possibility to make the concept of permanent establishment work in the digital age, which would be to create a jurisdictional sales threshold above which a taxpayer would be considered to have a digital establishment in that jurisdiction.

Even so, but worth mentioning is Kostiç's (2020) analysis of the Proposal for a Council Directive launched in March 2018 by the European Commission, which, in its Article 4, hopes to introduce a new concept of digital permanent establishment.

Elliffe (2021) highlights the importance of international taxation. And, in this regard, in order to ascertain the international taxation of a jurisdiction, we start from the relationship with a person or the relationship with a territory[1], as residence taxation comes precisely from the link between the taxpayer's address and the State's right to tax. When there is a link between the territory in which the income is obtained and the taxpayer, it is called taxation at source.

On the other hand, the European Commission, in the Council's conclusions on the taxation of digital services, November 30, 2017 (OECD, 2017), points out that:

> i) RECORDS that the concept of stable establishment, together with the rules on transfer pricing and the attribution of profits, remains one of the essential principles of the worldwide distribution of profit taxation rights;
> ii) NOTES, however, that this concept, centered on physical presence, has been challenged by the growth of the digital economy, which is based on digital presence, leading in certain situations to a mismatch between the place where profits are taxable and the place where value is created;
> iii) CONSIDERS when a company carries out significant activities in a jurisdiction, its physical absence alone should not prevent it from being subject to tax on the profits it has generated in that jurisdiction, provided that an appropriate nexus reflecting value creation is used, taking into account the arm's length principle;
> iv) CONSIDERS that an appropriate nexus in the form of a virtual stable establishment should be explored - together with any necessary corresponding changes to transfer pricing and profit attribution rules - which takes into account the place where value is created in the different business models of the digital economy [...] (OCDE, 2017)

In other words, the European Commission states that it is an internationally agreed principle that profits should be taxed where economic activities take place and value is created" (ELLIFFE, 2021).

On the notion of value creation, which is based on the idea that, with the digital economy, there is a shift in the tax base to jurisdictions with low or no taxation, given the lack of physical presence to carry out business activities in a context of "dematerialization of consumer relations" (BARRETO, 2019, p. 1012).

On value creation (LIPS,2020, p.977) notes that the apparently objective statement behind BEPS: ‘aligning taxation with economic substance and value creation’, masks the inherent distributional conflict of coordinating taxes between states. He claims that the BEPS proposals are criticized because the DST is levied on revenue which criticsargue is not an adequate proxy for value creation, limiting its value appeal in the policy stream. Critics also mentioned that introducing a significant economic presence would require renegotiating all the EU members’ tax treaties with third countries.

Value creation can refer either to the jurisdiction where the goods and services are produced (supply side) or to the jurisdiction where the consumer market is located (demand side), depending on the position adopted, that is, subject to the customer’s desire. (PIGNATARI, 2021, p.366).

Moreover, it is important to say many countries have chosen to introduce another system of digital taxation, such as digital services taxes (DSTs), as an alternative to business taxation despite ongoing international discussions. Nations utilize digital services taxes (DSTs) to tax big firms on the income they make from providing specific digital services to local users or customers, rather than changing present international tax legislation to better reflect the digital economy.

On the other hand, YONAH (2007) says , it is important to raise the issue of international taxation. And in this sense, in order to ascertain the international taxation of a jurisdiction, we start from the relationship with a person or the relationship with a territory.

Residence taxation comes exactly between the link between the taxpayer's address and the State's right to tax. When there is a link between the territory in which the income is obtained and the taxpayer, it is called taxation at source. International tax law is mainly concerned with the taxation of this type of cross-border income:

1. When the resident of a jurisdiction is doing business abroad and the foreign jurisdiction under consideration decides to impose taxation at source (investment abroad). Residency taxation of this income abroad is sometimes complicated as the tax laws of the country of origin may apply to this income and this will have consequent implications in the resident's jurisdiction.
2. When the government of a country taxes the business being carried out in its jurisdiction by a non-resident (inbound investment). The imposition of taxation at source is based on the link between income and tax jurisdictions.
3. When countries decide they will continue to operate residence-based taxation worldwide on outbound investment and tax non-residents on income from their jurisdiction on inbound investment, double taxation arises (ELLIFFE, 2021).

In October 2020, the OECD/IFF published new proposals for taxing the digital economy in order to find a solution to the digital taxation that is taking place all over the world, and to understand whether taxation will be levied at source, in the jurisdiction where the company is located, or in the jurisdiction where the profit was generated. One of the main proposals was the "Amount A" in Pillar One Blueprint (OECD/G20 Base Erosion and Profit Shifting Project), the Amount A would transfer part of the global profits made by automated digital services and consumer-facing businesses to the place/jurisdiction where they were generated. The OECD/FI also released an Economic Impact Assessment, which predicted the likely impacts of Amount A for four groups of tax jurisdictions: high-income, middle-income and low-income, jurisdictions and investment centers.

The OECD announced that progress has been made in developing the Amount A MLC but acknowledged some discrepancies between the jurisdictions on certain aspects. It is expected that a compromise will be reached on those discrepancies in the near future so that the Amount A MLC will be ready for signature later in 2023. The OECD envisages that the Amount A MLC will be accompanied by an Explanatory Statement. The Statement also suggests that if sufficient progress is made in 2024, the OECD/G20 Inclusive Framework members may further extend the DST moratorium to the earlier of December 31, 2025, or the date when the Amount A MLC enters into force.

In Lorraine's opinion (2021), this OECD option of Amount A taxation remains a bad idea, whether the scope is limited to the automated digital services and consumer-facing business sectors or extended to all sectors, but restricted to the 100 largest multinational companies. He believes there are much better and less invasive ways of taxing digital multinationals and providing tax revenue for developing countries in the 21st century.

His list includes: (1) add a new chapter on digital multinationals and transactions to the OECD Transfer Pricing Guidelines and the UN Transfer Pricing Manual; (2) replace the 19th century definition of bricks and mortar with a 21st century definition of permanent establishment; (3) encourage all tax authorities to adopt the Multilateral Instrument and its various clauses from the original BEPS project; (4) close the remaining international information and communication technology loopholes that have been used and abused by multinationals to create stateless untaxed income, as identified in the original BEPS project; (5) expand and improve the Tax Inspectors Without Borders, Information Exchange and Country-by-Country Reporting programs; and (6) create better taxes on digital sales/services, which are here to stay.

It can be concluded that on the digitalization of the economy, continental borders are practically non-existent, therefore choosing a tax residence criterion becomes very difficult, because it is not a criterion of physical jurisdiction.

There are those who argue that taxation should take place at the residence of the digital cloud service provider, regardless of where the utilities are made available (BAL, 2016).

To understand tax jurisdiction, the benefit criterion can be used, i.e. tax jurisdiction is allocated precisely on the basis of the benefits and services provided. Therefore, even if there is no physical presence of the company in the jurisdiction competent to tax it, it must be recognized that it has benefited from the infrastructure of the country where its consumer market is located (PINTO, 2002).

HASLEHNER (2019) comments on the competence of European member states that the Member States' competence can still be substantively impaired, at least to some extent, in those areas in which the EU has both competence to act and has already acted. The first such instance arises in the field of indirect taxation, where the EU's exercise of its own competence, through its various VAT directives and directives on excise duties, curtails the Member States' ability to act in a field already occupied by the EU legislature. As the direct conflict here is between the Member States' competence and secondary EU law, the detailed implications thereof is considered below. The second instance arises in the field of international tax law, specifically, the competence of Member States to allocate taxing rights among themselves aswell as between them and third countries in double taxation conventions (DTCs).

HASLEHNER (2019) says that, at this stage of EU integration in the area of direct taxation, however, the doctrine of constitutional external-sphere preemption cannot yet affect the Member States' ability to amend their existing DTCs in ways that alter the definition of a PE to account for a business presence that is more digital than physical.

It can be seen from the above that the choice of tax residence in digital taxation is a major global challenge, as regardless of the choice of the company's physical jurisdiction, as the service is provided without borders, because in the digital age these borders have already been overcome, taxation can/should fall to the jurisdiction in which the profit was generated.

The BEPS proposal is to seek to tax income in the jurisdiction of the market where the goods and services are used or consumed. Detailed rules of origin will be developed for specific categories of transactions and the methodology will have to take into account the specific facts and circumstances of a given multinational company. Profits can already be allocated to a market jurisdiction in the existing structure of MNEs. In other words, there is a safe harbor of marketing and distribution profits that limit the residual profit allocated to the market jurisdiction.

It is worth mentioning a few points that Pillar2 brings, AS the main purpose is to prevent MNEs from shifting profits to low-tax jurisdictions in order to reduce their tax liability, with this, there will be the generation of billions of dollars in additional tax revenue for governments around the world and is intended to create a more level playing field for businesses, that is, a global tax reform is being created, with the implementation of Pillar 2.

This can be seen in the OECD Pillar 2 rules:

> The resulting top-up tax is collected under three types of provisions: the QDMTT, the IIR and the UTPR. These provisions are applied in accordance with an agreed rule order that is embedded in the design of the GloBE rules and operates as follows:
>
> a. **The low-tax income is first subject to tax in the local jurisdiction.** As a starting point, the additional tax payable may be collected through the imposition of a

QDMTT which allows the jurisdiction where the low-tax profits have arisen to impose an additional amount of tax on the MNE Group's excess profits in order to bring the ETR on those profits up to the 15% minimum rate.

b. **Secondary taxing rights are allocated to the parent jurisdiction.** If the low-tax jurisdiction does not have a QDMTT, the obligation to pay the top-up tax will generally be imposed on the Ultimate Parent Entity (UPE) of the MNE Group under a Qualified IIR. If the UPE is located in a jurisdiction that has not implemented a Qualified IIR, then the GloBE rules generally provide that the top-up tax will be levied on the next highest entity in the ownership chain that is located in a jurisdiction with a Qualified IIR.

As a back-up to the IIR, residual taxing rights are allocated to other implementing jurisdictions. Where the IIR cannot be applied to a jurisdiction's low-tax income, the top-up tax is collected by all jurisdictions that have implemented a UTPR, often referred as the Under Taxed Profits Rule. The total amount of top-up tax as calculated under the GloBE rules is allocated among jurisdictions by reference to a substance-based allocation key. On such an allocated part, each jurisdiction collects the top-up tax by applying the UTPR as a denial of deduction under its existing corporate income tax, or through an equivalent mechanism.

The OECD model rules apply to multinational groups with annual consolidated group revenue of at least EUR 750 million and have the following :

1)An income inclusion rule (IIR) calculated and paid by the ultimate parent entity to the tax authority in its country. The tax due is the "top-up" amount with rate of 15%.

2)The undertaxed profits rule (UTPR) will apply as a secondary (backstop) rule , with the effective tax rate below the minimum rate of 15%.

3) The OECD model rules also allow for countries to introduce a qualified domestic minimum top-up tax (QDMTT) aligned with Pillar Two. This profits will be payable domestically, rather than to other countries under the income inclusion or undertaxed profits rules.

In addition, there is standalone subject to tax rule (STTR), a model treaty provision to developing countries to impose limited additional taxation on some cross-border payments between connected companies where the recipient is subject to a nominal corporate income tax rate below 9%.

What we now see is that some countries are in the process of implementing the OECD model rules in their domestic legislation and the IIR and QDMTTs will begin to apply from 2024 in some countries, with the UTPR expected to apply no earlier than 2025.

The OECD is yet to publish rules on the IIR, UTPR, and QDMTT. A multilateral instrument will be available to facilitate the implementation of the STTR within relevant existing double tax treaties.

BEALE affirms that jurisdiction to tax is an intrinsic element of the sovereignty of states, representing an exercise of such power aimed at providing the economic means for them to achieve domestic goals. For this reason, the jurisdiction to tax has recently been at the centre of international debates, such as in the work done in the BEPS Project. BAL(2014) concludes the concept of "tax sovereignty" also gives states the right to decide not to tax and to take special tax measures to pursue national policies, such as attracting investment or fostering economic growth.

LIOTTI alerts that If the framework of the GloBE rules (and any other similar minimum tax proposal) fails to exclude regimes not considered to be harmful according to international standards, especially Action 5, there is a significant risk that Pillar Two will severely and unjustifiably (within the BEPS Project) violate the sovereignty of states to pursue national goals by way of tax systems, and decide to exercise their jurisdiction not to tax.

On the other hand, BURIAK points out if customers are used by an MNE only as a market, that is, the place where the income is realized (not produced), there is no established principle basis for attributing taxing rights over business profits to that market state. Customers that yield no return cannot be subject to income taxation aiming to tax investment activities rather than trade.

BURIAK concludes the scope of the new taxing right for market jurisdictions should be limited to: (1) Businesses that cooperate with business users in the market jurisdiction to jointly deliver services or goods to end-users; (2) Businesses that actively engage users in using their services in exchange for data provided by these customers that is ultimately traded, used for targeted advertisement services or other income-generating commercial purposes;(3) Businesses that target a market and perform business functions like marketing, data collection and sales through digitalized channels and tools (also with the assistance of AI).

HASLEHNER points out Yet the final analysis is not so simple. For example, the fact that the new tax would be proposed as an added tax burden on one sector rather than as tax relief for all other sectors could be important: if the benchmark corporate tax system remains that of residence taxation, and entities paying the DST remain fully subject to that tax at home, no advantage can be said to arise for them as a consequence of their 'export' when compared to resident non-digital businesses.

It can therefore be said that the European Union, through Pillar 2, has introduced some ways of taxing profits earned in jurisdictions where there is no residence or permanent establishment. The first goal is to tax the biggest companies that make these profits, but it is still a long process to implement. Pillar 2 did not create a concept of digital permanent establishment, as some scholars had hoped. That is, this is still a controversial issue – there is the Tax Challenges Arising from Digitalisation of the Economy – Subject to Tax Rule (Pillar 2), published in October 2023 bringing the subject to tax rule STTR *) was developed by the members of the Inclusive Framework on BEPS (IF)as an integral part of the consensus solution on Pillar Two. Pillar Two consists of a set of rules that provide jurisdictions with a right to "tax back" where other jurisdictions have not exercised their primary taxing rights or the payment is otherwise subject to low levels of taxation.*

3. APPROACH OF A CONCRETE CASE

Based on the example of the *Google* case, a model which was also analyzed in Annex B of the BEPS Action 1 report, under the fictitious name "RCo Group" In the case of Google's planning, revenues from ad sales were not offered for taxation in the local markets where those revenues were generated, because Google did not have a physical and permanent establishment in those local markets.

All of Google's taxation took place in Ireland, which was the company's headquarters where the agreements with clients were executed, and where it existed. Operating the sites and making the services available to customers.

However, in Ireland, taxation was practically zero, because the revenue earned by Google in Ireland from providing the site's services was offset against the royalties owed to the Dutch company in the Google group, which had sub-licensed the technology to the company in Ireland. This tax planning was created on the basis of the double taxation agreement between Ireland and the Netherlands.

Google has set up its headquarters with intellectual property rights in Bermuda, which is a tax haven. The parent company was registered in the tax haven of the Bermuda Islands under the name *Google Ireland Holding*.

The subsidiary company was in the Netherlands under the name of *Google Netherlands Holdings BV*, which received the royalties, but the tax was only levied on the difference between the royalties received from Ireland and those paid to the company in Bermuda.

In other words, royalty income earned outside the US was transferred through its subsidiary *Google Netherlands Holdings BV* to *Google Ireland Holdings*, registered in Bermuda. This allowed the company to avoid triggering US income taxes or European withholding taxes on the funds.

Thus, in the United States, where the group's parent company was located, taxation was deferred because the royalties received were treated as revenue from the sale of advertisements in the Bermuda company, as active income. However, taxable income in Bermuda was only that earned from the down payment and the annual payments received under the *cost-sharing* agreement (CUPERTINO, 2022).

In this regard, under pressure from the European Union and the US, Ireland decided to phase out the agreement, ending *Google's* Irish tax advantages.

This example of the practice of evasive tax planning as a result of the digitalization of the economy is in line with OECD practices, such as Action Plan 12 of the BEPS Project, which provides that tax planning must be published and disclosed, with the aim of transparency and also in order to intimidate the practice of evasive planning.

Therefore, the Google case mentioned above was an example of one of the largest technology companies setting up in physical locations that had no connection with the revenue, and was entirely for the economic purpose of reducing taxes.

FINAL CONSIDERATIONS

The main purpose of this work was to address the issues generated by the evolution of the digital economy, especially with regard to the choice of country in which to declare taxation.

It has emerged that with the evolution of the digital age, the whole world, along with the economy, is facing this challenge of taxation on services and consumption provided through digitalization.

It was noted that the OECD, through the BEPS project, which was initially seen as a major development in international tax law, has not reformulated the principle of international taxation, precisely because the digital age is complex in view of the technology coupled with this economy.

Therefore, in line with the discussions on the taxation of digitalized companies, there is still no consensus on how this digital taxation should take place, and it is clear there are two clear scenarios, among many others, that must be addressed in order to overcome these issues: I) the choice of the tax residence of the digitalized company and II) the taxation of the profit generated by the company regardless of its location, as the place where the wealth is generated would become competent to levy taxation.

Still, with regard to this taxation in Brazil, which was not the scope of this work, first of all it is not part of the OECD, and therefore does not necessarily have to obey the rules and consensuses determined, but Brazil is also experiencing the same issues of taxation difficulties with regard to the digital economy that deserve attention, especially with regard to the rigid concepts covered by our national tax system, which would have to be made more flexible, so that we can talk about delegating jurisdiction to those entities that generate profit rather than earning profit.

On the European Union digital taxation, HASLEHNER comments on the one hand, it demonstrated that the EU has far broader discretion than its Member States when it comes to the application of EU-level non-discrimination rules in the context of digital economy taxation, but, on the other, it showed that the EU has much less room to manoeuvre under the existing competence framework established by the EU Treaties. Inevitably, the detailed features of each and every concrete proposal with respect to digital economy taxation must be carefully and fully considered against both the EU- and international-level prohibitions on discrimination and inappropriate subsidies.

Undoubtedly, the topic of digital taxation is still to be explored, but there is a new development in 2023, with the implementation of the Pillar Two rules that bring STTR as a way of taxing profits in resource countries, and the countries that are part of the Framework must follow many rules for this implementation.

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