Mutual Assistance for the Recovery of Tax Claims

Including a summary of the relevant contents of the 2002 Update to the OECD Model Tax Convention

by Maria Amparo Grau Ruiz

> Prologue by Ramon Falcon y Telia

Winner of the Prix Pierre Coppens 2002 Winner of the Mitchell B. Carroll Prize 2002

KLUWER LAW INTERNATIONAL

LONDON / THE HAGUE / NEW YORK

TABLE OF CONTENTS

Acknowledgements	xvii
Author's Note	xviii
Foreword	xix
Abbreviations *"	xxiii
Introduction	1
CHAPTER 1	
Concept, Foundation, Nature and Categories of Mutual Assistance for	
the Recovery of Tax Claims	7
1. An Approach to the Concept of Mutual Assistance	7
1.1. Terminology	7
1.2. The Concept of Mutual Assistance for the Recovery of Tax Claims	9
1.2.1. Assistance for the Recovery of Tax Claims as a Means of	
International Collaboration	9
1.2.2. The Mutual Nature of Assistance	10
1.3. The Purpose of Mutual Assistance for the Recovery of Tax Claims	11
1.3.1. Efficacy in Performance of the Recovery Function	12
1.3.1.1. Overcoming the inherent spatial limitations on	
enforcement of the regulations	12
1.3.1.2. Effective performance of the collection function	12
1.3.2. Justice in the Framework of International Taxation	13
1.3.2.1. Prevention and suppression of international	
tax avoidance and evasion	13
1.3.2.2. Approaching fair taxation	15
2. Foundations of Mutual Assistance for the Recovery of Tax Claims	16
2.1. Legal Foundations	16
2.1.1. Considerations Regarding Circumstances to	
which International Fiscal Law Applies	16
2.1.2. The Validity of the Classical Concept of Limited Financial Power	17
2.1.2.1. Manifestations of the principle of territorial sovereignty	17
2.1.2.2. Special features of the financial power of the	
European Communities	18

vn

	2.1.2.3. The principle of territoriality as a factor affecting the	• •
		20
	J 1	21
	······································	24
	2.1.4. The Lack of an Obligation to Provide Mutual Assistance in	. .
		24
	2.1.5. The Reactions of States to Unilateral Attempts at	
		27
	2.1.5.1. The Mansfield rule and its subsequent development in	
	5 1	27
	2.1.5.2. Critical considerations regarding the significance and	
	J	29
	2.1.5.3. Superseding the Mansfield rule; the decisive influence	
		30
	e i	33
	5	34
		34
	2.2.1.1. Drawbacks from the standpoint of State Administrations	34
	I	35
	6	35
	2.3. The Present Pragmatic Approach: The Limitations on Mutual Assistance	38
3.	8	40
	8	40
	e	40
	3.1.2. Useful Notes Derived from Standard Categories of Civil Law	42
	e	43
		43
		44
	3.2.2.1. The power of the competent authority in the applicant	
	State to apply for mutual assistance	45
	3.2.2.2. The obligation of the competent authority of the	
	requested State to provide mutual assistance	45
	3.2.2.3. Special aspects of enforced collection procedures	
	in the requested State	46
4.	Categories of Mutual Assistance in Taxation	46
	4.1. The Acting Authorities: Legislative, Judicial or Administrative Assistance	46
	4.2. The Nature of the Obligation: Conventional or Community	47
	5	47
	4.3.1. Type of Action Requested: Request for Information;	
	Request for Notification; Request for Recovery and Request for	
	Precautionary Measures	47
	4.3.2. The Nature of the Object of the Action: Taxes and	
	Other Public Liabilities	49

4.3.3. The Scope of Assistance: Comprehensive, or Limited to	
Unduly Obtained Tax Benefits	49
4.3.4. Persons or Entities to Whom the Action Refers: Nationals,	
Residents, etc.	49
CHAPTER 2 The Bower to Because Assistance for the Because of Tax Claims	
The Power to Request Assistance for the Recovery of Tax Claims and the Obligation to Lend such Assistance	51
Parti: The Power to Request Assistance for the Recovery of Tax Claims	51
1	51
1. The Power to Request Assistance	• -
1.1. Nature and Justification as an Administrative Power	51 53
1.2. A Regulated Power	
2. Scope of the Power to Request Assistance	54
2.1. Objective Scope	54
2.1.1. Forms of Mutual Assistance that may be Requested: The	- 4
Importance of a Request for Collection	54
2.1.2. Generic Delimitation of Resources in Respect of which	
Requests for Collection can be Made	55
2.1.2.1. The qualitative standpoint	56
2.1.2.1.1. Taxes qualifying for mutual assistance	56
2.1.2.1.2. 'Elements of tax debt to which mutual	
assistance is applicable	57
2.1.2.2. The quantitative standpoint	58
2.1.2.3. The temporal standpoint	60
2.2. The Most Favoured Nation Clause as a Means of Overcoming	
the Limitations on the Power to Request Assistance	60
3. What Entities or Bodies are Competent to Request Assistance?	61
4. The Public Purpose of the Power to Request Mutual Assistance	63
5. Requirements for Exercise of the Power to Request Assistance for	
the Recovery of Tax Claims	65
5.1. Advisability of an Assessment Prior to Exercise of the Power	65
5.2. Considerations Regarding the Status of Tax Debts	66
5.2.1. Factors Influencing the Choice Between Assessments and	
Court Decisions	67
5.2.1.1. The cost of enforcement	68
5.2.1.2. Complexity	68
5.2.1.3. International relations	68
5.2.1.4. Efficacy	68
5.2.1.5. Fair treatment of the taxpayer	68
5.2.2. A Brief Reflection on the International Fiscal Situation	68
5.2.3. The Search foFa Minimum Basis of Compatibility Between	20
Continental and Anglo-Saxon Systems	70
5.3." When to Exercise the Power	70
	.0

	5.4.	How the Power is Exercised	72
Pa	rt II:	The Obligation to Lend Assistance for the Recovery of Tax Claims	75
		in of the Obligation to Lend Assistance	75
		ective Elements	76
		The Right of the Administration of the Applicant State to	
Require Mutual Assistance: Peculiarities of the			
		Community Administration	76
	7.2.	The Obligation on the Administration of the Requested State	78
8.		Extent of the Obligation to Lend Assistance	79
	8.1.	Frame of Reference	79
		8.1.1. Precautionary Measures	79
		8.1.2. Collection of Foreign Tax Debts	80
		8.1.3. Information on the Procedure	81
	8.2.	Legal Limitations on the Obligation to Lend Mutual Assistance for	
		the Recovery of Tax Claims •	82
		8.2.1. Reciprocity as a Basic Condition in all Regulations for	
		the Effective Provision of Assistance	83
		8.2.2. The Legislation Clause as It Applies to the Procedures to be	
		Followed by the Requested State	85
		8.2.3. Progressive Disappearance of the Nationality Clause and	
		Its Immediate Consequence: The Obligation of the Requested	
		State to Collect Tax Claims of Another State from its Own Citizens	86
		8.2.4. The Public Policy Exception is Necessary as a Last Resort in	
		View of the Diversity of Systems	88
		8.2.5. Secrecy: A Latent Token of Mistrust among States	90
		The Obligation to Defray All or Part of the Costs of Mutual Assistance	92
9.		nguishment of the Obligation to Lend Mutual Assistance	94
	9.1.	Rejection a limine of a Request for Assistance on the Grounds that	
		There is No Obligation to Lend It -	94
	9.2.	Causes of Extinguishment of the Obligation to Lend Assistance	
		for the Recovery of Tax Claims	96
		9.2.1. Compliance: The Adoption of Precautionary Measures and/or	
		the Transference of Collected Taxes	96
		9.2.2. Failure to Comply: Explanation to the Applicant Authority	97
		9.2.3. Withdrawal by the Applicant State and Satisfaction of	00
		the Creditor's Interest by Other Means	98
	9.3.	Liability of the Requested State to the Applicant State in Respect of	00
		Failure to Honour the Obligation to Lend Assistance	98
C	нар	TER 3	
			102
			102
1.	Ori	gin and Production of Rules on Mutual Assistance	102

2.	The	Traditional Hegemony of Bilateral Instruments	104
	2.1. The Possibility of Regulating Mutual Assistance in		
	Double Taxation Conventions		104
2.2. A Brief Analysis of Comparative Law		A Brief Analysis of Comparative Law	107
		2.2.1. Belgian Conventional Practice	107
		2.2.2. German Bilateral Conventions	108
		2.2.3. Evolution of Measures to Counteract Tax Evasion and	
		Avoidance in the United States	109
		2.2.4. The Strength of the French Conventional Network	112
		2.2.5. Regulation in Italy	113
3.	The	New Stress on Multilateral Instruments	113
	3.1.	The Benelux Convention: A First Step in the	
		Direction of Multilateralized Assistance <	114
	3.2.	The Nordic Convention: A Benchmark for Future Norms of Assistance	115
	3.3.	The Work of the United Nations Organization	117
	3.4.	OECD: A Sustained Effort to Regulate	118
		3.4.1. The Council Recommendation of 21 September 1977 on	
		Tax Avoidance and Evasion	118
		3.4.2. Mutual Assistance Ignored in Model Conventions on	
		International Double Taxation	118
		3.4.3. The OECD Council's Recommendation of 19 January 1981 on	
		Mutual Administrative Assistance in Tax Matters	119
		3.4.4. The 1981 Model Convention on Mutual Assistance in	
		Tax Matters	119
		3.4.5. The Convention on Mutual Assistance in Fiscal Matters of	
		25 January 1988, a Joint Effort with the Council of Europe	120
		3.4.6. The Latest Tendencies in the Model Convention	124
	3.5.	Slow Progress of Supranational Norms on Mutual Assistance	125
		3.5.1. The Council Resolution of 10 February and the	
		Commission's Programme of Action.on Fiscal Matters of	
		23 July 1975	126
		3.5.2. 'Basic'Directive 76/308/EEC on Collection, and	
		Directive 77/794/EEC Modulating Practical Application	127
		3.5.3. Directive 77/799/EEC on Exchange of Information	128
		3.5.4. Evolution of Mutual Assistance in Collection of	
		Own Resources	128
		• 3.5.4.1. The inclusion of VAT in Directive 79/1071/EEC	128
		3.5.4.2. Collection of charges accruing on intra-Community	
		traffic under Council Regulation No. 3/84	129
		3.5.4.3. The impact of Council Regulation No. 218/92:	
		speedier exchange of information on VAT and	
		creation of a Standing Committee for Administrative	100
		Cooperation	130

		3.5.4.4. Collection of Special Taxes under Council	
		Directive 92/12/EEC as amended by	
		Council Directive 9.2/108/EEC	131
	3.5.5.	Other Recent Norms: The Treaty of European Union and	
		Council Regulation No. 2988/95	131
	3.5.6.	An Unresolved Issue for the Community: Collection of	
		Direct Taxes	132
	3.5.7.	Differences in Recovery of the ECSC Levy "	134
		Balance of the Fight Against Tax Evasion and Avoidance	
		Within the Framework of the Community	134
3.6.	The E	xistence of Other Norms That May Affect the Power to	
	Reque	st Assistance	138
	3.6.1.	The European Convention on Human Rights of 4 November 1950	138
	3.6.2.	The 1970 Hague Convention on the Gathering of Evidence'	
		Abroad in Civil 6r Commercial Matters	138
	3.6.3.	The 1977 European Convention on Service of	
		Administrative Documents	138
	3.6.4.	The 1978 European Convention on the Obtaining Abroad of	
		Evidence in Administrative Matters	139
	-3.6.5.	The 1957 European Convention on Extradition	140
	3,6.6.	The 1959 European Convention on Judicial Assistance in	
		Criminal Matters	140
Part II:	Appli	cation of the Norms on Mutual Assistance	143
4. Inter	raction,	, Interpretation and Application of	
the l	Norms	on Mutual Assistance	143
4.1.	Confli	ict of Conventions, Community Law and Domestic Law	144
	4.1.1.	Inapplicability of Domestic Laws Contravening Conventional or	
		Community Norms	' 144
	4.1.2.	Interaction of Conventional and Community Norms in	
		Community States	145
	4.1.3.	Interaction of Conventional and Community Norms in	
		Respect of Third States	147
4.2.	Interp	retation of the Rules on Mutual Assistance: Special Reference to	
		inciples that Ought to Guide It .	149
		Interpretation of Conventional Provisions	149
		Interpretation of Community Norms -	151
		Principles Applying to Mutual Assistance	151
4.3.		cation of the Regulations on Mutual Assistance	154
		Practical Factors	155
	4.3.2.	Legal Factors: Quantitative and Qualitative Inadequacy.of	
		the Regulations	155
		4.3.2.1. The utility of bilateral and multilateral conventions	156
		4.3.2.2. The utility of Community Directives	156

	4.3.3	. Assessment of the Present Situation of Mutual Assistance	158
		4.3.3.1. Use of the current regulations on mutual assistance,	
		with special reference to the Spanish case	158
		4.3.3.2. Suggestions to promote application of the rules	
		on assistance	161
CI	HAPTER 4	4	
Sp	ecial Featu	ures of Enforced Collection Procedure Deriving	
fro	m Mutual	Assistance	163
1.	Subjective	Requirements	165
	1.1. The (Competent Authorities in the Requested State	165
	1.2. Who	is Liable for a Debt Originating in the Applicant State	167-
2.	Objective	Requirements	168
	2.1. Requ	irements for the Adoption of Precautionary Measures in	
	Mutu	al Assistance Procedure	168
	2.1.1	. In the Conventional Sphere .	168
		. In the Community Framework	170
	2.1.3	. Precautionary Supervision in the Spanish Fiscal System	172
	2.2. Speci	ific Requirements of a Claim Whose Recovery is Requested	175
	2.2.1	. Qualitative	175
		2.2.1.1. Disparities in Conventions for the prevention of	
		International Double Taxation	176
		2.2.1.2. A landmark in the evolution of Community	
		regulations: institution of priority status for	
		the ECSC levy	177
		2.2.1.3. Towards full equivalence of Community resources and	
		domestic claims: proposed solutions	179
		. Quantitative Determination	181
3.	Requirem	ents for Action	182
	3.1. Initia	ation of Enforced Collection Procedure	182
	3.1.1	. The Distinction Between Material and Formal Conditions	182
	3.1.2	. Validity of the Instrument Permitting Enforcement	183
	3.2. Imple	ementation	186
	3.2.1	. Notification	186
	3.2.2	. Enforced Collection Procedures	' 188
	3.3. Term		190
	3.3.1	. Payment and Special Forms of Payment	190
		3.3.1.1. Deferment	191
		3.3.1.2. Compensation	194
	3.3.2	. Other Modes of Extinguishment, with Special Reference to	
		Time Limits -	196
4.		n by the Taxpayer	199
	4.1: Opp	osition in the Applicant State	203

4.1.1. Opposition on the Grounds that Enforced Collection	
is Inappropriate	203
4.1.2. Contestation Based on the Unlawfulness of Enforcement Measures	205
4.2. Contestation in the Requested State	206
4.2.1. Contestation on Grounds of Inapplicability or Defects in	
the Drafting and Admission of the Request for Assistance	208
4.2.2. Contestation on the Grounds that Enforcement Measures	
Adopted in the Requested State are Unlawful	210
4.3. Suspension of Enforcement Procedure	212
4.4. The Possibility of Recourse to Other Authorities	221
4.4.1. Diplomatic Offices of the State of Which the	
Taxpayer is a National .	221
4.4.2. Mutual Agreement Procedure	222
4.4.3. The Recovery Committee	222
4.4.4. The Court of Justice in Luxembourg	222
4.4.5. The International Court of Justice	223
4.4.6. International Arbitration	223
4.4.7. A Future International Fiscal Court	223
Latest ©evelopments	224
United Nations -	224
OECD	225
The European Union	229
Spain	234
The Multilateral Framework	236
Annex I	239
1. Mutual Assistance for the Recovery of Tax Claims in the OECD	239
2. Processing in Spain of Mutual Assistance for the Recovery of Tax	
Claims during 1995-2001	240
Annex II	244
Rules on Mutual Assistance for the Recovery of Tax Claims	244
1. Model Convention	244
1.1. OECD Model Convention	244
1.2. Model Convention of the League of Nations	251
1.2.1. Mexico, 1943	251
1.2.2. London, 1946	256
2. Multilateral Conventions	261
2.1. Convention on Mutual Administrative Assistance in Tax Matters,	
Council of Europe and OECD, 25 January 1988	261
2.2. Nordic Convention on Administrative Assistance 1989	274

3.	Bilateral Conventions	289
	3.1. Reduced Clause	289
	3.2. Basic Clause	291
	3.3. Full Clause	293
4.	Other Relevant Documents	308
	4.1. Exchange of Notes	308
5.	Community Legislation in Force (consolidated text)	311
Index		