TAXES AND TAX LAW FOR RELIGIOUS ORGANISATIONS IN EUROPE

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Abstract

The financial dimension of the contemporary world and societies represents an inseparable part of operation of all the organisations and entities, not excepting religious institutions. In this way in this material I want to present and underline the main characteristics of these models of financing religious organisations at European level and than at national level of three countries which may be taken as examples for Romania from some points of view.

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1. Introduction

This topic was and is a challenging one for the European scholars. Most of the questions relate to direct taxation, such as income tax or real estate tax. While the EU has achieved a significant level of harmonisation in the area of indirect taxation, in particular VAT (Bernaerts, 2015) and in the area of the Customs Union (Walsh, 2015), the EU has very limited competences in the field of the direct taxation (Isenbaert, 2010, Lang, M., Pistone, P., Schuch J., Staringer, C. 2012).

It is important to keep in mind that churches and religious communities are registered as legal persons in the vast majority of the Member States and they exercise various social and economic activities, partly commercial, like running schools, hospitals, owning media, cemeteries or even banks (in Germany). In this respect they operate according to the legal rules

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laid down by national legislation, even if certain exemptions and privileges are partly granted.

According to Article 17 of the Treaty on the Functioning of the European Union (TFUE), the EU respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States. The EU does not differentiate between state/ traditional/recognised Churches and religious communities versus other/smaller/new Churches and religious communities. The same applies to the philosophical and non-confessional organisations. As mentioned above, the EU is interested in the national legislation only if some provisions would constitute an impediment to the functioning of the Internal Market. This could happen in a following hypothetical situation: where a church or religious community registered in one Member State could not enjoy all the privileges of similar churches or religious communities registered in the other Member States. This hypothesis is unlikely: e.g. the Catholic Church is registered and operates in every Member State separately, so there is no need for a legal entity in a state A to operate in a state B, as state B has its own structures (and entities) of the Catholic Church. The same applies to most of the Protestant Churches, Jewish and Muslim communities. The presented hypothetical situation concerning discrimination could only relate to ecclesiastical bodies closely linked to another state: like e.g. parishes of the Church of England or of the Danish National Church, operating outside of the respective Member States. However, there are probably very few such legal entities which could illustrate such a hypothesis.

Last but not least, the Court of Justice of the EU developed in the field of taxation a concept of "abuse of law", according to which "a national measure restricting may be justified where it specifically relates to wholly artificial arrangements aimed at circumventing the application of the legislation of the Member States concerned" (Lenaerts, 2015). The Court issued a couple of judgements; however none of them seems to be relevant for churches or religious communities.

2. The German case

The German taxation law is extremely divers. There are a multitude of different taxes. The exact status of religious communities as well as of philosophical and non-confessional organisations in this legal field is specified in the various tax laws.

In addition, religious communities are in many cases exempt from certain fees such as court fees; many of these rules are provided in the laws of the various Lander, and they thus are extremely divers.

The existing exemptions from taxes and fees are thus extremely detailed and spread in manifold laws. There are no statistical data on to how much those benefits would amount.

Philosophical and non-confessional organisations enjoy the very same status as do churches and other religious communities. This follows from Art. 140 of the Basic Law in conjunction with art. 137 Subsection 7 of the 1919 Constitution of the German Empire which reads: "Associations whose purpose is to foster a philosophical creed shall have the same status as religious societies".

There are no "dominant religions", "known religions", "recognized" or "non-recognized" religions as legal categories in Germany. Religious communities and philosophical and non-confessional organisations are free to function. Germany has a two tire system of religious communities: Pursuant to Art. 140 of the Basic Law in conjunction with art. 137 Subsection 4 and 5 of the 1919 Constitution of the German Empire, religious societies acquire legal capacity according to the general provisions of civil law. They are thus mostly organised as civil law associations. A number of religious communities have the status of corporations under public law. As such, these communities enjoy a number of special rights and duties, including the right to levy the so-called church tax. According to the Basic Law, religious communities remain corporations under public law insofar as they have enjoyed that status before the 1919 constitution entered into force. Other religious communities are granted the same rights upon application, if their constitution and the number of their members give assurance of their permanency. Roman-Catholic, Protestant, Christian-Orthodox, Jewish, Jehovah's Witnesses, The Church of Jesus Christ of Latter-day Saints, some Muslim organisations as well as a multitude of other religious communities and their sub-divisions such as religious orders or congregations have this status as corporations under public law. There are also philosophical and non-confessional communities which have this public law status.

In taxation law and the laws on fees the religious corporations under public law enjoy in substance the same status as secular corporations under public law. Religious communities organized as civil law associations enjoy the very similar treatment insofar as they perform religious or equivalent, or charitable activities.

There are no reports on any major or significant tax fraud issues concerning religious organizations or philosophical and non-confessional organisations.

3. The Italian Case

A distinction must first be made in the case of Italy between "direct" and "indirect" sources of funding within the legal framework regulating the financing of religious denominations. In the case of direct financing, the recipient receives a direct payment while for indirect, funds are derived from a tax benefit. A further distinction must be made between the funding of directly religious activities and those with indirect links to religion. The first concerns activities that are directly and explicitly carried out within a religious scope. The second concerns activities with indirect links to religion such as secular events that the religious denomination is approved to hold.

Within this framework, what are the main funding instruments?

a) public funding. It must first be noted that public funding occurs through a mechanism of *tax allocation*, that is, it is directly transferred from the tax payer to the religion. In general, recipients of this type of funding are religious denominations that serve the needs of individual citizens. The individuality of this type of funding is however the source of some issues. Firstly, there is a danger that the mechanism be used politically to the detriment of religious freedom. Secondly, the possibility to donate only to religious denominations does not take into consideration the wide array of organizational forms through which organized religious phenomenology manifests today. Indeed, the mechanism of public funding finds discipline and recognition only in the confines of the agreement system: to access dedicated financial streams, an agreement or arrangement with the Italian government is mandatory.

But what activities carried out by religious organizations justify the right to benefit from public funds? Historically, the primary purpose of funding was to sustain the clergy and thus remunerate individuals in religious groups whose role it is to carry out specific liturgical and religious functions. Over time, other activities have been added that are not explicitly linked to these functions.

This expansion can be explained by the transformation from a Welfare State model to a Welfare Community model; both to affirm the principle of horizontal subsidiarity and the principle of non-discrimination of religious character or of an organization or institution's religious or worship objective.

Effectively, as religious organizations carry out socially useful activities and operate in the same sector and fields as non-profit organizations, they find themselves increasingly governed by the regulatory framework stipulated for non-profits and thus subject to the same disciplinary actions. In this context, funding for religions can be extended to religious groups, which are not explicitly religious or cultural, but hold an equivalent social value. Obviously, the risk of having branches of *ONLUS* (non-profit organizations) within the range of religious activities is that the latter will end up benefiting from two streams of funding: one as a civilly recognized religion and one as a non-profit organization.

Instruments of public funding:

• 8 per thousand of *IRPEF* (income tax).

The introduction of the 8 per thousand system goes came alongside the reform of systems that support the clergy within the Catholic Church. In 1983 there was a movement away from a system of congruent support with the reform of the *Codex iuris canonici* and the model based on the institution of diocesan or interdiocesan institutes for the support of the clergy.

The main source of funding of diocesan institutes for the support of Catholic clergy is the 8 per thousand system, provided for under laws 206 and 222 of 1985. Based on the bilateral model, these laws that have attracted the mechanism of public financing of religious denominations. The progressive implementation of art. 8 paragraph 3 of the Constitution with the unfolding of the season of agreements resulted in the extension of the mechanisms provided for under 222/1985 to minority religions interested in this type of funding.

How does the 8 per thousand system work? It is a part of a double system of public funding. A system where the Anglo-Saxon soul of tax deductibility is paired with the European tradition of state contributions to religious denominations. A system that introduces a safeguard clause of sorts in *favor religions*, protecting religions where one of the two expected financial flows does not have the expected or desired outcome.

The Catholic Church defines this as a "system of self-financing of the Church, facilitated by the State". It is true direct financing as it confirms a transfer of public funds from the treasury to ecclesiastic accounts. It is a funding system of a fiscal nature as the State devolves 8 per thousand of total tax revenues to the Catholic Church and other religious denominations by agreement, or to the State for income tax purposes for social or humanitarian use.

What are the critical points of the 8 per thousand system as highlighted by the judges?

a) in recent years, the contribution to religious denominations has exceeded 2/3 of the resources allocated for the preservation of the country's artistic heritage. This has resulted in a deduction from the Parliament of a significant portion of income tax revenue. If this is associated with a reduction in public spending, it can be interpreted as an unreasonable amount of public funding, bordering on a threshold of unconstitutionality when viewed in the context of the principle of secularism;

b) unexpressed quotas result in a triplication of revenues and benefit the major beneficiaries of allocated quotas; the Catholic Church alone is allocated 300 million euros of the quota. This is then used to calculate a relative percentage from the 700 million euros of unspoken quotas. There appears to thus be a defect in the system with respect to the principles of proportionality, voluntariness and equality. Indeed, the mechanism results in an interpretation of unexpressed quotas as a sort of *'blank delegation'* in favor of those who allocate, so that the entire amount is divided in proportion to expressed choices only;

c) this system confirms that there is an imperfect religious pluralism, the bilateral nature of which allows for the consolidation of privileged legal positions. Access to the 8 per thousand is subject to an agreement and access to such an agreement is dependent on the political discretion of the government as was recently confirmed by the Constitutional Court in ruling 52/2016;

d) the 8 per thousand system excludes non-confessional philosophical associations or, in general, those who have a negative religious objective;

e) the 8 per thousand system has contributed to the economic strengthening of the Catholic Church and other religious denominations that benefit from this type of funding. The data on contributions allocated demonstrate that the system needs re-examination as the 8 per thousand is becoming too great a burden for the Italian Treasury. A reduction in the percentage of funding should thus be renegotiated down with the State;

f) it is noted that there is a lack of transparency with regards to the use of the funds by those who benefit from the system. Indeed, the Lazio Regional Administrative Court (Judgment No 6634 of 8 September 2005) regarding the work of the Joint Committee, reiterated that the measures taken are for internal use for the purposes of applying Law No 222/1985 and that they are of a proactive nature and are thus not covered by the *actio ad exibendum*;

g) the lack of control on reporting of the contributions should be evidenced, with specific reference to the figures responsible for monitoring the management of these resources. The Court of Auditors notes a lack of control by the Ministry of Finance and the *Agenzia delle entrate* (Revenue Agency) in the development and management of computer data. There is thus a danger of manipulation of choices by intermediaries who are particularly close to certain beneficiaries;

h) checks on the use of funds are not provided for. The taxpayer is not provided with any opportunity to check that the choice indicated corresponds with the one sent to the Revenue Agency, as the data indicated in the model declaration can be modified by an intermediary prior to transmission. Controls carried out by the Court of Auditors demonstrate cases in which *Centri di assistenza fiscal* (Tax Assistance Centers – CAF) have transmitted data relative to the allocation of funds that differs from the will of the taxpayer;

i) procedures lack transparency and systems are unsatisfactory for use;

j) paradoxically, the reason why the 8 per thousand system was developed (for the support of the clergy) forms a marginal percentage when compared to the real use of the funding. This may give rise to an unreasonable form of public funding. Only 1/3 of the 8 per thousand is used by the Catholic Church for the support of the clergy. To this regard, the government has asked for a greater financial commitment from the Church, requesting the CEI to reevaluate the contributions. However, the Church does not agree with this, as it holds that ministers of worship must be held to "service". The government has also asked the Catholic Church to increase spending in humanitarian and charity projects as only 20% of the sums received from the 8 per thousand system are used for this purpose. Use of the funds for purposes that can be traced back to the category of "worship and pastoral requirements" is also inappropriate. In this sense it is incorrect if these funds are used to fund institutions of religious science, archives or libraries. These should be funded at the State or diocesan level.

• 5 per thousand of IRPEF (income tax)

The 5 per thousand system is intended for ecclesiastical entities that have established an *Onlus* (non- profit organization) in accordance with Legislative Decree no. 460 of 1997, taking on the role of partial non-profit, able to take advantage of the funds granted from the 5 per thousand of income tax. As is provided for by common law, religious entities tend to give way to organizations of a foundational nature in non-profit sectors, through which the proceeds of the 5 per thousand can be channeled. This practice often creates

misunderstanding relative to the nature of the entity, as well as the type of activities it carries out. The proceeds of the 5 per thousand can become a significant item in the budget of religious organizations (and for other non-profit organizations). That said, unlike the 8 per thousand, in which the funds are intended for religious purposes, in the 5 per thousand, religious entities are direct beneficiaries of the funds, which can then be used for one of the activities indicated in art. 10 of Legislative Decree no. 460 of 1997, or the non-profit branch of the entity.

b) ***private funding***

• Tax deductibility of voluntary donations up to a maximum of 1032.91 euro.

This form of funding provided for by art. 46 of Law 222/1985, concerns so-called "liberal acts" through which citizens freely and voluntarily donate personal economic resources to religious denominations to contribute to and support religious activities. The taxpayer is actively participating as the monetary donation is tax-deductible, resulting in a tax saving. The detaxation of donations results in a reduction in State revenue, classifying it as another negative budget item.

4. The Greek Case

4.1. Income Tax of Religious, Philosophical and Non-Confessional Organisations

Non-profit organizations of both public and private law in general, established in Greece and abroad including all associations and foundations are subject to income tax, except in the case of income which is gained in pursuit of the relevant organization's purpose. Such income is not taxable, pursuant to Article 45 (c) of Law 4172/2013 (the Greek Income Tax Code, hereinafter referred to as "GITC").

Non-profit-making legal entities governed by public or private law which are incorporated abroad are regarded as taxable persons in Greece when they have their tax domicile in the country, in accordance with the provisions of paragraphs 3 and 4 of Article 4 of Law 4172/2013, or when they have a permanent establishment in our country, in accordance with the provisions of Article 6 of Law 4172/2013 or the SAADF (Double Taxation Avoidance Contracts), or when they acquire income from real estate, dividends, interest and rights in Greece.

Some examples of income generated by non-profit organizations that is not subject to income tax are the following (on an indicative basis): income

from membership fees/contributions, government grants, private or business sponsorships, lotteries advertised in magazines which are issued and distributed free of charge only to the organization's members, third-party donations, and also the proceeds from the distribution of leaflets and other intellectual property content of the Holy Monasteries (Ref. POL.1044 / 2015; circular issued by the Secretary General of Public Revenue, otherwise known as the Administrator of the Independent Public Revenues Authority and hereinafter referred to as "Director of the IPRA").

Revenue earned by non-profit organizations from an activity which does not constitute a non-profit-making activity is taxable, even if it is used to fulfill the organization's non-profit-making purpose. Examples of such revenue are the following: income from capital (interest, dividends, royalties, income from real estate) and capital gains, subscriptions from non-members, income from the issuance and sale of magazines, books, publications, etc. to third parties / non-members of non-profit organizations as well as the advertisements that are posted on them, the revenue from advertising on sports jerseys, the revenue from tuition in private schools and laboratories, and the revenue from the sale of images, the operation of hostels and radio stations by the Holy Monasteries (circular POL. 1044/2015).

According to the aforementioned circular, religious organizations in Greece are subject to income tax on business income. The applicable income tax rate is currently 27%. Moreover, religious organizations are also subject to the pre-payment of tax for the next fiscal year[2].

In determining the income of such legal persons and the expenditure incurred by them, a distinction is made between whether the income and expenditure relate to the relevant legal person's business or to the pursuit of their purpose. Part of the expenses relating to business is deducted when determining that income.

On the other hand, expenditure relating to non-taxable revenue incurred in pursuit of the organization's purpose is not tax deductible. Furthermore, if there are expenses that are common (i.e. they can contribute to the creation of both taxable and non-taxable income), then they are allocated proportionately to the corresponding revenue.

Finally, it is clearly stated that the expenditure incurred by a legal person in pursuit of its non-profit-making purpose should in no case be

deducted from all its business income, regardless of whether its revenue is earned in pursuit of its business or its purpose.
Real estate income obtained by non-profit-making legal entities derives from the leasing / subleasing (in cash or in kind) or the use or free use of land and real estate, after deduction of all costs relating to real estate (i.e. repair, maintenance, renovation, fixed and operating costs), at a rate of 75% and, in the case of Mount Athos, at a rate of 100%, in accordance with paragraphs 1, 2 and 3 of Article 39 of Law 4172/2013, as well as the total imputed owner-occupation cost.

It should be noted that the notion of fixed and operating expenses, deducted from gross real estate income acquired by non-profit legal entities, includes the depreciation of property, calculated on the basis of the provisions of Article 24 of Law 4172/2013 (referring to the circulars POL. 1069/2015 of the General Secretariat of Public Revenues and 1069/2018 of the Director of the IPRA.

It should be noted that the tax year for non-profit legal entities is the same as the calendar year.

5. Conclusions

In conclusion, I have tried to present and underline three different taxing systems which are to be met in Europe.

The German taxation law is extremely divers. There are a multitude of different taxes. The exact status of religious communities as well as of philosophical and non-confessional organisations in this legal field is specified in the various tax laws presented in the paper.

In the case of Italy it must be made a distinction between “direct” and “indirect” sources of funding within the legal framework regulating the financing of religious denominations. In its case I analysed the main funding instruments - public and private showing advantages and disadvantages of these instruments.

Non-profit organizations of both public and private law in general, established in Greece and abroad, including all associations and foundations, are subject to income tax, except in the case of income which is gained in pursuit of the relevant organization’s purpose.

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