

Abstract of thesis

The value in tax and custom law

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The story of capitalism is confused with the history of analysis of the value of goods and services. Without any doubt, the idea or concept of value is the archetype on which economics is built, providing the mercantilism, through the classics, arriving in the neo-classics such awards Nobels, Debreu, Stigler or Hicks. The analysis of the economic value is also the object of philosophy. There are over 2500 years Aristotle revealed the dual aspect of this economic concept - exchange value and use value - influencing economists, philosophers and jurists even today.

Despite the fundamental importance of the topic, the study on the value remains little explored by law. And even less, by professionals in the tax law. What exists is the study piecemeal, as is the case of transfer pricing in the tax law and customs value for duty. Lawyers are often indifferent, even skeptical of that notion. Some believe that this is an obvious topic, no room for guesswork, or theoretical projections. Furthermore, the study of the 'currency' is usually restricted to the universe of accountants, mathematicians and economists. Others believe that if a contract between two parties set for X euros, so it will be fair. The doctrine is based on the dogma that everything that was subject of a common resolution is fair.

Interestingly, this concept is embedded in several areas of law, such as commercial law, civil law, competition law and administrative law and in our present case, tax law and customs law, denoting a trait that cross all the law.

The value is closely tied to the price. The price is defined as a monetary representation of objects. The reference price is the most direct and attributed to the real goods and services produced¹. The featuring of money is placed in evidence. The word pecuniary is, in turn, from the Latin, *percus, oris*, which means cattle, referencing the initial form of currency. The price, incidentally, is the fundamental condition of sale, as stated by Ulpian "nulla est sine pretio venditio". This characteristic is actually a very practical measure for the whole society.

¹ EATWELL J., MILGATE M., NEWMAN P., (dir.), *The New Palgrave a Dictionary of Economics*, Vol. 3, Palgrave, 1998, see: price and quantities.

The value is the measure of all common goods, in other words, far more capable of comparing the various goods.

But the value represents a reality that passes a strict cash bond; it is a reality that transcends it. We have to remember that the value has two aspects: the exchange value and utility value. The value exchange, according to Aristotle², is the ability that gives the ownership of this thing to be able to buy other. This form of value has the ability to put all things in the same level playing field. As for the utility value, it means the utility appreciate by a man. Thus, the use value is linked to the individual, while the exchange value depends on the value of others and different usage than the other guys can give to the same thing. The opposition between the two forms of value not frontal, but dialectic.

And to emphasize, the economic value is perceived by society in a paradoxical way. This perception comes from the fact that on one hand we observe the phenomenon of low system cost, travel, food, culture obtained through the Internet, on the other, we have the impression that goods are increasingly more expensive and that in European countries for example, people lose more and more their power to buy.

For the Tax Law, the value is the favorite instrument to the determination of taxes. Outside the so-called fixed taxes, it's the economic wealth which represents the wealth that has to be taxed. This wealth that has to be taxed is not measured by weight or any other chemical or physical aspect of a good, but by its economic value. The value is in this sense the measure³ and the implementation⁴ of tax liability. This measure achievement passes through the mechanism of "assessment base" or "assessment". In this operation, the evaluator recognizes the substance to be taxed to then evaluate it. In a modern tax system, the evaluation is done according to the consistency of monetary assets. For example, in French law, under Article 666 of the Tax Code, the taxes and right on land are grounded on "values." Thus, according to

² ARISTOTE, *La politique*, trad. J. Tricot, éd. J. Vrin, 1995, I, 9, 1257 a.

³ See : ALABARCE M.R., *Perspectiva Analítica no Estudo do Critério quantitativo das normas tributárias : a base de cálculo*, Cadernos de Direito tributário, *Revista de Direito Tributário*, n°95, 2005, Malheiros ; GARCÍA MARTÍNEZ A., *El valor tributario: su determinación objetiva y convencional*, Bosh, 2006, p. 42.

⁴ See : BARRETO A., *Base de cálculo, Alíquota e Princípios Constitucionais*, Revista dos Tribunais, 1986 ; BARROS CARVALHO P., *Curso de Direito Tributário*, Saraiva, 2004 and RAMALLO MASSANET J. , *Hecho imponible y cuantificación de la prestación tributaria*, *Revista Española de Derecho Financeiro*, n°20, 1978, p. 633.

VOGEL, the value 'wert', prices and costs, are starting points for the quantification of tax liability.

Undoubtedly, the determination of taxes comes directly and indirectly in money terms of goods and services. Directly as is the case in France and other EU countries that adopt the system TVA (VAT in English); of the right of registration, the solidarity tax on wealth, local taxes.

In Brazil, where the tax on industrial products (IPI), tax on the movement of goods and services (ICMS), tax on industrial products (IPI)m tax on the movement of goods (ICMS), tax on services (ISS), taxes on the changes in goods free of charge (ITCMD) or costly (ITBI). And the indirect value is required to establish the income tax, for quantification of sales, cost of capital gains or capital gains.

And finally, in relation to customs duty, through the process of charging, - changes to which system of taxation based on product weight or quantity, to a system based on value - the question of value becomes more essential that for any importation and exportation, and therefore it for the customs duty.

The tax and customs administrations are concerned a long time ago about the definition of fair value in the operations declared by taxpayers. This notion of fairness in assessment is essential for controlling the calculation basis of proportional taxes on the sale of property, a sale of goodwill, shares of a company, etc.. It seems to us that it is possible to study in a joint manner, observing, of course, the specificities of each branch, the question of value in tax law and customs. Even for functional reasons (the customs duty is about the relations linked to international trade while the tax law deals with internal relations). In France for example, by being part of the European Union, the right to impose taxes and customs duties are separated. Each branch of law has its *corpus juridicus* individual. As an example, the French tax law has the tax code itself (Code général des impôts) and book of tax procedures (Livres des procédures fiscales), and the duty, the French Customs code and the EU Customs code.

But we believe it is possible to study the issue of economic value in a joint manner. The right of taxation and customs areas is not complete strangers to each other. Instead, they have some common goals. All two, using wealth to raise taxes to keep

the goals of the state. Even if it is inside a variable degree. In poorer countries, the source of income from customs duty is considerable. We don't have to forget that part of TVA aims to feed the European Union budget. It's also to remember that in France for example, tariffs have a fiscal character in the Council's constitutional tax. It means that certain customs provisions, may integrate the finance law of the country. Moreover, the general administration of customs and indirect taxes depend on the same ministry, the Budget.

As to the purpose extra fiscal, both rich and poor countries use the tax as economic inductors. The customs duties are used by countries as protectors of the local economy, agriculture or industry sector. However, this instrument of protection is declining due to the guiding principles of international trade. The GATT in the past and WTO at present, aims to eliminate all barriers to trade that is detrimental to it. Moreover, the European Union led interdiction process between the EU borders, barriers or the creation of customs duties or equivalent. Elsewhere, the EU introduced a common duty tariff. Therefore, this extra fiscal instrument of using customs duty is declined.

Another strand of the stimulating function of the tax is to be used by many rich and less wealthy states to develop certain branches of the economy, free trade zones, or to encourage the green economy.

This means that, *lato sensu*, there is no intrinsic incompatibility between tax law and customs. It is recalled that for example in Brazil, norms that are governing the import and export taxes, are the same that govern the consumption tax on the capital, or equity, subject to the same constitutional principles and united in a single code (Código Tributário Nacional).

So our study was approached as follows. First, the object of this work is to achieve the reality of the phenomenon of value in tax law and customs. According to a multidimensional approach, it was possible to develop a theory about the value and tax and customs of its conceptualization. Then in the second part, we have as an opportunity to answer the fundamental question of how to find the value of goods and services fairly. In other words, initially will target the search for a general concept, then to determine the value of goods and services according to our concept. This is

not strictly a conceptual part and another, practical, but offset in practical and theoretical aspects.

It seemed important to us to seek a general concept in order to reduce cases of inconsistency and ambiguity. Market value, value, price, income, cost, etc., the lawmaker is full of creativity. Consequence of this multiplicity: ambiguity and incoherence. The terms used to translate the question of value in tax law for example are easy to apply and can be interconnected if there is only one criterion to refer to a particular concept, one method to forge a concept. Authors⁵ state that this situation is hardly observed. Multiple situations reveal the ambiguity. First, several criteria may have the same meaning, and the same criteria can cause the appearance of several criteria. There are also cases that one and only one criterion may appoint several criteria. The word "value" has several meanings. Finally there are situations where a concept can be developed through the use of different methods. This case is observed in the United States⁶ for example where three methods are used to apply the fair market value.

The multiplicity of ideas can give rise to inconsistency. Many times the lawmaker did not correctly determine the concept being used, or in the case that even using a concept, conceptualized loosely. Consequently, the terms used by the lawmaker does not allow deducing what is your will. We have observed cases of inconsistency in the Spanish, Brazilian and French Tax Law.

Our methodological analysis starts with the observation of the difficulties inherent to theorizing the sense of value by the tax law and customs. We could see that the difficulties in developing a concept of value comes from different backgrounds. But the first source of difficulty lies in the fact that the concept of value has a protean sense, exposed to the influence of other branches of law and science. Because the Tax Law is a branch of 'superposition'⁷. The fiscal rule, even creating his own

⁵ See : RAMALLO MASSANET J., et PEÑUELAS REIXACH L., *general report* , in La détermination de l'assiette de l'impôt sur les biens immobiliers, XLV, IFA International Conference.

⁶ See : GORDON A. S. , NAMMACHER S.A. et SHERMAN W.B., *Etats-Unis report*, in : La détermination de l'assiette de l'impôt sur les biens immobiliers, XLV, IFA International Conference.

⁷ See: TROTABAS L., *Précis de science et législation financières* , 3^o edition. La réforme fiscale, Dalloz, 1935.

notions, is based on real life, takes advantage of the institutes already created, from the notions of public and private law. This means that certain ideas, concepts or skills were imported from other branches of law and other sciences. Thus, there are several terms loaded with a long history. That's why we decided to approach the idea of value by a multidisciplinary way, not only the question in the other branches of law, but also in other sciences, such as philosophy and economics. In relation to extra-legal sciences, a value analysis is advisable, as this concept has been discussed and questioned since their roots. Without the multidisciplinary study, we could not recognize the true value and our study would be doomed to failure.

It was also observed that the value fits in terms recognized as legal concepts with a variable form, and determined by the use that is intended and the time it is applied. This notion is a reflection of extra-legal interpretations of a given time. To further augment the degree of uncertainty, beyond the fact that the variable geometry concept is interpreted differently to the passing of history at the same time, the term value is interpreted multifaceted. In reality, in a philosophical or economic context, the term "value" is conceptualized in different ways. There is actually a smooth and incontestable definition given by economists or philosophers. We observed classes, groups of theories that are often antagonistic. In economic history, every great economist showed his own way in explaining the value. Even economists of the twentieth century defined the value according to mathematical formulas, but yet without giving proof of its strength may therefore intellectually adapt fully to the legal science.

We analyze the question from the philosophical aspect so without reaching a convincing conclusion. However, we found the existence of groups of theories, subjective and objective.

The objectivist believe the value is observable, found himself in good or be that we want to evaluate. Saint Thomas said in his *Summa Theologica* that the value is an intrinsic quality of the thing. The value is accordingly imposed on men. The typical

example is the color⁸. No one argues about whether a car is red or green, we just observe and accept. The objectivists also believe that the values are not the product of the individual, but should be studied as a fact of society in its entirety. The value, according to sociologist TARDE, is an expression of social beliefs and desires. Indeed, society is seen as the guarantor of values. The values prevalent ones over the individual will, because they represent a trend of a society.

Already subjectivists believe that the center of all value is not in the good, but in the person who evaluates them. The only elements that influence the individuals are the motives, tastes and desires. There are several doctrinal trends that stand in favor of subjectivism. The current representatives of the psychologists believe that human desires are the source of all value. Many are hedonistic⁹, and say an object is valued because of the pleasure that can lead to its possessor.

For overcoming the difficulties of finding a concept that is clear, comprehensive and adaptable to different situations, we observed a framework in terms of tax law and customs and provide a work placement within a hierarchy of its own. In our base of hierarchy, the notion that are in the top is considered as a 'concept'; that term is as general as possible, adapted to situations dives and used by various taxes. We made a distinction between 'concept' and 'criteria'. The 'criteria' are signals that represent a way to observe or translate the expressions of economic goods or services. We have seen that the observed diversity of concepts, such the "price, value for money 'value-income', 'market value', only the expression 'market value' may receive a higher hierarchical status, which could cover several value criteria existing in the two legal disciplines studied.

Another source of difficulty to theorize the phenomenon of value comes from the fact that it can be recognized directly or indirectly. The principles and procedures for the determination of taxes impose a total or partial resource riches constitutive value. The principles of justice, equality, freedom, economical faculties, property rights, principles, moreover constitutionalized by several States ensure, and force contributing to the direct recognition and real wealth. But such principles and rules

⁸ In this sense, see: SCHELER M., *Le formalisme dans l'éthique et l'éthique matérielle des valeurs*, par M. Gandillac, Paris, Gallimard, 1955.

⁹ Such as Aristipo e Epicurio, ou Bentham e Meinong

are not immutable. Indeed these principles are flexible and adapted many times to situations or branches are dealing. For example, the principle of equality is decomposed in principle of total equality among all and the principle of equality before the tax law. The birth, social origin, does not seem like the most distinctive character among men. The latter are equal, they can buy and sell, do business as they see fit. And only their individual skills will count in negotiating the value of an item in a contract. The result of this value will subsequently be the basis of prices of goods and services. Equality has another form, perhaps as the second phase of equality, equality under the tax law. This principle represents one of the great guarantees of individuals concerning the tax law and customs. The principle of contributory faculties is the better represented of this application. According to the prism of this principle, this time, men are no longer considered exactly equal; their individual situations make distinction among them.

Accordingly, the difference in treatment will observe in one hand, his personal situation, if the individual is married or not, have children or not, and elsewhere, if the other operations were performed by he and those measures should be measured accurately and completely, without approximations.

The principle of freedom was proclaimed from a few centuries. According specifically to the principle of contractual freedom, it is observed that it is the basis of all trading¹⁰. Men are free to buy and sell with anyone, all the time and in any place. But this principle finds some exceptions. It is possible that in some way, the freedom of determining the value of a sale is restricted by law or the will of individuals is restricted by a higher order such as public policy, redistribution, social, or economic control. This means that the shares are no longer ladies of valuation. It should be emphasized that the practice of supervision of the economic values held by the State is an ancient practice. Most authors¹¹ consider that the Edict of Diocletian is the first example of this practice. Finally, it seems that the right to property fully reflects the basic principle to the construction of real value. The right to property is in fact the

¹⁰ For example : RICHARDS P., *Law of Contract*, 6^{ème} éd., Pearson Longman, 2004 ; McKENDRICK E., *Contract Law, Text, Cases and Materials*, 2^{ème} éd., Oxford, 2005 ; CHESHIRE FIFOOT , FURMSTON's, *Law of Contract*, 13^{ème} éd., Butterworths, 1996.

¹¹ EATWELL J., MILGATE M., NEWMAN P. (dir.), *The New Palgrave a Dictionary of Economics*, Vol. 3, Palgrave, 1998, see: price control

guarantor of the possibility of setting the value of goods. Without the right to sole ownership of the property, fixing the value would be hardly possible. The property has value precisely by the fact that only some may possess. The possibility of possession, exclusive use and disposition, is giving to a good his value.

Other principles are sought to justify the partial or rapid recognition of the value, such as the examples of principles of simplicity, efficiency, or policies to combat tax evasion or fraud. Often, the lawmaker himself will establish rules or delegate powers to the administration to achieve the wealth on display, in a transaction whether it is a transfer or possession of an element of an estate of a taxpayer. The legislature will permit or require that, by means of facts, or acts, will reveal the existence of certain elements of wealth. Accordingly, the lawmaker or the administration makes use of presumptions or myths. So it is possible to recognize the value of property by simple assumptions. The requirement to achieve a wealth is limited to the knowledge of some components of the value. But in the latter case, the reference to any factor related to economic wealth that is assessed, should be framed, because we are dealing with fictions. The legislature makes use of assumptions and fictions aimed principally at combating tax evasion or fraud, or to help administrative activities. The assumptions regarding the value can be made unilaterally by the administration in case of fault or not of the taxpayer. Simplifications can be done on a bilateral exchanges, such is the case of agreements between management and contributory. Finally, the approaches to value can be indirectly held by third parties such is the case of the consultative committees,

Indeed, there are several examples of presumption regarding the value observed in the Brazilian and French tax law. In this context, the conceptualization of the concept of value seems hard because that element, must meet diverse requirements of a direct assessment of complete and partial evaluation. Finally, recognizing the problems to theorizing, it is possible to overcome the difficulties, even being as diverse as we saw.

The definition of a concept is to give meaning to a word according to the information he provides. A concept must be able to reveal the elements that are assembled, material and intentional elements for the realization of an object, correlated with their

various influences. To give greater legal security, it is necessary that the concept is susceptible of a definition based on attributes that are inherent in their constituent elements.

To that end, a concept of value will be discovered by the determination of its elements. Recognizing its entirety, it is possible to determine a value concept.

We found that the concept of value is portrayed in two ways, two intrinsic factors: the exchange and use. According to our research, it was revealed that the figure represents the result of the pursuit of advantage by individuals in obtaining or possession of property. The exchange and use are the two elements of value. Concerning the exchange, initially, such an element means the right to a property to be exchanged for another or others. The French and Brazilian civil codes for example deal with the definition of exchange. Article 1702 of the French Code states that the French exchange means the contract which the parties give respectively shown one thing for another. Articles 1703 to 1706 deal with the particularities of their legal status, while Article 1707 shall send to the rules of a contract of sale. The exchange is treated similarly by the Brazilian Civil Code. The change means the contract on which the shares of one thing against another but that is not in money. The exchange has been examined by lawyers from antiquity.

In his work, the Nicomachean Ethique, Aristotle further develops the idea of exchange, making an interpretation of *sunallagma*. This notion translates the existence of union between individuals, the idea of private transaction, always with an intention of communication between community members. For Aristotle, there are volunteers relations, such as sales, and the involuntary, like the offense. He makes a distinction between distributive justice to corrective justice. The first is to trace the distribution of wealth and honor among men. The second focuses on changes that can carry the '*Sunallagmata*'. Distributive justice corresponds to the geometric justice and admits a certain inequity in the distribution of honors and riches. Since justice aims to respect the equality of arithmetic *Sunallagmata*. Although these definitions are philosophical, it seems that these elements exert influences on jurisconsult. In the Digest, we find the notion of *Sunallagma*. Ulpian, Gaius, use the precepts of Aristotle. This idea of movement and communication between heritages is present from the Romans, through the Medievales and Moderns.

The lawyers noted that the act of exchange, *stricto sensu*, the tradition of objects is not their most important trait. In fact, the predominant aspect of trading is the possibility of each person to ensure the desired good. We noted however that, despite the fact that the lawyers have defined emphasizing its material aspect, we saw that in the Napoleonic Civil Code, was given a focus on formal aspects. Formal aspect of a simple permutation of objects placed in the background. However, the change trim mainly by its material aspect is based on the individual motivations of the parties that perform such a swap, gains strength through the reading of Greek and Roman notions. The jurists of the eighteenth and nineteenth centuries, motivated by economic issues, will reconsider the importance of exchange in relations. It was this sense that the idea of 'cause' of the contract is replaced as the biggest concern right from the beginning of the twentieth century. The exchange will thus be considered as a privileged means of communication between men, each seeking an advantage.

Regarding the use, it represents the possibility that certain goods are useful for their possessors. We could see that the goods do not possess intrinsic qualities, immutable, but are the result of various destinations covered by men. Moreover, if first, the utility seems like a subjective concept, consequence of human motivations very different, it seems to us that it can be determined. The people are rational beings who can choose among various goods, that it seems more interesting. The calculation of the choice will be made in light of the possibility of buying an asset, for maximum utility and minimum penalty. The analysis can be done by the other party, use the calculation of value of an asset from the perspective of the owner, shall be done according to the maximum profit and minimal pain to get it. According to the analytical recognition of these two components of value, we observe the remains shortly after the first paradigm of value, market value.

The market value seems at first like the general concept as it has in its structure the value of two elements: the use and exchange. We also saw in a first test of the market value seems like the overall concept that can achieve various goods and taxes. The market value is recognized as the value used by most law and economics. It is easily and correctly cited by individuals as the basis of value in tax law and

customs. This idea is very rooted in the minds of lawyers. Without reflection, the market value is considered fairer because the concept represents the "social value". "All the society contributes to the formation of value, but nobody influences." In this paradoxical surrounding context, the market value is an excellent tool used to overcome shortcomings or deficiencies in the assets test. However, without knowing its qualities, this concept does not deserve the status of norm. During our study, we could observe its flaws. If, commonly cited by economists, accepted by the jurists, in reality, its use is limited to certain cases. In a market based on the idea of a stock exchange, it is possible at any time, to recognize the value of a stock or commodities. Unfortunately, into the world of values, the reality is not so simple. The market idea is variable; we observe that markets are not 'The market'. There are product markets, geographic markets, government markets, etc. Moreover, if we observe one of the conditions of application of market value, the existence of perfect competition, we recognize their weaknesses. This competition is too conceptual and unrealistic.

We have now to develop a concept that can encompass, while all taxes and all goods and services. A concept allowing to fill the deficiencies in market value but can grasp its qualities. It will be a custom value. Custom does not mean to open a total subjectivism. But a value returned to the men. A dependent value of individual actions, no longer aiming to maximize their advantages, but just looking for an advantage. If *homo economicus* has a predictable default behavior, where it will get the maximum benefit, *homo fiscalis* is in this case, the subject can be recognized in their behaviors. In fact, the valuation of goods is made by the analysis of behavior performed by the parties or the taxpayer who own a good, or performing a service.

The value of an asset will be represented by reasonable advantage actually seized by the taxpayer in transmit or possession of asset, a result of confrontation or coordination among people and goods.

This advantage will be based for example on the difference between the good produced by the taxpayer and his consideration. Fixing the value through the control of benefits received by each individual. On the buyer, the advantage is the total obtained by the difference between the money given to acquire it and the price of the product.

Moreover, the demand for benefits, for the buyer, the seller or the owner, should be made following legal rites and not artificial, that is, acts that are not fake or artificial. The choices and actions made by individuals must be reasonable. It means that advantage should always be sought in the transactions, and that the subject aims at individual interests, however avoiding advantage through fictitious acts. In this aspect, the fair value is the one that is normal. If the operation itself was considered normal, it will be fair and consequently the value of property will be fair.

To conclude, the value is an authentic concept, but it must be counterbalanced. That is, can not be reduced to a pure subjectivity or tied to a radical objectivity. The concept of value is the door between objectivity and subjectivity. This is personalized value. It is necessary to treat the taxpayers' choices, their motivations, desires and translate them into monetary bases.

The second part of our work, pass by the assessment, according to the concept determined by us, the value of goods and services. If we talk about fair value of an asset, this value will be determined in two stages: in the transfer and detention of such property. Regarding service, it will be determined according to the perceived advantage by the taxpayer.

We can conclude that to seek fair value is necessary to assess the operations, which are envisaged in two ways. The first is by confrontation. The first way to recognize an obligation is one in which two parties opposed to set the value of a good or service. The contracts of buy and sale or delivery services are typical examples. The sides will reach a fair measure of a fair sale by confrontation of wills and desires. In this context, the value for the determination of taxes on consumption, it is in most cases referred to the value of the asset in a sale or the value of services.

Reciprocity is an essential element to determine a fair price. Moreover, as we have seen, the basis for a fair assessment is that each party seeks its interest in a contractual relationship. Therefore, legislators will introduce rules stating that in case of connection between the contracting people, the consequence of the transaction value is unfair. For example, a party that is performing a contract and is in the executive board or board of another, or if a company has capital of another, or that a

person has family ties with the other party, are all cases of putative binding who comes to break a relationship that is based on the clash of wills.

But how to know if the value is fair? It is noteworthy that manipulation of the value of goods and services are the most varied forms, and it will be through the manifestations of the behavior of taxpayers that it'll be considered. The manipulations have different legal systems and are repressed under a variable degree. But it is possible to affirm that the manipulations of the value can be classified into two groups: the first concern several practices aimed a duality of values and second, behaviors aimed at unity of values. The first group represents manipulations that will show the public value but that one was actually done another. It is the typical case of fraud and concealment of the value. The fraud, *stricto sensu*, is that the taxpayer's conduct explicitly or intentionally omit the emergence of the event for taxes by making use of forgeries. Already concealment reflects the attitude of the taxpayer to provide the public value but that in fact, held a contract for another. Such behavior is more subtle, there are the declared will and the will hidden. You can not make use of forgeries as fraud. We can cite for example in France disguised donation into a sale. It is agreed between the parties since the conclusion of the contract that the cash consideration is not given by the buyer. The contract which is shown as costly to society, the exchange of goods in return for a sum of money, doesn't exist. And finally, we can cite the case where the parties stipulate a value more or less to be able to transfer an additional share in the form of bribes for example. In this case, there is the consideration, but not in its entirety.

The other group of manipulation has the common trace the lack of differences of the values. Values are those which the taxpayers truly wanted, and that are presented to the authorities. Exaggeration or diminution seeks only to escape the tax. The administration has been just to recalculate the price, more or less. We are faced with cases recognized as the hidden distribution of profits, or shining in the part of profit taxation, such as transfer pricing. In France there is the typical case of the theory developed by jurisprudence called abnormal act of management¹². The latter theory

¹² See : COZIAN M., *Précis de fiscalité des entreprises*, Litec ; SERLOOTEN P., *Droit fiscal des affaires*, Dalloz.

is that prevents the owner of a company to carry out acts that go against the interest of your company.

Such is the fact prevent the sale by the company for a price too low, or buy a very expensive well. In the control of transfer pricing and combating disguised profit transfers, the logic is the same, avoid shining in the wealth that is manipulating the value of a sale, a purchase or a lease as such transaction will have consequences the determination of taxes. To conclude, there are cases where manipulation (word should not be interpreted in a pejorative manner) has no purpose to evade taxes. In reality there are few countries that carry out the practice of supervision of values even in the case where there is not fraud, concealment or shone taxes. In some countries, such as France's example, the administration has the power to exclude the value of a transaction if it is not equal to "real". Decreases or increases can be contested. The legal instrument in France is recognized in Article L.17 of the book of tax procedures (LPF), concerning the tax on onerous transfer of property.

Both in Brazil¹³, in general, as in the European Union¹⁴, concerning the VAT, the administration can only excludes the value of an asset only if it was verified case of fraud or tax evasion. This is not an unlimited right.

After recognizing the operations that manipulate the value, we'll know observe how to know the fair value of goods and services. In the act of confrontation of wills, the fair is one where there is an equilibrium contract. We saw in a historical research, that justice is recognized when contractual equilibrium exists. This balance is seen through an analysis done in two steps. First, you need to know if the contracting people actually exchanged benefits. This means that the value will be calculated according to the set of constituent elements of value or service offered or provided by the seller, supplier. This also means that the value corresponds to the set of data elements by the seller for the sale or supply. The idea of compensation is commonly used as the basis of value for consumption taxes. The European¹⁵ case law, French¹⁶ and Brazilian¹⁷ case laws consider the value of a transaction as the total

¹³ Article 148 of tax code.

¹⁴ Sixth VAT Directive.

¹⁵ CJCE, 5-02-1981, aff. 154/80, Coöperatieve Aardappelenbewaarplaats : rec. CJCE, p. 445. – 23 - 11- 1988, aff. 230/87.

¹⁶ CA Paris, 16ème ch. B, 6 avr. 1995 ; Sté SOCOTEC c/ SCI Echat.

consideration received by the seller in exchange of good data. According to EU case law, the compensation means everything received in exchange for the supply of goods or services, including fringe cost such as packaging, transportation and assurances. This means that not only the amount of money received, but the total value of goods received in exchange¹⁸.

The value is thus a result of various factors that come both from the buyer, or the seller or provider and policyholder services. In relation to the seller, we need to know how much he spent to acquire or build a good. As the buyer, how much will be the consideration received by the money given. It should also be observed in an operation, if there is a connection between the given and received.

The second step is whether the benefits given by the parties are proportional. If in a sale, the buyer and seller give too much or too less, or vice versa, the operation will be unbalanced and the price, unfair. This also applies to the case where the seller receives too much, and the buyer gets nothing, and vice versa. We don't have to forget that the same reasoning can be made between the borrower and the service provider. If there is neither reciprocity of rights and obligations nor any return, and hence no equivalence, the contract will be unbalanced. Two criteria must be met: reciprocity and equivalence. Reciprocity responds to a particular function, it analyzes the content of a comprehensive and coherent manner according to the structure of the contract. It checks whether the global nature of equilibrium. The balance is found if exists if the same faculties are granted to each of the parties, or if the parties generally have the same number of advantages. The second stage of this logical path starts with the qualitative analysis of benefits, or in other words, a qualitative analysis of supply involving a purchase and sale. It is necessary to examine the value of their benefits and privileges reciprocally, applying the equivalence or proportionality.

¹⁷ STJ, REsp n°4777525/GO, Rel. Min. Luiz Fux ; STJ, REsp n°63838/BA, Rel. Min. Nancy Andrichi; STJ, AgRg n°887.406/RS, Rel. Min. José Delgado, j. 30/08/2007.

¹⁸ 2^o directive CEE 67/228, 11 avr. 1967, art. 8-a : Journal Officiel des communautés européennes 14 Avril 1967. – V. CJCE, 5 févr. 1981, n°154/80, Sta atssecretaris van financien c/ Coopérative Aardappe Lenbelaarplaats GA : Rec. CJCE, 1981, p. 445.

Another way to determine the fair value of goods will be with the coordination. We face no more than a simple clash of wills and people, but in fact the union between them. In that case, justice will be distributive. Justice is designed according to the proportions of the merits and responsibilities of each contracting party. So justice is exercised by common division. The justice evaluation in terms of cooperation is not the same kind of trade in services, but is by looking for the most appropriate balance in the division. We observed the typical case of pricing within a multinational. In fact, we know that each entity has its own relations with third parties but in constant relationship with other group members. Indeed, it was observed that in a progressive manner, the birth of the sole interest of the multinational group in tax law, despite a law in countries like France¹⁹ initially reluctant. The relationship between the multinational companies is not fair that the position found in the confrontation, it is necessary to note that members exchange knowledge and synergies. A simple analysis of confrontation has not yielded the true value, according to an equitable division of responsibilities and benefits between each group member, set according to the precepts of distributive justice.

Such coordination also takes place between the taxpayer and the good to be evaluated. The most notable case is that of intangible assets. It must be noted that the intangible assets are sensitive to assess mainly due to its composition and difficulties related to the appraiser. This means that such goods due to its immaterial nature, can be neither touched nor visualized. The lack of hard physical trait also prevents any comparison with other goods. We can add that comparisons are difficult for the simple fact of being single. The difficulty also comes from the difficulty of being independent of the entity that created it as a difficulty to be appropriate (possibility to be sold or used). We must remember that only when the good is capable of being sold or being used which will have a value²⁰. And how good a producer of wealth, the property's value is in essence will be directly linked to the withdrawal of its operating income or because of their possession. You should calculate the benefits perceived by their owners. This measurement methodology's advantages is the reason why his ownership rights in such property. Several methods are presented in order to determine its value. It seems that the method best suited to the reality of the

¹⁹ French Highest Court : CE, 4 mars 1985, n°35066.

²⁰ In this sense, see : PLANIOL M. , *Traité élémentaire de droit civil*, LGDJ, 1932

intangible assets that is capable of perceived soaked up the wealth with the possession of such property. Thus, the value of intangibles goods will depend upon the possibility of wealth production. But first you must determine the amount to buy it or build it. In this context, there are a first group of evaluation methods are static ones, able to translate expenditures that were made to create it or buy it as the accounting method and cost method. The second group of evaluation methods reflects the aptitude to generate wealth, and methods of determining the method of intangible benefits, billing, cash-flows.

Let us now analyze the methods for determining the value in tax law and customs used by the Administration. In the case where the taxpayer does not declare the value of a good or service that was obligated under the tax law, or where the declared value is considered false by the administration, it is necessary that the latter practice the act of evaluation. We note for example that in customs law, Article 3 of the Agreement on customs valuation opens the possibility that the transaction value is to be rejected when the buyer and seller manipulated the value of an operation by the existence of links between them, or just in case of fraud.

The determination methods are diverse in nature and highly variable. The administration, when she did not believe that the value declared by the taxpayer is treated as true, makes comparisons to find the value of this transaction disregarded. Comparisons are made that should at least be similar to those made previously by the taxpayer. In fact, when we talk about the application of arm's length principle in international taxation is not only the result of a comparison between the transaction recorded, and other transaction made by an independent company. It is necessary that all the factors that influence the value or income are recognized²¹.

The administration should insert in their comparisons used in the calculation base of assets, where the operation was performed, the object of evaluation, timing. It is necessary to make comparisons relating the reality of the taxpayer, thus obeying the holistic view, the *ratione materiae*, *ratione loci* and *ratione temporis* criterion. Because the *ratione materiae* criterion is necessary for a good comparison to recognize the physical appearance of a good, in the case of land must observe the

²¹ BAUEN M. et GANI R., *La fiscalité internationale des Etats-Unis*, Bruylant, LGDJ, Schulthess, 2008.

nature of the soil, whether it is suitable for the production of cereal or good for prairie (grassland). Or should aim at the conservation status, size, quality, etc. Regarding *ratione loci* criterion, should know where the goods are located, because even two physically identical goods may be valued at different prices. Observe the town, city, region where the asset, object of comparison, we are located; we need to know if it is close to urban centers or not, near routes, etc²². As for the temporal criterion, because time is always factors to take account to assess the value of goods. Identical commodities such as rice, may have different values each, for the ingathering of the year 2000 may not have been equal to the year 2001, due to climatic phenomena, economic conditions, etc. The time is variable according to logic retrospective and prospective. According to the logic of retrospective, self administration in a 2010 dispute the value of an item referring to a transaction conducted in 2007, that comparison will not be possible. In the case of the control rule of transfer pricing in Brazil, Article 18, § 1 of Law 9430/96, says the administration can only make comparisons to how those operations performed in the same year was realized that the disputed appraisal. The Brazilian administrative law case ensures that annual limit²³. Since the Agreement on Customs proclaims a comparison even more rigid. Article 5-1-b of the Agreement specifies that the import should be compared was performed in the last 90 days for imports to be evaluated. And finally, we cite the case of taxes on wealth (IGF) and the tax on transaction of real state even more flagrant in France²⁴ where the general rule will be the day of the taxable event tax liability.

According to the logic prospective, evaluation will be performed using a connection to the future, such is the case of the determination of copyright. Whether the book sold in the hundreds or thousands copies, or if a film was seen by 500,000 people, conditions that are linked to the risk factor is a basis for valuation of certain assets. Concerning the risk, there are methods that the Evaluation risk, according to a refresh rate.

²² For example French Case Law: CAA Nancy 26 janvier 1995, req. 92-240, SARL Moulin de la Chée : RJF 6/95, n°712.

²³ 103-22.017, 3^oChamber, 1^oConselho de Contribuin tes.

²⁴ French case Law : Cass. com. 28 janvier 1992, n° 295 P ; Cass. com. 29 novembre 1994 n°2216 D, Jourdan-Barry :RJF 3/95 n°416 ; Cass. com. 6 mai 2003 n°753 FS-D, DGI c/ Tomasi et a : RJF 11/ 03 n°1318

In general, the accounting created an instrument for determining the influence of time on value of goods. This is the depreciation, where is observed the time factor, responsible for the reduction in value of property without due to the use, technological advances or end of the legal protection.

To put it in a nutshell, we must combine several criteria in order to reach a fair measure of goods and services. The distinctions between identical and similar goods shall be made according to a combination of criteria. In the customs, the Customs Valuation Agreement treats about (article 15) the set of criteria that make goods identically or not. Comments operated by World Customs Organization (WCO) are going into that direction. But there are some barriers to implementation of holistic assessment. For example you need to know the evaluation will be exclusively of a good or a set of goods, or services that are interconnected, as the case where a good is sale with assembly service; or if comparisons are made between related enterprises with companies not related, related to transfer pricing (both internal and external comparisons), or comparisons subject to professional secrecy.

Now the whole process of assessment or reassessment is in any way by analyzing the situation and the position of the taxpayer. To make a fair evaluation should be observed for example the use made of the good by taxpayers, the legal constraints imposed on the good, the risks incurred by taxpayers in the conduct of its business or operation, the economic situation of the company that sells, etc..

Specifically, the pricing relationships between affiliated companies, the methods used by states and recommended by international organizations (OECD) must be processed and established in order to recognize the situation of each taxpayer where it should be, or was at any given time, with whom related, as the operation took place, etc.. Concerning the transfer pricing, the resale value of methods is used for price determination in the case where the taxpayer is a dealer or distributor and the method du cost is adapted to the reality of the producers. Likewise for the determination of intangible property. The OECD recognizes directly and indirectly the use of methods according to the position of the taxpayer.

The method of resale seems adapted to the situations where the taxpayer realize a transaction relating to a license tied to a after- license, or case where the taxpayer build his own property.

Then we should add that states, through their governments, are key figures in forming rules for determining values of uniform goods and services. On the internal level, the legislature should contribute to the establishment of a single law on the valuation of goods and services containing rules and methods of measurement such as seen in Germany, Austria and Luxembourg. It will be an interesting initiative, capable of significantly reducing the litigation in this area.

Currently, it seems the idea of greater integration of customs administrations and tax authorities regarding the issue of transfer pricing. It should highlight the fact that in recent years, to the administrative tax and customs from different countries go in that direction. In fact, several administrations of the same country, conduct exchanges information on the price of goods and services. This is especially the countries with more experience in the assessment of transfer pricing and customs valuation. Such coordination will bring benefits for all joint, such as greater efficiency in combating fraud, a better respect of the rules by economic operators and an increase in revenue.

Under the international plan, the creation of proposals for closer evaluation systems, transfer pricing and customs valuation, and the deployment of joint evaluation. It is envisioned to approach the valuation rules for assets related to transfer pricing and customs valuation. Such an approach is beneficial for everyone: governments and taxpayers.

We might note that such sets of rules are not completely contradictory. On the contrary, have many points of similarity. It is necessary that the economic agents, the international organizations such the WTO and OECD work more in this direction, aiming mainly to overcome certain obstacles to a possible harmonization of rules. Remember that according to a study by KPMG²⁵, in the majority of countries studied, the level of coordination between tax and customs is high. Further, since 1973, the jurisprudence of this work contributes to coordination of customs and tax rules (strictly speaking). It is to remind the judgment delivered by the US Court, *Ross Glove U.S.*²⁶, by the German Federal Court²⁷ in 1993 and recently the decision

²⁵ KPMG International survey of global transfer pricing issues, 2009.

²⁶ *Ross Glove Co. v. Commissioner*, 60 TC 569 (1973).

²⁷ BFH, 2-05- 1992, VII B 129/91

rendered by the Spanish Supreme Court²⁸ in 2009. Those judgments are going in this direction.

Finally, the harmonization of accounting standards (IAS / IFRS) leads us to believe that a closer link to the rules of transfer pricing is possible. Accounting is undoubtedly the primary instrument for the establishment of rules for consistent evaluation. In reality, this science is the branch responsible for the translation of monetary economic situation of enterprises. Accounting can show the true image of the company, and consequently, the value of goods produced by it.

But first of all, there should be greater dialogue between government and taxpayer. In this context it should be encouraged to introduce mechanisms for consultation (ruling) specialized in the evaluation. The idea is to create a body composed of representatives of administrations and taxpayers should be part of the political calendar. Concerning the international operations, States should promote the implementation of procedures for conflict resolution, before or after starting the tax litigation process. It seems interesting to us primarily to encourage the conclusion of agreements between states on tax matters, a party (as is the case of Advance Pricing Agreements, APA), and customs of another to then pass the creation of a common procedure - Fiscal and customs, which is bilateral or multilateral agreement in the assessment. In the medium term, the idea of establishing a court that is permanent or ad hoc should be treated seriously by the States. It is not in any way a utopian proposition. Good and fast measure of the asset's value passes through, undoubtedly, by the creation of a specialized court for the assessment. If, initially, such a jurisdiction will be responsible for setting property tax under the optical strictly between two or more States, it seems that later must be glimpsed a competent court for resolution of disputes relating to corporation tax and taxes customs. The experience of the WTO dispute settlement and existence of its corpus administrative structure, merged with the experience of OECD on transfer pricing, or even the European practice of arbitration in tax matters, will be important to be recognized for the establishment of such jurisdiction.

Finally we have to conclude that the value should be treated with caution. First because it is an instrument of "domination", since its value can be used by companies as a means of gaining market or destroy competition. It is also an

²⁸ STS 7507/2009, Sección Segunda de la Sala Tercera del Tribunal Supremo.

instrument of escapism, for the handling of the economic values may lead to the shining in the income tax zones for insider trading and tax havens. The value is also an instrument of 'settlement'. *Stricto sensu* settlement of determination of tax where each is responsible. But also in the broad sense, because liquidate have an idea of sacrifice, so well explained by the anthropologist René Girard²⁹. For outstanding, pay a tax means to a certain extent, the individual assets and liquidate consequently finally to a "jealousy" between people. The once sacrificial material (of an animal, for instance) became assets. People know that through taxes, the rich will be imposed. A part of this social class has sacrificed his heritage. Finally, it is an instrument of 'preservation', both for taxpayers and for the states. Because the irregular fixation can come to the taxation of elements that do not correspond to contributory faculties of the taxpayer. As to the State, a wrong measure, or a perverse manipulation of the value, can lead to erosion of the basis for calculating taxes and consequently, swaying directly to economic health and functioning of a nation!

²⁹ "Violence and Sacred", or "Things Hidden Since the Foundation of the World" Stanford University Press, 1987.