

CORPORATE SOCIAL RESPONSIBILITY AND TAX PLANNING: FROM PRIVATE TO PUBLIC REGULATION

RESPONSABILIDADE SOCIAL CORPORATIVA E PLANEJAMENTO TRIBUTÁRIO: DA REGULAÇÃO PRIVADA À PÚBLICA

Marcus Lívio Gomes*

Paula Santos de Abreu**

Abstract: Corporate Social Responsibility (CSR) is a subject that is gaining increasing importance not only in the domestic sphere of companies, but also in the national and transnational agendas. Currently, there are hardly any companies that have not been facing demands to institute more responsible practices beyond the social and environmental areas. Communities and current public opinion also expect companies to act differently when it comes to the payment of taxes. The mere compliance with the cold letter of the law when creating corporate tax planning, whose effects imply the unreasonable reduction of taxes, is no longer tolerated. Nevertheless, the regulatory initiatives undertaken by government authorities have not been sufficient to curb the tax arrangements of large multinational companies, facilitated by the different existing tax policies of the International Tax Regime. For this reason, it has been increasingly necessary to count on the “voluntary” participation of these corporations to determine a solution to tackle abusive tax planning. Following this trend, there has been significant interest in regulating CSR at the transnational level. The objective of this study is to understand how these efforts will shape CSR in terms of tax planning.

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* Federal Judge, Post Doctor in Laws at University of London (SAS/IALS) and Finance and Tax Law Professor at Universidade do Estado do Rio de Janeiro (UERJ). Email: marcusliviogomes@gmail.com.

** Attorney, Master of Laws in International Law at *Centro Universitário de Brasília* (UniCEUB) and Doctor of Laws student in Tax Law at the University of Rio de Janeiro (UERJ). Email: pabreu0314@gmail.com.

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Resumo: A Responsabilidade Social Corporativa (RSC) é um assunto que vem ganhando cada vez mais importância não só no âmbito interno das empresas, mas também nas agendas nacionais e transnacionais. Atualmente, quase não existem empresas que não tenham enfrentado demandas para instituir práticas mais responsáveis além das áreas social e ambiental. As comunidades e a opinião pública atual também esperam que as empresas ajam de maneira diferente no que diz respeito ao pagamento de impostos. O mero cumprimento da letra fria da lei ao criar um planejamento fiscal corporativo, cujos efeitos implicam a redução excessiva de impostos, não é mais tolerado. Não obstante, as iniciativas regulatórias empreendidas por autoridades governamentais não têm sido suficientes para coibir os arranjos tributários de grandes empresas multinacionais, facilitadas pelas diferentes políticas fiscais existentes no Regime Tributário Internacional. Por esse motivo, tem sido cada vez mais necessário contar com a participação "voluntária" dessas corporações para determinar uma solução para enfrentar o planejamento tributário abusivo. Seguindo esta tendência, tem havido um interesse significativo em regulamentar a RSE ao nível transnacional. O objetivo deste estudo é entender como esses esforços moldarão a RSE em termos de planejamento tributário.

Palavras-chave: Elisão tributária; responsabilidade social corporativa; regulação.

CONTENTS: 1. INTRODUCTION; 2. ABUSIVE TAX PLANNING; 3. WHAT IS CORPORATE SOCIAL RESPONSIBILITY (CSR)?; 4. CSR AND TAX PLANNING; 5. INITIATIVES TO REGULATE CRS; 6. THE ENFORCEABILITY OF CSR; 7. TAX PLANNING AND THE PRINCIPLE OF SOLIDARITY; 8. CONCLUSIONS.

1. INTRODUCTION

In years of international crisis, marked by a worsening public deficit and fiscal imbalances that require "fiscal austerity" measures, such as a reduction in public spending, cuts to social benefits, and a tax load increase, stories such as the one published by the Brazilian newspaper *O Globo* on May 6, 2015, reporting that a giant U.S. fast food chain had got away with not paying some € 1 billion between 2009 and 2013 by using a manoeuvre that involved moving its head office from the United Kingdom to Switzerland and using a subsidiary in

Luxemburg¹, have incited strong reactions from the international community and created a certain sense of urgency to combat the abusive tax planning of major corporations². It is estimated that US\$ 20 trillion are being sent to tax havens around the world³ and that the practices that facilitate the allocation of taxable income to jurisdictions that charge little or no taxes lead to the erosion of these countries' tax base.

Although it is recognized that this practice by companies is mostly legal and understandable⁴, there is also a feeling from governments that the current

¹ O GLOBO. *Mc Donald's é suspeito de evasão fiscal de €1 bi.* Rio de Janeiro, May 6, 2015. Economy Section, pg. 23.

² Other examples include Apple accounts in Ireland, Starbucks in Holland, and Amazon in Luxemburg. See more details at: The NY Times. *Double Irish with a Dutch Sandwich*. Available at: <http://www.nytimes.com/interactive/2012/04/28/business/Double-Irish-With-A-Dutch-Sandwich.html>. DRUCKE, Jesse. **"Google 2.4% Rate Shows How \$60 Billion is Lost to Tax Loopholes"**. Bloomberg, 21 out. 2010. Disponível em: <http://www.bloomberg.com/news/2010-10-21/google-2-4-rate-shows-how-60-billion-u-s-revenue-lost-to-tax-loopholes.html>. Acesso em: 9 maio 2015. In Brazil, the cases of Vale and Eagle, among others, have led to a flood of not only administrative proceedings, but also legal proceedings focused on the legality of their tax planning.

³ See: RT.COM. **Shocking abuse of public trust: Columbia University prof estimates \$20tn hidden in tax havens**, RT.Com. 16 jan. 2014. Disponível em: <http://rt.com/business/tax-evasion-columbia-sachs-701/> Acesso em: 13 maio 2015. *"It's estimated that there are maybe \$20 trillion of assets put in these tax havens around the world," Sachs told RT on the side lines of the fifth annual economic forum in Moscow. "And who creates this? Not these little islands, but the U.S. government by approving these arrangements, the U.K. government because after all these are British territories." An estimate by Boston Consulting Group pegs offshore wealth at \$8.5 trillion. The British Virgin Islands, the Cayman Islands, and Bermuda are among the key destinations for "offshore wealth" - money that is kept abroad for tax purposes.*

⁴ Sacha Calmon Coelho believes that tax planning is a duty, a corporate goal of maximizing gains and minimizing costs, since this does not constitute fraud and simulation. The author is adamant in his argument that tax avoidance should be treated as an instrument inherent to the capitalist system, which demands that companies operate competitively. (COELHO, Sacha Calmon Navarro. **Os limites atuais do planejamento tributário**. In: ROCHA, Valdir de Oliveira (coord.) *O Planejamento Tributário e a Lei Complementar 104*. São Paulo: Dialética, 2001, p. 279-304. p. 283). For Huck, the use of a tax haven does not always indicate some fraudulent or illegal practice, but may serve legal purposes, helping drive commerce and/or the international financial system. (HUCK, Hermes Marcelo. **Evasão e Elisão. Rotas Nacionais e Internacionais do Planejamento Tributário**. São Paulo: Saraiva, 1997., pp. 258-259). On the same topic, see an interesting article by Professor Daniel Gutmann about the criminalization of abusive tax planning. (GUTMANN, Daniel. **Planejamento tributário pode ser um crime? Perspectivas doméstica e Internacional**. Revista Direito Tributário atual, São Paulo: Dialética, v. 26, p.129-136, 2011).

system is not equipped with proper rules to deal with this problem on a national level or even on an international level⁵. This led to a pressing need to create more sophisticated rules and methods to fight tax planning considered abusive⁶.

Despite the existence of an international movement to improve regulations and laws to combat tax avoidance⁷, national governments are at the same time investing in and supporting the development of voluntary mechanisms that can deliver social and environmental benefits at a more rational cost-benefit than implementing regulatory instruments and legal rules.

In this article, we will cover these initiatives focused on encouraging corporate social responsibility (CSR) designed to fight abusive tax planning.

⁵ OECD (2014). *Bringing the International Tax Rules into the 21st Century: Update on Base Erosion and Profit Shifting (BEPS), Exchange of Information, and The Tax and Development Programme*. Available at: [www.oecd.org/tax/C-MIN\(2014\)6-ENG.pdf](http://www.oecd.org/tax/C-MIN(2014)6-ENG.pdf). Accessed on: 6 July, 2015.

⁶ For Ricardo Lodi Ribeiro, tax avoidance should be combated both by the law and the tax administration, since it violates the principle of equality based on the individual's ability to pay taxes. (RIBEIRO, Ricardo Lodi. **Justiça, interpretação e elisão tributária**. Rio de Janeiro: Lumen Juris, 2003, p.137). For K. TIPKE, *Die Steuerrechtsordnung*, pg. 1332 apud Torres: "Combating tax avoidance is a constitutional duty of the legislation and administration" (*Die Bekämpfung der Steuerumgehung ist daher eine verfassungsmässige Aufgabe von Gesetzgebung und Verwaltung*). (TORRES, Ricardo Lobo. **Normas Gerais Antielisivas**. In: TORRES, Ricardo Lobo (org). *Temas de Interpretação do Direito Tributário*. Rio de Janeiro: Renovar, 2003, p. 302). Marco Aurélio Greco is among those who argue for the application of anti-avoidance standards when combating abusive tax planning. (GRECO, Marco A., **Planejamento Fiscal e Interpretação da Lei Tributária**. São Paulo: Dialética, 1998, pg. 71 and following)

⁷ One of the more recent initiatives is BEPS (Base Erosion and Profit Shifting), currently considered the largest International Tax Reform project in history (TAVARES, Romero J. S.. **Política Tributária Internacional: OCDE, BEPS e Brasil. Como deve se posicionar o setor industrial brasileiro**. RBCE N° 121, Outubro - Dezembro de 2014. Disponível em: http://www.funcex.org.br/publicacoes/rbce/rbce_sobre.asp. Acesso em 02/06/2015, pg. 53). The project, developed within the sphere of OECD by request of the G20, involves the effective participation of 94 countries, accounting for over 90% of the global economy. BEPS covers 15 complementary actions and is designed to create multilateral instruments for implementing significant changes to the current international taxation model. Among the different recommendations, the project suggests that the economic substance of the tax planning be assessed by national jurisdictions, but also emphasizes the need to equip companies with mechanisms that foster certainty, transparency, and security so they can make decisions about foreign investments (OECD (2013). *Addressing Base Erosion and Profit Shifting*. <http://dx.doi.org/101787/9789264192744-en>).

2. ABUSIVE TAX PLANNING

Until recently, the approach to companies' tax planning was focused on discussions that established differences between illegal tax evasion and tax avoidance⁸.

⁸ For Huck, the concept of "tax evasion" would be a "genre" that comprises two types of tax planning: illegal tax evasion and legal tax evasion, the latter, also called tax avoidance. For the author, the extensive concept of tax evasion corresponds to "every and any action or omission focused on avoiding, reducing, or delaying compliance with a tax obligation, regardless of whether those actions are legal or illegal." (HUCK, Hermes Marcelo. *Op. Cit.*, p.15). There is plenty of discussion about the concepts of tax avoidance and evasion. Aliomar Baleeiro states that "doctrine and jurisprudence have, nevertheless, long admitted the validity of tax avoidance – a name used to describe legal methods and means practiced by the taxpayer to prevent the occurrence of the taxable event, reducing or eliminating the duty or tax obligation and radically different from tax evasion." (BALEEIRO, Aliomar. **Direito Tributário Brasileiro**. 13^a ed. Rio de Janeiro: Forense, 2015., p.1,103). Some authors consider avoidance before evasion and evasion before avoidance (MACHADO, Hugo de Brito. **Curso de Direito Tributário**. 36^a ed. São Paulo: Malheiros Editores Ltda, 2015, pg. 134). Others, like Xavier, understand that international tax avoidance corresponds, in a certain sense, to the concept of fraud in law (XAVIER, Alberto. **Direito Tributário Internacional**. Coimbra: Almedina, 2007, p. 45), while other authors distinguish tax avoidance and tax evasion from tax dodging and fraud (DORIA *apud* BALEEIRO, Aliomar, *Op. Cit.* pg. 1,103). It is worth mentioning that the international concepts of tax avoidance and tax evasion are closely associated with the legitimacy of the means used by taxpayers not avoid paying taxes. The International Bureau of Fiscal Documentation has also covered the concepts of tax avoidance and evasion. (IBFD. **International Tax Glossary**. 6th Edition. Amsterdam: IBFD, 2009, pgs. 165 and 418). For the entity, tax avoidance is the term used to indicate a reduction in tax charges through legal means. It is frequently used in pejorative sense, such as when it is used to describe savings in taxes achieved through artificial personal or corporate business arrangements, taking advantage of loopholes, anomalies, or other deficiencies in tax law. (...). In contrast to avoidance, tax evasion is a reduction in taxes obtained through illegal means (...), including the omission of taxable income or transactions made from tax declarations or a reduction in the amount owed through fraudulent means." We can verify that the concept of tax avoidance varies based on the fundamental theoretical positions related to the interpretation of tax law. Accordingly, for normative and conceptual positivism, avoidance based on valid legal tax arrangements would always be legal. This position was vehemently defended by Baleeiro (BALEEIRO, Aliomar. *Op. Cit.*, pg. 1,107). For sociological and historicist positivism, based on the theory of economic consideration of the taxable event, avoidance would represent the abusive exploitation of the tax regime by applying atypical structures to a business with the sole purpose of reducing taxes, and would thereby always be illegal. In Brazil, Falcão supports such line of thought. (FALCÃO, Amílcar de Araújo. *Introdução ao Direito Tributário*. Rio de Janeiro: Forense, 1994, p. 81). The jurisprudence of values and post-positivism, in turn, accept tax planning as a legitimate way of reducing the tax liability, as long as that there is no abuse of rights. For them, only the abusive avoidance or inconsistent planning are illegal (TORRES, Ricardo Lobo. **Normas Gerais Antielisivas**. In: TORRES, Ricardo Lobo (org). *Temas de Interpretação do Direito Tributário*. Rio de Janeiro: Renovar, 2003, pg. 267).

For many authors, while tax evasion corresponds to an illegal activity practiced by the taxpayer by breaking the law through fraud, simulation or misconduct, tax avoidance is a legal type of arrangement adopted by taxpayers to save on taxes.

Thereby, from a legal standpoint, corporate tax planning is defined as a preventive way of structuring legal businesses and legally saving on taxes⁹, where the legal options selected by taxpayer freedom are considered legitimate to optimize tax liabilities¹⁰.

Indeed, considering the freedom that private individuals have to organize their businesses, it is understandable that they use the benefits offered by international and national tax systems according to their needs and interests.

Nevertheless, between the two extremes of the illegality of breaking the law and taking advantage of the tax benefits granted by the jurisdictions where the companies operate, there would be a grey, polemic zone in which the tax planning would be framed and which warrants several discussions on how it should be treated. From there, a third concept of tax abuse has emerged over recent years¹¹, which considers not only the legality of tax planning, but also its legitimacy¹².

Accordingly, "aggressive" tax planning concepts were developed and refined, coming to including tax arrangements that, although compatible and

⁹ Ibid, pg. 175,

¹⁰ MARTINS, Alexandra Coelho. **A Admissibilidade de uma Cláusula Geral Anti-Abuso em Sede de IVA**. Coimbra: Almedina, 2007, p.18.

¹¹ Marcus Abraham understands that, based on the configuration adopted by the taxpayer, the result may be considered "tax evasion, illegal tax avoidance, or legal tax avoidance.". (ABRAHAM, Marcus. **O Planejamento Tributário e o Direito Privado**. São Paulo: Quartier Latin, 2007. p, 229).

¹² PANAYI, Christiana HJI. **Is Aggressive Tax Planning Socially Irresponsible?** INTERTAX, vol. 43, Issue 10 (2015). Kluwer Law International BV, The Netherlands, p. 545.

compliant with the tax law, would lead to a significant reduction in the taxpayer's tax liabilities, which would be incompatible with the effective transaction.

For Avi-Yonah¹³, "aggressive" or "strategic" tax planning means the use of transactions not motivated by valid business purposes, even if concealed in a way that may appear as such. In other words, aggressive tax planning is that in which the choice of a lower tax cost, conflicting with the solidary duty to contribute toward public expenses, is made possible by adopting abnormal business practices and setting up atypical structures or operations with the sole purpose of obtaining a less costly tax treatment.

This type of planning is characterized by the quest for three basic objectives: a) stopping the tax obligation from materializing by preventing the occurrence of the taxable event; b) reducing the tax liability by diminishing its taxable amount or tax rate; and c) deferring the tax payment¹⁴.

On an international level, multinationals began taking advantage of beneficial arrangements involving the establishment of controlled or affiliate companies in tax havens or harmful preferential tax regime jurisdictions¹⁵.

¹³ AVI-YONAH, Reuven S. **Corporate Taxation and Corporate Social Responsibility**. N. Y. U. J. L. & Bus. 11, no. 1 (2014): 1-29, p.2.

¹⁴ CASTRO, Flávia Almeida Viveiros de [et al.]. **Gestão e Planejamento de Tributos**. 2. ed. Rio de Janeiro: Editora FGV, 2001, p.43.

¹⁵ In general terms, based on OECD criteria, tax havens are considered to be those jurisdictions where there is no taxation or income tax is very low, combined with legislation that favours the incorporation of companies without an effective business activity, allowing non-residents to escape taxation in their respective country of residence. Other characteristics of tax havens include the lack of an effective exchange of information among countries for tax purposes and lack of transparency of legislative, legal or administrative provisions. Besides tax havens, there are other jurisdictions that, despite having a normal tax structure, exceptionally adopt preferential tax regimes to attract volatile capital. This is a practice that may become harmful to the international community (BIANCO, João Francisco. **Transparência Fiscal Internacional**. São Paulo: Dialética, 2007, pg. 18). Countries with harmful preferential tax regimes are considered those that, besides taxing income on very low levels or not taxing income at all, do so in a way that only favours non-residents, insulating the domestic economy from the adverse effects of such a regime. Other elements, such as lack of transparency granting those benefits and the lack of instruments for exchanging information with other countries about taxpayers who benefit from the preferential tax regime, are also characteristics of these types of regimes. In Brazil, Law 9.430,

Although tax planning already included this practice, changes in multinational companies' structures with the division of specialized roles in the production process (both within the same company as well as between non-related commercial companies) led to the maximization of the operational, financial, and tax efficiency of those companies¹⁶. Under pressure from stock markets and investors, companies begin treating taxes just like any other business cost that should be minimized. Besides dedicating resources to complying with the accounting and tax requirements of different jurisdictions, multinational companies dedicate a substantial amount of energy to reducing or avoiding taxes¹⁷.

In a 2006 survey conducted by KPMG involving senior executives from 120 multinationals, 62% responded that they had plans to transfer operations and capital to countries with low taxation regimes; 14% admitted that they already have part of their operations in these countries¹⁸.

Within this context, the exercise of private autonomy by large multinational companies through the implementation of aggressive tax planning became

dated December 27, 1996, amended by Law 11.727, dated June 23, 2008, defines tax havens and preferential tax regimes. For the current list of countries, see RFB No. 1037 from June 4, 2010, published in the Official Federal Gazette (DOU) from 07/06/2010 and last amended by RFB Normative Instruction No. 1773, dated December 21, 2017.

¹⁶ In the original: *"Globalization has resulted in a shift from country-specific operating models to global models based on matrix management organizations and integrated supply chains that centralize several functions at a regional or global level. Moreover, the growing importance of the service component of the economy, and of digital products that often can be delivered over the Internet, has made it much easier for businesses to locate many productive activities in geographic locations that are distant from the physical location of their customers. These developments have been exacerbated by the increasing sophistication of tax planners in identifying and exploiting the legal arbitrage opportunities and the boundaries of acceptable tax planning, thus providing MNEs with more confidence in taking aggressive tax positions."* OECD (2013), *Action Plan on Base Erosion and Profit Shifting*, <http://dx.doi.org/10.1787/9789264202719-en>, p.7)

¹⁷ AULT, Hugh J.; SCHON, Wolfgang, & SHAY, Stephen E., **Base Erosion and Profit Shifting: A Roadmap for Reform**, 68 Bull. Int'l Tax'n 275 (2014), p. 276.

¹⁸ MILLER, Angharad; BUS, Lynne Oats B., **Principles of International Taxation**. [s.l.]: Tottel Publishing, 2009, p. 255.

relevant due to the level of their tax liabilities as it affected countries' tax base and their respective income redistribution policy, which was no longer determined by their political choices, but by what they could truly afford to offer.

Certainly, for tax planning to produce the expected benefits, it has to be facilitated by government jurisdictions that encourage it.

The solution, therefore, would be focused on developing an International Taxation Regime that discouraged such arrangements. In fact, there has been a movement in the international community for that to happen¹⁹. However, given the difficulty of coordinating the interests of sovereign countries to establish international rules that mitigate these practices, other avenues are being explored. Furthermore, it is probable that more rigid standards and rules to curb aggressive tax planning may not be the best approach to achieve the expected results.

For that reason, attentions are turning to combating abusive tax planning through other instruments such as Corporate Social Responsibility (CSR), which has started to gain increasing importance. If those initiatives primarily are used to define the parameters for operation in areas such as environment and social responsibility, tax avoidance is becoming a fundamental part of these instruments.

¹⁹ As in the case of BEPS, a project led by OECD that includes 15 complementary actions to combat the abusive tax planning of multinational companies and which is designed to create multilateral instruments to implement significant changes in the current international taxation model. For more information see: OECD (2013), *Action Plan on Base Erosion and Profit Shifting*, OECD Publishing. Available at: <http://www.oecd.org/ctp/BEPSActionPlan.pdf>

3. WHAT IS CORPORATE SOCIAL RESPONSIBILITY (CSR)?

The concept of CSR involves the idea that companies should pursue social objectives that extend beyond generating profits for shareholders²⁰. This concept is not new, but its definition is still quite controversial²¹.

For Carroll²², an adequate definition of CSR should consider three aspects of corporate behaviour that must be articulated and interrelated.

The first aspect corresponds to companies' responsibility toward society, involving economic, legal, ethical, and discretionary issues (philanthropic). Within this context, the company should act with the primary goal of producing goods and generating profit, operating not only within the law, but also based on the ethical parameters defined by the expectations of society in a certain point in time²³.

Carroll²⁴ also believes that there is another expanded dimension of ethical value that should govern corporations' actions. This dimension extends beyond society's expectations and is relegated to the individual choices made by each

²⁰ Frank Adams, former executive at the Standard Oil Company back in 1951, understood that with the professionalization of businesses, companies needed to think not only about profits, but also about their employees, clients, and the general public (ABRAMS, F.K. (1951). **Management's Responsibilities in a complex world**. Harvard Business Review XXIX, pp.29-34. See more in: EUROPEAN COMMISSION (2002). *Corporate Social Responsibility: A Business Contribution to Sustainable Development*, (Brussels 347 final, July 2002). EUROPEAN COMMISSION (2001). *Promoting a European Framework for Corporate Social Reasonability* (Green Paper, Luxembourg: Office for Official Publications of the European Communities, July 2001).

²¹ See different definitions in CARROLL, Archie. B. (1979). **A Three-Dimensional Conceptual Model of Corporate Performance**. The Academy of Management Review, Vol. 4, No. 4 (Oct., 1979), pp. 497-505. URL: <http://www.jstor.org/stable/257850>, pgs. 497-498.

²² Ibid, pgs. 499-501.

²³ For Carroll, the conceptual framework for corporate social performance should be designed taking into consideration the social issues or topical areas related to each different industry, bearing in mind that these issues may change from time to time, according to society's needs and interest. CARROLL, Archie B.. Ibid, pg. 501.

²⁴ Ibid, pg. 500.

company voluntarily to pursue social causes²⁵, even if these conflict with shareholders' desire to increase their profits²⁶.

The second aspect to consider is which social areas should be addressed by CSR. On this point, there has been little or no consensus, although, over recent years, the use of abusive tax planning by corporations has been taken into account designing a CSR model.

Finally, to complete the conceptual model for CSR, it would be necessary to evaluate the business response to social issues and social responsibility itself, according to Carroll's perspective. "Corporate social responsiveness," as Carroll puts it, results from the assumption that companies do have a social responsibility that demands not only the acceptance of a moral obligation, but also an obligation to act. In that sense, the responsiveness of an enterprise would be evaluated according to parameters that would range from a total inertia to a full engagement to reach a social objective²⁷.

For ActionAid²⁸, an international, non-profit organization present in 45 countries, the definition of CSR should include aspects that extend beyond the mere "moral considerations." The concept of CSR should cover both the company's impact on society and the environment beyond its obligations to comply with the letter of the law, as well as the potential impact of the company's

²⁵ These activities involve contributions to philanthropic institutions and causes and support for education and cultural curatorship, among others. Accordingly, they are not considered responsibilities, and if the companies are not engaged with these initiatives, they are not considered anti-ethical (Ibid, pg. 500).

²⁶ FISHER, Jasmine N. **Fairer Shores: Tax Havens, Tax Avoidance, and Corporate Social Responsibility**. Boston University Law Review [Vol. 94:337], 2014.

²⁷ CARROLL, Archie B. Op cit. pg. 501.

²⁸ ACTIONAID. *Tax responsibility - The business case for making tax a corporate responsibility issue* (July 2011). Available at: https://www.actionaid.org.uk/sites/default/files/doc_lib/tax_responsibility.pdf. Accessed on 10 March, 2018, p.3.

actions in environmental and social issues over the long term. For the organization, tax planning is correlated with these two aspects of CSR.

Over recent decades, discussions about CSR – before restricted to the sphere of domestic business – gained popularity in the international scenario²⁹. Global organizations and governments developed different initiatives to forge new corporate governance models that could suit a reality affected by globalization³⁰ and which could be more encompassing regarding the range of responsibilities included in CSR³¹.

In this sense, different studies were conducted to explain whether CSR would be self-sustainable, considering that this issue has revealed itself to be of utmost importance to justify the implementation of CSR by corporations.

As already mentioned, CSR needs to be financially justifiable for the management of a company whose main goal is the generation of profits. CSR also needs to be self-sustainable for shareholders, who expect returns on their investments and for social activists, since companies should be able to maintain the activities these activists are promoting. Furthermore, government authorities also have an interest in the sustainability of CSR, since the results achieved

²⁹ CARROLL, Archie B. and SHABANA, Kareem M. **The Business Case for Corporate Social Responsibility: A Review of Concepts, Research and Practice**. International Journal of Management Reviews (2010) DOI: 10.1111/j.1468-2370.2009.00275.x, pp 85-86.

³⁰ The Economic Globalization caused by technological advances and the revolution of information and communication is characterized by stronger transnational company roles, earning the attention of the international community when it comes to environmental issues, the rights of minorities, and global poverty, and requiring that public and private topics be addressed with a focus on transparency (Ricardo Lodi Ribeiro, *Piketty e a Reforma Tributária Iguatária no Brasil*. 3 RFPTD, n.3 (2015), pg. 30).

³¹ KURUCZ, Elizabeth c.; COLBERT, Barry a.; WHEELER, David. **The Business Case For Corporate Social Responsibility**. In A. Crane, A. McWilliams, D. Matten, J. Moon, D. Seigel (Eds.) The Oxford Handbook on Corporate Social Responsibility, 2008 p. 83-112. Oxford University Press: Oxford. ISBN: 978-0-19-921159-3. Available from: https://www.researchgate.net/publication/235771847_The_Business_Case_for_Corporate_Social_Responsibility [accessed Mar 17 2018], p. 85.

through these voluntary initiatives can be more rational from a cost-benefit perspective when compared to regulatory initiatives imposed by law³².

KURUCZ et al³³ believe that there are reasons beyond potential financial returns that prompt a company to engage with CSR. These reasons include: a) reduction in costs and risks to the firm (corporate economic interests mitigate threats created by the demands of stakeholders³⁴ by establishing a threshold level of social or environmental performance); b) obtainment of competitive advantages by meeting the desires and expectations of stakeholders; c) development of a good reputation and legitimacy as a "license to operate;" and, d) the search for advantageous results for all through the creation of synergistic values by connecting with stakeholder values.

But how does CSR relate to the company's responsibility to engage in abusive tax planning?

³² CARROLL, Archie B. & SHABANA, Kareem. Op. Cit. p.92. In a report on the topic, the United Kingdom Government defined CSR as a way for a company to be held responsible for the social, economic, and environmental impacts caused by its operations, so as to maximize the benefits and mitigate the negative impacts in these areas. However, the report emphasizes that "CSR does not mean altruism, but rather must be good for the long-term sustainability of businesses and society" (Department of Trade and Industry, UK Government, *Corporate Social Responsibility - A Government Update*. May 2004. DTI/Pub 7201/1k/05/04/NP. Available at: <http://webarchive.nationalarchives.gov.uk/20090327083102/http://www.berr.gov.uk/files/file48771.pdf> . Accessed on 10 March, 2018.

pg. 3).

³³ KURUCZ, Elizabeth C. et al, Op. Cit., pp. 85-92.

³⁴ Stakeholders are defined here as interested parties, such as shareholders, clients, and suppliers, among others.

4. CSR AND TAX PLANNING

The studies and approaches associated with corporate social responsibility have not been very encompassing when it comes to the matter of abusive tax planning³⁵.

That is quite interesting, given that all citizens have a "fundamental duty" to contribute to funding public services³⁶. Besides, the payment of taxes is generally considered a basic example of a company's citizen behaviour and can be easily measured.

Yet, the fact that the payment of taxes can be legally avoided constitutes a certain limit for CSR. Even though the law and CSR suggest that a company should pay its fair share of taxes, many successful companies avoid their commitment, voluntarily and actively, to not adopt aggressive tax planning through some CSR initiative so that they are not later considered social irresponsible³⁷.

However, notwithstanding the lack of commitment by major multinational corporations by not using aggressive tax planning, the media and public opinion have been critical of this posture, leading governments to take an opposing position to tax planning, especially by large multinationals³⁸.

³⁵ See DESAI, Mihir A. & DHARMAPALA, Dhammika, **CSR and Taxation: The Missing Link**, Leading Perspectives, Winter 2006, pg. 4; SIKKA, Prem, **Smoke and Mirrors: Corporate Social Responsibility and Tax Avoidance**, 34 ACCT. F. 153, 154 (2010).

³⁶ See NABAIS, José Casalta. **O Dever Fundamental de Pagar Tributos: Contributo para a Compreensão Constitucional do Estado Fiscal Contemporâneo**. Coimbra: Edições Almedina, 2012.

³⁷ DOWLING, G.R. **The Curious Case of Corporate Tax Avoidance: Is it Socially Irresponsible?** Journal of Business Ethics (2014) 124: 173. <https://doi.org/10.1007/s10551-013-1862-4>, p.1.

³⁸ See: FAIRTAX: "Public want to see UK Government intervene more robustly to encourage responsible tax planning by business", June 6, 2018. Available at: <https://fairtaxmark.net/public-want-government-intervene-tax/>. Access on July 5, 2018.

Investigations conducted on the tax planning of giant transnationals like Apple, Caterpillar, Vodafone, Amazon, Google, and Starbucks, among others³⁹, reached the conclusion that, even though no illegal act has been practiced, it was the morality and honesty of these arrangements that ended up being evaluated. In the case of Starbucks, for example, fearing boycotts from its clients in the United Kingdom, the company confirmed the payment of more than £ 20 million in taxes during the years following the investigations (2013-2014).

In fact, the companies are being forced to comply with parameters defined not only by the law, but in a more uncertain and volatile regime, determined by public opinion⁴⁰ when it comes to their share of contribution to funding public expenses⁴¹. That makes it very difficult for businesses, since there is not a

³⁹ For more details about the cases, see: TING, Antony. **iTax – Apple’s International Tax Structure and the Double Non-Taxation Issue**. (March 19, 2014). British Tax Review 2014 No.1. Disponível em: SSRN: <https://ssrn.com/abstract=2411297>. Acesso em 01.02.2018; CHRISTIANS, Allison. **The Big Picture: How Starbucks Lost Its Social License - And Paid £20 Million to Get It Back**. Tax Analysts: 2013; CASTRO, Leonardo Freitas de Moraes. **Caso VODAFONE**. In: CASTRO, Leonardo Freitas de Moraes (coord.) *Tributação Internacional – Análise de Casos*. Vol.3. 1ª ed. São Paulo: MP Editora, 2015; <http://www.theguardian.com/business/taxavoidance>; <http://www.mirror.co.uk/news/uk-news/tax-avoidance-soars-35billion-under-2362328>; <http://www.independent.co.uk/news/uk/politics/revealed-47bn-corporation-tax-lost-through-evasion-and-avoidance-as-royal-mail-is-sold-for-650m-less-than-it-is-worth-8874873.html>; <http://www.telegraph.co.uk/finance/personalfinance/tax/9673358/Starbucks-Amazon-and-Google-accused-of-being-immoral.html>; <http://rt.com/news/googlestarbucks-amazon-uk-556/>; Reuters (Special Report: How Starbucks avoids UK taxes, by Tom Bergin of Reuters, available at: <http://uk.reuters.com/article/2012/10/15/us-britain-starbucks-tax-dUKBRE89E0EX20121015>; and <http://www.bbc.com/news/business-20288077>. For more information on the hearings, see: (i) Permanent Subcommittee on Investigations of the Committee on Homeland Security and Government Affairs, US Senate, *Caterpillar’s Offshore Tax Strategy, Majority Staff Report Permanent Subcommittee on Investigations*. United States Senate – Released in conjunction with the Permanent Subcommittee on Investigations 1 Apr. 2014 Hearing; and (ii) Permanent Subcommittee on Investigations of the Committee on Homeland Security and Government Affairs, US Senate, *Hearing on Offshore Profit Shifting and the US Tax Code – Part 2 (Apple Inc.)* (21 May 2013) (Apple Hearings).

⁴⁰ CHRISTIANS, Allison. *The Big Picture* Op.Cit., p. 637.

⁴¹ Desai & Dharmapala adds that tax evasion practices are not as well viewed by stock market investors, perhaps due to the possibility of being associated with corporate mismanagement. (DESAI, Mihir A. & DHARMAPALA, Dhammika, *Op. Cit.*, p.2)

consensus on what a "fair share of tax" is or even what the term "a good corporate citizen" means.

Given that the main purpose of a business is to maximize shareholders investments according to the law, should there be limits for tax savings, considering companies' basic objective of generating profits and the voluntary character of CSR? Would there be flexibility to using the boldest tax planning in those countries that offer a lower service level to taxpayers? Is there space for this "private autonomy" by the taxpayer?

These discussions are far from being pacified and lately, more and more governments and International Organizations have been reviewing the subject.

5. INITIATIVES TO REGULATE CRS

Authors like Panayi⁴² believe that the international tax system offers taxpayers multiple opportunities for tax planning, including where they choose to invest and how they structure their businesses.

Aggressive tax planning is not a legal concept and there are no legal remedies to frame them. Therefore, the question is more of what is actually morally acceptable in terms of tax planning savings. If certain choices are considered unacceptable in the eyes of the international community, it is expected that international organizations, such as OECD and governments, support multinational companies when designing CSR.

Knuutinen⁴³ believes that it is preferable that governments encourage companies' engagement with CSR instead of focusing directly on regulation when

⁴² PANAYI, Christiana HJI. *Op. Cit.*, p.556.

⁴³ KNUUTINEN, Reijo. (2014). **Corporate Social Responsibility, Taxion and Aggressive Tax Planning**. Turku, 2014. Nordic Tax Journal. v.1., DOI: 10.1515/ntaxj-2014-0003. p. 39.

combating abusive tax planning. For the author, in some cases, companies would be in a better position to assess the best approach to tax planning.

The fact is, the complexity and low level of tax system transparency, which leads to uncertainty in tax planning and a serious inefficiency of economic decisions⁴⁴, have caused multinational companies to use their high degree of mobility and their structures to create increasingly complex and elaborate tax planning, putting regulation in a disadvantageous position to curb such arrangements in advance⁴⁵.

Indeed, the voluntary nature of CSR that implies unregulated action is an approach that has been supported by many different governments worldwide, as well as private organizations⁴⁶.

⁴⁴ TORRES, Ricardo Lobo. **Tratado de Direito Constitucional Financeiro e Tributário, vol. I – Constituição Financeira, Sistema Tributário e Estado Fiscal**. Rio de Janeiro: Renovar, 2009, p. 329.

⁴⁵ It is the states that encourage tax planning by companies. The use of taxation with extra-fiscal purposes, the complexity of the tax systems, the tax incentives offers, and sometimes the inconsistency of the tax law all foster the creation of a mindset focused on tax planning (GRIBNAU, Hans. **Corporate Social Responsibility and Tax Planning: Not by Rules Alone**. (February 12, 2015). Social & Legal Studies 2015, Vol. 24(2) 225–250; Tilburg Law School Research Paper No. 09/2015. Available at SSRN: <https://ssrn.com/abstract=2610090>, p.245). In the same sense, it is vital for companies as well as for individuals to have a certain freedom to plan their lives: where to establish their company, what investments to make, and where to save.

⁴⁶ See: Institute of Business Ethics (INSTITUTE OF BUSINESS ETHICS. **Business Ethics Briefing - Tax Avoidance as an Ethical Issue for Business**. Issue 31, April 2013. Disponível em:

https://www.ibe.org.uk/userassets/briefings/ibe_briefing_31_tax_avoidance_as_an_ethical_issue_for_business.pdf. Acesso em 10.03.2018); ACTIONAID (ActionAid. *Tax responsibility - The business case for making tax a corporate responsibility issue* (July 2011). Available at: https://www.actionaid.org.uk/sites/default/files/doc_lib/tax_responsibility.pdf. Accessed on 10 March, 2018) and the Ethos Institute in Brazil (INSTITUTO AKATU. **Pesquisa. Responsabilidade Social Empresarial: o que o consumidor consciente espera das empresas**. Análise Nacional Brasil, 2005, n. 6 Disponível em: https://www.akatu.org.br/wp-content/uploads/2017/04/22-pesq_6-Internet-Final.pdf. Acesso em 18.03.2018.

The European Commission published a Green Paper in 2001⁴⁷ recognizing CSR as the means through which companies consider social and environmental issues in their operations and how companies interact with their “stakeholders” in a voluntary way, going beyond simply complying with the law⁴⁸.

In a survey conducted in 2016 with United Kingdom consumers about which aspects of CSR companies needed to observe, the Institute of Business Ethics⁴⁹ verified that since 2012, the first year the survey was conducted, the issue of tax avoidance has been occupying a top spot in the minds of the British, followed by the massive payments to company administrators and the need for fair work relations.

In Brazil, the survey conducted in 2005 by the Akatu Institute⁵⁰ in partnership with the Ethos Institute already indicated that, while consumers believe that issues associated with product quality and safety, treatment of employees, and the observance of “minimum ethics,” (meaning that everyone needs to comply with the law and pay taxes) are “always important attributes”, little is done by companies to implement bolder and more assertive actions related to these topics.

⁴⁷ EUROPEAN COMMISSION (2001). *Promoting a European Framework for Corporate Social Reasonability* - Green Paper, Luxembourg: Office for Official Publications of the European Communities, July 2001, p.6.

⁴⁸ In full: “Most definitions of corporate social responsibility describe it as a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis. Being socially responsible means not only fulfilling legal expectations, but also going beyond compliance and investing “more” into human capital, the environment and the relations with stakeholders. The experience with investment in environmentally responsible technologies and business practice suggests that going beyond legal compliance can contribute to a company’s competitiveness and (...) can also have a direct impact on productivity. It opens a way of managing change and of reconciling social development with improved competitiveness.”

⁴⁹ Institute of Business Ethics. **Attitudes of the British Public to Business Ethics 2016**. https://www.ibe.org.uk/userassets/briefings/ibe_survey_attitudes_of_the_british_public_to_business_ethics_2016.pdf. Accessed on 18 March, 2018, p.3.

⁵⁰ Instituto Akatu, *Op Cit.*, p.34.

This behaviour is not something exclusive to Brazilian companies. The great majority of companies prefer not to commit when it comes to tax-related issues, even if they participate extensively in CSR programs⁵¹.

For this reason, society and international media have been pressing governments for improved regulation on this topic⁵².

In January 1999, the European Parliament adopted the Resolution "EU Standards for European Enterprises Operating in Developing Countries: towards a European Code of Conduct" calling for a standardization of voluntary Codes of Conducts based on international standards, as well as the constitution of a European Monitoring Platform that could check the terms and conditions of the Codes, with the implementation of complaint and corrective action procedures. The Resolution, nevertheless, reinforces the voluntary nature of the Codes of Conduct and recognizes that these documents should not be used to subject multinational companies to higher standards than those established by the law of each country in which they operate⁵³. The recommendations consider international taxation issues, although only within the sphere of combating illegal tax evasion.

⁵¹ See Note 31 above.

⁵² LYNCH-WOOD, Gary and WILLIAMSON, David. **A Contextual Review of CSR Policy and Law in the UK**. Mountbatten Journal of Legal Studies, December 2005, 9 (1 2), pp. 4-20. Downloaded from: <http://ssudl.solent.ac.uk/995/>, p.5.

⁵³ In the original: "(...) Welcomes and encourages voluntary initiatives by business and industry, trade unions and coalitions of NGOs to promote codes of conduct, with effective and independent monitoring and verification, and stakeholder participation in the development, implementation and monitoring of these codes; emphasizes, however, that codes of conduct cannot replace or set aside national or international rules or the jurisdiction of governments; considers that codes of conduct must not be used as instruments for putting multinational enterprises beyond the scope of governmental and judicial scrutiny." (EUROPE (1999). *Resolution on EU standards for European Enterprises operating in developing countries towards a European Code of Conduct*. Official Journal C 104, 14/04/1999 P. 0180).

The most recent initiatives include the guidelines to elaborate the "European Taxpayer Code"⁵⁴, the "OECD Guidelines for Multinational Enterprises"⁵⁵ and the "OECD G20 Corporate Governance Principles"⁵⁶.

OECD is currently one of the most active organizations when it comes to international taxation and its recommendations have a high level of adherence by the international community. That is why the documents and recommendations issued by the organization are so important for this discussion.

The OECD Guidelines for Multinational Enterprises constitute a flexible, non-binding instrument that establishes responsible standards of business conduct, which the OECD believes to be "consistent with applicable laws and internationally recognized" parameters⁵⁷.

Among these standards of conduct that multinationals should meet, OECD included an entire chapter for "taxation."

Based on OECD guidelines, corporate citizenship in the area of taxation implies complying with the legislation in those countries in which a company operates. Compliance, nevertheless, should be consistent with both the letter of the law as well as its "spirit." This means that corporations must implement

⁵⁴ The Code is a non-binding instrument designed to establish a behavioural model to be followed both by European taxpayers as well as by the tax authorities of the Member Countries. Despite not being a rigorous code, it establishes certain rights and duties for taxpayers, such as the "right to present a complaint, primarily in cases in which internal resources are not covered." Examples would be a complaint related to an employee's behaviour or the handling of a certain tax-related issue when assisting taxpayers. COMISSÃO EUROPEIA DIREÇÃO-GERAL DA FISCALIDADE E UNIÃO ADUANEIRA (2016). *Orientações para um modelo de Um Código Europeu do Contribuinte*. Available at: https://ec.europa.eu/taxation_customs/sites/taxation/files/guidelines_for_a_model_for_a_european_taxpayers_code_pt.pdf. Accessed on 10 March, 2018, p.16.

⁵⁵ OECD (2011), *OECD Guidelines for Multinational Enterprises*, <http://dx.doi.org/10.1787/9789264115415-en>

⁵⁶ OCDE (2016). *Princípios de Governo das Sociedades do G20 e da OCDE*, <http://dx.doi.org/10.1787/9789264259195-pt>.

⁵⁷ OECD (2011), *OECD Guidelines for Multinational Enterprises*, <http://dx.doi.org/10.1787/9789264115415-en>, p.3.

measures to ensure that the "intention" of the law is observed and the interpretation of tax law is consistent with this intention, taking into consideration the literalness, as well as the contemporary historical context of the rule⁵⁸. The organization adds that tax planning should not be structured in such a way that the results achieved are inconsistent with the underlying consequence from the structures used, unless expressly allowed by law⁵⁹.

In this sense, OECD went beyond the aforementioned European Union initiative and raised the bar by determining what CSR should do to ensure that companies structure their transactions in a way that the tax result does not violate the intention of the law. In other words, tax avoidance would be in focus.

The document "*Principles of Corporate Governance*" is designed to help the governments of different countries assess and improve the regulatory, legal, and institutional structure of corporate governments to "support economic efficiency, sustainable growth and financial stability," as well as to establish roles and responsibilities within the company structure⁶⁰.

OECD recognizes that there is no single model for governing companies, but it does believe there are common underlying elements that should be followed by all⁶¹.

Among these common principles or elements, OECD lists the following: (i) cooperation with authorities to supply relevant information for the appropriate

⁵⁸ Hans Gribnau believes that corporations "may plan their affairs to achieve a favourable tax treatment within the limits set by law but they should interpret these limits from an ethical perspective." For the author, the ethical factors should exceed the legal factors when interpreting the tax legislation (GRIBNAU, *Op. Cit.* p.240).

⁵⁹ OECD (2011), *OECD Guidelines for Multinational Enterprises*, <http://dx.doi.org/10.1787/9789264115415-en>, p.60.

⁶⁰ OCDE (2016). *Princípios de Governo das Sociedades do G20 e da OCDE*, <http://dx.doi.org/10.1787/9789264259195-pt>, pp 3-4.

⁶¹ OCDE (2016). *Princípios de Governo das Sociedades do G20 e da OCDE*, <http://dx.doi.org/10.1787/9789264259195-pt>, p.11.

application of tax legislation; (ii) transparency and compliance with laws; (iii) establishment of tax risk assessment systems so that the Board can understand these risks to guide companies.

In this sense, by establishing guidelines for the boards of directors⁶², the organization advocates for those jurisdictions to "increasingly require that the boards supervise the financial and tax planning strategies allowed for the management, and accordingly, discourage practices such as, for example, aggressive tax planning, which does not suit the long-term interests of corporations and their shareholders and may cause legal and reputational risks to the business⁶³.

Finally, OECD recommends that CSR programs observe the transfer price rules established by the OECD Taxation Model Convention⁶⁴ and the U.N. Model Convention about double taxation between developed and developing countries⁶⁵, since these are the internationally accepted standards for adjusting profits between associated companies⁶⁶. According to OECD, observing transfer price rules is important because they materially influence the division of the tax base between those countries in which multinationals operate.

OECD instruments also include monitoring instruments to guarantee compliance with and implementation of its guidelines.

⁶² There is still no defined concept of this board since the structure of companies can vary.

⁶³ OCDE (2016). *Princípios de Governo das Sociedades do G20 e da OCDE*, <http://dx.doi.org/10.1787/9789264259195-pt>, p.53.

⁶⁴ OECD (2017), *Model Tax Convention on Income and on Capital: Condensed Version 2017*, http://dx.doi.org/10.1787/mtc_cond-2017-en

⁶⁵ Department of Economic & Social Affairs, United Nations, *Model Double Taxation Convention between Developed and Developing Countries* (2011). Available at: http://www.un.org/esa/ffd/documents/UN_Model_2011_Update.pdf. Accessed on July 2018.

⁶⁶ OECD (2011), *OECD Guidelines for Multinational Enterprises*, <http://dx.doi.org/10.1787/9789264115415-en>, p.61.

It is clear than the international community is working increasingly hard to close in on aggressive tax planning, whether through increased regulations or by implementing standards to combat transfer prices and CFC rules⁶⁷. Additionally, there is also a demand from the international community for multinational companies to not only merely comply with tax legislation, but also "voluntarily" abandon aggressive tax arrangements.

6. THE ENFORCEABILITY OF CSR

But, how effective can CSR initiatives be? Some authors⁶⁸ believe that voluntarism is not very effective⁶⁹, mainly because it relies entirely on business will.

As market lacks "ethical consumers"⁷⁰, informed enough to pressure on multinational companies, there is little incentive for companies to commit to higher standards of responsibility, specially when it relates to tax planning.

Besides, the increasing number of different and competing standards, codes and guidelines, arising from both public and third sectors, makes reporting, inspecting, comparing and benchmarking an impossible task.

⁶⁷ Controlled Foreign Corporations (CFC) Rules or international transparency rules, are general anti-avoidance rules that consider interposed companies "transparent" for tax-related purposes.

⁶⁸ See: DOANE, Deborah. **Promoting the "Social Case" for Mandatory CSR**. In: GONZÁLEZ, Marta de La Cuesta, DUPLÁ, Leonardo R. Responsabilidad Social Corporativa. Publicaciones Universidad Pontificia Salamanca: 2004.

⁶⁹ See: DOANE, Deborah. **Promoting the "Social Case" for Mandatory CSR**. In: GONZÁLEZ, Marta de La Cuesta, DUPLÁ, Leonardo R. Responsabilidad Social Corporativa. Publicaciones Universidad Pontificia Salamanca: 2004. p. 149-151.

⁷⁰ According to an article published at the Guardian, ethical products account for only around 1% of market shares, probably because only about one in seven consumers would consider companies' engagement in CSR to make them choose one product over another, even if they have the same price and quality. (The Guardian, *Commentary Co-op Bank reports on the who, where, what and why of ethical consumerism. Morality is a Spending Force*. <https://www.theguardian.com/money/2000/oct/06/ethicalliving.business>).

Notwithstanding the above, more and more companies are seeking to engage in CSR initiatives to recruit more consumers. To do so, businesses are listening to their consumers through social media and websites to better understand their expectations as well as to enhance their legitimacy as responsible companies⁷¹.

Likewise, there has been a shift from the way investors choose to invest in a business. Instead of simply avoiding the so called "sin companies" such as those associated with alcohol, tobacco, weapons and pornography, for example, Socially Responsible Investment (SRI) has been also giving greater emphasis in how asset managers invest portfolios. Some investors are considering companies' environmental, social and corporate governance (ESG) to assess the quality of their management and their resilience against future challenges, as it is believed that ESG leads to a better financial performance. Even though responsible tax planning is not explicitly included in the ESG concept, it is not incompatible with it. On the contrary, aggressive tax planning can result in further big financial liabilities and businesses have their responsibility with their shareholders.

Therefore, companies who adhere to a certain level of CSR should be legally accounted for what they have committed before their consumers and stakeholders, from a contractual perspective. Consumers might have chosen a different product if it weren't for the companies CSR commitments and shareholders could have selected another company to do business with.

The certification granted by the "B Corps"⁷² movement, for instance, requires that the company institutionalize their commitments by registering them

⁷¹ MOON, Jeremy. **Corporate Social Responsibility: A Very Short Introduction**. Oxford: Oxford University Press, 2014, p. 76.

⁷² <http://www.bcorporation.net/>.

into their corporate governing documents, so that they can be enforced against the board of directors, managing members and even shareholders.

In regard to tax planning, the subject poses a lot of questions to companies seeking to engage in CSR: what should be the extent of CSR engagement? Is tax planning socially irresponsible? Does a corporation have any kind of social responsibility apart from complying with the law? How to raise the bar and go beyond legal compliance to curb aggressive tax planning?

7. TAX PLANNING AND THE PRINCIPLE OF SOLIDARITY

The convergence between ethics and law in the last decades recovered the idea of solidarity that the liberalism from the XIX century and part of the XX century had abandoned⁷³.

According to Torres⁷⁴, the principle of solidarity influences freedom since it establishes duties to citizens and hence, taxpayers, respectively. As paying taxes is a fundamental duty⁷⁵, meaning that everyone has to share the costs of the public services, it would transcend the concept of a mere obligation imposed by law, to be more inclusive, taking up a constitutional dimension.

In that sense, the principle of solidarity gains great relevance in legitimizing CSR to fight tax avoidance. Since taxpayers are both sponsors and beneficiaries of public services, it is important to observe the morality of the tax planning, as tax avoidance transfers, to other taxpayers, the burden of covering for the tax avoided.

⁷³ TORRES, Ricardo Lobo. **Tratado de Direito Constitucional Financeiro e Tributário**, vol. II, 2ª ed., Rio de Janeiro: Renovar, 2014, p. 177.

⁷⁴ Ibid. p. 177.

⁷⁵ See: NABAIS, José Casalta *Op. Cit.*

8. CONCLUSIONS

Currently, CSR initiatives have been increasingly compelled to consider the matter of taxation within their scope, whether due to pressure from stakeholders, governments, or public opinion.

Despite not having a uniform approach in condemning the use of aggressive tax planning, stakeholders observe the impact that such practices have on the final financial results of their investments. Public opinion, in turn, amplified by the media, has reacted strongly to tax avoidance, with protests and boycotts leveraged by social media.

Even though international authorities and organizations recognize the legality of the tax planning used by companies, there has been a movement to frame certain more aggressive types of tax planning in a control zone that falls outside the illegal evasion vs. legal avoidance debate.

This is because it is necessary for companies to help fund public services in a more solidary way. They are also a relevant player in the control of international tax competition.

In fact, "voluntary" engagement and more moderate behaviours related to tax planning are more preferable than regulation. Firstly, because it takes pressure off of governments for more constant and complex inspections. Secondly, because major multinational corporations have resources and structures to always find available alternatives to pay less tax.

From a CSR perspective, while the basic premise when elaborating related initiatives is that the company should generate profit and value for its shareholders, combating aggressive tax planning is not inconsistent with this principle. However, one of the difficulties faced by companies when including the topic of taxation within the sphere of CSR is the lack of clear and transparent

taxation rules, adding a certain degree of insecurity and rigidity to the legitimate choices made by companies when it comes to tax planning.

Accordingly, it is believed that a certain harmonization in the design of the CSR, guided by internationally accepted principles and parameters can help combat aggressive tax planning. Such approach strengthens initiatives implemented by international organizations, such as OECD and the European Community.

Even though there are those who advocate that those guidelines are non-mandatory rules ("soft law") and that CSR constitutes voluntary initiatives and not obligations that companies are "forced" to meet, the recognition of those guidelines by governments creates a normative strength that forces them to act.

However, if governments are being compelled to forge voluntary CSR initiatives to be developed by businesses, how effective could those initiatives be?

CSR commitments may not be easily enforceable from the perspective of the legality of the tax legislation, but alternatively, they may be enforceable from a contractual standpoint, considering that stakeholders and clients entered into a contract with a specific company because of its citizen-oriented commitment.

In essence, it is not realistic to believe that CSR will replace or will be an alternative to government, but it can be a complementary tool in the fight against aggressive tax planning.