

# THE LEGAL NATURE OF OVER-TAXATION OR SURCHARGING

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## Abstract

*In this article, the author addresses the issue of the legal nature over taxation or surcharging within the national legislation of the European Union Member States, designing and comparing the various charges or taxes established under that name. To this effect, the analysis of certain similar notions such as the juridical or economic double taxation was sought, the author showing that over-taxation, unlike the latter, refers to additional tax on income acquired or assets owned by taxpayers who hold a privileged economic position. Comparative law and tax law of Romania regulate charges or levies like the “Robin Hood tax”, solidarity tax, wealth or property over-tax, over-tax on income from drug production.*

**Keywords:** *over-taxation, double taxation, “Robin Hood” tax, solidarity surcharge, wealth over tax, over taxation on owners of multiple homes, claw-back tax*

## 1. Introduction. Delimitation of certain notions

The global financial crisis prompted governments around the world to use various methods to increase state revenues and reduce budget deficits, such as salary cuts, freezing the pensions, increasing VAT or excise duties, cuts of certain public expenses or converting them into productive<sup>1</sup> expenditures and over-taxation or surcharging.

Over-taxation or surcharging takes many forms from one country to another, from one government to another, from one crisis to another, and is materialized by:

- establishing the “Robin Hood” tax on certain activities;
- over-tax on the overall wealth;
- over-tax on high income of individuals or “solidarity” tax;
- over-tax on bank profits;
- establishing the “Claw-back” tax on income from drug production;
- over-tax on multiple householder.

According to some analysts, over-taxation or surcharging appears a way to supplement state revenues; according to others, it seems a form of economic discrimination not encouraging work or bringing prejudice to the private property.

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<sup>1</sup> Refer to “Productive costs theory” in Barrere Allain, *Politique financieres*, Librairies Dalloz, Paris, 1959, p. 22-24

In my own opinion, over-taxation cannot be mistaken for a tax increase, such as increase in the VAT rate from 19% to 24%, but it implies an additional tax on the same taxable object for various categories of taxpayers. Thus, over-taxation shall not be confused with:

- the economic double taxation which means that a taxable item is subject to two or more different taxes (e.g. VAT and excise duty) within a State<sup>2</sup>; or
- the juridical double taxation which refers to the fact that a taxable item is subject to two or more taxes of the same kind in different States.

The legal nature of over-taxation differs from the juridical or economic double taxation, in the way that over-taxation is considering additional tax on income acquired or assets owned by taxpayers who have a privileged<sup>3</sup> economic position in relation to the rest of the taxpayers.

## 2. Over-taxation - aspects of comparative tax law

2.1. *The “Robin Hood” tax* – aims to "tax the rich", the proceeds being used in health and social protection; in the common language meaning that it shall be taken from the rich and given to the poor just like the historical character who gave the name to the tax did. The idea of this type of tax arose from the proposal of non-governmental organizations in the UK and U.S. that aimed to levy additional tax on financial transactions. The campaign carried out by these NGOs suggested charging the trading of stocks, bonds, treasury bills, mutual funds and other transferable securities; subsequently, the tax coverage is to reach global dimensions.

In the European Union, the Commission took into consideration additional taxes on the profits of energy companies, banks, and the funds hereby achieved are to be used for the welfare of people struck by energy and food crisis. A document on financial matters<sup>4</sup> states that the “Robin Hood” tax, implemented at European level, must be designed so as not to affect the investment ability of energy companies.

As regards the implementation of the “Robin Hood” tax within each Member State, the methods differed according to their juridical and economic particularities, as well as the interest in supplementing the state revenues.

*In France*, the “Robin Hood” tax on financial transactions will take effect in August 2012 and shall be 0.1% of the value thereof, to be paid by companies that have a share capital of more than one billion Euros and their registered office in France.

*Portugal* approved the tax on profits of oil companies, amounting to 25% and contained in a tax package aimed at providing additional revenue to the state budget if oil prices hit a record high. The Government of Portugal estimates that this tax will lead to an increase in income for the state budget of around 100 million Euros, funds that will finance certain measures to alleviate the effects caused by the financial crisis that encompassed the country.

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<sup>2</sup> Refer to I. Condor, *Evitarea dublei impuneri pe venit și pe avere*, (Avoidance of double taxation on income and wealth), Publisher: Tribuna Economică, Bucharest, 1999, p. 32.

<sup>3</sup> There are certain categories of taxpayers who hold monopolies or have great wealth or income.

<sup>4</sup> Refer to European Commission, Eurobarometer 74: Public opinion in the European Union, *Economic Governance in the European Union*, Bruxelles, January 12, 2011, p.13-14.

A similar tax is regulated in *Hungary* which will lead to an increase in income for the state budget of around 125 million Euros. Moreover, the Hungarian “Robin Hood” tax envisages several economic sectors such as energy, banking, telecom and even consumption<sup>5</sup>.

*In Italy*, the tax on the profits of oil companies has been introduced since 2008.

Even if the idea of a surcharge on financial transactions emerged in the U.S. and the UK, such surcharge was not regulated in these countries, as it was deemed that the two countries could bear the cost of internal and external aid granted to mitigate the effects of the financial crisis whilst the “Robin Hood” tax wouldn’t be a good way to attract new funds in the budget, given the implications hereof.

Governmental debates were also held in Romania; the tax would have targeted the profits of oilmen and banks, yet nothing was regulated in this area, as it was thought that changes in the tax law on banking matters would have led to the removal of foreign capital in this sector.

2.2. *Solidarity tax* is a “Robin Hood” tax or charge type and was established in France. The French parliament passed a special surcharge on income, as part of its efforts to reduce the deficit; under this tax, people with an annual income ranging from 250,000 Euros to 500,000 Euros will have to pay a surcharge of 3% of their income while an additional 4% taxation will apply to the incomes exceeding 500,000 Euros.

Germany also regulated a solidarity tax, but it was a temporary surcharge introduced for the first time in 1991, following the German reunification. Since 1991, the legislation on solidarity tax suffered a series of changes so that in current conditions it has changed its purpose of solidarity charge for the former East Germany (former GDR) in that of a solidarity tax for the poor; currently, the amount thereof is 5.5% of the value of the income taxes. Solidarity tax is not charged on people paying an annual income tax of up to 972 Euros, respectively 1944 Euros for married couples. Above this level, the percentage increases until reaching 5.5% for an income tax amounting to 1340.60 Euros, respectively 2681.38 Euros for married couples.

In regard to the solidarity tax, the Scandinavian countries are “champions” as the tax amounts to 59% for any annual income exceeding 45,000 in Denmark and 56% for income exceeding 374,000 Swedish kroner, the equivalent of 366,000 Euros.

2.3. *Wealth surcharge* envisages additional taxation of all estates that exceed a certain amount and represents a type of solidarity tax.

As such, assets exceeding the amount of 770,000 Euros are taxable *in France*, the applicable amount being 0.55%; a different percentage is applied on the companies with respect to those assets whose value exceeds 16.02 million Euros, namely 1.8%. Copyright, art collections and income from private pensions are exempt from this additional tax.

*Norway* has regulated a similar tax whose value ranges from 0.9 to 1.1%.

*In Switzerland*, wealth tax differs from one canton to another and varies around 1.5%. The federal law delimits this tax according to residence: the residents pay wealth tax in respect of all assets they own in the country, while the non-residents must pay an annual tax on the assets related to the companies and buildings located in Switzerland.

*In Romania* there was a legislative proposal whereby the owners with wealth of over 500,000 Euros were to pay a so-called “stated wealth tax”, meaning a surcharge on the declared property, and hence already taxable, which was to reach an amount of 0.5-1% of the

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<sup>5</sup> Refer to the carbonated beverage tax.

amount exceeding the threshold of 500,000 Euros. Such proposal failed to take shape as an over-tax on the number of dwellings has been applied since 2010.

### **3. Over-taxation in Romania**

Romania's over-taxation was done in two ways: over-taxation of individuals who own several homes and claw-back tax.

Primarily, the over-taxation targeted individuals who own several dwellings by applying progressive tax rates from a dwelling to another in the order of and depending on the date of their attainment. According to the Tax Code, if an individual owns two or more buildings used as dwelling, the building tax shall be increased as follows<sup>6</sup>:

- a) by 65% for the first building other than the owner's residence;
- b) by 150% for the second building other than the owner's residence;
- c) by 300% for the third and subsequent buildings other than the owner's residence.

It should be noted that this tax is a custodial source of the local budgets. Thus, balancing local budgets by increasing the property tax revenue, whilst reducing the local finances dependency on deducted shares and transfers from the state budget, was studied.

If a person owns two or more buildings other than the residence, increased tax shall be determined according to the order in which the property was acquired, as shown in the documents certifying the ownership.

These regulations do not apply to individuals who own buildings acquired through legal inheritance.

To organize the building tax revenues, the Tax Code established the obligation of individuals to lodge a special statement to the specialized departments of local authorities in the area they reside in, as well as to those in the area of which their other buildings are located in.

According to the fiscal and budget strategy for the period 2012 - 2014, which includes the macro-economic parameters agreed with the International Monetary Fund, the European Commission and World Bank, local government will be able to increase taxes according to the local needs and the level of tolerability of the population.

Thus, is possible to implement a system in which the highest market value of the taxable amount of land and buildings is to be reported. The taxable value of buildings and land will be reported at the market value thereof only where such surcharge is obviously higher than that determined through the calculation formula.

This measure is substantiated by the Romanian Government inasmuch as increase in local communities' autonomy is called for by transferring new decision-making responsibilities and financial and patrimonial resources.

*Claw-back tax* was originally regulated by the Emergency Government Ordinance no. 104/2009 amending Law no. 95/2006 on healthcare reform, which was amended by Government Emergency Ordinance no. 77/2011 establishing a contribution for financing certain expenses in the healthcare field and represents a paid share (%) from the drug producers income that is calculated by the quarterly consumption of drugs settled from the "Unique National Fund of Health Insurance" and the budget of the Ministry of Health. Thus collected, the contribution is transferred to the health insurance fund, so that the amounts return on the drug market and healthcare market, hence the claw-back tax has the juridical nature of a solidarity charge designed to cover the health insurance budget deficit.

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<sup>6</sup> According to art.252 of Law no. 571/2003 on the Fiscal Code, published in the Official Gazette, Part I, no.927/December 23, 2003, as supplemented and amended, last updated by GEO no 125/2011.

The difference between the original claw-back tax and the 2011 regulated one is that, when the first regulations were set out, the quarterly contribution was calculated by applying a differentiated rate varying from 5 to 11% subject to the producers income (from 1250 to 75,000 thousand lei) and starting with the 1<sup>st</sup> of January 2012 the percentage determined by a specific formula is being applied to the drug quarterly total consumption. Taking into consideration the drug consumption instead of producers' income aims to cover the entire relevant budget deficit.

In terms of budget, the claw-back tax is a very suitable action for covering the drug funding shortfalls, but economically, it may lead to increase in drug prices for the consumer.

After all, the claw-back tax is applied in all EU countries and some Asian countries.

## **Conclusions**

Given the above, we can draw a series of conclusions from this study.

We believe that surcharging or over-taxation must not be confused with an increase in a tax or charge and nor with a double economic taxation. Over-taxation is an additional tax on the revenues and assets of taxpayers who hold a privileged position compared to other taxpayers or hold a monopoly in a particular economic sector.

Besides the juridical nature as an additional tax, over-taxation has a dual nature, namely an economic one by aiming to supplement the state revenues, and a social one as the proceeds are used to fund welfare and social care activities.

At European level, over-taxation of certain activities, great wealth, and high income or of certain assets was regulated long before Romania did, being successfully applied for many years.

Romania's over-taxation is low and is targeted on people who own several homes and on drug producers, without taking into account monopolistic sectors (energy sector) or the banking sector.

Both in Romania and at European level, over-taxation of wealth raises a series of constitutional issues, as additional taxation is deemed unconstitutional and discriminatory.

We believe that over-taxation is without prejudice to the right to private ownership guaranteed by art. 44 of the Constitution, republished, only surcharging certain material excess owned by those economically potent.

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