Transplants of some aspects of corporate income tax law
Le, Chau Thi Nguyet

IMPORTANT NOTE: You are advised to consult the publisher's version (publisher's PDF) if you wish to cite from it. Please check the document version below.

Document Version
Publisher's PDF, also known as Version of record

Publication date:
2006

Link to publication in University of Groningen/UMCG research database

Citation for published version (APA):

Copyright
Other than for strictly personal use, it is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), unless the work is under an open content license (like Creative Commons).

Take-down policy
If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

Downloaded from the University of Groningen/UMCG research database (Pure): http://www.rug.nl/research/portal. For technical reasons the number of authors shown on this cover page is limited to 10 maximum.
PART IV
CHAPTER 10
SUMMARY AND CONCLUSIONS

1. Summary

This dissertation is a comparative study of the transplants of corporate income tax in Malaysia, the Philippines and Vietnam. It follows the path described by Thuronyi, as "the historical method that traces the development of law over time and across countries, and studies how particular systems have been influenced by others or by transnational legal culture" (Thuronyi 2003). The aims of this dissertation are:

1. To make a historical comparative study of some elements of the company tax system of Malaysia, the Philippines and Vietnam in relation to that of the original donors (the UK, US, advice from IMF and other organizations) and in relation to each other. Purpose of this comparison is to prove that due to negative harmonization and convergence, some tax rules in recipient countries that are in the same region after some decades more resemble each other than they resemble the rules of the original donor countries although they have transplanted rules from different donor countries.

2. To examine some aspects of the legal system and legal principles which may influence the effectiveness of the transplants of (corporate income tax) law.

Legal Transplants

The term "Legal Transplant" was used by Watson to describe "the moving of a rule or a system of law from one country to another, or from one people to another" (Watson 1974). However, many scholars were not keen on using this term to describe the moving of law from one place to another. Indeed, they openly criticized Watson for using the term "transplant" and his ideology of law and society. Nevertheless in the last decade, the term has gradually gained popularity among legal professionals. The term "transplants" is used to describe the process of exporting the law from the West to former socialist countries, or to the non-Western worlds. Besides the traditional studies on the terminology, there have been studies on the factors that might influence the transplantation process, the success and failure of legal transplants, etc.

Legal transplants have a long history and are among methods to develop a legal system. Unlike the transplants of organs, in which “voluntary” is essential, transplants of law can take place with or without the consent of the donees. In the field of tax law, many “involuntarily” transplants took place during the colonial period and by means of conquest. The “native” people might not like the “transplanted” rules imposed on them. They might not even acknowledge that they needed any transplant at all. Nevertheless, many of these involuntarily transplants contributed to shape the today legal systems of the former colonies. After colonial times, former colonies could decide themselves whether they wanted to transplant any law from other countries or would make use of rules suggested by organizations such as the IMF, World Bank, etc. However, that does not imply that those transplants are voluntary. Nonetheless, many transplants are voluntarily. When countries
face the same problems, it is logical that there is a tendency to adopt solutions that have been created somewhere else.

Scholars classified several typologies of legal transplants such as cost saving transplants, externally dictated transplants, entrepreneurial transplants, legitimacy generating transplants, “potted plant” transplants, and hybrid transplants, etc.

There are many factors that may influence the transplant process. Like in the case of transplants of organs, the donees’ mental and physical conditions, the selection of potential donors, quality of experts (doctors), etc. are also essential for legal transplants. In the case of legal transplants, the donees’ conditions include social, economic, legal, etc. conditions; the potential donors comprise of countries, organizations and people who can give (the most suitable) rules, notions, system, etc. to the donees; and the experts of legal transplants can be domestic experts and foreign experts. Those experts can be lawyers, professionals, scholars, government officials, etc.

Determining whether a transplant is a success or not is not an easy task, especially in the case of legal transplants. Watson stated that: “a successful legal transplant – like that of a human organ – will grow in its new body, and become part of that body just as the rule or institution would have continued to develop in its parents system. Subsequent development in the host system should not be confused with rejection” (Watson 1974). Thus, a transplanted rule or system should become the “local” rule or system and will develop in the new body. Unlike the case of organ transplants where the rejections can happen immediately, it often needs a longer time to discover whether a transplant of rules or systems is suitable for a country’s development. Therefore, in order to grow in the new body, as described by Watson, the transplanted rules need time. Moreover, a country should be aware of the long term effects of legal transplants when it decides to transplant rules not only because the old rules are no longer suitable to the changes in local social and economic conditions, but also because it expects that such transplants will cause changes in the society.

Transplants of tax laws

Transplants of tax laws may take place involuntarily or voluntarily. Involuntary transplants often happened when the colonists brought with them their own systems and imposed these on the colonies. For instance, the UK brought with them their tax system when they went to North America and Malaysia. Voluntary transplants have normally taken place when countries adopted solutions from elsewhere for their own problems (such as budget needs, investment promotions, anti tax avoidance, evasion, prevent double taxation, etc.). It is logical that they do not need to re-invent the solutions that had been created in other countries. Moreover, in the global economy, where labor, capital, and goods are mobile (Haufler 2001), it is essential that some common rules should be created so the workers, investors and traders will feel “at home” wherever and whenever they are.

Many factors will influence the transplants of tax laws. Tax law is interdisciplinary by nature. Tax is bound up with politics, legal, economic, ethical, social, etc. factors. Thus, those factors should be given full attention during any tax transplantation process. There are studies on tax reforms which provide many details on the economic, administrative,
and political perspectives of tax law. However, only a few studies focus on the legal factors that may affect transplants of tax law. The legal factors have been proven to be important for the transplantation of tax rules and systems. The legal aspects of tax include the function of the state powers, the relationship between the legislative, executive and judicial branches and the human rights of taxation. Considering my limited knowledge concerning the human rights of taxation, in this study I focused on the transplants of corporate income tax in view of the legal structure and the principles of law such as the separation of power, stare decisis.

The study of tax transplants should not ignore studies of tax reforms. Since many transplants took place during the tax reforms and placing “external” rules that are developed somewhere else into a system is one of the solutions applied in tax reforms.

Case study: Malaysia, the Philippines and Vietnam

This dissertation studies the transplants of corporate income tax in Malaysia, the Philippines and Vietnam since the modern corporate income tax was first introduced in Malaysia in 1947, in the Philippines in 1939, and in Vietnam in 1990. The Malaysian legal system belongs to the English common law family, the Philippines applies a mix of civil law and American common law, and Vietnam is classified as a socialist law country in transition. Malaysia and the Philippines follow the principles of separation of powers and stare decisis in their way of structuring the state power and in application and interpretation of law. Donor countries’ case law and other foreign countries’ case law can be used by the courts or by scholars in interpreting and understanding the law, like in the case of Malaysia that of Australia, New Zealand and Singapore are used. However, the implementations of the principles of separation of powers and stare decisis in the two countries are different from that of the original donors (the UK and the U.S). There is an imbalance in vesting the power. The executive branch often has wide, discretionary powers not only in administration but also in legislation. Vietnam recognizes neither the principle of separation nor the principle of stare decisis. In principle the National Assembly (Parliament) has a supreme power in legislation. However, in practice the law passed by the National Assembly is less important than the guide made by the government or ministries in charge. Moreover, the court is not independent from the executive system and has a limited right to interpret the law. The above characteristics must be considered when (corporate income tax) rules are transplanted into Malaysia, the Philippines and Vietnam.

This study provides two sets of comparative studies:

1) A historical comparative study of the corporate income tax system of Malaysia, the Philippines and Vietnam in relation to that of the original donors (the UK, US, advice from IMF);

2) A comparative study of the current corporate income tax system of Malaysia, the Philippines and Vietnam.

In Malaysia, one can find the corporate income tax in the Income Tax Act, the Philippine corporate income tax is part of the National Internal Revenue Code and in Vietnam the corporate income tax is stipulated as separate law.
To keep the scope of the research reasonable, not all of the topics of the corporate income tax law have been analyzed. The topics that were selected include taxable subjects, tax bases, tax rates, tax incentives and shareholder/corporate taxation. These topics are essential in the three countries where the tax system is considerably less sophisticated than in the developed countries. Rules such as participation exemption, group relief, tax on financial instruments, thin capitalization, Controlled-Foreign-Company rules, etc. are important in developed countries but generally have not been developed in Malaysia, the Philippines and Vietnam. Thus, it is very difficult to make an adequate comparative study. Among the studied countries, at the time of writing, only Malaysia offers some relief to groups of companies engaged in food production projects approved by the Minister of Finance. And in September, 2005, the Prime Minister presented the Budget 2006 to the Parliament, in which group relief is suggested to any resident corporate group in Malaysia.

The studied rules can be divided in three sets:

- The first set of rules includes structure of corporate income tax and taxable subjects. These rules have not changed much in Malaysia and the Philippines since the transplantation of income tax rules in these countries although some reform has taken place. The focus of this reform has been more on improving the quality of specific tax rules, the tax administration and tax judicial than on changing the structure of the tax code or the organization of the tax institutions. However, rules related to the tax administration and to tax dispute solutions have not been changed. In the three countries, which “person” is subject to corporate income tax is broadly stipulated.

- The second set comprises rules that are similar to rules in the original donor countries at the time the transplantation took place but have moved away to some extent and did not follow new developments in the donor countries. This group includes rules regarding corporate/shareholder taxation and tax base. Malaysia chose to have an imputation system in 1947, and has always had a form of imputation system while the UK has switched its system from classical to imputation and vice versa. The Philippines followed the U.S in having a classical system. However, unlike the U.S, the Philippines is not concerned about the double tax consequences that the classical system may have. The effective tax rate in the Philippines is so low that the total tax burden on taxpayers is not high.

- The last set of rules includes rules that were formulated independently from the rules in the donor countries, such as tax rates and tax incentives. There are more similarities in those rules between Malaysia, the Philippines and Vietnam than between the recipient and the donor countries. As tax competition is the result of an attempt to encourage investment in the region, there is a trend of negative harmonization of corporate income tax. Moreover, if ASEAN, as is its aim, wants to “create a stable, prosperous and highly competitive ASEAN Economic Region, in which there is a free flow of goods, services, investments, capital, and equitable economic development and reduced poverty and socio-economic disparities"(ASEAN Vision 2020), after finishing their agenda of removing the custom barriers, ASEAN may have to think of the possibility of harmonizing other taxes (including corporate income tax) as experiences have shown in the EU. In order to create an internal market, the EU has harmonized their sales tax, abolished
of the corporate income tax and taxable subjects, tax administration. These topics are less sophisticated thanional, group relief, tax on Company rules, etc. aredeveloped in Malaysia, thecorporate group in Malaysia.

Malaysia offers some relief toioved by the Minister ofFinance in the Budget 2006 to thecorporate group in Malaysia.

Although some reform hasbeen moved away to someoriginal donor countries. This group has always had a form of system from classical to the U.S in having a classicalconcerned about the double taxation is not high.

In drafting their law the three countries pursue similar principles of tax law such as equality, fairness, transparency, certainty, simplicity.

The early transplants of corporate income tax rules in Malaysia and the Philippines can be compared with the transplants of “potted plants” where plants came in the pots. In these transplants, the “pots” included, among others, the legal system, the legal principles of thedonor countries, donor countries’ case law, etc. The transplant of the Vietnamese corporate income tax system took place in a different form. It took with it little “ground”. Thus, the non-socialist rules must grow in the socialist legal system and function under the socialist legal principles. Therefore, the conclusion is that when countries look for transplanting a (tax) rule they must not simply copy the rules but they should also be aware of the following factors:

1. The effect of globalization. To some extent tax systems become closer to each other;
2. The level of economic development and social conditions in Malaysia, thePhilippines and Vietnam are not too different from each other but they differ in many ways from the developed donor countries. Thus, it is logical that they chose to learn from each other;
3. Some positive harmonization followed the establishment of ASEAN, due to which investment among ASEAN countries became easier;
4. Tax competition in the region. In order to attract foreign investment and to encourage domestic investors to invest abroad, countries tend to create the investment environment that investors will feel comfortable with at home and abroad;
5. In drafting their law the three countries pursue similar principles of tax law such as equality, fairness, transparency, certainty, simplicity.
Further research in these areas is recommended.

(i) The differences of the legal system of the donor country and their own country such as the legal family that they belong to;
(ii) The law making process;
(iii) The interpretation of law;
(iv) The power of the tax administration and tax judicial organ in the donor country and in their own country;
(v) The possibilities to implement the transplanted rules based on the administrative capacity and functioning of their tax system.