MODELS FOR DIRECT TAXATION OF COOPERATIVES UNDER COMPARATIVE LAW[1]

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1. INTRODUCTION

The cooperative society is shown to be a corporate formula inspired by different operating principles from those governing the conventional corporation. Based on this special nature that the cooperative has, the paper goes on to analyse its tax treatment, trying to find the answer to two questions.

First, what are the reasons or arguments on which the legal provision of special tax treatment (in some cases, also beneficial) for cooperatives could be based or justified[3]. This question takes on special relevance in view of the model of cooperative society designed by current regulations. In some way, they are progressively abandoning the traditional cooperative principles, in order to strengthen its competitive component as a company operating in the market (Vargas-Vasserot *et al*, 2017: 24, Vargas-Vasserot, 2020: 44), in which the cooperatives competes with other companies with different operations, for which such tax treatment is not recognised.

Secondly, on the basis of these reasons for the special taxation of cooperatives, the aim is to analyse what this taxation is like today. To this end, we will deal with the tax treatment of the three elements which we consider fundamental in the development of the economic activity of cooperatives: cooperative surpluses; cooperative returns[4]; and allocations from the mandatory reserve and the apprenticeship and training reserves. Therefore, it focuses on income taxes by giving examples of legal systems that put into practice different taxation techniques. This focus is very broad for two reasons: the regime may be different depending on the type of cooperative and in many countries fiscal sovereignty is decentralised, resulting in differences in taxation within the country

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[3] In relation to the tax regime, it has been pointed out that the problems of justification of tax incentives lie in their compatibility with the principle of equality and fiscal neutrality, especially if it is taken into consideration that the current permissiveness of cooperative legislation with regard to operations with non-member third parties places these entities in a situation of clear competition with non-cooperative entities in the same economic sector (Alguacil-Marí, 2001: 917).
[4] The profits made by a cooperative are distributed among its members on the basis of the cooperative business each carries out during the financial year, not according to the capital each contributed. This is known as cooperative return and is completely different from the dividends paid out by companies with share capital (Ballestero, 1990: 102, Prieto-Juárez, 2002: 165; Vargas-Vasserot and Aguilar-Rubio, 2006: 228).

itself. So, for purposes of illustration, the preferred approach was to generalise and make such distinctions only where necessary.

2. RECOGNITION OF A SPECIFIC TAX REGIME FOR COOPERATIVES

Clearly, we are among those in favour of recognising special taxation for cooperatives, but if it is to be useful, it must be based on grounds that have two characteristics. On the one hand, its foundations or motivations must be verifiable in reality, i.e., in facts, since this is what gives them force. And, on the other hand, they must be arguments of sufficient significance for the rest of the companies with which they compete in the market to consent to the existence of specific subjects who either do not pay as much taxes as the others or pay them in a different way. If the differentiated tax treatment is not justified with sufficiently solid arguments, it will always be suspected of favouring a position of unfair competition for these entities *versus* the rest of the companies operating in the market[5].

From the different legislations on cooperatives and the doctrine that has analysed them, we have summarised six justifications for the existence of a specific tax treatment for cooperatives.

2. 1. Absence of profit motive

Throughout the history of the cooperative movement, it has often been argued that the cooperative is a non-profit-making entity[6]. This idea has become one of the main arguments in defence of the non-taxation of cooperatives because it is a way of justifying favourable tax treatment and because it is required in order to qualify for certain tax benefits. Based on cooperative mutualism, the concept of cooperative act arose to identify the activity of the cooperative with its members, a concept defined by Salinas Puente (1954: 150) as "a collective, patrimonial and not onerous act". From this first use of the concept, it was widely taken up by the doctrine and introduced in Latin American cooperative regulations (Brazil, Argentina, Uruguay, Honduras, Colombia, Mexico,

[5] Thus, the preamble to the Spanish Law 20/1990 on the tax regime for cooperatives puts forward various arguments to justify the special tax regime it provides for and does so in the following terms: “cooperative societies have always received special attention from the legislator who, aware of their special characteristics as associative entities and their social function, has long recognised certain tax benefits for them [...] in view of their social function, activities and characteristics [...]”. And also “insofar as they facilitate workers' access to the means of production and promote the adaptation and training of the members' persons through the allocations made for this purpose [...], because of their activities in these sectors, the economic capacity of their members and the greater proximity to the mutualist principle, they enjoy additional benefits”.

[6] Cracogna (2006: 2) explains this by contrasting capitalist companies and cooperatives. He considers that there is a clearly different starting point in each case: the commercial organisation is set up to make a profit as compensation for the risk involved in investing the capital that the members commit to this activity. This is the logic of commercial profit-making activity; that is what it is organised for, and that is its *raison d'être*. The co-operative, on the other hand, is organised to solve a common need of its members. Whatever activity it undertakes, in all cases its purpose is always to solve a common problem that affects all the members of the co-operative, and not to make a profit by organising a business.

Paraguay, among others) [7]. Thus, it is understood that "market transactions carried out by the cooperative in pursuit of its corporate purpose, linked to the activity of the members and on their behalf, do not involve income, turnover or any financial advantage for the cooperative"[8].

However, it seems that nowadays the question of whether or not the cooperative is profit-making is considered to have been fairly well overcome, as it is generally understood that profit is normal in the existence and survival of any company operating in the market, so that the justification for the differentiated tax regime must be sought in other arguments[9]. Moreover, the decision to tax cooperative surpluses should not be based on whether or not the cooperative intends to make an income, but on whether or not it actually does make an income. In other words, for tax purposes, whether or not the cooperative is profit-making seems a futile debate, since what matters is whether or not a cooperative actually makes an income as a result of its operations, whether or not it intends to do so, and, if such an income actually exists, how it should be treated for tax purposes.

2.2. The activity they carry out

There is a high percentage of cooperatives working in activities that are in great need and not always sufficiently defended, such as all those related to the primary sector (agriculture, mining, livestock farming, forestry, beekeeping, aquaculture, hunting and fishing, etc.).

This argument seems to be easily refuted by a very simple reasoning: if the need for tax support is justified by the activity carried out, protection should be granted to all entities operating in that sector of activity, regardless of the legal form they adopt, i.e., cooperative society, public limited company, limited liability company or other (Alonso Rodrigo, 2001: 43).

2.3. The mutual operation that characterises them

The requirement for the cooperative to act on a mutual basis and the legal limitation of its operations with third parties constitutes a specialty of cooperative operation insofar as it is a limitation that may not exist for other companies and, consequently, can be taken into account when designing a tax regime that accommodates its specialties.

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[7] Its characteristic features can be summarised as follows: (1) the subjects of the cooperative act are necessarily a cooperative and its members; (2) it must form part of the compliance with the object of the cooperative; (3) it is celebrated within the cooperative, it is not a market operation; (4) its economic function is mutual aid, and it is not contractual; finally, (5) it is celebrated in fulfilment of an associative agreement, it is not an isolated operation (Cracogna, 1986: 13).

[8] Justification of Article 7. Cooperative Act of the Framework Law for the Cooperatives in Latin America.

[9] Furthermore, cooperative legislation, at least in Spain, has progressively introduced measures that favour the generation of profit for the cooperative and its members. These include the possibility of distributing among members the results obtained from operations with third parties; the raising of the interest limit on capital contributions; and joint accounting of cooperative and extra-cooperative results together with an increase in the allocation to reserve funds (among others, Cooperative Laws 11/2010 of Castilla La Mancha, 14/2011 of Andalusia, 12/2015 of Catalonia and 11/2019 of Basque Country, as can be seen from their respective explanatory memorandums).

However, we should be cautious about using this argument for favourable tax treatment, because the current trend in the cooperative world, both in terms of its actions in the market and its regulation, is precisely towards an ever-greater permissibility in the volume of operations with third parties which, have moved from being totally prohibited in the early cooperative orthodoxy towards broad levels of openness. One does not have to look any further than Spain to find examples[10]. The question is, therefore, if the law ceases to limit the possibilities of the cooperative to operate with third parties, what will be the fate of the special taxation justified in this way?[11]

2.4. Their lower economic capacity

It is based on the assumption that people who form cooperatives are by definition people with scarce economic resources, so that cooperatives would also have a reduced economic capacity[12]. This justifies a more advantageous tax regime in application of a basic principle of tax justice, which obliges taxpayers to contribute to the support of public expenditure in accordance with their economic capacity. But this is not always the case; it is a purely theoretical approach. In developed countries, the cooperative model, based on the principles of the ICA, has long since ceased to be an instrument for marginal and subsistence economies or a mere formula for self-employment and the development of depressed areas and activities, and has become a model of competitive enterprise, with projection and expansion in the market. (Rosembuj, 1985: 11-13, Vargas-Vasserot *et al*, 2015: 47).

2.5. The special rules of operation to which they are subject

[10] Article 5 of Catalan Law 12/2015 on Cooperatives places no limits on operations with third parties for all types of cooperatives. 50% of the result of these operations must be allocated to the mandatory reserve fund, but the other 50% could be freely disposable, if so regulated in the bylaws. Article 10 of Law 14/2006 on Cooperatives of Navarra says cooperatives may operate with non-members if so stated in their bylaws, but 50% of the result of these operations must be allocated to the mandatory reserve fund and the remaining 50% to the voluntary reserve fund. This is not necessary for workers' cooperatives. Also Law 27/1999 of Cooperatives (national) and most of regional liberalise operations with third parties for consumer and user cooperatives (except Laws of Cooperatives 5/1998 Galicia and 4/2001 La Rioja).

[11] The limitation on third party operations for these companies was a requirement introduced by the legislator at the request of non-cooperative companies to ensure that the tax benefits granted to cooperatives would not serve to place them in a position of advantageous competition in the market (Paniagua Zurera, 1997: 204-205). This requirement, which limited the operability of cooperatives, makes no sense in today's globalised market, where the aspiration of companies, whatever their legal form, is to expand markets, sometimes not only to grow, but simply to maintain their position.

[12] In Latin America this consideration has been widespread. The Discussion paper for the Specialized Meeting of MERCOSUR Cooperatives, I Cumbre ACI-Americas, Uruguay, 2009, states: "It has sometimes been considered as a marginal business formula -'an economy of the poor for the poor'" *(Las cooperativas como parte de la economía social, ¿una alternativa para salir de la crisis?* https://www.aciamericas.coop/IMG/pdf/Claudia_Delisio-Cumbre_Mxico_eje3.pdf)

In Spain, the former Decree of 9 April 1954 approving the Tax Statute for Cooperatives emphasised the low taxation capacity of cooperatives as well as their submission to the mutualist principle. Expressions such as "production cooperatives formed by workers or small artisans", "consumer cooperatives formed by civil servants, employees or workers", "workers who act with their own labour" take us back to a time when cooperativism was mainly identified with this model of a union of people with scarce resources to satisfy their most basic needs, with the limitation of the exclusive limitation of operating exclusively with its members.

Cooperatives have special operating characteristics that fully justify their special taxation, such as the configuration of their capital, the dual status of members as partners and workers, their specific mandatory reserves, etc. As they are different taxable entities, there can be no question of positive discrimination compared to other entities[13].

2.6. The social function they perform

Together with the previous one, this is the fundamental argument to justify the special taxation of cooperative societies. The social function that cooperatives perform not only for the benefit of their members, but also for the benefit of the social group in general (Fici, 2015: 77-98), is one of the clearest reasons in favour of advantageous taxation for cooperatives. In fact, many tax rules cite precisely this social function as a justification for the differentiated treatment of cooperatives[14].

In addition, the social function manifests itself in the fact that cooperatives are basic instruments for job creation, both in the form of refloating companies in crisis and in the creation of new companies. This is something that the figures show, and which has been recognised in various international reports and documents[15]. The contribution of cooperatives to development is also

[13] A large part of the tax doctrine defends a specific taxation that mitigates the parafiscal burdens of its substantive legal regime. Among many others, Alguacil-Marí, 2003: 131-181; Calvo-Ortega, 2005: 33-64; Tejerizo-López, 2010: 51-72 and Aguilar-Rubio, 2015: 373-400.

[14] In Spain, the special taxation will be justified by the obligation imposed by Article 129.2 EC: "The public authorities shall effectively promote the various forms of participation in business and shall encourage, by means of appropriate legislation, cooperative societies". The Constitutions of Italy, 1947 (Article 45), Greece, 1978 (Article 12.5 and 6) and Portugal, 1976 (Article 61, 80.f) and 85) also include a mandate to promote cooperativism, without determining, a priori, the means to do so. Article 19.4 of the 1991 Bulgarian Constitution states that "the law shall establish the conditions conducive to the establishment of cooperatives and other forms of association of citizens and corporate bodies for the benefit of economic and social prosperity". Apart from these cases, only the Serbian Constitution of 2006 guarantees cooperative ownership in Article 86.

In the Americas, the 1988 Federal Constitution of Brazil, article 146.III.c) establishes that it is up to the law to complement "the appropriate treatment of the cooperative act". The 1992 Constitution of Paraguay, in article 113, under the heading "Promotion of cooperatives", establishes that "the State shall promote cooperative enterprises and other associative forms of production of goods and services, based on solidarity and social profitability, and shall guarantee their free organisation and autonomy. The cooperative principles, as an instrument of national economic development, shall be defended through the educational system". The Political Constitution of the Republic of Guatemala, in its Article 119. e), establishes among other obligations of the State "to promote and protect the creation and operation of cooperatives by providing them with the necessary technical and financial assistance". The 1993 Political Constitution of Peru contains only one reference to cooperatives in its Article 17, relating to the field of education, whereas the previous one, of 1979, was a paradigmatic case due to the reference to cooperatives in numerous provisions (Articles 18, 30, 112, 116, 157, 159, 162 and 15th General and Transitory Provision). The Bolivarian Constitution of the Republic of Venezuela of 1999 has a set of Articles 70, 118, 184 and 308, which encourage the strengthening and development of associative expressions and the consolidation of a participatory economy. Article 64 of the Constitution of the Republic of Costa Rica provides that "the State shall encourage the creation of cooperatives as a means of facilitating better living conditions for workers". The Constitution of the Republic of Nicaragua, in the seventh paragraph of its Articles 5, 99 and 103 (amended by Law No. 854) guarantees and promotes the cooperative form of ownership without discrimination with respect to others. The Constitution of Honduras of 1982 establishes that the law "shall encourage the organization of cooperatives of any kind" in Article 338. The Constitution of El Salvador of 1983 also recognizes the promotion of cooperatives in Article 114, as does the Constitution of Bolivia of 2009 in Article 55 and that of Ecuador in 277.6.

[15] From the International Labour Organization statement on "*The cooperative key to sustainable development*" (https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_303222/lang--en/index.htm) to the European Commission's Consultation Paper on Cooperatives in Enterprise Europe of 7 December 2001; the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on *The Promotion of co-operative societies in Europe* of 23 February 2004 (COM/2004/0018 final); the Opinion

fundamental. This is more than just a theoretical statement since the United Nations recognised early the important role played by the cooperative movement in various social and economic sectors[16].

Therefore, from the point of view of justifying a favourable tax regime for these entities, the most interesting argument is that of the identity of purpose that exists between the State and this type of societies, with the tax benefit being presented as compensation for the development of work aimed at achieving the general interest[17]. In my opinion, the interest of this last argument lies in the fact that it not only justifies the full existence of tax benefits for these companies, but also demands their existence in compliance with the most basic principle of commutative and distributive justice, since the contribution in kind that, in particular, cooperatives make must be taken into account to reduce their economic contribution via taxes, otherwise they will be taxed more than they should be (Alguacil-Marí, 2003: 180-181; Calvo-Ortega, 2005: 33-64; Tejerizo-López, 2010: 69-70 and Aguilar-Rubio, 2015: 400).

On the basis of the social function performed by cooperatives, these entities should be granted a tax regime that serves at least two purposes: first, to include technical adjustment measures, consistent with the special features of the economic regime of cooperatives, and secondly, to provide incentives for the model in the sense of containing a system of tax benefits that would serve both to compensate for the social work they carry out and to defend these organisations and encourage their development (Alguacil-Marí, 2001: 916-917)[18].

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on *Different types of enterprise* of 1 December 2009 (2009/C 318/05) and the Opinion on *Cooperatives and restructuring* of 25 April 2012 (CCMI/093-CESE 1049/2012), Opinion on *Social economy enterprises'contribution to a more cohesive and democratic Europe* (2019/C 240/05), all of them from the European Economic and Social Council. Also, from the EESC; the Report on *The contribution of cooperatives to overcoming the crisis* of the European Parliament of 12 June 2013 (2012/2321/(INI)); the study on Recent evolutions of the Social Economy in the European Union of 2016 (CES/CSS/12/2016/23406); up to the 2018 Report on *The future of EU policies for the Social Economy: Towards a European Action Plan* by Social Economy Europe.

[16] Since United Nations General Assembly Resolution of December 1968, *The role of the cooperative movement in economic and social development*, it is recognised "the important role of the cooperative movement in the development of various fields of production and distribution, including agriculture, livestock and fisheries, manufacturing, housing, credit, education and health".

[17] In fact, it follows from the documents cited in the notes above that the differences in the cooperative model could justify specific tax treatment, provided that all aspects of cooperative legislation respect the principle that any protection or benefit granted to a specific type of entity must be proportionate to the legal constraints, added social value or limitations inherent in that corporate form and must in no case be a source of unfair competition.

[18] Although in favour of the existence of tax benefits for cooperatives, for Montero-Simó the promotion of cooperatives does not necessarily translate into them, the tax regulations must inevitably recognise the peculiarities of cooperatives compared to other social forms and adapt the general corporate tax regulations to these entities (2016: 42).

3. TAX TREATMENT OF COOPERATIVE SURPLUS

3.1. The concept of cooperative surplus

Three forms of profit will arise from the normal functioning of the cooperative[19].

Firstly, the economic and social advantages in favour of the members depending on the type of cooperative (education, housing, jobs, provision of services, purchases or sales at better prices, etc.) which constitute its main purpose. Although they represent a benefit for the member, they do not constitute taxable income.

Secondly, some cooperatives obtain monetary surpluses in addition to producing these non-monetary benefits for their members. If these surpluses have been generated exclusively by the action of the provision margins and over-perception, then neither the cooperative nor the member can be said to have made a profit[20]. Thus, the traditional approach to the taxation of cooperative surpluses is that all cooperative surpluses are made up of overpayments and profit margins which do not constitute income of either the cooperative or the member and should therefore not be subject to taxation.

However, not all cooperative surpluses will always be made up in this way. It is normal for the operation of the cooperative to generate a real profit, a profit over and above these adjustments. That is, thirdly, the co-operative will obtain profits in excess of costs, which is known as surplus.

Knowing the characteristics of the cooperative surplus and how it differs from the profit made by other companies operating in the market, we can analyse how it should be taxed by a corporate income tax.

a) It is considered to be an accidental element

They are neither necessary nor the main objective of the cooperative because the essential aim pursued by the members when they set up the cooperative is to satisfy their needs: to buy at better prices, to access a job, to sell their production, etc. But this is without prejudice to the fact that there may be secondary motivations such as obtaining a benefit or profit[21]. We must not lose sight of the

[19] Vargas-Vasserot *et al*, 2017: 143-148 deeply explained the evolution of these concepts.

[20] In this case, what the member overpaid or underpaid at an earlier time comes back to him through the returns at the end of the year. We consider that this is neither a profit nor an income, neither for the cooperative (which gets rid of that amount) nor for the members (who only gets back what they previously paid in) (Alonso-Rodrigo, 2001: 111).

[21] This is clear from the International Cooperative Alliance Statement on the Co-operative Identity, which defines a cooperative as an "autonomous association of persons united voluntarily to meet their common economic, social, and cultural needs and aspirations". If their main purpose were essentially profit-making, it seems clear that they would not form a cooperative, but would opt for a different corporate model, as there are several mechanisms that limit profit for the members within the cooperative model (International Cooperative Alliance, 1995: https://www.ica.coop/en/cooperatives/cooperative-identity).

fact that, in order to satisfy their needs, cooperative members do not constitute a foundation or an association or any other type of non-profit entity, but a company operating in the market. They are, therefore, organisations which do not necessarily exclude the idea of profit, but which, on the contrary, will need to be profitable in order to maintain themselves in a market in which they will be competing with companies inspired by principles of maximum profit[22].

b) It is subordinated to the general interest

Before any surplus can be distributed, it is a requirement to cover the apprenticeship and training reserves in the terms established by the applicable law, a fund that does not exist in capitalist companies and which is used for social purposes. Moreover, before obtaining these surpluses, the needs of the members have to be met and these must correspond, to a certain extent, to the general interest. In order to justify the non-taxation of cooperative surpluses, the argument has usually been put forward that the way in which these surpluses are distributed is different in cooperative and capital companies[23]. For others, the fact that the distribution is carried out in one way or another will have a significant influence on the characterisation of the company, but not on the characterisation of the profit, which will be equal profit regardless of the way in which it is distributed[24].

c) It is linked to the cooperative activity

The surplus is distributed in proportion to the transactions carried out by the members with the cooperative during the financial year. This is the substantial difference between cooperatives and capital companies: in the latter, the profit is distributed in proportion to the capital contributed by each member. In the cooperative, however, the capital is subordinated to the work of the members (Vargas-Vasserot *et al*, 2017: 162).

3. 2. Methods for the tax treatment of cooperative surplus

If we look at the European context, the tax treatment granted in the different member states is not homogeneous. With regard to the corporate tax adjustment rules affecting cooperative profit, the

[22] According to Alguacil-Marí (2001: 958) the tax protection of cooperatives cannot ignore the search for economic efficiency that every enterprise pursues when operating in a competitive market and, therefore, the need to establish contracts not only with its members, but also with third parties within certain limits. In this way, cooperatives can be more competitive, allowing members to obtain better prices for their consumer products or for the factors of production they contribute to society than they would on the free market. This result is, of course, compatible with the promotion of cooperativism through appropriate legislation.

[23] They are distributed on the basis of the cooperative activity carried out by each member and after endowment of compulsory funds and voluntary funds, if any (Ballestero, 1990: 237-240, Vargas-Vasserot and Aguilar-Rubio, 2006: 227-229, Arana-Landín, 2019: 33).

[24] For further discussion of these arguments, traditionally defended by economists, see Rovira-Ferrer (1969: 50) or Ballestero (1983: 21).

solutions adopted by the different European tax systems can be grouped into four main blocks (Alguacil Mari, 2001: 938-950):

1) systems that apply the general tax regime to cooperatives without taking into account their peculiarities, as is the case in Ireland and Austria;

2) systems that apply the method of exempting the results obtained with members for the cooperative. The exemption is combined either with a system of fiscal transparency or imputation of incomes to members. Also, with taxation of the profit received as a dividend by the member. This tends to be the case only for certain cooperatives, in countries such as Greece, Germany and Portugal, among others.

3) those that deduct the return from the cooperative's tax base, as in Italy and the United Kingdom, in some cases;

4) those that treat the distributed profits as a dividend and apply a lower tax rate to the cooperative, including Spain and Portugal.

In Latin America, the formulas have traditionally leaned, in some cases, towards non-taxation, or, more frequently, towards exemption from paying taxes on the results of cooperative activity, in accordance with the doctrine of the cooperative act and the absence of profit. It has been argued that the recognition provided by law through the specific legal framework must also be present in tax matters. On the basis of the principle according to which "in the cooperative, capital is not capable of producing income because the law itself does not allow it to appropriate the income produced by the social activity", taxing the cooperative with income or wealth taxes "means applying a tax that deteriorates, that diminishes the manifestation of wealth expressed in the cooperative. It is not like in commercial companies where the potential ability to produce profits is taxed because, as there is no profit, what is being done is to reduce the capital" (Cracogna, 2006: 1). However, since the 1990s, laws have evolved, in different countries of the continent, towards taxation of the benefit, as soon as it is accepted that there may be a profit (Sánchez-Boza, 2015:129, Cracogna, 2019: 17).

Let us now look at the formulas that have been put forward for taxing the income made by cooperatives[25].

[25] What cooperatives get is not profits, but income or margins and thus, we can speak of net income, net margins or a net surplus. The general principle of cooperative income taxation is that money flows through the cooperative and reaches the members, leaving no margins for the cooperative to retain as profit. (Arana-Landin, 2019: 33).

3.2.1. Application of the general corporate tax regime

At least in Europe, there is no shortage of those who, without taking into account the peculiarities of cooperatives and their social function, have been in favour of applying the same tax regime as that for capital companies without any specialties whatsoever to cooperatives[26]. The main argument underpinning this position is that today's cooperatives are not charities or mutual societies, which simply carry out transactions with their members and, emphasises that they are companies which operate in the market (Cracogna, 2013: 210). It is assumed that they act on an equal footing with other companies so that caution should be exercised when establishing special rules for co-operatives which could place them in a position of unfair competition, protected by the legislation itself, compared to other companies operating in the same market.

This concern will become even more evident when the special tax regulations for cooperatives include tax benefits, as is currently the case in some European legal systems. In fact, following a complaint by Spanish service station owners' associations against a regulation that allowed diesel to be distributed to non-member third parties, a debate arose within the European Union about the legality of the existence of a subsidised tax regime for cooperatives. The European Commission was very belligerent on this issue and has gone from a favourable position to considering that tax systems such as the Spanish or the Italian ones represented state aids that were incompatible with the single market, to the point of demanding that the cooperatives refund the taxes they had not paid because of these exemptions. The resolution of the Italian case by the European Court of Justice restored some reassurance to the sector. The ruling of the European court understood that the system as a whole is not incompatible with the single market and that each exemption established will have to be studied in the light of the State aid regulations in order to determine its legality or illegality[27].

[26] This tendency links tax benefits to pure mutuality and does not justify them outside of it. A good example of this is the Commission Decision 2010/473/UE, of 15 December 2009 on support measures implemented by Spain in the agricultural sector following the increase in fuel prices. In connection with the extension of cooperatives' operations with non-member third parties without losing the tax benefits provided for in Spanish law, the Commission stated that this was a fiscal State aid affecting competition within the EU.
On the one hand, the favourable measures were considered to be justified or not on the basis of the 'pure mutuality' criterion. That is, they could be considered compatible with the common market only to the extent that cooperatives fulfil the Common Agricultural Policy objectives of Art. 33 of the Treaty and thus contribute to the general interest, but for this they need to be proportionate. Therefore, in the Commission's view, only those measures which fell under the mutual character were justified, while those affecting operations with non-members would only be compatible with the Treaty if they had a negligible impact on competition and this would occur, according to the Commission itself, when the co-operatives fulfilled the necessary conditions to be considered as small or medium-sized enterprises.
On the other hand, the regime is State aid since it necessarily entailed a loss of tax revenue for the State correlated with a lower taxation of the beneficiaries, who would thus obtain a tax advantage for the cooperatives to the exclusion of the other companies.

[27] In the case described in footnote 25 the European Commission justified the tax benefits granted to Spanish cooperatives with the higher tax burden on cooperative returns compared to dividends from commercial companies as a result, on the one hand, of the compulsory contributions to the mandatory reserves and, on the other hand, of the deficient model for correcting double taxation between cooperatives and members. However, after that, the Decision 2010/473/UE marked a turnaround.

3.2.2. Absence of taxation

In a properly structured State, one of the fundamental principles that should inspire the tax system is that of the generality of taxation, in the sense that all those who manifest economic capacity have the duty to contribute to the support of public expenditure. However, this principle admits exceptions, and these have been used to defend the total non-payment of taxes by cooperative societies[28]. There are two techniques that would allow this result to be achieved: non-taxation and exemption.

a) Non-taxation

As a consequence of the particular operational characteristics of the cooperative, the activities it carries out and the economic relations it develops do not constitute taxable events of the rule and are therefore not subject to taxation[29]. This situation arises as a result of the fact that tax regulations often define the taxable events with the conventional company's operating system in mind, without taking into account the peculiarities of cooperative operation[30].

Thus, it has been argued that the cooperative act is that carried out by the co-operative with its members for the fulfilment of its institutional purposes, i.e., animated by a service purpose. If the cooperative act has a specific legal nature in accordance with its economic reality, it cannot be treated from a tax point of view in the same way as a commercial act, which is a different legal nature, with a different economic background. If it were to make a profit, it would accrue to the members by way of return, which means that the cooperative could never, even if it intended to, make a profit from the transactions it carries out with its members. Likewise, in the limited services or operations offered to non-members, the final destination of the surpluses generated are not distributable, and they are not returned to the members (Cracogna, 1986: 13 *et seq*.).

This is explained at length in Alguacil-Marí, 2003: 131-181; Merino-Jara, 2009: 109-128; Hinojosa-Torralvo, 2010: 73-89; and Aguilar-Rubio, 2016: 49-71.

[28] See section 2.1., where reference has been made to the concept of cooperative act, which underpins the thesis of non-taxation of cooperatives.

[29] Article 3.d) of Costa Rican Income Tax Law No. 7092 of 1988 (introduced by Law No. 7293 of 1992 on current exemptions, derogations and exceptions) implies that cooperatives incorporated under Law No. 6756 of 1982 on Cooperative Associations are not subject to tax. But following the Comprehensive Reform of this law, it seems that this non-taxation has been transformed into a case of exemption (Article 78), since certain formal obligations are established, in particular, the withholding obligation to safeguard the tax liability of the members for 5% of the surpluses from which they benefit.

[30] In Spain. Rosembuj (1985: 119) has expressed this opinion. But it is above all a position defended in Latin America. In Argentina, Professor Cracogna (2019: 16) defends the non-taxation of cooperatives in corporation tax because, "strictly speaking, they do not constitute the taxable event". He criticises the confusion of the Argentinian law, stating that "the profits of cooperative societies are exempt" because "there are no such profits, but rather a price adjustment which is returned to the members by way of a return".

In my opinion, there is no justification for defending the cooperative's non-liability to all the taxes that may affect it, but rather that whether or not it is liable must be determined for each specific tax. Only by verifying that the cooperative has not carried out the taxable events can we say that it is a case of non-taxation. Furthermore, if the absence of taxation is linked to the absence of profit, the measures adopted by many current cooperative laws, which favour the generation of profit for the cooperative and its members, would make this unjustifiable[31].

b) Exemption of corporate tax

The thesis of tax exemption for cooperatives is based fundamentally on the social function they fulfil. On the grounds that taxes are levied to meet social needs such as education or health care, taxes should not be levied on those user groups who, through the cooperative, either satisfy these needs themselves without requiring public activity, or collaborate with the public sector in meeting these needs[32].

The argument is particularly valid for *developing countries*, where a significant sector of cooperatives is dedicated to this type of function, providing its members with essential services (such as housing, health, education and others), making up as far as possible for the incapacity or inactivity of the State (Vargas-Vasserot *et al*, 2015: 21-22). In countries considered *developed*, these basic services are sufficiently provided by the State, but precisely for this reason they represent a cost for the public coffers which is avoided through cooperative action (Alonso-Rodrigo, 2001: 122-123). Moreover, the provision of these services by the cooperative and their subsequent exemption from taxation is much cheaper for the State than it would be if it were to raise the sums necessary to pay for them itself, then organise the expenditure, and finally devote part of its funds to these purposes[33].

[31] I have already refuted the no-profit argument in section 2.1. of this paper.

[32] For Rosembuj (1991: 15-16) cooperatives integrate, complement or substitute state action in the provision of public services, so that the fiscal benefit is compensated by the greater social effort entrusted to them and they share the responsibility for the provision of public services.

[33] Thus, for example, in Europe, we find that in Italy the results obtained by production, agricultural, maritime and other cooperatives are fully or partially exempted from corporation tax (DPR 29 September 1973, n. 601, Articles. 10, 11 and 12 updated by Decree Law n. 63 of 2002). In Germany, the Corporation Tax Act of 31 August 1976 (recast version of 15.10.2002) exempts housing cooperatives from corporation tax under certain conditions (§ 5.10 a) and b). In Portugal, Decree-Law no. 215/89, which approves the Tax Benefits Statute, establishes in Article 66.º-A the exemptions for cooperatives, which depend on whether their activity can be considered mutual. To this end, it begins by classifying cooperatives into two main groups. For the first group, which includes agricultural, cultural, consumer, housing and construction and social solidarity cooperatives, the distinction is similar to ours between cooperative and non-cooperative results. With regard to the second group, which includes marketing, credit, worker production, craft, fishing, educational and service cooperatives, the distinction lies in certain characteristics of the cooperative itself which may function as indicators of its mutualist purity. The exemption regimes for these two groups not only depend on the fulfilment of different requirements but produce very different effects. And in Greece agricultural cooperatives are exempt from profit tax according to Paragraph 5 Law 52-1980 on capital gains.
In Latin America, the income tax exemption was introduced in Colombia by Article 2 Law 128, of 28 September 1936. Curiously, it required that the income had been obtained in the exercise of the ordinary activity of the cooperative and that it was invested entirely within the country. This favourable treatment was gradually lost as a result of the different national and

There is no shortage of opponents to this thesis, who argue that excessive state protectionism of the cooperative phenomenon through favourable tax rules would lead to excessive dependence of the sector on the state[34]. This would inevitably result in chronic stagnation in its development and permanent entrepreneurial inefficiency in its management and operation[35].

3.2.3. Application of a special regime

The particularities of cooperative functioning, which are condensed in the ICA Cooperative Principles, amply justify the existence of a tax regime for them that is different from that generally

local tax laws, and the exemptions were greatly reduced. In Argentina, article 26.d Income Tax Law (Ordered text by Decree 824/2019) recognises that "the following are exempt from taxation: d) The profits of cooperative societies of any nature and those that under any denomination (return, share interest, etc.) are distributed by consumer cooperatives among their members". In El Salvador, Articles 71 and 72 General Law of Cooperative Associations No. 559- 1969, provide for exemption from taxes of different nature. In Brazil (Article 182 Decree No. 3000- 1999) and in Guatemala (Income Tax Decree No. 26-92), the exemption for cooperatives applies to income obtained from transactions with their members and with other cooperatives, federations and confederations of cooperatives; income, interest and capital gains made with third parties are not exempt. In Honduras, Article 56.a) Decree No. 65-87, which regulates the Honduran Cooperatives Law, exempts cooperatives from income taxes. And the Tax Equity Law (Decree No. 51-2003) exempts cooperatives engaged in agricultural activities from the general payment of taxes. In Panama, cooperatives are subject to, but exempt from, Property Tax, Income Tax and Transaction Tax (Article 116 Law No. 17- 1997, which, being relatively recent, has incorporated many of the proposals of the Framework Law for Cooperatives in the Americas). Law No. 127-64 on Cooperatives in the Dominican Republic recognises the exemption and exoneration of taxes, fees and contributions to legally constituted and properly functioning cooperatives for their surpluses from transactions with their members. In Peru, according to the General Law on Cooperatives (Decree No. 85), they are subject to income tax only on their net income from transactions with non-member third parties. Although, according to the Most Favoured Enterprise Principle, cooperatives should enjoy all the benefits or privileges granted to other forms of business organisation, as long as they are more beneficial than those granted to cooperatives. Both the 2001 Special Law on Cooperative Associations and the Venezuelan Income Tax Law provide for the exemption of cooperatives from direct national taxes when they operate under the general conditions set by the National Executive. In Chile, according to Article 49 General Law on Cooperatives, cooperatives are exempt from the following taxes: a) 50% of all contributions, taxes, fees and other fiscal charges in favour of the Treasury, except VAT; b) all taxes levied on legal acts, conventions, acts related to their constitution, registration, internal functioning and judicial proceedings, and c) 50% of all contributions, duties, taxes and municipal patents, except those related to the production or sale of alcoholic beverages and tobacco. Finally, in Mexico, there is no exemption for the society in the Decree regulating income tax (DOF 11-12-2013). It has been criticised that the 2014 tax reform has eliminated the tax benefits achieved not so long ago, in the 2006 reform, thus ignoring the true social function and nature of cooperatives (Izquierdo, 2016: 105). However, the 2015 Decree granting housing support measures and other fiscal measures established the tax incentive for production cooperatives that determine taxable profit for the fiscal year and do not distribute it, to be able to defer the total tax for the year determined for three fiscal years in addition to the two already provided for in the Law, so that they can then defer the payment of the income tax, if they do not distribute the profits to the members, for a maximum of five years.

[34] An appropriate balance must be sought between, on the one hand, the promotion of the most needy inherent to the state which is described as social, and, on the other hand, economic competition in the markets, which is part of the essential content of the freedom of enterprise (Paniagua-Zurera and Jiménez-Escobar, 2014: 66).

[35] In order to avoid this negative dependence on the state, positions have been defended in favour of recognising temporary tax benefits. An example of this technique can be found in Bolivia, where Article 39 of the General Law on Cooperative Societies DL Nº 5035-1958 established that "they shall be exempt from paying taxes and fees on the operations they carry out to develop their economic activity and guarantee the fulfilment of their social purposes, for a period of two years". This rule was repealed by Law No. 356-2013, which does not contain a similar provision. Costa Rica's Law on Cooperative Associations No. 6756 maintains the "exemption from payment of land tax for a period of ten years from the date of its legal registration" (Article 6.a). El Salvador's General Law of Cooperative Associations No. 559-1969 provides in Article 72: "for a period of five years, from the date of its application and extendable at the request of the Cooperative for equal periods: a) Exemption from income tax [...] whatever its nature, the capital with which it is formed, interest generated from the fiscal year during which the application is submitted".

However, the recognition of tax benefits for cooperatives is not exclusively aimed at helping the business consolidation of a cooperative, but rather at a more general and lasting promotion insofar as it fulfils certain purposes of social interest throughout its life, or whose operation implies difficulties of competitiveness in the market which they try to compensate through the recognition of certain tax advantages.

provided for companies[36]. The existence of sufficient compelling arguments justifying a special tax regime for cooperatives precludes any accusation of discrimination[37].

Once it is accepted that the cooperative can make a profit, in the form of income, which would be taxable for corporate tax purposes, some possibilities for special taxation arise.

a) The system of fiscal transparency or taxation of partners

Fiscal transparency is designed to tax members on the results obtained by the cooperative. Thus, the company's fiscal personality is denied, and the members a "re taxed on the results obtained by the company, whether they have been distributed or not. This system considers the members to be the owners of the company's profits by means of the mechanism of presuming that the company's profits are attributed to the members in proportion to the cooperative activity carried out by each of them[38].

The main arguments in favour of the application to cooperatives of the fiscal transparency regime or, in general, of the imputation of results to members, are summarised below (Cracogna,1992: 174)[39]. The first argument stems from the personal nature with which the cooperative society has traditionally been conceived. The leading role of the members in the cooperative model makes it appropriate to have a taxation mechanism that refers precisely to them. Secondly, the special relationship that exists between the cooperative and the member, different to that found in any other company, sometimes defined as a kind of agency relationship in which the cooperative acts as a simple agent for the member. According to this conception, the cooperative is seen as the sum of the members and not as a reality independent of the member or the group of members. The company takes a back seat to the tax administration, which addresses itself to the member. Thirdly, this peculiar relationship between member and company means that it is the member, not the cooperative, who benefits from and also bears the risks involved in the development

[36] All those who defend the existence of these specific characteristics are aligned with this position. We have left a good sample of this doctrine above in footnote 12.
[37] These arguments are developed at length in Aguilar-Rubio, 2015: 373-400.
[38] This regime was in force in Spain, albeit for a short time and with little success, in Laws 61/1978, on Corporate Tax and 44/1978, on Income Tax (see Busquets 1995: 1-3).
Many countries do not treat the cooperative's surplus on its transactions with members as part of the co-operative's taxable income. But any distribution of that surplus to the members may be treated as part of their taxable income.
In France, only SICA and SCOPs benefit from a total exemption from Corporate Tax on transactions with their members (Article 204 CGI). This income is shifted to the tax base of the members. SICA are agricultural collective interest companies. SCOPs are production cooperatives. They are considered 'closed' according to Article 3 Law 47-1775 of the Statute of Cooperation, because they are not allowed to let non-members benefit from their services, unless the specific laws regulating them allow them to do so. In that case they have to admit them as members, if these non-members make use of this option or if they carry out work for the cooperative and fulfill the conditions set by their statutes.
[39] In Spain, Albiñana (1986: 228) has defended this formula in the legal sphere and Juliá-Igual & Server-Izquierdo (1992: 96) have done so in the economic scope.

of the cooperative activity. It is therefore only the member who has to be taxed[40]. Fourthly, the economic capacity that is taxed is only held by the member, who is the one who receives the profit, and not by the company, and what is achieved through the formula of fiscal transparency is the taxation of those who manifest this economic capacity (Falcón y Tella, 1984: 160). And, finally, it is suitable for eliminating double taxation on the company's results, a double taxation that may exist in the application of the general corporate tax regime for the cooperative and the taxation of the amounts distributed afterwards in the member's income.

b) Reduced rate of taxation

Under this model, cooperatives would be subject to corporate tax, but at a lower rate than the general rate, which would apply to capital companies. This is a fairly common formula and there are also different techniques to implement it. In the European Union some Member States distinguish between the results deriving from the cooperative's activity with its members and its activities with third parties for taxation purposes, with the latter being taxed to a greater extent[41]. Others allow the tax rate to be reduced according to the type of activity carried out by the cooperative[42].

4. TAXATION OF COOPERATIVE RETURN

4.1. The concept of cooperative return

Cooperative return "is defined as the return by the cooperative to the member of what it overcharged or underpaid him" (Aranzadi, 1976: 89). Therefore, in order to be entitled to it, it is not enough to carry out operations with the cooperative, but it is also necessary to be a member through the joint contribution of capital and work.

[40] The approach is that we are dealing with an entity aimed at obtaining certain social and economic advantages for the members, rather than directly at obtaining a cumulative monetary benefit for the company (Cracogna,1992: 171).

[41] In Spain, for example, a distinction is made between two tax bases for each cooperative: the cooperative tax base and the extra-cooperative tax base. Once calculated, non-protected cooperatives will be taxed on both at the general rate, and protected cooperatives at the reduced rate of 20% for the cooperative and the general rate of 25% for the extra-cooperative. In addition, specially protected cooperatives will be entitled to a 50% rebate on the corporate income tax they would have to pay (Articles 33 and 34 Law 20/1990). Portugal also distinguishes for taxation purposes the mutual activity of cooperatives from transactions with third parties that are not members or that fall outside the corporate purpose (see note 20). Cooperative results are exempt but those from transactions with third parties and from activities outside their own purposes will be taxed at the general rate of 21% according to Law 2/2014 (updated to 2019).

[42] In Spain, only worker cooperatives, agri-food cooperatives, community land use cooperatives, maritime cooperatives and consumer and user cooperatives are eligible for special tax protection (Article 7 of Law 20/1990), provided they meet the requirements laid down in the tax law for each type of cooperative. In Italy, agricultural cooperatives, which have a very varied typology (they can be worker cooperatives, production cooperatives, consortia of companies) benefit from a reduction of the corporate tax base (DPR 29 September 1973, n. 601, Articles 10, 11 and 12 updated by Decree Law n. 63-2002). In France, several types of cooperatives are exempt from Corporate Tax under certain conditions, in particular agricultural and craft cooperatives provided that they operate in accordance with the provisions governing them (Article 207.1-2 and 3 CGI). In Colombia, legal entities called cooperatives (non-profit companies) are subject to income tax at a rate of 20% from 2019 on their surpluses (being the general rate of 33% plus surtax of 4%, resulting in a net tax of 37%. (Law 1819-2016 through which a structural tax reform is adopted, the mechanisms for the fight against tax evasion and tax avoidance are strengthened, and other provisions are issued).

As a first consideration in addressing the issue, it is necessary to start by distinguishing between what we consider to be a strict return and a broad one. As the amounts involved in the return are of a different nature, the tax regime applicable to them must also be different.

A cooperative return in the strict sense can be defined both as, on the one hand, the amount that the member overpays for a supply provided by the cooperative, and which at the end of the year the cooperative returns to him, and on the other hand, conversely, the amount in addition to the price initially paid to the member. The former should be deductible in the taxable base, as it is not a profit made by the cooperative and distributed to the member, but an amount advanced by the member and now returned to the member. The latter should be considered as part of the cost or price of the service or good provided by the member to the cooperative, which could be understood to have been paid in two instalments. It would be a question of determining the exact cost of the member's service to the cooperative, and that amount should be deductible, even if it has been paid in two instalments (Alonso-Rodrigo, 2001: 265)[43].

So much for the most basic functioning of the cooperative. However, as we said before, one of the changes brought about by the evolution of the company is the new positioning of the cooperative in relation to the idea of profit. The cooperative is now presented as a company with the same right to make an income as any other, distributable among the members, although it does not necessarily have to do so, as this is not its essential purpose. This is therefore a return in the broad sense, as the part of the income that is given to each member of the cooperative in proportion to the operations that they have carried out with it, and which includes both the income of what has been underpaid or overcharged to the member (strict return) and the economic result achieved.

4.2. Deductibility of cooperative income for corporate tax purposes

Comparative law has often opted for the deductibility of these incomes in the tax base of the cooperative's results. Amongst all, the main reason is to consider the return simply as a price adjustment, and not as a distribution of the cooperative's profits. Moreover, this formula has been used to avoid double taxation which is caused by the tax borne first by the cooperative and then by the member. Some regulations allow the deductibility and non-taxation of the company for these amounts based on the mandatory nature of the return mechanism[44].

[43] To the extent that the strict return constitutes an adjustment to the price the cooperative pays or collects from the member, it is part of that price and should be taken into account in determining the exact amount of the member's supply in order to take into account for tax purposes the exact amount of that supply.

[44] In the USA, it is even allowed to deduct from the corporate tax base the amount paid by the cooperative as a return to its members, even if it was generated in transactions with third parties, provided that the requirements are met that it is a legally imposed payment and is proportional to the activity carried out by the member (*Internal Revenue Code, Section* 521). In

A different issue concerns the amounts which the co-operative gives to the member as a price for its products or services, i.e., in exchange for the delivery of products or the provision of services by the members. These amounts are deductible from the cooperative's corporate tax base.

However, under Spanish law, they are only deductible up to their market value, so that, whatever the real cost of the product or service to the cooperative is, only its market value can be deducted[45]. Consequently, even if the actual price at which the transaction was carried out between the cooperative and the member is higher than the market price, the cooperative will only be able to deduct the latter; the rest will not be deductible. We understand that the underlying logic is to avoid a fraudulent manipulation of prices, but it distances the cooperative from reality, condemning its volume of deductible expenses to wander at the mercy of the prices agreed in a market to which the cooperative-member relationship does not belong.

Italian law, on the other hand, provides for the deduction of the amounts paid for the benefits of working partners up to the amount of the current salary plus 20%. Whatever exceeds this limit cannot be deductible and is classified as profit sharing. Therefore, although it refers to the amount of the current salary, by allowing for the extension of the amount of the current salary, the margin granted for calculating the deductible amount is greater[46].

Finally, in Germany, they can only be considered deductible under certain conditions that have been determined by case law in order to combat possible hidden profit sharing The general rules that apply for the recognition of cooperative returns as operating expenses are equal treatment of all members, so that all members must be reimbursed in proportion to the activity they have carried out with their cooperative; and that surpluses arise exclusively from transactions between the cooperative

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France, Article 214.1.1.1-2 and 5 General Tax Code, the return is deductible in consumer cooperatives, provided that it is imposed by law, and it is not sufficient for its payment to be based on an option in the statutes or a decision of the general assembly. And production cooperatives can deduct the profit participations of the workers made in accordance with the conditions laid down in Article 33-3° of the 1978 Law on the Statute of Production Cooperatives. This provision has been extended by administrative doctrine to other cooperative, mutual and related companies or groups which, by application of the legal provisions governing them, distribute a fraction of their profits among their members in proportion to the transactions carried out with each of them or to the work provided. However, Article 214.1-6° specifies that the fraction of bonuses exceeding 50% of the surplus is taxable if the sums in question are made available to the co-operative during the following two financial years. Finally, Article 214.1-7 stipulates that cooperatives may not benefit from the deduction of dividends when more than 50% of their capital is held by non-cooperative members. In other countries the deductibility of the return has been based on its proportionality to the activity and not to the capital. Also based on this argument, the deduction of amounts distributed to members in proportion to their transactions with the cooperative introduced by the Netherlands (Law of 1969, replacing the Corporate Tax Decree of 1942) is justified. UK co-operatives under the Industrial and Provident Societies Act also deduct the return from their tax base. In Argentina, some cooperatives have excluded the amount of returns from their tax base because the way cooperatives distribute their surpluses is a legal obligation (Article 42 Law 20.337).

[45] Article 18. 1 Law 20/1990: "The following shall be considered deductible expenses in the determination of cooperative income: 1. The amount of deliveries of goods, services or supplies made by members, the work provided by members and the income from assets the enjoyment of which has been assigned by members to the cooperative, estimated at their market value in accordance with the provisions of Article 15, even if they appear in the accounts at a lower value".

[46] Article 11.3 DPR 29 September 1973, n. 601.

and the members. This implies that transactions with non-members must be accounted for separately and are subject to corporate income tax (Münker, 2014: 76).

4.3. Deductibility of returns for members' income tax purposes[47]

The starting premise here is that in order to receive returns it is necessary to be a full member, i.e., to make a double contribution, in other words, to pay out capital and carry out an activity within the cooperative. For tax purposes, therefore, we assume that the return is a joint return on capital and activity, in other words, it is a joint income from capital and work (activity), since without the combination of both elements it does not exist.

The excess price which the member previously paid to the cooperative and which the cooperative returns to him after making the cost adjustments for the year does not constitute income obtained by the member, and therefore does not form part of the taxable event. In other words, it is a case of not being subject to the tax on the member's income. The part of the income that does not constitute an excess price that is returned to the member, on the other hand, would constitute income and would therefore be taxable and therefore both items are taxable.

Once this assumption has been accepted, it will be necessary to see what type of personal income taxable event each of them fits into. In the case of incomes turning back to members, the doctrine is divided. Some classify returns as income from movable capital (Ferreiro-Lapatza, 1995: 335)[48]. This is established in Spanish law, due to the traditional identification between return and dividend and the conceptualisation of the return exclusively as a benefit resulting from the status of member, and not as a return of the excess contribution made by the member. There are also those who classify them as income from personal work (Rosembuj, 1991: 96-97)[49]. This thesis focuses on the purely labour aspect of the cooperative member and seems to leave aside the social component of the cooperative. And finally, there are those in favour of considering them as mixed income from work and capital (Alonso-Rodrigo, 2001: 283)[50]. According to this thesis, cooperative returns are distributed by virtue of the status of member and not of worker, but the total remuneration of the

[47] We have focused here on the individual member, although we are aware of the possibility that many legal systems allow for legal persons (including limited companies) to be members of cooperatives.

[48] When the income clearly derives from the combination of the two factors, labour and capital, it seems that it should be classified as income from business or professional activities. Only two characteristics allow, according to the law, their classification as professional or business income: the own-account management of the human resources used in the work and that such management is done with the purpose of intervening in the production or distribution of goods or services.

[49] "The return is clearly distinguishable from social benefits, since, firstly, it does not constitute remuneration of capital [...] returns are different from dividends, because they are distributed on the basis of the labour advances allocated, always representing, in this case, a remuneration of labour, not of capital".

[50] By fully identifying the return with the dividend, two essential realities are being ignored: firstly, the member receives these amounts not only as a member, as is the case with dividends in any public limited company, but is also required to carry out an activity in order to be able to access them; and secondly, not all of the return constitutes a profit, but part of it comes from the price adjustments which the cooperative makes at the end of the financial year with its members.

worker-member is, from a tax perspective, mixed (labour and movable capital). Moreover, the returns cannot in any way be equated or assimilated to dividends, because unlike dividends, the mere fact of being a member of the cooperative does not entail the receipt of dividends; it is not an income derived from membership alone but requires the concurrence of a second circumstance: the exercise by the member of an activity in the cooperative.

5. THE TAX TREATMENT OF AMOUNTS EARMARKED FOR MANDATORY RESERVES

5.1. The mandatory reserve

The unavailability of the mandatory reserve for distribution has been one of the specificities of traditional cooperative operation, which implied its indefinite permanence in the cooperative's assets. However, in the light of the most recent cooperative legislation, this principle is evolving[51].

In Spain, from a tax point of view, the mandatory reserve has tax implications in two areas: on the one hand, its operation will determine the classification of the cooperative as protected or non-protected; on the other hand, an adjustment rule provides for the deduction from the cooperative's corporate tax base of part of the amounts set aside for this reserve.

In this respect, three different positions can be found in comparative law.

The first position is based on the non-distributable nature of the mandatory reserve, even in the event of dissolution, and on the fact that its provision is mandatory. Therefore, it is considered that its correct treatment is that which allows the deduction of its full amount from the tax base[52].

Another sector maintains that what is important about the mandatory reserve is not its unavailability for distribution, but the fact that it is earmarked for the same purposes as the mandatory reserves established for conventional capital companies. Consequently, as the latter are not deductible

[51] In Spain, Law 4/1993 on cooperatives in the Basque Country (repealed by Law 11/2019 of 20 December) was the first to introduce the possibility of distributing the amounts constituting this fund among the members, overcoming the dogma of *irrepartibility* (at the time of dissolution of mixed cooperatives if so authorised by the Higher Council of Cooperatives of the Basque Country). Since then, many others have introduced this modification.

[52] This rule of total deductibility in view of the non-distributable nature of the reserve is applied to the amounts allocated to the MRF in Italy, where the sums allocated to indivisible reserves are not included in the taxable income of cooperatives and its unions, provided that the possibility of distributing these reserves among the members, in any form, either during the life of the entity or at the time of its dissolution, is excluded. Furthermore, at the time of the cooperative's disappearance, they must be used for public utility purposes (Law 1977, n 904, Article 1, amended by Law 2004, n. 311). In the USA, the Cooperative Development Agency already suggested in the 1980s that indivisible reserves could be exempted from corporate income tax in exchange for the members' contribution of new capital (Alonso Rodrigo, 2001: 220).

from the tax base for these companies, the amounts set aside for the mandatory reserve should not be deductible for cooperatives either[53].

There is also an intermediate route which provides for a percentage deduction of the results to be used for the mandatory reserve [54]. We note here the problems that are detected in the application of deductions is that there are regulations that allow the distribution of part of the funds, sometimes as an option exercisable at the time of the dissolution of the cooperative: if the basis for the deductibility of the fund is its non-distributable nature, what will happen if the tendency to allow its distribution is consolidated? What will then be the regime applicable to the amounts earmarked for the mandatory reserve of a cooperative whose distributable or non-distributable nature will not be known until its dissolution, it being precisely this nature which determines the existence or otherwise of the right to deduction?

5.2. The apprenticeship and training reserves

This is a typical and specific fund for cooperative societies and its existence is part of the very *raison d'être* of these entities. In our opinion, it is the most obvious example of the social vocation that distinguishes the cooperative society, since, through this fund, the cooperative allocates part of its surpluses to educational and social purposes.

One of the arguments traditionally used to justify the deductibility of the amounts allocated to these reserves is that it is non-distributable among the members, even in the event of dissolution. Without prejudice to the fact that this principle is a distinguishing feature of the cooperative compared to other companies, we consider that the basis for this special treatment lies, above all, in the purpose for which it is used[55].

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[53] Under the Spanish tax regime prior to Law 20/1990, allocations to this reserve were fully subject to corporate tax, however, these amounts were not imputed to the members' base when the cooperatives were taxed on a fiscally transparent basis (see footnote 37).

[54] This is the case in Spain. Article 16.5 Law 20/1990 provides for a deduction of 50% of the results which are compulsorily allocated to the fund. In order to justify this intermediate option, the report of the draft law on the tax regime for cooperatives stated: "although such funds cannot be distributed among the members, they provide them with an indirect advantage in that they allow the company to finance itself. This indirect advantage has been assessed at 50%, hence the reason for the deduction". By referring exclusively to compulsory allocations, it seems logical to think that, for allocations made by the cooperative voluntarily above the legally established limit, there will be no right to deduct anything from the tax base. In the US, measures in order to promote the cooperative funds can be considered to be a must. A good incentive would be the exclusion (or a reduced inclusion) from taxable income of margins devoted to reserves. In the end, if these reserves were not used for the cooperative and, instead, they were distributed to members they would then pay income tax. If the cooperative ended up not distributing the reserve, it would be for the benefit of the cooperative in the long run. (Arana-Landín, 2019: 35).

[55] In Spain, cooperatives must comply with the rules for the operation of the EPF laid down in the applicable substantive law in order to qualify as a fiscally protected cooperative. And three causes for loss of this status relate to the EPF: one, failure to make contributions to the fund under the conditions required by the cooperative provisions; two, distributing it among the members during the life of the company and the surplus assets on liquidation; and three, using the amounts allocated for purposes other than those provided for by the Law. Once these conditions have been met, the amounts which the

6. CONCLUSION

Special taxation of cooperatives is fully justified from at least two points of view.

First, because they perform a genuine social function. This is evidenced by their role in creating and maintaining jobs, their emphasis on education, their contribution to the development of disadvantaged areas and their emphasis on the individual rather than capital. This social function translates into a real contribution 'in kind' to the social group and should be responded to with the recognition of a special tax treatment that includes tax benefits.

Secondly, because the causes of their origin, their traditional principles and their configuration in the rules governing them, lead us to understand the cooperative as a company that is clearly differentiated from the conventional capital company in several respects.

In view of the above, the tax legislation governing cooperatives should respond to them by creating genuine taxation rules that are adapted to them. This is not simply trying to fit them into tax concepts that have been created with the capitalist company model in mind, and which do not fit in with a society inspired by much more personalist criteria. There have been given examples of countries which, on the basis of the cooperative speciality, have designed specific tax measures to adapt corporate income taxation to the idiosyncrasies of this model, seeking to achieve, with greater or lesser success, the ideal of tax justice, which is a fair distribution of the obligation to contribute to the support of public expenditure.

According to the necessary neutral competition, a reasonable alternative is to endow social economy entities once and for all with a regime that distinguishes them in what is different about them and that is sufficiently clear and precise, and even compromised, to be accepted peacefully and not continually called into question (Hinojosa-Torralvo 2010: 88). This kind of special regime for cooperative societies should:

1. Be based on adjustment rules that recognise the necessary adaptation of corporate taxation to cooperatives and must be applied to all cooperatives (Alguacil-Marí, 2007: 43).

2. Have tax benefits applied according to the characteristics they share with other social economy entities or, even, capital companies, which may be characteristics relating to the size of the cooperative or the role it plays in achieving objectives such as job creation, consumer protection, promotion of business models of worker participation in the means of production, necessary

cooperatives set aside to the EPF for compulsory purposes will be deductible, provided that they do not exceed 30% of the net surpluses of each financial year (Articles 13, 18 and 19 Law 20/1990).

capitalisation, etc. (Monzón, 2009: 96-100). Failure to comply with the requirements should not result in expulsion from the tax system, but only in the loss of the right to apply the benefit.

3. Not tax cooperatives on the profit it obtains from transactions with members in the pursuit of its corporate purposes and those directly related to them (Montero-Simó, 2016: 44)[56] —these transactions should also be valued at the price actually paid (Rodrigo Ruiz, 2010: 22)— and tax profits from transactions with third parties in all cases (Montero-Simó, 2016: 43[57]).

In the event that the former are taxed, it would be appropriate to establish a lower rate of taxation than the normal rate of corporate tax based on the internal structure of the company in question, taking into account the subjective circumstances of the shareholders and considering the company's corporate purpose. This would reduce the tax burden in a simple and perceptible way for cooperatives (Monzón, 2009: 89).

4. Consider the cooperative return as a deductible expense insofar as it does not come from operations with third parties (Rodrigo-Ruiz, 2010: 21)[58].

5. Consider deductible in full both the amounts earmarked for the apprenticeship and training reserves and the mandatory reserve, provided that the latter is non-distributable or just to the extent that it is non-distributable (Hinojosa-Torralvo, 2010: 87).

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[56] In Spain, the 50% rebate on the full amount of Corporate Tax, applicable only to specially protected cooperatives, is based on the logic of not taxing the results of transactions with members. Law 20/1990 itself stipulates transactions with third parties may under no circumstances exceed 50% of the total volume of transactions, which in a way indicates that 50% of the total tax liability, which will at least come from transactions with members, will not be taxed.

[57] Also warns that non-taxation could occur by passing on the profit from such transactions by selling to partners at below cost or buying from them at a loss.

[58] The distributed return is conceived as a refund of part of the price of the goods or services acquired by members or a higher remuneration of the contributions made by members, and should therefore be taxed in the member's personal income tax as income of the same nature as that received for the transactions that the member carries out with the company.

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