اندماج المجتمعات والمنظمات الإريترية الكندية
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CECCO
Coalition des communautés et organisations érythréennes du Canada
Coalition of Eritrean Canadian Communities and Organizations

2% Recovery and Rehabilitation Tax Under Canadian Law

Produced by
The Coalition of Eritrean Canadian Communities and Organizations/ Coalition des Communautés et organisations Érythréennes du Canada

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About Us

The CECCO is a national body that represents Eritrean-Canadian communities, Eritrean-Canadians and Eritrean-Canadian organizations in Canada. The primary purpose of this organization is to foster good relations between Eritrea and Canada and between the people of both countries, promote cultural exchange and trade relations and represent our communities with a collective voice.

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I. Introduction

1. Members of the CECCO who choose to receive certain services from the State of Eritrea are required under the laws of that country, to pay an annual 2% Recovery and Rehabilitation Tax on the income they earn while residing Canada[1]. This memo seeks to shed light on the legal framework of the 2% Recovery and Rehabilitation Tax that should be considered by Canadian lawmakers in addressing this issue.

2. More recently, the 2% tax has drawn criticism from the mainstream Canadian media, some going as far as calling it an "extortion tax" because citizens no longer residing in Eritrea are allegedly pressured by non arm's-length agents of the government to remit their taxes[2]. Of the alleged incidences of threat and intimidation reported to the police none have resulted in any charges by the crown.

3. Part of this controversy stems from a misunderstanding of the laws relevant to the application of the 2% Recovery and Rehabilitation Tax. The levying of taxes by the State of Eritrea and its payment by Canadians of Eritrean descent is, according to our research, legally permissible[3]. Any state may, under international law regulate the taxation of individuals, even those who are not present in its territory if there is a connection between the state and the taxpayer, such as nationality or domicile. This conclusion is supported by a report made by the Swedish Parliamentary Committee on Justice as well as our own independent legal research[4]. The requirement to pay taxes is an obligation, and by that nature all taxation is coercive. The media's use of the term extortion is erroneous and misleading. The members of our communities who do not wish to maintain their citizenship rights are under no obligation to pay taxes to the State of Eritrea.

4. Limits do exist to the rights of states to tax individuals, including administrative collection on Canadian soil without the consent of the host state. Furthermore, in Canada, the *Criminal Code* creates offences for uttering threats, fraud and other related conduct[5]. The limits however cannot justify an outright ban on the right of Canadians of Eritrean descent to pay the 2% Recovery and Rehabilitation Tax. A decision to that effect would violate well-established principles of international law and could arguably be a violation of the right to hold dual citizenship in Canada and possibly open the door to Canadian Charter challenge.

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[1] The term "ግብሪ" in Tigrigna has a double meaning "Act" and "Tax". For the sake of simplicity however, we have translated it into tax because of the confusion that result from using 'act to rehabilitate'.
into tax because of the confusion that result from using 'act to rehabilitate'.

[2] Bell, Stewart, "we don't force them: Eritrean diplomat insists consulate is not extorting money from citizens in Canada." The National Post 27 May 2013

[3] This tax is often confused with a separate defence fund contribution which is not treated in this report

[4] See Justitieutskottets betänkande 2011/12 : JuU15

[5] Criminal Code, RSC 1985, c C-46, 264.1 (1)

II. What is the 2% Recovery and Rehabilitation Tax and why do Eritrean-Canadians pay it?

5. The 2% Recovery and Rehabilitation Tax was enacted in 1994 by the National Assembly of Eritrea, shortly after it gained its independence from neighbouring Ethiopia[6]. According to the government of Eritrea, the tax pays for infrastructure and represents a commitment by the diaspora to help reconstruct their homeland following the devastating toll of its 30 years struggle for independence[7]. For CECCO members, the 2% Recovery and Rehabilitation Tax serves as a prerequisite for receiving certain public services from the Eritrean government. Amongst these services include: the purchase of land, inheritance claims, requesting government documents (marriage certificates, state university transcripts), and acquiring and renewing business licenses. For members of the Diaspora who still maintain a strong attachment to their homelands, the 2% Recovery and Rehabilitation Tax is also a way to help in the reconstruction effort of Eritrea. There is a strong interest amongst our members to help rural areas get access to clean water, help children and mothers get adequate health services, and support school age children get access to affordable education.

6. Under section 2 of the Income Tax Act of Canada, the subject of any taxation is defined by where they live and not by their citizenship status[8].

> 2. (1) An income tax shall be paid, as required by this Act, on the taxable income for each taxation year of every person resident in Canada at any time in the year.

This makes the term ‘‘Canadian taxpayer’’ misleading because the subject of any income tax applies as much to foreigners as it does to Canadian citizens. The taxpayer is therefore subject to the territorial sovereignty of the state by virtue of the fact that the source of their income is generated while they reside (deemed or actual) in Canada at any time of the year[9]. Seen in a different way, Canadian citizens who no longer reside in Canada for a definite period of time or have no real link to the country are not liable to pay taxes on income they have earned abroad[10].

7. There are currently only two countries in the world that do not observe this choice of tax policy. The State of Eritrea and the United States of America define their tax subjects by their citizenship, and not by their residency[11]. An American citizen is therefore imposed regardless of where they reside, and on the sum of their worldwide income; regardless of whether or not they exercise the privileges of citizenship[12]. While the American tax is a progressive one (some paying as high as 39.6%), the Eritrean tax is flat, most probably to account for the burden it would represent to members of the diaspora that do not earn as much as the average Canadians.

8. The rationale behind the Eritrean and American tax models are that its citizens should pay taxes regardless of where they reside because of benefits they derive from their civic affiliation to their homeland.

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[6] Alternatively referred as the ‘development and rehabilitation’ tax by the Eritrean government

[7] Eritrea gained de facto sovereignty in 1991 and international recognition in 1993. See U.N. Resolution A/RES/47/230, 19th Plenary Session, January 1993

[8] Income Tax Act, RSC 1985, c 1 (5th Supp), s. 2

[9] Income Tax Act, RSC 1985, c 1 (5th Supp), s. 250

[10] Vern KRISHNA, The Fundamentals of Canadian Income Tax, 9th edition, Toronto, Carswell Legal Publisher, 2006

[11] CFR §1.1-1 –Income Tax on Individuals

[12] Lovell v. United States, 755 F.2d 517, 519 (7th Cir. 1984)

III. Can CECCO members legally pay the 2% Recovery and Rehabilitation Tax?

9. In the absence of any formal prohibitions by the federal government it is our belief that Canadians of Eritrean descent can continue to remit their taxes to the Eritrean government. This is consistent with the discussion we have had with the Canadian government and is supported by our own independent legal research. Before explaining in detail how we came to this conclusion we should nuance our position with the following caveat. The right to pay the 2% tax does not include the defence fund contribution.

10. The precise rules of international taxation law that deal with the 2% Recovery and Rehabilitation Tax are complicated and it is in this context sufficient to note that the extra-territorial taxation prima facie to be regarded as permissible under international law as we will demonstrate throughout this paper using general principles of international law. We should however draw your attention to a distinction raised by the Swedish State Department in 2011 between the legislative and executive jurisdiction of international taxation, i.e. to introduce rules on the taxation of citizens abroad versus taking concrete steps to recover tax from those citizens of another State[13]. Despite the fact that Eritrea may pass laws governing the taxation of its citizens in diaspora, it cannot carry out the administrative functions related to the collection within Canada without maintaining Canada's consent. This follows the generally accepted principles of international law such as state sovereignty, non-intervention of law and respect for territorial integrity.

A. The Legal framework

11. The legal framework for the taxing power of Eritrea is firmly anchored in the principles of public international law. Rooted in the consent of states, either by tacit or explicitly, it is often seen as law without an arbitrator; and therefore has no obligatory nature[14]. Public international law is a veritable source of law in Canada. The fact that it comprises no sanctions does not mean it has no juridical basis. The sources of international law are different from internal law because the former lacks an international legislator equivalent to our parliament. Two principle sources of international law exist, the formal sources and informal sources. These sources are both laid out under section 38 of the Statute of the International Court of Justice, which is annexed to the Charter of the United Nations[15]:

> Article 38
>
> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations;
>
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

[13] See Justitieutskottets betänkande 2011/12 : JuU15

[14] Jean-Maurice Arbour et Geneviève Parent, Droit international public, 5e édition, Cowansville, Éditions Yvon Blais, 2006

[15] Statute of the International Court of Justice, 18 April 1946, found at: http://www.unhcr.org/refworld/docid/3deb4b9c0.html

12. Sub Paragraph (a) would not apply to the 2% Recovery and Rehabilitation Tax because no treaty exists between Canada and Eritrea. Instead we turn to sub paragraph 38(1) c. This section refers to the principles of internal law that are common to a majority of legal jurisdictions.

It is the link between internal law and international law, which aims to extract an ensemble of rules that are present in the majority of different countries. A judge must therefore proceed by different stages to determine if a specific principle constitutes a general principle of law. There must be a common denominator between all the different internal rules. One example of a general principle of law is the principle of sovereignty that we must now turn our attention to.

B. *Sovereignty theory*

13. The Sovereignty theory is a general principle of law and a theory that is accepted in Canada and applied by the government. The right to tax, according to the theory of sovereignty, is an essential attribute of statehood and is limited only by laws and can be exercised in varying ways according to the policies of the states that possess the right.

14. The powers of the state as understood by the doctrine of Sovereignty can be classified as being exercised over individuals or over territory. The theory provides the right to extend laws to regulate conduct of legal consequences wherever the individuals may be; contrary to territorial sovereignty that grants the right to tax all subjects found within a state's jurisdiction. Eritrea does not distinguish between citizenship and residency the same way Canada does. Anyone possessing Eritrean citizenship by birth (jus soli) or by virtue of naturalization acquires the de facto precondition for juridical taxation. For this reason, its policies are more closely aligned with the classification of sovereignty that is exercised over individuals rather than simply its territory. Canada, on the other hand, taxes based on residency. While the sovereignty to tax is exercised over the individual subject, it does so with an intention of limiting it to subjects who reside within their territorial jurisdiction or those subjects who own sources of income that can be found in Canada. In that sense, the tax policies in Canada are a hybrid of the territorial and personal classification of the sovereignty doctrine.

15. Most nation states apply one form of the doctrine of sovereignty to fiscal administration. The Eritrean model however attaches a greater importance to the nationality of the subject and holds the individual liable for taxes on their income from wherever it derives.

16. An important legal case outlining the justification for the Eritrean and American tax policy is Cook v. Tait[16]. In it, an American citizen with income and assets was living in Mexico and a court held that the nationality link provided the necessary grounds for a fiscal attachment and ruled as follows:

"The consequence of the relations is that the native citizen who is taxed may have domicile, and property from which his income is derived may have situs, in a foreign country and the tax be legal— the government power to impose tax."

17. The Canadian tax system does not adhere to such a strict interpretation. It holds the tax subject to be responsible to the state by virtue of the fact that the earner of income resides within its territory. One can argue this to be more efficient because the State actually has the resources at its disposal to enforce tax laws on those who reside in the country as well as those who own property in Canada. Attempting to mobilize the administrative machinery of the Canadian government to chase after undeclared income of Canadian citizens abroad would be challenging and expensive.

[16] Cook v. Tait,. 265 U.S. 47 (1924).

18. In sum, the taxing power of a state can come either by virtue of nationality or residence within its territory. Both are upheld by international law and both are considered to be legitimate by jurists.

IV. Is Eritrea judicially acting outside of its own territory by taxing foreign nationals?

19. The act of taxing Canadians of Eritrean descent in Canada is prima facie extraterritorial in nature. Competence to act physically outside one's territory is controversial and generally not permitted under international law. The act of sending a person to another country to accomplish a judicial act is rarely an accepted practice. For example, asking peace officers from one country to arrest a person in another state. Exceptions however do exist. For example, a state can send naval ships to stop pirate boats in international waters according to principles of extraterritorial competence. This is because the territory does not fall into the jurisdiction of any particular state. Another exception occurs when one state gives legal effect on their territory to facts or situations that occurred abroad. The theory of normative extraterritorial competence, as it is called, applies mainly in the area of penal law. For example, a Canadian court can rule against an individual subject who is found to have committed reproachable crimes in another country[17]. International law does not forbid such acts. Certain crimes in the Criminal Code, for example, target specific acts committed extraterritorially (crimes of war, against humanity, sexual crimes, and pedophilia). The general principle of universality also adds that if the repression of a crime is in the interest of each state and the interest of the entire international community they are applicable to all states[18]. This allows national courts to judge individuals on their own territory for crimes committed abroad. It is on this basis that states can pursue their own diplomats who commit crimes abroad. In 2000, Canada adopted a law on crimes against humanity that added Canada as a jurisdiction in the case of these crimes[19]. The law permits the pursuit of certain crimes, regardless of the nationality of those victims or the accused. The sole condition is that the author of the crime be physically present in Canada. For example the Desire Munanyesa case before the superior court of Montreal[20].

V. Limits to the 2% Recovery and Rehabilitation Tax

20. Public international law on one hand grants the right to tax individuals based on the doctrine of sovereignty but international law equally restricts the extraterritorial reach of states in respect of the sovereignty of other states. How do we reconcile these competing principles? International law grants but it also restricts the application of fiscal power by sovereign states.

21. This confusion calls for a distinction between legislative rights the Eritrean government has with respect to its citizens and their executive rights to enforce these rules. We believe that Eritreans around the world have the right to pay the voluntary taxes but the State of Eritrea is only limited in the right to exercise its executive function on these dual citizens while they reside in Canada. It is precisely in recognition of territorial sovereignty that most countries pass bilateral tax treaties.

22. The Eritrean government is constrained in the exercise of enforcing its taxing authority within its own territory. This does not prevent it from legislating over its citizens living abroad, but it cannot enforce it without first affecting the sovereign rights of Canada. In the absence of any agreement between Canada and Eritrea, the latter may not exercise its jurisdiction on Canadian territory without maintaining consent. This does not mean its laws are not without value, but that it must modify how it enforces its sovereignty. We believe the Media hastily reported that the Consulate was in violation of Canadian law when it requested that Canadians of Eritrean descent wire money to pay their taxes from Canadian banks through Germany.

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[17] Criminal Code, RSC 1985, c C-46, 607. (1) (6)

[18] Lyal S. SUNGA, Individual Responsibility in International Law for Serious Human Rights, Martinus Nijhoff Publishers, 1992, p. 252

[19] Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24

[20] Munyaneza c. R., 2012 QCCA 1247

VI. Controversy surrounding the 2% Recovery and Rehabilitation Tax

23. The 2% Recovery and Rehabilitation Tax has drawn criticism recently from the conservative government of Canada and the mainstream Canadian media. They cite the UN Somalia Eritrea Monitoring Group (SEMG) report that alleges the government of Eritrea in the use of extraterritorial agents to pressure Canadians of Eritrean descent into paying the 2% Recovery and Rehabilitation Tax, and the use of these funds to supply and train armed groups in the Horn of Africa. The U.N Security Council voted in favour of introducing sanctions against Eritrea in 2009 which the parliament of Canada adopted in the form of federal regulation. Regulation SOR/2010-84 prohibits Canadians of making financial contribution to military activity in Eritrea.

More recently, the SEMG alleged that the 2% Recovery and Rehabilitation Tax as a likely source military funding in Eritrea, calling for a prohibition on the use of the tax in all U.N. member states from being used to destabilize the Horn of Africa region or violate other relevant resolutions. It is important to consider that the credibility of the SEMG has publically taken a hit since August 2012 when both the chairperson of the Group and its finance expert were rumored to have been forced out due to the former's alleged leaking of confidential reports to the media and micromanagement of Eritrea's Air Force outside of the Group's mandate[21]. In October 2014, the replacement for the finance expert himself was found to be inappropriately using UN time and resources to advocate for regime change in Eritrea – he was subsequently forced to resign[22]. Even according to the SEMG's most recent report in 2014, the Foreign Ministry of the Netherlands told the Monitoring Group that the reports they received of threats and extortion involving the tax collection were anecdotal, anonymous and were not reported to law enforcement[23]. While Canada implemented the 2009 sanctions it has not gone as far as implementing a ban on the right of Eritrean-Canadians from remitting the 2% Recovery and Rehabilitation Tax. The CECCO agrees with this decision and feels that an outright ban would violate well-established principles of international law.

Furthermore, we also believe the UN allegations regarding Eritrea's use of the taxes to fund armed groups in the Horn of Africa have not been sufficiently proven. We are concerned over the expulsion of Eritrea's only diplomat to Canada on the ground that tax collection was incompatible with the normal performance of consular functions under the Vienna Convention on Consular Relations is an unnecessary knee jerk reaction to a controversy exacerbated by media reports.

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[21] Inner City Press, 21 August 2012, found at: http://www.innercitypress.com/unbryden1hege082112.html

[22] Inner City Press, 07 October 2012, found at: http://www.innercitypress.com/smeg1scandalicp100714.html

[23] Leaked copy of the SEMG Report from 2014, found at: http://www.tesfanews.net/no-evidence-of-eritrean-support-to-al-shabaab-says-un-monitoring-reports/

VII. Conclusion

26. The Eritrean 2 % Recovery and Rehabilitation Tax is legal under international law and represents a commitment of Canadians of Eritrean descent to maintain their civic affiliation to Eritrea and help rebuild the country after the devastation of a 30 year struggle for independence. There are two main limits: first the principle of sovereignty restricts the Eritrean government from actively collecting the tax on Canadian territory without consent. Secondly, the criminal code prohibits the use of threats to enable compliance. The best form of relief for tax subjects is a bilateral tax treaty to set out parameters for the collection of tax and information related to it.

A. Charter Implications

27. A final point to consider is the possible Charter implication of a ban of the 2% Recovery and Rehabilitation Tax by the federal government. Canadians can, and have long benefited, from the right to hold dual citizenship under the law. In allowing new Canadians to maintain their civic affiliation to their countries of origins they are also assuring the protection of rights and freedoms without discriminating on grounds prohibited by the Charter. The Canadian government would be ill-advised to target the legitimate right that Eritrean Canadians have to pay in order to exercise their dual citizenship effectively. A Charter challenge could be mounted on behalf of Eritrean Canadians who identify a ban on the tax as an effective violation of their right to hold dual citizenship. This ban would come in the form of implementing UN Security Council Resolution 2023. International treaties and resolutions that are introduced into Canadian laws through their dualist system form an integral part of domestic laws and thus the Charter would apply to them. The sanctions would discriminate on the basis of national and ethnic origin and would be contrary to section 7 and 15 (1) of the Charter. Eritrean-Canadians would face discrimination on the grounds that their liberty would be threatened by upholding a regulation that ran contrary to the principles of the Charter.