



INFORMATIVE NOTE No. 38/2017

THE CONSTITUTIONAL COURT UNANIMOUSLY DECLARES THE UNCONSTITUTIONALITY OF THE SO-CALLED “FISCAL AMNESTY” PASSED BY THE GOVERNMENT IN 2012

The Plenary Meeting of the Constitutional Court has unanimously upheld the unconstitutionality appeal lodged by the Socialist Parliamentary Group in Congress against the first additional provision of Royal Decree-Law 12/2012, of 30 March, introducing various tax and administrative measures to reduce the public deficit. This rule had allowed a regularisation of the tax position of natural and legal persons who had not declared their full income to the Tax Authorities. The challenged provision has been declared unconstitutional and null and void due to breaching Art. 86.1 of the Constitution, which forbids the use of decree-laws if the measures passed “*have a relevant or material*” impact on the duties enshrined in Title I of the Constitution, such as “*everyone’s constitutional duty to contribute to the sustenance of public expenditure*”. By virtue of the principle of legal certainty (Art. 9.3 of the Spanish Constitution (*Constitución Española*–“CE”), the Court’s decision will not affect any final tax regularisations completed pursuant to the repealed rule. Andrés Ollero acted as the Reporting Judge in the resolution.

The Royal Decree-Law challenged contemplated the possibility of taxpayers of personal income tax (*Impuesto sobre la Renta de las Personas Físicas* – “IRPF”) and corporations tax (*Impuesto de Sociedades* – “IS”) who had not declared their full income to submit a statement in order to regularise their tax situation. Any income so declared would be taxed at a 10% rate, without incurring any surcharge or criminal/administrative sanctions.

In order to determine whether the Government went beyond the limits established by the Constitution in its use of a decree-law (Art. 86.1 CE), the Court has appraised whether the measure foreseen in the challenged additional provision had a material impact on the general duty of all citizens to help sustain the public expenditure, based on their wealth and under a fair taxation system. This analysis involved examining the nature of the taxes affected, the tax components altered and, finally, the scope of the regulations passed.

The Plenary Meeting reaches the conclusion that the challenged measure has had three “*important effects*”: it allowed previously concealed income to be regularised, “*at a lower rate*” (10%); it released the taxpayers applying for this regularisation from “*paying default interest, surcharge on income not declared in a timely manner and any administrative or criminal sanctions, due to breaching formal and material duties derived from an applicable tax obligation*”; and, finally, it converted the amounts taxed in the regulations “*into declared income to all intents and purposes*”.

The judgment explains that the regularisation was addressed to “*all taxpayers affected by direct taxes*”, “*constituting the cornerstones of the Spanish tax system*”. Furthermore, it affected “*determination of the tax debt payable by the affected taxpayers, in all respects (taxable amount, default interest, surcharge and sanctions)*”, enabling “*regularisation at a lower rate and excluding all accessory liability*”. As a result, “*the effect caused on those applying for this regularisation is (...) a partial cancellation of the main tax obligation and total exemption from any potential accessory consequences associated to the infringement existing until the regularisation date*”.

All of this led the Court to affirm that the provision contained in Royal Decree-Law 12/2012 “*has directly and materially affected how the tax charge is determined, levied in all types of persons and entities (both natural and legal persons, resident or non-resident), by replacing the amounts accruable for generated income under individual tax regulations, albeit concealed from the Tax Authorities, with a single 10% charge, free of interest, surcharge and administrative/criminal sanctions*”. Consequently, the rule “*has affected the very essence of the right to help sustain public expenditure*”, proclaimed by Art. 31.1 CE, by “*altering how the tax load should be allocated, borne by all taxpayers in general*”. And it has done so in terms “*forbidden*” by Art. 86.1 CE.

In response to some allegations made by the State Attorney, the Court has also made the following considerations:

It claims that the fact that the disputed measure could be legally justified (such as the “*need to adjust the public deficit in order to fulfil the principle of budgetary stability enshrined in Art. 135 CE*”), “*could be a necessary but albeit insufficient requirement, in constitutional terms, when introduced by using a regulatory instrument that does not affect the fulfilment of one of the duties foreseen in Title I of the Constitution*”. The same applies with the OECD (The Organisation for Economic Co-operation and Development) recommendations on promoting special procedures for those in breach of their tax obligations, as “*this would not legalise either the way in which the challenged measure has been adopted*”. “*Irrespective of the purposes sought by the legislator*”, “*(...) the principles established in Art. 31.1 CE should be upheld in order to achieve a fair taxation system*”.

Finally, the judgment advises that the adoption of measures which, “*instead of helping fight tax fraud, take advantage of it with the excuse of generating income that is deemed essential in a serious economic crisis scenario, leading the State to overlook its obligation to render effective everyone’s duty to help sustain the public expenditure (Art. 31.1 CE)*”. In this way, “*a valid option is upheld for those who, with disregard for the common good, have infringed their duty to pay taxes according to their economic capacity, eventually placing them in a more favourable situation than those who voluntarily complied with their obligation to contribute in a timely manner*”.

To conclude, “*The objective of collecting tax funds that are deemed essential is not, per se, sufficient to legalise a breach of the justice that is sought and to which the taxation system should in any case be addressed, in general, to include its specific measures in particular*”.

Madrid, 8 June 2017