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TEXT OF THE DECISION

On June the 24th 2016, the Administrative Chamber of the High Court of Justice of Castile-La Mancha registered in the Constitutional Court of Spain an Order, issued the 22 April 2016 submitting a question of unconstitutionality. This question referred to Chapters I and II of the Law 9/2011, of 21st May, on the Eolic tax and the fund for renewable energies technological development and energy rational use in Castile-La Mancha.

ORDER

Grounds

1. The Administrative Chamber of the High Court of Justice of Castile-La Mancha submitted a question of unconstitutionality referred to Chapters I and II of the Law 9/2011, of 21st May, on the Eolic tax and the fund for renewable energies technological development and energy rational use in Castile-La Mancha. The first Chapter consists exclusively of Article 1, which defines the contents and objectives of the Law. Chapter II, entitled "Eolic tax", consists of Articles 2 to 14. These provisions regulate the Eolic tax and set its nature and object, as well as the allocation of the revenues and its essential elements: taxable event, taxable period and accrual, taxable persons, joint debtors, taxable base and tax rates. There are also other management rules necessary for its application.

The General Public Prosecutor requested the dismissal of this question of unconstitutionality because it is not abide to the proceeding rules and, besides, is notoriously unfunded.

According to Article 37.1 of the Organic Law of the Constitutional Court, this Court may, after hearing the General Public Prosecutor, issue Orders rejecting *in limine* those questions of unconstitutionality that have not complied the proceeding requirements established by the Organic Law itself or can be considered notoriously unfunded. Both circumstances concur in this case.

2. According to Articles 163 the Spanish Constitution, and 35.1 and 2 of the Organic Law of the Constitutional Court, judges may raise a question of unconstitutionality when they doubt about the conformity to the Constitution of an enactment having the force of law, which is conclusively applicable

to the pending case. Judges must justify To submit correctly an unconstitutionality issue, Article 163 and sections 1 and 2 of Article 35 of the Organic Law of the Constitutional Court specify that rules with power of Law, whose constitutionality is doubted by a judicial body, that are applicable to the case and on whose validity depends the ruling; this body must justify in the Order to what extent the decision on the proceedings depends on the validity lest the question of unconstitutionality is transformed into an abstract instrument of control of the validity of legal regulations, which is not its nature and purpose. This would happen if it is used to obtain unnecessary or irrelevant rulings.

Therefore, it is not enough to consider that the rule applies to the pending case it also has to be relevant or conclusive. The applicability of the legal rule is a necessary but not sufficient requirement to raise the question of unconstitutionality, because the final decision of the proceedings must depend on the validity of the questioned legal rule. Among many others, see Judgments (in Spanish, Sentencias del Tribunal Constitucional [STC or SSTC hereinafter]) 17/1981, 1 June, Ground (in Spanish, Fundamento Jurídico [FJ hereinafter]) 4; 42/2013, 14 February, FJ 2; 156/2014, 25 September, FJ 2 and 79/2015, 30 April, FJ 3 and Order (in Spanish, Auto del Tribunal Constitucional [ATC or AATC hereinafter]) 12/2016, 19 January, FJ 2.

The Constitutional Court, when controls the judicial reasoning that justifies raising a question of unconstitutionality can reject inconsistent or badly argued issues when it comes to the applicability and relevance of the legal rule. This way, it is guaranteed that the question of unconstitutionality adequately fulfils its specific purposes and it does not become an abstract control without effects. On this, see SSTC 6/2010, 14 April, FJ 3; 151/2011, 29 September, FJ 3; 84/2012, 18 April, FJ 2; 146/2012, 5 July, FJ 3, and 40/2014, 11 Mars, FJ 2; AATC 155/2013, 9 July, FJ 2, and 188/2015, 5 November, FJ 2.

In application of the referred constitutional case law about the inobservance of the procedural conditions, this unconstitutionality issue shall be dismissed.

The Administrative Chamber of the High Court of Justice of Castile-La Mancha has simultaneously raised a preliminary ruling to the Court of Justice of the European Union and a question of unconstitutionality to this Court; both concern the same legal provisions. The submission of a preliminary ruling before the Court of Justice of the European Union and question of unconstitutionality before this Court determines that the requirement of the applicability of an enactment having the force of Law is not complied in this case, as explained in ATC 168/2016, 4 October, FJ 4.

Indeed, in that Order we stressed that “without a decision on the preliminary ruling submitted before the Court of Justice of the European Union, the judge cannot raise a question of unconstitutionality before this Court. The potential incompatibility of the domestic Law with the European Union Law would causes the non-applicability of the concerned rule and that implies the lack of the conditions required to admit the question of unconstitutionality.”

In accordance with this case law, we must understand that the procedural conditions established in Article 35 of the Organic Law of the Constitutional Court were not correctly complied.

3. We agree with the General Public Prosecutor that the question of unconstitutionality is notoriously unfunded in the sense given to this expression by the Constitutional Court case-law (ATC 43/2014, 12 February, FJ 3).

The concept "notoriously unfunded" is somehow vague which, regarding proceedings, means that this Court has a margin of appreciation to control the argument consistency in questions of unconstitutionality. Sometimes it is possible to appreciate the lack of consistency with a preliminary consideration of the question. This does not necessarily mean that the concerned question is absolutely void of arguments or arbitrary. We have highlighted the benefits of a prompt rejection of this kind of questions, especially when their admission may cause undesirable consequences, such as the gridlock of those judicial procedures where the contested legal rule is applicable. Such is now the case. See, among others, ATC 417/2005, 22 November, FJ 3; as well as AATC 121/2015, 7 July, FJ 2; 194/2015, 18 November, FJ 3, and 14/2016, 19 January, FJ 2.

The Administrative Chamber of the High Court of Justice of Castile-La Mancha sustains that chapters I and II of the regional Law 9/2011 infringe Articles 31.1 and 133.2 of the Spanish Constitution. In fact, the proceedings show that the grounds of the question of unconstitutionality do not deal properly with the two articles of the regional Law expressly contested.

This question sets out two issues: a) A double imposition contrary to the prohibition established in Article 6.3 of the Organic Law 8/1980, of 22 September, on finance of the Autonomous Communities due to the coincidence of the events subject to taxation under the new Eolic tax and the local tax on Economic Activities. b) Related to the former issue, and bearing in mind that forbidden double imposition does not concur where the revenues of one of the concerned taxes are assigned to specific purposes, i.e., they have an extrabudgetary nature, the judicial body stress the lack of such requisite. The assumption of the contravention of these premises leads the judicial body to conclude that the regional regulation is contrary to Articles 31.1 and 133.2 of the Spanish Constitution.

4. Although the new Eolic tax is legally defined as an extrabudgetary property contribution, we must stress that it constitutes a real tax because its main aim is to contribute to the regional finance as a new source of public revenue. Regardless the *nomen iuris,* each of the property contribution enjoys its own and specific nature according to the matter subject to the tax, setting and legal structure. Under no circumstances, the name assigned by the Legislator to a tax will be decisive to elucidate its real nature. In this sense, see SSTC 296/1994, 10 November, FJ 4; 164/1995, 13 November, FJ 4; 185/1995, 5 December, FJ 6; 134/1996, 22 July, FJ 6; 276/2000, 16 November, FJ 3; 102/2005, 20 April, FJ 4; 121/2005, 10 May, FJ 5, and 73/2011, 19 May, FJ 4.

Thus, according to its tax nature, we must examine the Eolic tax in the light of Article 6.3 of Organic Law 8/1980, on finance of the Autonomous Communities after the reform adopted by the Organic Law 3/2009, of 18 December. A concern about regional tax power limits arises because the Organic Law 8/1980, on

finance of the Autonomous Communities autonomous is part of the criteria must take into account when examining the validity of the contested Law.

Judgment 210/2012, of 14 November, recalls that the regional power to establish new taxes is not absolute. On the contrary, it is subject to the limits set by the State laws referred to in Articles 133.2 and 157.3 of the Spanish Constitution. The State can delimit the regional taxing power, as long as such delimitation does not turn the regional power unfeasible. About the current limit of Article 6.3 of Organic Law 8/1980, on finance of the Autonomous Communities, this Court declared in STC 122/2012, of 5 June, among many others, the compatibility between the tax on large commercial establishments of the Parliament of Catalonia and the tax on real estate. It was stated that Article 6.3 of Organic Law 8/1980, on finance of the Autonomous Communities has a similar limit to the one traditionally foreseen in Article 6.2 of Organic Law 8/1980, on finance of the Autonomous Communities, which, in turn makes possible its application to this case.

This application of the limits is included in the Court's case-law in Judgments such as the one aforementioned: SSTC 122/2012, 210/2012, of 14 November, about bank deposits of Extremadura. 30/2015, of 19 February, 107/2015, 108/2015 and 111/2015, of 28 May, and 202/2015, 24 September, all of them related to different regional taxes on credit institutions deposits and Judgment 74/2016, 14 April, about a tax established by the Parliament of Catalonia on electrical nuclear energy production.

In our case law we have stressed that, in order to establish whether a regional tax is contrary to the prohibition of double imposition, it is necessary to compare not only the matters subject to the concerned tax, but also the rest of the tax elements connected to it. In particular, it is necessary to consider the taxable persons, taxable base and the rest of quantification elements such as tax rate and tax exemption cases.

This Court has recalled, in STC 74/2016, FJ 2, regarding Article 6.2 of the Organic Law 8/1980, on finance of the Autonomous Communities, a fundamental criterion transferable to Article 6.3 of this same Law. "To appreciate double imposition contrary to Article 6.3 of the Organic Law 8/1980 (a same event subject to two different taxes), it is necessary to analyse the basic elements of the taxes confronted, to determine not only the coincidence in taxed wealth or taxable matter, which is the starting point of every tax regulation, but also the way in which such wealth or economic capacity source is on the taxable part of the tribute structure tribute [SSTC 210/2012, FJ 4, and 53/2014, of 10 April, FJ 3 a)]. In this scrutiny, we must always bear in mind that it is possible to tax the same activity considered from different perspectives. As we also reiterated, for example in STC 210/2012 (when comparing the tax on banking deposits established by the Autonomous Community of Extremadura and the State tax on economic activities). This is due to the fact that, since the economic reality in its different expressions is all virtually covered by State taxes, this would lead to…practically deny the possibility to create at least for now, new regional taxes' (STC 37/1987, of 26 Mars, FJ 14).

Due to this assumption, the interpretation of the limits included in Article 6 of the Organic Law 8/1980, must respect the fiscal self-government of the Autonomous Communities and, particularly, take into account the powers on tax matters assumed by them, and in particular, by the Autonomous Community of Catalonia in accordance with Article 203.5 of its Statute of Autonomy. It is also important to recall that the prohibition of double taxation intends specifically to avoid non-coordinated double taxation and to ensure that the taxing power is exercised in a way compatible with the existence of a tax 'system' mentioned in Article 31.1 of the Spanish Constitution. See, among others, Judgments, SSTC 19/1987, of 17 February, FJ 4; 19/2012, of 15 February, FJ 3 b); 210/2012, FJ 4, and 53/2014, FJ 3 a)".

According to the established method for adjudicating this kind of disputes, we must review the basic elements of the challenged Eolic tax and compare them with the tax on economic activities elements to verify whether they are equivalent or not, in terms that infringe Article 6.3 of Organic Law 8/1980.

5. Accordingly, we will start with the description of the challenged regional tax.

The Eolic tax was established "to expand the benefits derived from the use of eolic resources by the implementation of electricity generating plants on the basis of eolic technology throughout the regional territory and as compensation instrument for the situations linked to the development of this economic activity (Article 1)". This approach is ratified in Article 2, according to which the tax "pursues to preserve territorial cohesion environmental protection, in an economic activity linked to the industrial use of the wind".

The Law defines the activity subject to taxation as follows: The generation of adverse impacts on the natural environment and on the territory, as a result of the installation of wind parks and wind turbines to produce electricity and based in the Autonomous Community of Castile-La Mancha territory (Article 4.1). Taxable persons are (Article 6) individuals or corporations that carry out an economic exploitation of a wind park or eolic generating plants even if they do not enjoy an administrative licence. Its tax base (Article 7) is the sum of wind turbines based in a wind park in the territory of Castile-La Mancha. The tax rate (Article 8) is determined by the application of the tax base of the taxation rate defined depending on the number of wind turbines —providing that wind parks of two turbines are exempted— and establishing progressive tranches: 3-7, 8-15 and more than 15 turbines with two sub-tranches depending on whether the number of wind turbines is equal, superior or inferior to the installed power of the park measured in megawatts. The taxable period (Article 5) shall correspond to the calendar year trimesters and the accrual will occur the first day of January, April, July and October respectively. According to Article 3, revenues derived from the tax, net of management costs, will be used to promote rational energy use and renewable energies, as well as the fulfilment of socio-economic and technological aids in Castile- La Mancha. A portion of the collected revenues are used to consolidate the regional energy model, throughout the fund for renewable energies technologic development and energy rational use, in the amount annually fixed by the general budget law of the Community Council of Castile-La Mancha.

When we consider the tax on economic activities we must take into account its special nature, as stated for example in STC 122/2012. In this tax, the economic activity as a whole is concerned. Accordingly, we must insist, as we did in STC 210/2012, on the fact that "the contrast of any regional tax on an economic activity with the general tax on economic activities will result in the infringement of Article 6.3 of Organic Law 8/1980, if the latter is construed in a literal way" (STC 201/2012, FJ 6).

The general tax on economic activities is a direct tax through which it is taxed the mere exercise of activities likely to cause economic revenues. Revenues are measured according to the supposed average benefit (STC 168/2004, of 6 October). Its taxable event is "the mere exercise, in the national territory, of commercial, professional or artistic activities, no matter whether it is in a facility or not, and whether they are specified in the tax rates or not" (Article 78.1 of Legislative Royal Decree 2/2004, of 5 Mars, that passed the Law on Local Finances). This tribute intends to tax the economic capacity expressed by the exercise of an economic activity, so the tax rates will be collected according to that potential wealth which the legislator attributes to the exercise of an economic activity during a calendar year or, in other words, according to the supposed average benefit of the taxable activity (Article 85.1). The taxable persons are persons, natural or legal, that carry out any of the activities included in the taxable event in the national territory (Article 83 of Law on Local Finances). The taxable activities content is defined in the tax rates passed in the Legislative Royal Decree 1175/1990, of 28 September. What is now relevant, section 151.4 on the rates of the tax on economic activities, refers to taxable matter "energy production non specified in previous sections", including tidal and solar energy, etc., and in section 151.5 it is mentioned the activity of transporting and distribution of electrical energy. In both cases the rate is defined according to the generators and contracted power.

6. Once defined both taxes, as highlighted also by the General Prosecutor, the existence of important differences between them is obvious.

The tax on economic activities only taxes the exercise of one economic activity, the capacity to generate Eolic electrical energy, while the regional tax is defined by the obvious and notorious environmental impact, caused by the installation of wind turbines and their infrastructure. According to the regional regulation of Castile-La Mancha, these environmental damages must be internalized by those who exploit the facilities.

The analysis of the various tribute elements confirm this idea. The description of the activities subject to the tax follows this same logic because it refers to environmental effects such as visual pollution. For the tax on economic activities it is different, because it taxes the exercise of an economic activity linked to the electrical energy production and distribution. This is, the taxable activity is not quantified according to the actual benefits, but according to the supposed potential income of each kind of economic activity. This way, the tribute does not tax the economic activity benefit, but the economic activity itself and it has a collection purpose that, like the tax on real state, it may be adjusted to extrabudgetary criteria (Article 88 of Law on Local Finances). Moreover, it is also control instrument to avoid this tax form falling into the matter of income or company's earnings taxes (STC 210/2012, FJ 6).

There is no coincidence in the tax base either. The fact that the regional provision choses the number of wind turbines as determinant factor, is totally consistent with the regional tax's structure, given that its aim is to counter the negative effects on the landscape. So the most important factor is the number of wind turbines that are working, regardless their value or power. For its part, the tax on economic activities focuses only on the activity exercise because in order to determine the tax rate, it only takes into account the wind turbine power kilowatts, this is, facilities' power related criteria.

As for the tax on economic activities, the tax rate is determined according to the installed power which is an element chosen by the legislator in this particular field, while the Eolic tax's aim is to counter the negative effects on the landscape, so its qualification is consistent with its deterrent function. What it is relevant for the legislator is the number of wind turbines not their power, as it is for the tax on economic activities, this may have an influence on the wind park potential to obtain profits but it does not on the environmental effects that intends to compensate. Thus, while the tax on economic activities does not make any differences, the tax's first tranche, which consists of wind parks of one or two wind turbines, benefits form an exempt minimum because each unit is rated at zero. Therefore, if the taxable person, with the same electric power whose plant has been authorised by the Administration, achieves to reduce the wind turbines' number in the wind park, he/she would avoid paying the tribute. By following this approach the regulation tolerates the damage to the environment that those facilities are likely to cause but it is limited in a maximum threshold.

The tax on economic activities does not establish any tranches, while the tax does because it establishes a progressive scale of charges that rises as the number of wind turbines increases in each wind park. The consequence is that the taxable person, taking advantage of the most efficient technology, increases the unity capacity of each wind turbine and achieves to reduce their number in order to be in the lower tranche, which would also reduce its tax rate. Therefore, the tax burden will always be lower for those companies that install less wind turbines but more efficient ones. Ultimately, the revenue-raising capacity will be inversely proportional to the efficiency increase shown by the facilities intended to the use of wind energy resources.

Finally, the tax has, at least partially, an extrabudgetary purpose, following Article 3 and concordant, what it should be taken into account when comparing it to the tax on economic activities.

7. To conclude, the comparison between the regional tax bases and the tax on economic activities, once established the relationship between the rest of their elements, provides enough distinctive elements to state that the challenged regulation does not have an identical taxable event. Therefore, it is not contrary to the prohibition established in Article 6.3 of the Organic Law on finance of the Autonomous Communities.

Once dismissed this constitutionality aspect raised, it is no longer necessary to examine the supposed lack of an extrabudgetary purpose of the regional tax, also raised by the judge. Since it has already been stated

that the contested regulation does not contravene the prohibition established in Article 6.3 of the Organic Law on finance of the Autonomous Communities regarding the taxation power of the Autonomous Communities inasmuch as the question was based on the assumption that such limits had been overtaken.

Accordingly, the Plenum

Has decided

To dismiss this question of unconstitutionality.

May this Judgment be published in the “Official State Gazette”.

Madrid, 15th November 2016.