

Tax controversy in Mexico (an overview of the main obstacles and solutions)

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Mexico has been a member of the Organisation for Economic Co-operation and Development (OECD) since 18 May 1994 and, as most of its members, it has embraced the Base Erosion and Profit Shifting (BEPS) actions outlined by said organisation in the context of the OECD/G20 BEPS Project. Mexico has also been an enthusiastic promoter of tax modernity always looking for ways to improve the taxation system eliminating loopholes and mismatches in the tax legislation.

However, tax justice not always lies in the level of sophistication of the tax rules but also in the strength and impartiality of the institutions that will apply the tax law. In this regard, our substantive tax rules may be fair or optimal in a theoretical level, but without adequate incentives or counterweights designed to prevent the politisation of tax justice, we will never achieve true fairness in the application of the law.

The Tax Administration Service

For example, it is a well-known fact that tax collection departments are praised according to the volume of their collection figures and that tax auditors and other authorities make their decisions based on the revenue goals established in the corresponding tax year. No impartiality can be achieved under those terms on an administrative level, because clearly the tax authorities will carry out their audits looking to find a plausible reason to deny a tax refund or to determine a tax assessment instead of applying the tax law blindly.

In this regard, we should remember that the legislative branch is the one in charge of designing and developing the tax legal system (although the Tax Administration Service and, in general, the executive branch is entitled to collaborate in such design through miscellaneous rules and regulations). Therefore, the Tax Administration Service, as an applicator of the tax law, should not be encouraged to develop unjustified audit procedures against taxpayers in order to find a possible reason to determine a tax assessment or deny a tax refund. The only acceptable goal in an administrative level should be the correct application of the law and not the achievement of revenue goals, as such goals depend mainly on the number of times that a taxable income is caused under certain tax law hypothesis. In this regard, establishing administrative objectives according to revenue goals is an invitation for partiality in the application of the tax law.

The administrative appeal

As a consequence of such partiality, some legal means of defense have become virtually ineffective in most cases. For example, in the latest amendments to the Federal Tax Code, the corresponding Statement of Motives recognises that the administrative appeal is, in several cases, a mere procedure to confirm unfavorable tax resolutions issued by other departments of the Tax Administration Service.

Thus, in order to mitigate the inefficiency of the administrative appeal, the legislator has conceived some legal measures to preserve the usefulness of this mean of defense (v.gr. the taxpayer has several opportunities to provide

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information not submitted during the tax audit and is not required to provide a guarantee to ensure the payment of the tax assessment). Also, a new modality of administrative appeal has been recognised in the Federal Tax Code. Such modality allows the taxpayer to request a hearing in order to expose the legal grounds of the case to the administrator in charge of the resolution and allows the administrator to issue a final ruling considering mainly the existence or non-existence of a factual tax inconsistency, disregarding any other formal considerations that, in a typical procedure, would affect the final ruling. These legal measures are the result of serious effort aimed to mitigate the inefficiency of the administrative appeal introducing orality and several opportunities to submit information before attending to the tax courts.

The annulment lawsuit

Although the tax courts in Mexico develop judicial functions, they are not part of the judicial branch and although some legal advances have been made in matter of budgetary independence, the magistrates are still elected by the President with the approval of the senate. This situation consolidates a factual obstacle for impartiality in the application of the law.

In order to mitigate such partiality, the newest legislation has concentrated in the development of a new modality of annulment trial that allows orality in legal procedures and a final resolution focused only in substantive legal considerations (under the same ideas of the new modality of administrative appeal). However, it would be desirable to see some efforts focused in the emancipation of the tax courts from the executive and legislative branch.

The Supreme Court

In the same sense, for democratic legitimation purposes, the members of the Supreme Court are also elected by the President with the approval of the Senate. In this regard, we have seen several members of the Supreme Court that are factual representatives of the tax policies of the executive branch including a former general attorney of the executive branch and a former chief of the Tax Administration Service.

This tendency has reduced significantly the percentage of favorable resolutions obtained in amparo lawsuits against potentially unconstitutional tax laws. Currently there are not measures to mitigate the decrease of favorable resolutions in tax affairs

before the Mexican Supreme Court of Justice.

Alternative means of defense

Finally, although in Mexico we have a tax ombudsman created to protect taxpayers against potential injustices of the tax authorities, its resolutions are not binding to the tax authorities.

However, the conclusive agreement regulated in the Federal Tax Code, through which the taxpayer can file a mediation procedure before the tax ombudsman in order to settle with the tax authorities has been proven useful in some scenarios. Although the tax ombudsman is reluctant to adopt a legal stance in such procedures, its mediation is frequently useful to avoid typical litigation procedures.

Conclusion

Several advances must be made in order to really improve the justice administration in tax affairs, although some temporary solutions have been provided in recent amendments. In order to ensure legal fairness regarding tax related cases, structural and procedural changes would have to be made, as well as ideological advances among the tax operatives aimed to favor tax legality above tax morality. ■