N O B O A P A G Á N A B O G A D O S

ACTUALIDAD REGULATORIA BOLETIN INFORMATIVO

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Editor's Note. Construction of Tax Exemption Rules. By A. Noboa-Pagán.

The tax regime established in Law No. 28-01 on the incentive to the border area after its modification (or interpretation law, as alleged in the introductory motivation), embodied in Law No. 236-05, leaves without effect many of its original tax benefits granted to the investor. A sudden change in the legislation causing serious damages to holders of previously acquired rights occurred without prior exhaustion of at least one exercise of gradual cut or indemnifying economic compensation. In fact, lawsuits demanding the appropriate construction of the tax rule applicable to the companies established at the border under such legislative program have been filed with at least two courts. Likewise, the construction of the tax rule in question brings upon a challenge for the tax authority itself, with which a gratuitous appeal on the particular issue was also entered.

Tax law is a legal branch with *competent autonomy* to examine the facts through its own legal structures. At the same time, It is an ordinary legal rule. Its regime does not tackle the freedom or patrimony of individuals. It finds basis on a regulated assumption that allows for certain preparations in favor of the collective interest, provided they are agreed upon through legal categories and schemas pre-established in the law and respectful of the constitutional order.

The discussion over the unconstitutionality of Law No. 236-05, in particular as to the tax capacity of companies established under the protection of the incentive program recognized by Law 28-01 and regulation thereof, along with the constitutional safeguard guaranteeing *legal security and protection of confidence,* in this case, to a legitimate right of investment return and fair competition, both elements of the *fundamental right to the free enterprise,* as well as the expropriating nature of the demand for the payment of taxes that meet the basic elements of legality and constitutional nature, deserve a careful rigor of the analysis of the Dominican tax regulation applicable in the case.

The recognition of the exceptional and ordinary in the examination of the tax regulations allows overcoming old mistakes in its interpretation, such as the lack of flexibility in the interpretation, to notice in addition to the writing, its intent. The interpretation by excess or defect, that is, both *in dubio pro taxpayer,* and *in dubio pro IRS (Internal Revenue Service),* considered nowadays as erroneous approximations, and also the most common and mistaken tendency to interpret the tax obligations directly from the general theory of the obligations of Civil Law, without taking into account specific reasons predefining the existence of a taxation, or in this case, exemption regulation.

Ever since VANONI, the Italian tax expert from this past century, determined the singularity of the tax regulation, after review of the public finance knowledge involving the unraveling of the economic content of the tax regulation, the rest of the schemas and category of the Common Law, only maintain an accessory nature in order to admit the Tax Law within the universality of the Positive Law, and in particular of the Public Economic Law. It is appropriate to stress out that a Treasury-related issue of continuous interest to a dependent economy such as the Dominican economy

constitute the attraction and maintenance of the investment flows, claiming concrete safeguards and climate as the number one requirement for *legal security*. Such specific need of the Dominican Public Finances requires that the interpreting judges in the cases in question include in their hermeneutic exercise a serious and concrete legal consideration of such finance aspect in the legal universe of the positive law at their disposal; that is, how much and to what extent such fundamental aspect is affected by the legislative change.

The appropriate comprehension of the dimension of the tax subject has enabled the jurisprudence to solve specific problems in the task of interpreting the regulation. An example would be the case of the mussels, wherein the Supreme Court of Justice of Spain made clear that a scientific differentiation between fish and shellfish alleged by the taxpayer in order to elude certain tax obligations was inadmissible, since the tax regulation, when using any meaning, does it in the vulgar sense of the term, without having to entail any specialize knowledge by the legislator on the subject. Afterwards, the Court of Catalonia, in an accessory interpretation over similar facts stated that given that such item is a commodity, a taxable base of the tax regulation, the differentiation hoped by the taxpayer had no grounds.

The case of the tax regulations that provide tax exemptions or benefits is even more delicate as the tendency to give it an extralegal, restrictive interpretation or an interpretation of a strict civil matter imposition are recurrent mistakes. According to Eusebio GONZÁLEZ-GARCÍA, Tax and Financial Law Professor at the University of Salamanca, tax laws that establish exemptions are not exceptions respect to the tax regulations. In this case, any regulation imposing taxes wherever financial capacity exists to contribute to public expenditure is as normal and ordinary as that of the bonus or exemption regulation, which imposes less o no taxes at all, given that there are legally provided tax or outside tax circumstances to such effect, indicates the author. Regretfully, Law No. 236-05 did not clarify in its content the fiscal or outside fiscal circumstances supporting its origination. The creators did not pay attention to the serious damage that such abrupt change brings upon the ordinary legislation, in detriment of our Rule of Law, built as of a pillar of legal security, among other basic legal aspects.

In his work *La interpretación de las normas tributarias*, professor GONZÁLEZ-GARCÍA explains that when taxing capacity exists, the taxation regulation is as normal, common, and ordinary as the exemption regulation when no taxable capacity exists. The normal thing is to pay when there is tax capacity. Equally normal is not to pay when there is no capacity. It is logical and comprehensible to understand that since its formulation, Law No. 28-01 finds basis on the premise that companies to be established in such expensive section of the national territory are in a disadvantageous position productively and competitively, and are in need of the exemption boost.

This easily intelligible assertion respect to tax exemption, that is, those operating based on the absence of the taxable capacity, is perfectly deployable to the outside fiscal exemption, because at this stage hardly anyone argues that in the legislation, next to the tax justice, there are other values worth of protection, points out the Spanish tax expert. In the case of our analysis, the outside fiscal cause in question

becomes completed by a legal schema embodied in it, along with a *progress provision*, of article 7 of our Constitution, which states that the development of the border area is a priority. It is not about a simple appreciation de facto. Dominican positive law includes instruction and infrastructure enabling the powers exercised by the legislator in Law No. 28-01, and which were respected during the process of formation, but ignored in the subsequent modification.

However, we have just begun to rediscover in the Dominican Republic the fair dimension of the tax regulation. As explained by GONZÁLEZ-GARCÍA, there is a fairly extended error, which consists in sustaining that because the aim of the tax regulation is the collection, exemptions shall be interpreted restrictively. That is not right, as those who think so are finding basis on a false premise. The aim of a tax regulation is not pure collection, but rather the aim of the tax regulation is the collection, but based on the tax capacity of the people called to pay taxes. The tax capacity of the companies that the Dominican legislator has prompted and invited to invest in the rural zone with lower income per capita in our country is what justifies its regime of freeing from certain tax burdens.

The intent of the tax regulation is not to collect taxes where no tax capacity exists. Legally, it is inappropriate to claim *unfair competition* because of having the benefit of certain tax exemptions. It has been proven that, when accessing to such exemptions, mainly at the initial stage of investment in an industrial project, the cost for the investor at the border is much higher than that of the metropolitan area nearby to road, telecommunications, port, and airport infrastructures, not to mention capital goods' and consumers' market. Therefore, and so says the mentioned author, the tax capacity is the central point and aim of every interpreting task. It is within the very same regulation that orders payment when there is tax capacity, and no payment when there is not any. That is, the tax capacity understood in its two senses, positive and negative, supports the fact of paying and serves, if applicable, as a taxation measure.

Therefore, it is very important that the tax capacity be present throughout the interpreting process, and not only in the configuration of the taxable fact. In this regard, it will not suffice for the competent judge who is to hear the unconstitutionality of Law No. 236-05, to appreciate the way in which the tax capacity shall preside the configuration of the taxable fact and the entire interpreting process that may generate from its application, including the determination of the base and type, as established in the Tax Code, but also it must get to the ultimate result, which is the amount to be paid by the passive subject and the tort of its untimely withdrawal, a preparation that may be put together with the estimation of the previously cited relevant constitutional regulations with regard to the legal security, protection of the legitimate trust, free enterprise, proprietary right, tax capacity of taxpayers, legal regime of tax exemption, and progress provision of the border area.

We hope that Dominican judges, just as the Spanish justice system has been doing it lately, will assist the Internal Revenue Service respect to the appropriate interpretation of the tax regulations applicable in these cases.

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Health. Bill Regulating Processes against Health Providers is presented to the House of Representatives (Chamber of Deputies). By B. Roa-Mateo.

The bill establishing a regulatory framework for malpractice lawsuits against both public and private health providers was submitted to the Chamber of Deputies.

The bill establishes a special protection regime stating that health providers who are certified and recognized by the General Health Act shall not be curtailed of their freedom due to punishable actions in connection with their practice except for *flagrante delicto*; as well as, among others, the protection of their identity in the event of a legal action, until proven guilty of the charges.

Institutionalism: The Dominican Republic Senate Makes Public Credit Bill into a Law. By J. Velázquez-Morales.

Last Thursday, January 12, 2006, the Dominican Republic Senate enacted the bill that creates the Public Credit System, a legislation that will establish the regulatory framework for the obtention of credit resources under better terms, cost, and opportunities for the nation and, enforcement of an adequate control of the government's obligations, thus avoiding any irresponsible indebtedness.

The legislation provides that guarantees or bonds of any nature granted by the government shall require of a law, while the rest of organizations in the non-financial public sector is not authorized to issue any kind of guarantees or bonds.

Likewise, no authorization from the National Congress shall be required to transact negotiation aiming to get better amounts, terms or reduction of the type of interest of the obligations that constitute a public debt, so long as it does not entail an increase of the present value of the amount owed. Such operations shall be approved by the Executive Branch, upon favorable opinion from the Public Debt Board.

However public credit transactions carried out by the Central Bank with multilateral institutions seeking to guarantee the monetary and foreign exchange stability are excluded from this law's enforcement.

Competition. The US Federal Trade Commission Campaigns against Anticompetitive Agreements in the Pharmaceutical Industry. By B. Roa-Mateo.

Since November 2005, the Federal Trade Commission (FTC) has begun a solid and strong campaign against antitrust agreements in the US pharmaceutical industry. As a result, a lawsuit has been filed in the Federal District Court seeking to terminate an agreement between the drug manufacturers Galen Chemicals Ltd. and Barr Laboratories. Both companies, in accordance with the FTC, are denying users the possibility of purchasing a lower cost generic version of the oral contraceptive Ovcon® manufactured by Galen Chemicals.

Based on the FTC lawsuit, Barr Laboratories had planned to launch a generic version of Ovcon at the time it received the regulatory approval from the Food and Drug Administration (FDA). By dealing with the prospect of loosing a great revenue and market share, Galen Chemicals instead of competing with Barr Laboratories, the company that should have

manufactured the contraceptive's generic version, entered into a USD 20 M agreement with its future competitor to prevent the release of the Barr Laboratories' generic product in the US market for a five-year period.

FTC's lawsuit, according to a press release published by the FTC dated November 7, 2005, states that in September 2001, Barr Laboratories submitted an application tending to the FDA approval for the sale of the generic version of Ovcon. Barr Laboratories had planned to sell the generic contraceptive for 30% less that the price of the original product. The introduction of the generic Ovcon into the market was construed by Galen Chemicals as the "greatest risk for the company" in accordance with the FTC. Warner Chilcot forecasted that the generic contraceptive by Barr would capture at least 50% of Ovcon prescription market during the first year, thus resulting in a significant decline in market revenues and dividends.

The lawsuit alleges that both companies entered into a horizontal agreement not to compete. In April 2004, Barr received FDA's approval to manufacture and distribute the generic contraceptive, and weeks later, Gale Chemicals paid Barr Laboratories the money established in the agreement. As a result, Barr Laboratories is restricted to commercializing its own generic contraceptive until May 2009.

Financial. Resolutions from December 8, 2005 by the Monetary and Financial Administration. By J. Velázquez-Morales.

The Monetary and Financial Administration through the December 27, 2005 edition of the newspaper *"Listín Diario"* made public the 5th resolution issued by the Monetary Council on December 8. Following are the most relevant provisions in each Resolution:

Fifth Resolution authorizing the Central Bank to provide to other financial mediation entities the services that it provides to multiple banks for the remittance of foreign currency to their counterpart banks abroad, pursuant to the November 21, 2002 Monetary and Financial Law No. 183-02, and regulations thereof, in effect on the subject matter. Likewise, it modifies the commission charged by the Central Bank on account of the remittance service, established in the 3rd paragraph of the sixth resolution issued by the Monetary Council on November 14, 2002. Henceforth, the commission will have a value of 0.09%, that is **0.90 per 1,000.00.** This commission shall be charged in the same currency of the money remitted if in USD or Euros, on the understanding that a USD equivalent will be applicable to other foreign currencies.

The financial mediation institutions that engage these services directly from their counterparts abroad shall report it in writing to the Central Bank, prior to every foreign currency remittance abroad. The financial mediation institutions remitting foreign currency in cash shall get an annual certification from the SIB, indicating that the institution is compliant with current regulations.

On the other hand, the resolution instructs the Central Bank and SIB to make available to the financial mediation institutions within a 30-day period as of the publication herein, the format of the report to be submitted to such Supervising Institutions for the follow up of foreign currency transactions in cash. Failure to

submit such information shall be subject to the provisions established in article 79 of the Monetary and Financial Law.

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