



Special Issue

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Special Edition. The Principle of the Tax Capacity and its integration along other Constitutional Objectives in the Consumption Tax Exemption Systems. By A. Noboa-Pagán.

The American Declaration of Human Rights and Duties approved in Bogotá, Colombia in 1948, expressly states that "any individual has the obligation to pay the taxes established by law to support public utility services," thus confirming the equality and generality principles in the enforcement of the tax regulation. The tax capacity principle would be the third principle, or as preferred by FERREIRO-LAPATZA, a way to enforce the two first ones. Over this criterion governing the Tax Law, the Spanish Constitutional Court stated in Judgment 27/981 that the text of the fundamental law that establishes it, also expressed in the Dominican Constitution, involves "the incorporation of a logical demand that compels to find wealth where wealth is."

In that regard, explains the Argentinean treatise writer, Rodolfo SPISSO, in his book *"El Derecho Constitucional Tributario,"* the term tax capacity denotes people's aptitude to pay taxes; that is, possession of enough wealth to fulfill the tax obligations. On the other hand, Francisco MOSCHETTI clarifies that it is possible to note that the "tax capacity" is not identifiable with "economic capacity," but that it comes with economic power or wealth of an individual that exceeds a minimum that would make possible for the taxpayer and his/her family to enjoy the standard of life that they deserve.

The principle of tax capacity does not prevent the legislator from taking into

account other considerations and establishing taxes that, without ignoring or contradicting the principle of economic capacity, would respond mainly to other socio-economic criteria geared towards the fulfillment of goals or satisfaction of public interests proclaimed or guaranteed by the Constitution, indicated SPISSO. The main objectives of the taxes are not always of an economic nature, as they may take into account reasons of financial convenience, social justice and common good, unrelated to the simple measure of the tax capacity of the affected, as evidenced by the 1948 precedent of Banco Río de la Plata against the Province of Buenos Aires. Although it is true that all taxes must match a taxation capacity, the determination of the various taxpayer categories can be done for reasons other than the sole economic measure of such capacity. The economic value of the assets that make up the material tax object does not determine by itself, and at times at all, the different taxpayer categories, nor those that the tax system makes out of the taxed goods, and of the situation of taxpayer. Other non-financial or indirectly financial factors may interfere in these interventions, as explained in the legal doctrine of the referenced judgment.

This jurisprudence comes to explain the scope of the constitutional principle of tax capacity found in article 9, paragraph e)¹ of the Dominican Constitution, which authorizes the legislator to contemplate in a distinct way situations considered to be different, in view of other legal items

¹ Art. 9, Paragraph e): Given that the prerogatives recognized and guaranteed in the precedent article of this Constitution entail the existence of a correlative order of legal and moral liability that bind the behavior of men in society, the following have been declared to be fundamental duties: Contribute in proportion to their tax capacity to the public burdens.



Special Issue

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supporting the opening of such new categories and treatments, as in the case of the progress provision in Article 7 of the Magna Letter,² which favors the border area of the country. As of such provision, Law 28-01 did an extended tax exemption in favor of investors in such expensive region³. Nonetheless, it is important for the discrimination not to be arbitrary nor import illegal prosecution or improper privilege of people or groups, as stated in the mentioned Argentinean precedent. However, as explained by SPISSO, the

² **Article 7:** It is an issue of great and continuous national interest in connection with the socioeconomic development of the Dominican Republic along its border, as well as for the spreading of culture and religious tradition of the Dominican people.

³ **Article 1.-** A special Development Zone at the border is created. It includes the provinces of Pedernales, Independencia, Elías Piña, Dajabón, Montecristi, Santiago Rodríguez and Bahoruco.

Article 2.- Industrial, agroindustrial, framing, metalmechanics companies in the trade free, tourist, metallurgic, and energy zones, as well as any kind of companies permitted under Dominican laws, which exist as of the date of enactment of the present law, and those to be established in the future within the limits of any of the provinces mentioned in article one (1) of this law, shall enjoy the facilities and exemptions indicated in the following paragraph.

Paragraph.- Industrial, agroindustrial, framing, metalmechanics companies in the tourist, metallurgic, and energy free trade zones, as well as any kind of companies permitted under Dominican laws, established or to be established in the future, and which operate within the limits of any of the provinces of Pedernales, Independencia, Elías Piña, Dajabón, Montecristi, Santiago Rodríguez and Bahoruco shall have a hundred percent (100%) exemption of domestic taxes, customs duties on raw material, equipment, and machinery, including any type of taxes for a period of 20 years. They will also be granted a 50% in the payment of the right of way and use of ports and airports.

interdiction criterion of the arbitrariness exclusively is neither sufficient nor satisfactory in order to determine whether the discriminatory treatment or privilege is compatible with the principle of tax capacity, and hence, with the constitutional prescriptions. It will also be necessary to have a) an objective ground for the unequal treatment b) coherence by the legislator in the development of the criteria chosen for the differentiation; and c) other constitutional principles supporting the existence of a discriminating treatment.

Revealing results were obtained when checking the fulfillment of this analytical procedure in the content and intent of Law No. 28-01 on the border development promotion, as well as the modification in the plain Law No. 236-05, which reduces whether by interpretation or modification, a good portion of the tax incentives consigned in the first one.

In order to verify an objective basis of the exemption in Law 28-01 or the imposition of Law No. 236-05, on certain taxes, it does not suffice to have a reasonable motive to separate from the tax capacity principle, but rather it becomes necessary to do an authentic weighting of the legal items involved in the reform and its legal effects. In 1990, the Spanish Constitutional Court considered that the principle on equality forbids those "inequalities" that are cunning or unjustified for not being supported on objective and sufficiently reasonable criteria," adding that in order for the differentiation to be constitutionally legal it does not suffice that the intent be legal. It is also essential that the legal consequences resulting from such distinction be adequate and proportionate to such intent, so that the relation among the adopted measure, final result, and



Special Issue

February 3, 2006 • Sto. Dgo., D. R. • Year II, Volume XVIII

objective intended by the legislator exceed a judgment of proportionality in the constitutional jurisdiction, thus avoiding particularly out-of-proportion and burdensome results.”

Not long ago, our Supreme Court of Justice rejected an appeal on the basis of unconstitutional nature against Law No. 28-01, through the March 2, 2005 decision in which it conducted a control of the *need* and *fitness* of the tax measures of such legislation, reaching the conclusion that the regulation’s weighted legal items were appropriate. That is, the tax exemption alternative provided in such law was the least detrimental to the principle of tax capacity taking into account the social requirements that it addressed.

It would still remain pending to review whether last year’s legislative modification introduced after the mentioned award from our highest court, through Law No.236-05, which interprets or limits the tax paradise created by Law 28-01, carries a proportionate use of the fitness control. That is, if perhaps, the legislator at such time appropriately weighted the legal items of constitutional hierarchy, involved in the decision. For instance, by excluding the ITBIS within the exemptions generally recognized by Law No. 28-01⁴, failing to

⁴The application rules of the Law No. 28-01 establishes:

Article 17: The enterprises or projects that apply the preferential regime established on the law and its application rules will have the right, bound to specific limitations pending to the classification that are entitled, the following forms of tax incentive:

Paragraph II: Exoneration of the amounts to pay on the concept Tax on the Transference of Industrialized Goods and Services (ITBIS by its name in spanish), established on the Title III of the Law No.

appreciate the legal effects of such “interpretation” or “modification face to the acquired rights deriving from the concessions granted by the Special Free Trade Zone Council of the Border prior to its enactment, including the exercise of the fundamental rights in connection with the industrial exploitation in question; that is, that of the *right to the free enterprise* and the *proprietary right*, just to mention some of the legal items of constitutional hierarchy of that sort that are ponderable.

Some of the ponderable legal items mostly discussed with regard to this case are the *principle of equality* in the payment of taxes. Other taxpayers have considered the ITBIS exemptions in favor of free trade zone industrialists as a sort of “unfair competition.” In the fitness analysis of the differentiation of the tax capacity between one taxpayer and another, the judge, the last one in the law’s interpreters chain, shall consider which one of the possible alternatives and benefits (social and economic) will be less damaging to the general and constitutional principle on equality.

In terms of social benefits, does an incentive to the industrial production in the provinces along the border, generator of direct and indirect jobs in the region, to recognize the ITBIS as part of the rights acquired by Law No. 28-01 create more value? Or is it more important to suspend (upon admitting) such market access incentive modality in order to protect competitors established only because they allege (they do not necessarily prove it) that

11-92, of may 26 of 1992 and its modifications. Such exoneration will only be granted by the previous presentation of the Certificate of Border Enterprises, acknowledging the prerequisites of classification.



Special Issue

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the benefit ignores the cost structure of the item in question in favor of the investor at the border?

It is appropriate to mention at this time that the interpretation in that the ITBIS was included in the benefits is not the free and exclusive interpretation of investors at the border. There is written evidence that the investment projects submitted to and approved by the authority regulating and granting exploitation authorizations, include the exemption of such tax to the value of the final goods to be manufactured as an essential element of the operating cost structure at the border. Therefore, is the competent judge going to be coming across a simple literal translation of Law No.28-01? The allegation finds support in a systematic and historical hermeneutic exercise of the treatment given by the competent administrative authority, who also assumed the exemption of the ITBIS when approving the investment project. in virtue of its own construction of the law and its regulation.

On the other hand, domestic producers claim an unfair competition, only because of the mere recognition of such exemption. However, a widely accepted criterion on tax matters is that *iure de iure* presumptions attributing a merely probable wealth cannot be established. Absolute presumptions are notoriously unconstitutional, based on the fact that by admitting a certain economic power, which existence has not been proven, is damaging to the principles on tax capacity and law reasonability, the latter for lack of proportionality between the intended objective and the chosen mean. Technical and logical criteria along with credible evidence are required to destroy any presumption of unlawfulness of the exemption. In such instance, local producers in question would have to destroy

the presumption by submitting evidence to the contrary proving that the exemption produces illicit wealth, while exceeding the cost of producing from the provinces along the border.

As indicated by the Spanish Court, anything that is burdensome and excessive must be proven. In the event the determination or recognition of a tax exemption fails to take into account the subjective circumstances, for instance, by failing to admit the deduction of family burdens according to the individual's basic needs, such imbalance persists, although respect for the principle of financial capacity is honored with respect to the other taxes, indicated HERRERA-MOLINA. A reasonable investment return and a fair assessment of the investor's equity, both as to the fixed assets and company's stocks, are a must for the local or foreign investor encouraged by the regulation governing the Rule of Law that incited such investor to establish and make capital investment in the region. These depend on the establishment of facilities located away from domestic consumers and production markets, or access channels to international market, and raw material, such as ports and airports. If it can be proven that the regulating authority admitted the interpretation of the investor to the exemption of the ITBIS, as part of its investment project, prior to the granting of the concession, the competent judge, in his/her capacity as the ultimate and highest rank authority to interpret the law, will have to take very much into account the legal benefit of the constitutional hierarchy protecting the acquired rights in view of the *legal security* and *protection of the legitimate trust*.



Special Issue

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On the issue of subjective economic capacity, SPISSO emphasizes there are certain factors involved when determining the minimum necessary to meet the basic needs of an individual. One of such factors is the cost of life, which varies not only from country to country, but also from location to location within a nation. The author also takes into account when determining the *subjective economic* capacity, any government-provided public utility services. The more such efficient public utility services are missing, the higher the demands in favor of the admission of greater tax deductions to cover such lack of utility provisions will be. The asymmetry between the basic needs and public utility services of the investor at the border and the one operating in the metropolitan are notorious at first sight, and can also be verified and quantified.

It is suitable to point out that given that the ITBIS is a consumption tax, a dissociation occurs between the wealth intended to be taxed –the final consumption action- and the configuration of the taxable fact. However, there are no doubts today in the international jurisprudence and doctrine in the sense that subject of the taxation burden definitely supports the tax burden. The passive subject, in this case the investor at the border, provisionally supports the tax, while managing to affect and pass its economic incidence on to the final consumer. It replaces the taxpayer face to the Government, and in operational terms, such transition causes a financial impact. The right to translate the consumption tax, does not change the economic effect upon the person supporting its weight, most of all, if that person planned, according to the legal framework in which execute its investment that, in the following 20 years, it would not have that

charge, and its final product, such cost, in the price structure. VANOSSO explains that although the tax transfer is a phenomenon governed by economic laws, there are cases where it may be possible and also necessary to recognize the legal implications on the economic effects of taxes to find a harmonic solution of the rights and guarantees established in the constitution.

Consumption taxes, as a result of the repercussion expressly or tacitly admitted in the law, requires understanding the economic situation of the person over whom the tax burden has a bearing on, continues VANOSSO. The principle on tax capacity responds to the demand for social constitutionalism, which in the Italian Constitution, as stated by the author, it provides principles equivalent to the *Social State Clause* of Article 8 paragraph *in fine* of the Dominican Constitution.

The Dominican Justice has the magnificent opportunity to respond to the concern respect to the formation of different categories of ITBIS taxpayers, in the analysis case, in which a distinct treatment is applied, tending to overcome situations of manifested inequality through the evaluation of the legitimate measure of the chosen restriction for the formation of the categories of Law No. 28-01, ignored in its modification No. 236-05; and most importantly, the legal consequences of such original restrictions and the subsequent repeal, beyond the simple economic logic that examines the consumption taxes, as in this case, the exempted consumption tax has a duty of social justice in favor of the final beneficiaries of the incentive program in Law No. 28-01 –the population at the border- and at the same time, it consigns the enforcement of the principle of the tax capacity in favor of the investor along the



Special Issue

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border under reasonable terms in order to prove the basic need of such exemption.

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