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A jurisprudential approach to the Spanish ability to pay principle: current issues

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Una aproximación jurisprudencial al principio de capacidad económica español: cuestiones actuales

This paper analyses current issues related to the ability to pay principle enshrined in the Spanish Constitution, to see how it influences the establishment of Spanish taxes. To do so, it is necessary to start with a conceptual analysis of this principle, as well as its relationship with the rest of the principles of tax justice enshrined in the Spanish Constitution. The different exceptions to this principle admitted by the Constitutional Court, as well as features of the Spanish State, such as its decentralised nature, which influence its application, are also explained.

Este trabajo analiza cuestiones de actualidad relacionadas con el principio de capacidad económica consagrado en la Constitución Española, comprobando cómo este influye en el establecimiento de los tributos españoles. Para ello, es necesario partir de un análisis conceptual de este principio, así como de su relación con el resto de los principios de justicia tributaria consagrados en la Constitución Española. También se exponen diferentes excepciones que a este principio admite el Tribunal Constitucional, así como rasgos del Estado español, como su carácter descentralizado, que influyen en su aplicación.

Keywords: tax justice; ability to pay principle; double taxation; tax residence; decentralised State; inflation; tax amnesty; extra-fiscal taxes.

1. Introduction

In Spanish law, the principles governing the duty to contribute, the so-called principles of tax justice, are enshrined in article 31 of the Spanish Constitution (SC).

The first paragraph of article 31 of the SC states that *everyone shall contribute to the support of public expenditure in accordance with their ability to pay through a fair tax system inspired by the principles of equality and progressivity which, in no case, shall have confiscatory scope*.

From this paragraph we conclude that the material principles of tax justice are the principles of generality, ability to pay, equality, progressivity and non-confiscation. Alongside these principles,

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the third paragraph of article 31 of the SC enshrines the *principle of no taxation without representation* as a formal principle of tax justice, when it states that *personal or property-based charges of public character may only be established in accordance with the law*.

On the basis of this paragraph, the legislator has established a distinction between property-based charges of public character and a fiscal nature and property-based charges of public character and a non-fiscal nature. This has not been an issue that has been peacefully accepted by the doctrine,[1] as it facilitates an escape of tax law and its principles of material justice. However, the Constitutional Court (CC), in Judgment 63/2019, of 9 May, resolved the controversy, supporting this distinction.

Both property-based charges of public character respond to purposes of general interest and are established coercively by law; although, unlike taxes, property-based charges of public character and a non-fiscal nature are characterised by the fact that they do not have a revenue-raising purpose[2] and can be collected either by a public entity or by an individual, defining, in the latter case, a new and original way of carrying out the financial activity of public entities, apart from the classic scheme of financial activity.

In relation to property-based charges of public character and a non-fiscal nature, the CC has declared that *as they are not taxes, the general principles enshrined in article 31.1 of the SC do not apply to them* (Constitutional Court's Judgment (CCJ) 63/2019, of 9 May, *Fundamento Jurídico* (FJ) 6th). Therefore, the ability to pay principle which, as we shall see, constitutes the basis for imposing taxes, would cease to be the basis for charging in the case of property-based charges of public character and a non-fiscal nature. In such cases, the basis being determined in each property-based charge of public character.[3] However, this does not mean that the rest of the principles, values and rights of the SC, as well as the limits derived from European Union law, do not apply. For example, the right to property (article 33 of the SC) and the principle of equality (article 14 of the SC) — which also affect the area of taxation — should be respected in the establishment and regulation of property-based charges of public character and a non-fiscal nature.[4]

Returning to the analysis of the material principles of tax justice enshrined in article 31.1 of the SC, it must be said that the ability to pay principle occupies a pre-eminent position. On the one hand, the ability to pay is a *conditio sine qua non* for requiring the citizen's contribution to the support of the Public Treasury; in other words, it is a premise for the payment of a tax. On the other hand, despite not being among the inspiring principles of the Spanish tax system — equality, progressivity and non-confiscation —, they make sense when they related to the ability to pay principle.[5]

However, as PALAO TABOADA[6] stated and the CC reiterated in Judgment 221/1992, of 11 December, FJ 5th, *the ability to pay principle is not an axiom from which positive, precise and concrete consequences can be drawn, by simple logical deduction, on the particular regulation of each tax*

1. LITAGO LLEGÓ, R., "La desaparición legal de la parafiscalidad: Análisis de la nueva Disposición Adicional 1.ª de la LGT conforme al art. 31 de la CE". *Revista de Contabilidad y Tributación. CEF*, Num. 430, 2019, pp. 75-110; MENÉNDEZ MORENO, A. "Las prestaciones patrimoniales de carácter público. Un análisis de la noción de las mismas en la Ley 9/2017, de Contratos del Sector Público", *Quincena Fiscal*, Num. 1-2, 2018, pp. 13-22.

2. PALAO TABOADA, C., "Prestaciones patrimoniales de carácter público" *Revista de Contabilidad y Tributación. CEF*, Num. 481, 2023, pp. 5-58.

3. For example, the property-based charge of public character and a non-fiscal nature for temporary incapacity for work established by article 129.1 of *Real Decreto Legislativo 1/1994, de 20 de junio, por el que se aprueba el texto refundido de la Ley General de la Seguridad Social*, is justified on article 41 of the SC, the institutional guarantee in the field of Social Security.

4. ORTIZ LACALLE, E., "Las fronteras del derecho tributario. A propósito de las prestaciones patrimoniales de carácter público no tributario", *Quincena fiscal*, Num. 19, 2018, pp. 47-74.

5. SÁNCHEZ SERRANO, L., "Principios de justicia tributaria" in *Manual General de Derecho Financiero. Volumen II. Derecho Tributario. Parte General*, coordinated by Lasarte Alvarez, J, Ed. Comares, 1996, p. 82.

6. PALAO TABOADA, C., "La imposición sobre las Ganancias de Capital y la Justicia Tributaria", *Hacienda Pública Española*, Num. 9, 1971, pp. 35-72.

figure. This recognises that taxes of a *synallagmatic* nature are based on the theory of benefit or equivalence — that is, payment is made according to the product or service received — without prejudice to the fact that they cannot disregard ability to pay (CCJ 71/2014, of 6 May, FJ 3rd).

It should also be remembered that, like all principles, these are not absolute, but rather, as the CC recognises it is possible that *the tax legislator, when regulating each tax figure, may give pre-eminence to other values or principles, respecting, in any case, the limits established by the Constitution* (CCJ 221/1992, of 11 December, FJ 5th), as occurs in the case of extra-fiscal taxes.

Consequently, and as we shall see below, the intensity of the ability to pay principle can be graduated to make it compatible with other legal interests worthy of protection, such as the fulfilment of social and economic policy objectives, the fight against tax fraud or reasons of tax technique (CCJ 182/2021, of 26 October, FJ 5th).

2. The formation of the ability to pay principle on the basis of article 31 of Spanish Constitution

The explicit reference to ability to pay is a characteristic feature of the SC, as the CC remarked in its early Judgment 27/1981, of 20 July, stating that, *unlike other Constitutions, the Spanish Constitution specifically refers to the ability to pay principle and, moreover, does so without exhausting in it - as certain doctrine has done - the principle of justice in tax matters*. The CC defines ability to pay for the purposes of contributing to public expenses as a *logical requirement that obliges us to seek wealth where wealth exists* (FJ 4th).

For this reason, the CC points out that the ability to pay taxed must be 'real or potential' (CCJ 37/1987, of 26 March, FJ 13th), but in no case 'non-existent or fictitious' (CCJ 221/1992, of 11 December, FJ 4th).

As a logical criterion founding fair taxation, SOLER ROCH[7] argues that it would not even be necessary to proclaim the ability to pay principle in any text. In fact, in the German Constitution, the ability to pay principle is not expressly included, but it has been deduced from the principle of equality, since the ability to pay principle, according to which the transfer of financial resources — in essence, wealth — to the Public Treasury is carried out according to the wealth of each citizen, is the most appropriate criterion for comparison between taxpayers.

The CC states that *this constitutional reception of the duty to contribute to the support of public expenditure according to the ability to pay of each taxpayer configures a mandate that affects not only citizens but also the public authorities (CCJ 76/1990, of 26 April, FJ 3rd) since, if some are obliged to contribute in accordance with their ability to pay to the support of public expenditure, the public authorities are obliged, in principle, to demand this contribution from all taxpayers whose situation reveals an ability to pay susceptible to taxation* (CCJ 96/2002, of 25 April, FJ 7th).

In the opinion of RODRÍGUEZ BEREIJO,[8] ability to pay fulfils a triple function, as it is *the basis of legitimacy, the measure, and the maximum limit* of the fair contribution of each person *by paying taxes to support public expenditure. One must pay because one has ability to pay, and one owes according to one's ability to pay*.

From this last statement, we can extract the two meanings of the term "ability to pay", used by GIARDINA[9] in relation to what is known in Italian law as "capacità contributiva" and, in Spain, by

7. SOLER ROCH, M.T., "La capacidad económica en los impuestos de ordenación", *Cuadernos de energía*, Num. 26, 2009, p. 27.

8. RODRÍGUEZ BEREIJO, A., "Breve reflexión sobre los principios constitucionales de justicia tributaria", *Revista jurídica de la Universidad Autónoma de Madrid*, Num. 13, 2005, pp. 236 and 237.

9. GIARDINA, E. "Le basi teoriche del principio della capacità contributiva", *A. Giuffrè*, 1961.

CORTÉS DOMÍNGUEZ[10] in relation to what is known in Spanish law as "capacidad económica".

On the one hand, one speaks of 'absolute ability to pay' as the abstract ability to pay public expenses. This ability will be possessed by those individuals who are the protagonists of facts indicative of ability to pay; that is, of wealth. Such facts are usually reflected in the earning of income, the ownership of patrimony (income saved) and consumption (income spent).

On the other hand, 'relative ability to pay' is used to refer to available wealth, that is, the part of the individual's wealth that can be taxed in order to comply with the constitutional duty to contribute to the support of public expenditure.

From this perspective, available wealth is not considered to be the income used to pay the costs of conducting an economic activity or the part of the income that is used to meet the basic needs of the person, the *existential minimum* or *vital subsistence minimum*. However, the CC does not provide the same treatment for its determination.

In the first case, the CC considers that the legislator may limit deductible expenses; that is, increase available wealth, for many reasons: the nature and purpose of the tax, the relationship between the expenditure and the income obtained, the fight against fraud or technical reasons, such as objective assessment. However, the legislator cannot limit deductible expenses if this means taxing a non-existent ability to pay and not real income or wealth, as this would violate the principles of article 31.1 of the SC (CCJ 214/1994, of 14 July, FJ 5th).

In the second case, the CC considers that the *vital subsistence minimum* not subject to taxation is *an inseparable element of the ability to pay principle [principio de capacidad económica]*. It is also a requirement of justice derived from article 1.1 of the SC when it states that *Spain is a social and democratic State governed by the rule of law* and from the human dignity and protection of the family proclaimed in arts. 10 and 39 of the SC. Consequently, people's income cannot be taxed from their first economic unit but only from the *subsistence minimum*. However, the way to guarantee that this minimum is not taxed corresponds to the legislator, who will determine both the taxes in which this minimum is established and the technique used to do so (CCJ 19/2012, of 15 February, FJ 4th).

Considering the above, relative ability to pay refers to the degree of an individual's ability to contribute to the support of public expenditure. This means that one can have ability to pay — absolute ability to pay — but not the capacity to contribute to the support of public expenditure. In other words, an individual may receive an income, but it may not be sufficient to cover his/her vital needs according to the limits established by the legislator, which means that he/she will have absolute ability to pay but not relative ability to pay. For this reason, relative ability to pay could be identified with the Spanish term "*capacidad contributiva*".

This seems to be the CC's point of view when, on the occasion of the analysis of the existential minimum not subject to taxation, it makes the following statement: *while it is true that every natural person, from the first unit of income generated, externalises, in scsubject to taxation, it is also true that his or her relative ability to pay [capacidad contributiva], understood as the ability to contribute to the support of State expenditure (…) must appear once a certain threshold of income has been exceeded which protects the income necessary to satisfy the vital needs of the taxpayer (vital subsistence income), individually considered or, where appropriate, of the family unit* (CCJ 19/2012, of 15 February, FJ 4th).

However, it is true that, in general, the CC uses the terms absolute ability to pay, "capacidad económica", and relative ability to pay, "capacidad contributiva", interchangeably.

As has been stated, the ability to pay principle does not exhaust the principle of justice in tax matters; this obliges us to analyse that principle in connection with the rest of the principles enshrined in article 31.1 of the SC.

10. CORTÉS DOMÍNGUEZ, M. "Ordenamiento tributario español I", *Civitas*, 1985, pp. 76 y 77.

The principle of generality is implicit in the expression *all shall contribute (…)*. This principle alludes to the subjective scope of taxation. Article 31.1 of the SC imposes the duty to contribute on "all", which would extend to any subject, whether natural or legal person, national or foreign, resident or non-resident (CCJ 96/2002, of 25 April, FJ 7th). This principle does not imply that every tax must concern all taxpayers (Supreme Court Judgment (SCJ) 25/2015, of 2 January, *Fundamento de Derecho* (FD) 4th).

However, this principle is tempered by the ability to pay principle, since only those persons who manifest ability to pay must contribute. In turn, the principle of generality conditions the content of the ability to pay principle, by preventing the same manifestations of ability to pay from contributing differently, thereby rejecting the idea of a tax privilege or benefit, without there being any constitutional justification (CCJ 96/2002, of 25 April, FJ 7th).

This last idea, where ability to pay is the magnitude or measure of comparison, is linked to the principle of equality in tax matters. Equality is a superior value of our legal system as proclaimed by the SC in article 1.1 and reproduced throughout its articles. However, the content of the "principle of equality" in article 31.1 of the SC cannot be traced back to the declaration of non-discrimination in article 14 of the SC when it states that *Spaniards are equal before the law, without any discrimination on the grounds of birth, race, sex, religion, opinion or any other personal or social condition or circumstance*.

In article 14 of the SC, equality is clearly subjective, formal and negative, as a guarantee of non-discrimination. Moreover, it is susceptible to the constitutional appeal for protection. Nevertheless, the equality of article 31.1 of the SC is objective — it is based on ability to pay —, positive — the distribution of the tax burden is based on available wealth — and, as a requirement derived from articles 9.2 and 40 of the SC, material — it aims to promote real equality by means of a more equitable redistribution of income —. This last circumstance links the equality of article 31.1 of the SC with another principle of tax justice, that of progressivity.

Thus, tax equality, as the TC pointed out, is achieved through the principle of progressivity. *It is for this reason - because the equality claimed here is intimately linked to the concept of ability to pay and the principle of progressivity — that it cannot be, for these purposes, simply redirected to the terms of article 14 of the Constitution: a certain qualitative inequality is indispensable for this principle to be understood to be fulfilled. Precisely that which is achieved through the overall progressivity of the tax system in which the aspiration to redistribute income is encouraged* (CCJ 27/1981, of 20 July, FJ 4th). Consequently, *quality is perfectly compatible with the progressive nature of the tax* (CCJ 45/1989, of 20 February, FJ 4th).

Progressivity of the tax system, as is well known, means that those who have more disposable wealth contribute more than those who have less disposable wealth. Progressivity as a principle inspiring the tax system is enforceable with respect to all taxes and not each one of them (CCJ 19/2012, of 15 February, FJ 4th). However, it does imply that the main taxes in the tax system respond to this characteristic or, in other words, that *in a fair tax system there can be room for taxes that are not progressive, provided that the progressivity of the system is not affected* (CCJ 7/2010, of 27 April, FJ 7th).

Finally, article 31.1 of the SC enshrines the principle of non-confiscation, stating that the tax system *shall in no case have a confiscatory scope*. This principle operates as a limit to the ability to pay principle and progressivity, insofar as taxes cannot exhaust the wealth of the individual (CCJ 150/1990, of 4 October, FJ 9th). This is a logical provision if we bear in mind that the SC itself enshrines the right to private property (article 33 of the SC).[11]

11. VICENTE DE LA CASA, F., in "Los principios de capacidad económica y no confiscatoriedad como límite a la concurrencia de tributos", *Crónica Tributaria*, Num. 144, 2012, pp. 149-178, refers to the courage of the German Constitutional Court in setting the maximum limit of the taxpayer's tax burden at 50 per-cent for patrimony and income taxation. He also mentions that the Argentine Constitutional Court has set it at 33 per cent. The Spanish Constitutional Court has not (for the time being) made any such pronouncements.

Therefore, the principle of non-confiscation constitutes a maximum limit, insofar as the taxpayer's wealth must not be exhausted; but also, a minimum limit, insofar as not all the individual's wealth can be subject to taxation, ignoring his or her vital needs. In other words, it is a principle that limits the available wealth (relative ability to pay) subject to taxation.

In any case, it should not go unnoticed that *the principle of non-confiscation understood as a prohibition on taxing non-existent or fictitious wealth implies per se a violation of the ability to pay principle* (CCJ 182/2021, of 26 October, FJ 2nd) and that, as we shall see, the CC has recently recognised the effectiveness of this principle not only in relation to the tax system, but also in relation to each tax.

3. Exceptions to the application of the ability to pay principle

In spite of the clear wording of article 31.1 of the SC, the CC has admitted a series of assumptions in which the ability to pay principle is tempered or made more flexible.

a. The criterion of generality of cases

In the creation of any tax, the legislator must consider facts that are manifestations of ability to pay. The most obvious of these are the obtaining of income, the possession of patrimony and the consumption of goods, but they are not the only ones.

Given the impossibility of foreseeing all the circumstances that occur in reality, the CC has repeatedly considered that the ability to pay principle is satisfied if this is manifested in the generality of cases subject to the tax in question. It is possible for there to be specific exceptions to the general rule[12] without this affecting the constitutionality of the law (see, for example, CCJ 73/1996, of 30 April, FJ 5th).

The sale of a house, for example, generates a capital gain subject to taxation. Although in most cases this transaction manifests the seller's ability to pay, there are circumstances, such as transfer in lieu of payment, in which this does not happen. In this situation, the solution is not to eliminate the rule that taxes the gain obtained from the sale of a home, but to establish a system of tax exemptions and allowances,[13] as occurs in the *Impuesto sobre la Renta de las Personas Físicas* (IRPF) and the *Impuesto sobre el Incremento de Valor de los Terrenos de Naturaleza Urbana* (IIVTNU).

b. The constitutionally protected extra-fiscal purposes

The SC seems to recognise only a revenue-raising purpose for taxes. For its part, the CC states that *the extra-fiscal function of the state tax system is not explicitly recognised in the Constitution*, but considers that it can be *derived directly from those constitutional precepts that establish guiding principles for social and economic policy* (articles 40.1 and 130.1 of the SC), given that the tax system as a whole as well as each specific tax figure are part of the instruments available to the State for the achievement of the constitutionally ordered economic and social purposes (CCJ 37/1987, of 26 March, FJ 13th).

In this sense, article 2 of General Taxation Law 58/2003, of 17 December (*Ley General Tributaria*), as did article 4 of the previous General Taxation Law 230/1963, of 28 December, explicitly allows taxes to serve as instruments of general economic policy and to serve the realisation of the principles and purposes enshrined in the SC.

12. BÁEZ MORENO, A. "Las tasas y los criterios de justicia en los ingresos públicos: una depuración adicional del ámbito de aplicación del principio de capacidad contributiva", *Civitas, Revista española de derecho financiero*, Num. 144, 2009, p. 961.

13. MARTÍN QUERALT, J et al. "Curso de derecho financiero y tributario". *Ed. Tecnos*. 2022. p. 82.

The CC considers that respect for the ability to pay principle *does not prevent the legislator from determining the facts that will give rise to the tax liability taking into account extra-fiscal considerations* (CCJ 37/1987, of 26 March, FJ 13th). In other words, it admits that extra-fiscal purposes are compatible with the ability to pay principle.

The CC has even identified the capacity to affect [the environment] as a modality of the ability to pay principle provided for in article 31.1 of the SC (CCJ 289/2000, of 30 November, FJ 5th).

There are differences of opinion on this issue in scientific doctrine. While authors such as SALASSA BOIX[14] consider that the carrying out of polluting activities, the income obtained through them or the possession of polluting assets effectively manifest a certain ability to pay susceptible to taxation — although recognising the difficulty, on occasions, of detecting this ability —, SOLER ROCH[15] considers that the capacity to pollute has *a different and unrelated basis to ability to pay*, referring with this term to the capacity to produce risk, damage or costs to the environment. This is the reason she refers to the restorative nature of extra-fiscal taxes, in general, and environmental taxes, in particular, and that contributions are made according to the risk, damage or cost produced.

In any case, it should be noted that extra-fiscal purposes have been justifying the creation of new taxes by the Autonomous Communities (AACC), although these must be within the framework of their competences (CCJ 37/107, of 26 March, FJ 13th). This situation arises largely because traditional manifestations of wealth are taxed by the State. Furthermore, the CC considers extra-fiscal purposes to be *a relevant criterion for assessing the possible overlapping of an autonomous tax with state or local taxes* (CCJ 28/2019, of 28 February, FJ 4th).

The question, then, is how to differentiate a revenue-raising tax from an extra-fiscal tax. In this regard, the CC has considered, on the one hand, that, *the fact that the tax has a final purpose or is affected by a specific extra-fiscal purpose […] does not mean that the tax has a primarily extra-fiscal purpose*; and, on the other hand, that *the extra-fiscal or revenue-raising nature of a tax is a question of degree, so it is difficult to find 'pure' cases*. To determine whether we are dealing with an extra-fiscal tax or not, *it must therefore be considered the reflection that this extra-fiscal purpose finds in the central elements of the structure of the tax* (CCJ 125/2021, of 3 June, FJ 4th) and fundamentally, as we shall see, in the elements of quantification.

So, for example, although the *Impuesto sobre las emisiones de dióxido de carbono de los vehículos de tracción mecánica* of Catalonia is similar to the local tax on mechanically propelled vehicles in its material object, taxpayer and periodic nature, the different ways of calculating their respective tax liabilities reveal their different natures: revenue-raising in the local tax — although it has environmental tax allowances — and extra-fiscal or environmental in the regional tax. In fact, for the calculation of the liability of the last one, it *completely disregards the price or value of the vehicle, and its private or business use, and only takes into consideration the data on pollutant emissions* (CCJ 87/2019, of 20 June, FJ 19th).

In the case of the *Impuesto sobre el daño medioambiental causado por las grandes áreas de venta* of Aragon, it taxes the ability to pay manifested in the economic activity carried out in commercial establishments which, due to its effect of attracting consumption, causes a massive displacement of vehicles with a negative impact on the environment. Although the compatibility of the regional tax with the local *Impuesto sobre Bienes Inmuebles (IBI)* and the local *Impuesto sobre Actividades Económicas (IAE)* was disputed, the CC admitted it on considering that there are sufficient distinctive criteria in the calculation of the tax liability, which is carried out in the regional tax according to the surface area and the type of land (CCJ 96/2013, of 23 April, FJ 12th).

14. SALASSA BOIX, R., "Cuestiones elementales sobre los tributos ambientales", *Revista de Derecho*, Num. 16, 2013, pp. 141 y 142.

15. SOLER ROCH, M.T., "La capacidad económica en los impuestos de ordenación", *Cuadernos de energía*, Num. 26, 2009, p. 30.

c. The methods for determining the tax base

Spanish tax legislation provides for different methods of determining the tax base of a tax; that is, different ways of measuring ability to pay. Although all of them respect the ability to pay principle, they do so to different intensity.

The direct assessment method is the one that best reflects the taxpayer's ability to pay because it considers the taxpayer's income and expenditure in an analytical way; however, on occasions, precise knowledge of this is renounced and the objective assessment method is used to facilitate the application of the tax and its administrative control, applying in this case magnitudes, indices or modules to determine the taxable base.

Recently, the CC, in relation to the local *Impuesto sobre el Incremento de Valor de los Terrenos de Naturaleza Urbana* (IIVTNU), established the criteria for the application of the objective assessment method, for reasons of simplification, to be respectful of the ability to pay principle. Thus, it is required that the objective assessment method of the taxable base is not the only one, allowing its concurrence with the direct assessment method, and, therefore, its application must be voluntary for the taxpayer (CCJ 182/2021, of 26 October, FJ 5th).

d. The fight against tax fraud

The fight against tax fraud is a constitutionally legitimate aim that allows tax measures to be established that do not consider the real ability to pay of the taxpayer. However, these measures must be proportionate to the aims pursued (CCJ 194/2000, of 19 July, FJ 5th), without being able to allege reasons of practicality or administrative convenience or the need to avoid manipulations by taxpayers to reduce the tax debt.

On this basis, the CC considered disproportionate to establish a variable tax deduction in the IRPF in cases of joint taxation only when the income sources of the members of the family unit were outside the family circle in order to avoid the artificial transfer of income between the various members of the family unit or the simulation of deductible expenses (CCJ 255/2004, of 22 December, FJ 5th), as the legislator can accredit the reality and effectiveness of these transfers of income by imposing special means of evidence appropriate to the purpose pursued (CCJ 255/2004, of 22 December, FJ 6th).

Therefore, it cannot be taken for granted that these transfers between family members are fictitious, but rather that it is the Administration who must prove the existence of fraud (CCJ 146/1994, of 12 May, FJ 8th).

Paradoxically, the tax amnesty can be justified as a measure to combat fraud, although it is unfair to taxpayers who comply correctly with their tax obligations. Thus, if the fraudster acknowledges possession of hidden assets and income, the tax debt to be paid will be reduced. Even if at that moment a lower ability to pay than the real one is taxed, it allows its normal taxation in the future.

The CC has not ruled on the relationship between tax amnesty and the ability to pay principle; it only requires that tax amnesties be approved by Law as they affect the duty to contribute to the support of public expenditure. Therefore, it is not possible to use a Decree-Law to approve a tax amnesty (CCJ 73/2017, of 8 June, FJ 6th).

4. Ability to pay, double taxation and decentralised structure of the Spanish State

In Spain, the State, the AACC, the Provinces and the Municipalities have taxation power, understood as legislative power. Therefore, in the Spanish tax system, state, autonomous communities and local taxes coexist.

Article 149.1.14ª of the SC grants the State exclusive competence over the general tax system, which gives it preference in taxing any manifestation of ability to pay and allows it to coordinate the state tax system with that of the AACC, as well as to harmonise how a given matter is taxed by the AACC (CCJ 26/2015, of 19 February, FJ 4th). Under this competence, the local tax system is established by state law.

From the foregoing, the prohibition of double taxation regulated in article 6 of Autonomous Communities Financing Law 8/1980, of 22 September (*Ley Orgánica de Financiación de las Comunidades Autónomas* — LOFCA —) is derived. This precept articulates, from that perspective, the relationship between autonomous community and state taxes and between autonomous community and local taxes.

The prohibition of domestic double taxation was addressed by the CC by distinguishing between the term "taxable source" and the term "taxable event" in CCJ 37/1987, of 26 March, FJ 14th. "Taxable source" belongs to the factual field and is identified as any source of wealth susceptible to taxation, while the "taxable event" belongs to the legal field and establishes the way in which that wealth is to be taxed in a specific tax.

Regarding the prohibition of domestic double taxation between state and autonomous community taxes, article 6.2 LOFCA, reflecting the feeling of article 149.1.14ª of the SC, prevents the AACC from taxing abilities to pay already taxed by the State; in other words, from establishing taxes on taxable events already taxed by the State. Moreover, it empowers the State to tax manifestations of ability to pay originally taxed by the AACC and which, after financial compensation by the State, they may no longer continue to tax. That is, the State may establish taxes on taxable events already taxed by the AACC.

CCJ 37/1987, of 26 March, questioned the violation of the ability to pay principle due to the possible domestic double taxation between the taxable events of the state *Impuesto sobre el Patrimonio* (Law 19/1991, 6 June) and the Andalusian *Impuesto sobre tierras infrautilizadas*. The CC concluded that, in both cases, the taxable source was the ownership of patrimony, but the taxable events were different. The taxable event of the *Impuesto sobre el Patrimonio* (IP) was the ownership of patrimony, while in the autonomous tax the obtainment of a yield lower than the optimal yield fixed for the rustic property was taxed (CCJ 37/1987, of 26 March, FJ 14th).

The State's harmonisation capacity, which allows it to tax manifestations of ability to pay already taxed by the AACC, has been articulated in different ways.

Firstly, by abolishing the autonomous community tax and compensating the AACC, as happened with the *Impuesto sobre los Depósitos de Entidades de Crédito* of Extremadura, Andalusia and Canary Islands. In this case, the State created the *Impuesto sobre los Depósitos en las Entidades de Crédito*, initially subject to a zero rate of taxation.

Secondly, without abolishing the cession of a state tax to the AACC, complementary state taxes have been created to correct the differences between AACC, as happened recently with the creation of the *Impuesto Temporal de Solidaridad de las Grandes Fortunas* (Law 38/2022 of 27 December), complementary to the IP — a state tax ceded to the AACC —.

In relation to domestic double taxation between local and autonomous community taxes, article 6.3 LOFCA prohibited taxing the same "taxable source", which led the CC to declare unconstitutional the *Impuesto sobre instalaciones que incidan en el medio ambiente* of Balearic Islands, since there was an overlap between the taxable source of the autonomous community tax and the local *Impuesto sobre Bienes Inmuebles* in the generality of conceivable cases; that is, in most cases (CCJ 289/2000, of 30 November, FJ 6th). However, with the new wording of article 6.3 LOFCA, which only prohibits the same taxable event from being taxed, the current conclusion would be the opposite, as has occurred in the *Impuesto sobre instalaciones que incidan en el medio ambiente* of Extremadura (CCJ 120/2018, of 31 October, FJ 5th), as there are substantial differences in the

elements of quantification of both taxes (as happens, as we have seen, with the extra-fiscal purpose of the taxes).

5. Ability to pay and tax residence

The exercise of taxation power, understood as legislative power, by the territorial entities, State, AACC, Provinces and Municipalities, may lead to different regulations of the same tax figure, resulting in different tax treatment of taxpayers. The immediate consequence of this is that the same ability to pay would be taxed differently.

The principle of autonomy allows for these differences, as uniformity would be against this principle (CCJ 37/1987, of 26 March, FJ 10th). However, there are limitations derived from European and domestic law for the exercise of this tax autonomy.

a. Limits from the European Union

According to settled case law of the Court of Justice of the European Union (CJEU) (for example, CJEU's Judgment of 3 September 2014, European Commission v. Kingdom of Spain, Case C-127/12, paragraph 73), different tax treatment of residents and non-residents is only justified when they are not in objectively comparable situations or when there are imperative grounds in the general interest, and cannot be justified solely by the tax autonomy of the different territorial entities.

This differential treatment occurred in the *Impuesto sobre Sucesiones y Donaciones* (Law 29/1987, of 18 December) when an inheritance was divided between non-residents and residents, as the former were subject to the state legislation and the latter to the Autonomous Communities' one. The Autonomous Communities' legislation was more beneficial as they had established tax benefits in the exercise of their legislative competence over the elements of quantification of this tax (tax base, tax rates, allowances and deductions from the tax liability). In view of this situation, the CJEU ruled that there is no objective difference between the situation of resident and non-resident heirs that could support a difference in treatment (CJEU's Judgment of 3 September 2014, European Commission v. Kingdom of Spain, Case C-127/12, paragraph 77).

Despite this CJEU's Judgment, discrimination between residents and non-residents is again committed in the new *Impuesto Temporal de Solidaridad de las Grandes Fortunas* (ISGF), to which we will return later.

This tax is levied on the ownership of the net worth exceeding €3,000,000 by both residents and non-residents in Spain. However, it grants a favourable treatment to residents by establishing a minimum exemption of €700,000. Thus, residents must reach a net worth of €3,700,000 to pay the tax and non-residents would pay the tax from €3,000,000 onwards.

This situation is not consistent with the IP, which recognises the minimum exemption for both residents and non-residents. Consequently, the ISGF regulation would be contrary to the principle of non-discrimination by treating objective situations that are comparable in a different way.

b. Limits from domestic law

As we have already stated, the Autonomous Communities' tax autonomy allows for different regulations of a ceded state tax in their respective territories. This means that the same ability to pay may be taxed with different intensity.

In any case, it is not permitted, once it has been determined which autonomous community regulation is applicable, to treat non-residents differently if the situation in which they find themselves with residents is comparable and there are no objective or reasonable causes to justify such differences. That is, the same ability to pay cannot be taxed with different intensity depending on where the taxpayer resides (CCJ 52/2018, of 10 May, FJ 3rd and CCJ 20/2022, of 9 February, FJ 4th), as

this would violate the principle of equal taxation (article 31.1 of the SC) by taxing the same ability to pay in different ways.

For this reason, the CC considered that the *Impuesto sobre Sucesiones y Donanciones* of the Community of Valencia did not respect the ability to pay principle by granting tax benefits only to residents in that Community, on the understanding that all heirs, regardless of the Autonomous Community in which they reside, are in a comparable situation without there being any objective or reasonable cause to justify differential treatment (CCJ 60/2015, of 18 March, FJ 5th).

6. Current issues

a. The consideration of interest on arrears received for undue payment as ability to pay

The interest on arrears received for an undue payment by the taxpayer have compensatory nature. Its purpose is to compensate the taxpayer for the payment of an amount of money that he should never have paid. Consequently, it does not seem reasonable that this compensation for the damage caused to the taxpayer should be considered as income or capital gain. Even less so, if the origin of the undue income is an error on the part of the Administration, as this would be an unjust enrichment on its part.

Initially, the Supreme Court (SC) considered that the interest on arrears received by the taxpayer for the refund of the undue payment of a tax cannot be considered as a capital gain as its purpose is to compensate the damage caused to the taxpayer. This compensatory purpose *would be frustrated, at least partially* if we consider interest on arrears for undue income subject to *Impuesto sobre la Renta de las Personas Físicas* (SCJ 1651/2020, of 3 December, FD 3rd).

However, recently, the SC has considered that i*nterest on arrears paid by the Spanish Tax Agency when making a refund of undue payment are subject to and not exempt from the Impuesto sobre la Renta de las Personas Físicas, constituting a capital gain* (SCJ 121/2023, of 12 January, FD 3rd).

If we accept this reasoning, it would be taxing a non-existent, merely fictitious or apparent ability to pay, which is prohibited in the light of the doctrine of the CC (for example, CCJ 221/1992, of 11 December, FJ 4th).

b. The unconstitutionality of the regulation of the tax base of the *Impuesto sobre el Incremento del Valor de los Terrenos de Naturaleza Urbana* (IIVTNU)

Prior to CCJ 182/2021, of 26 October, there was only an objective assessment method for calculating the IIVTNU tax liability. This always resulted in a positive tax base and the corresponding tax liability, regardless of whether or not there had actually been an increase in value.

In most cases, this increase in value occurred without the constitutionality of this local tax ever being called into question. However, as a result of the economic crisis, it was often the case that there was no increase in value in the transfer of real estate. Therefore, applying the existing objective assessment method in these cases where there was no increase in value or even a decrease in value violated the ability to pay principle and the principle of non-confiscation, since this must be understood, as we have seen, not only as an obligation not to exhaust taxable wealth, but also as a prohibition on taxing non-existent or fictitious wealth (CCJ 182/2021, of 26 October, FJ 2nd).

For this reason, CCJ 26/2017, of 16 February, FJ 7th; 37/2017, of 1 March, FJ 5th; 59/2017, of 11 May, FJ 5th; and, 72/2017, of 5 June, FJ 4th, declared the unconstitutionality of the IIVTNU when there was no increase in value.

In the first of these Judgments, the CC clarified that the principle of non-confiscation is not only predicated of the tax system as a whole, but it must also be respected in each tax (CCJ 26/2017, of 16 February, FJ 2nd).

Subsequently, CCJ 126/2019, of 31 October, FJ 4th, also declared the unconstitutionality of the IIVTNU when, in the event that there is an increase in value, the resulting tax liability exceeds the profit actually obtained, since it would mean the taxation of a partially non-existent ability to pay and would be confiscatory.

However, this solution, which would allow the resulting tax liability to be equal to the profit obtained without being unconstitutional, was subsequently corrected when the CC recalled that in no case could the taxable wealth be depleted (CCJ 182/2021, of 26 October, FJ 3rd). Nevertheless, the CC does not resolve when a disproportionate or excessive tax liability, even if it does not deplete the taxable wealth, is in accordance with the principle of non-confiscation.

Finally, as we have already pointed out, the CC, in CCJ 182/2021, of 26 October, declared that for the calculation of the IIVTNU quota, the taxpayer should be offered the possibility of choosing between the existing objective assessment method or the direct assessment method.

c. *El Impuesto Temporal de Solidaridad de las Grandes Fortunas* (ISGF)

As already mentioned, the ownership of wealth in Spain is subject to the *Impuesto sobre el Patrimonio* (IP). This is a state tax that has been ceded to the AACC, which can assume regulatory powers over the elements of its quantification (minimum exemption, tax rate and allowances and deductions from the tax liability).

The regulatory power of the AACC has caused significant differences between taxpayers subject to the IP depending on their tax residence. For example, in the AACC of Madrid and Andalusia the tax liability is 100 % discounted.

In order to avoid such differences, harmonise autonomous community regulations and increase tax revenue, the State has created the ISGF as a complementary tax to the IP and applicable only to individuals whose net worth exceeds €3,000,000.

The Preamble of the ISGF law highlights the coincidence of its configuration with that of the IP, pointing out that the only difference is the taxable event, although this is limited only to the elements of quantification.[16]

The manifestation of ability to pay, the source of wealth, in the IP and in the ISGF is the same, the ownership of a net worth. In both cases, a minimum exemption of €700,000 is established for residents, and in the ISGF the first €3,000,000 of net wealth is subject to a zero rate of taxation. Therefore, a paradoxical situation arises when different relative ability to pay are taken into consideration for the same absolute ability to pay.

Moreover, the doctrine critically points out its potential confiscatory scope and consequent violation of the ability to pay principle as a consequence from the rules established for the calculation of the quota.[17]

The ISGF quota together with those of the IP and IRPF cannot exceed 60 % of the IRPF taxable bases. In cases where this limit is exceeded, the ISGF quota may be reduced up to a maximum of

16. In relation to the IP, article 3 of Law 19/1991, of 6 June, provides that *the taxable event for the tax shall be the ownership by the taxpayer at the time of accrual of the net worth referred to in the second paragraph of article I of that Law*.

    With regard to the ISGF, article 3.3 of Law 38/2022, of 27 December, establishes that *the taxable event shall be constituted by the ownership by the taxpayer at the time of accrual of a net worth of more than €3,000,000*.

17. GARCÍA NOVOA, C., "Los visos de inconstitucionalidad del Impuesto Temporal de Solidaridad de las Grandes Fortunas (impuesto de solidaridad)", *Revista del Instituto de Estudios Económicos*, Num. 1, 2023, pp. 50-66; RUBIO GUERRERO, J.J., "Impuesto Temporal de Solidaridad de las Grandes Fortunas (ITSGF): una valoración crítica", *Revista del Instituto de Estudios Económicos*, Num. 1, 2023, pp. 87-98.

80 %. This implies a minimum quota of 20 %, which may in some cases lead to a taxation of more than 60 % of the IRPF taxable bases. This is the main reason GOROSPE OVIEDO[18] warns of the possible infringement of the ability to pay principle in the ISGF, as it could have a confiscatory scope.

However, this would not go against the doctrine of the CC in relation to the principle of non-confiscation, since, as we have seen above, this is limited to prohibiting the exhaustion of taxable wealth, without pronouncing on what percentage a quota is confiscatory due to its excess or disproportionality.

d. Inflation's impact on the taxpayer's ability to pay and its lack of consideration in tax design

The increase of prices or, in other words, the loss of the value of money has an impact on the taxpayer's ability to pay. Therefore, the elements of quantification of taxes should take inflation into account in order to tax the real ability to pay of the taxpayer and not a fictitious or non-existent ability to pay.

However, the CC considered, when discussing whether the calculation of the IIVTNU should take into account the inflation produced between the period of acquisition and transfer of the land, that the legislator is *free to decide whether or not to apply monetary corrections, as well as to determine the specific formula for carrying them out* and that only in *extreme situations* of *particularly acute* inflation would the legislator be required to act to avoid taxing fictitious or non-existent ability to pay (CCJ 221/1992, of 11 December, FJ 6th).

In relation to this local tax, the SC has also rejected taking into consideration inflation or the updating of the acquisition value of the land of the real estate (SCJ 1689/2020, of 9 December, FD 2nd).

Moreover, the CC has recently considered that it is consistent with the ability to pay principle that the calculation of capital gains derived from the transfer of real estate in the *Impuesto sobre la Renta de las Personas Físicas* does not take inflation into account, considering that the economic situation prior and subsequent to the reform that abolished the updating coefficients cannot be described as extreme or particularly acute (CCJ 67/2023, of 6 June, FJ 4th). This position distances itself from current trends in neighbouring countries such as Germany, France, Italy, Luxembourg and Portugal and would mean taxing not real income, but rather nominal income (totally or partially non-existent) and, therefore, a non-existent or fictitious ability to pay, as reflected in the dissenting opinions of this CCJ.

7. Conclusions

From article 31.1 of the Spanish Constitution, it can be deduced that the ability to pay principle is a basic element of the taxes and indispensable for understanding the principles that inspire the Spanish tax system. However, the legislator can graduate the intensity of the application of the ability to pay principle in order to achieve other aims, principles and values enshrined in the Spanish Constitution. In fact, the creation of taxes with primarily extra-fiscal purposes, such as environmental taxes, in which, in some cases, it is difficult to defend the respect of the ability to pay principle, has been admitted.

It is not only when the tax is used as an instrument for such purposes that a relaxation of the ability to pay principle has been accepted, but also when it has only a revenue-raising purpose. Thus, for example, the fight against tax fraud or reasons of taxation technique can be used by the legislator to graduate the intensity of the application of the ability to pay principle.

18. GOROSPE OVIEDO, J.I., "La dudosa constitucionalidad del impuesto sobre las grandes fortunas", *Tributos Locales*, Num. 161, 2023, pp. 165-186.

The above, undoubtedly implies a reconsideration of the influence of the ability to pay principle in the creation of taxes, which is also at risk, like the rest of the material principles of tax justice, with the creation of property-based charges of public character and a non-fiscal nature. These allow the satisfaction of general interests outside the scheme of article 31.1 of the Spanish Constitution — that is, contribution to the support of the Public Treasury in accordance with ability to pay through the payment of a tax in order to carry out public expenditure — since it is possible to demand a payment between private individuals for the satisfaction of a general interest without taking into consideration ability to pay as a basis or parameter for distributing the burden for its satisfaction. However, these property-based charges of public character and a non-fiscal nature are completely subject to the rest of the principles, rules and values enshrined in the Spanish Constitution.

The situation described in this article reveals a divergence in the treatment of ability to pay in Spain and in other EU countries, such as France or Germany. For example, the failure to update the calculation of the tax in accordance with inflation — taxing a non-real ability to pay — and the Constitutional Court's failure to specify the percentage above which a tax is considered not to satisfy the principle of non-confiscation - allowing practically the entire ability to pay to be taxed without its depletion - situates the Spanish economic sector at a disadvantage in relation to other Member States of the European Union in the internal market.

In the same way, property-based charges of public character and a non-fiscal nature detract wealth from those obliged to pay them — even though this is not their raison for existence — reducing their ability to pay. However, this is not considered when calculating the tax burden supported. Therefore, when comparing the tax burden in the countries of the European Union, not all the burdens supported by Spanish citizens are being considered.

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