

The Messi case: the criminal risks of tax advisors*

Juan Martín Queralt ¹

Table of Contents

1. A hot topic issue: the criminal responsibility of the tax advisor 2. The authorship of the tax crime, strictly speaking, can only be imputed to the taxpayer of a tax liability defrauded 3. The Spanish Supreme Court does not admit the figure of the delegation and the consequences associated with it in the tax compliance 4. The participation of third parties in the commission of tax crimes. Dominant doctrine: the tax advisor as necessary co-operator 5. Conclusions

1. A hot topic issue: the criminal responsibility of the tax advisor

One of the features that draws great attention to who examines the case-law is the frequency with which the Courts has recently ruled about judgments related to crimes against the public finance. The phenomenon is not exclusive to the Spanish legal system, but it is also observed in all European Courts , including European Union courts.

In these judgments there are the following common notes: a) close relation between Criminal law and Tax law, taking into account that criminal norms defines the punishment but that refers to tax law to define the offence (criminal law in blank); b) tendency towards the admissibility of the pursuit of the administrative action -both tax settlement and tax collection-, thus overcoming the paralysis of administrative action that traditionally occurred as a consequence of the principle of criminal prejudiciality ; c) dogmatic

* How to quote this article: J.M. QUERALT, *The Messi case: the criminal risks of tax advisors*, translated by SATURNINA MORENO GONZALEZ, Universidad de Castilla La Mancha, in *Studi Tributari Europei*, n. 1/2017 (ste.unibo.it), pp 251-272, DOI: 10.6092/issn.2036-3583/8779.

¹Juan Martín Queralt, Full Professor of Tax Law and Public Finance at the University of Valencia, Spain

redraft of some criminal principles, especially exacerbated in the criminal prejudiciality field and in the *non bis in idem* principle.

The abovementioned context is due to a main reason: the need to satisfy the tax collection requirements of tax Administrations whose indebtedness is contrary to the budgetary stability requirements promoted by European Central Bank and International Monetary Fund.

The modification of that traditional dogmatic is also disturbed by other circumstances that are present in the legal tax systems: the plurality of sources of law (European, national, regional, etc); the complexity of tax rules, which is associated with the overcoming of the tight national territorial framework in which the rules used to produce their effects; the necessary respect to the doctrine held by EU Courts and, finally, the consequences that all this on the principle of legal certainty.

Considering the aforementioned factors, it is easy to conclude that several difficulties arise when the requirements of the tax system must be complied. That difficulties are increased when what is at stake is the possibility -or not- that its infringement may cause an accusation for a crime against the public finance. Indeed, it is the complexity of tax rules what explains why both enterprises and natural persons turn to the advice of third parties -tax advisors, accountability practitioners, etc.-, increasingly more frequently, to comply with their tax liabilities.

It is just in this point where arises *the requirement that the legal system determines in which cases*, under what conditions and under what entitlement (co-operator, accomplice, instigator, etc.) these third intermediaries can be accused of a crime.

Traditionally, the case law collected the trials originated by civil claims by those who felt injured by the advice of the tax advisor. The criminal jurisdiction order, like the tax crime, (the so-called *impossible crime* given its inanity) was barren for the tax practitioner in this point. Over time, and especially since 90s, both civil and criminal ways have increased.

In the civil jurisdiction order, the claims have intensified as a consequence, to a large extent, of the issues that the Tax law itself presents for the correct compliance of tax duties. The telematic requirements, the extreme

rigorism linked to the formalization of such duties, the meaningless administrative burdens filling in some forms have led to a scenario in which the position of the tax advisor is exposed to responsibilities of all kinds.

A good example is pointed out in the Supreme Court (SC) judgment of 11 March 2016, Civil Chamber, whereby the Supreme Court confirms that the contractual responsibility of the tax advisor who, having advised on a business restructuring, did not report on the need for a future accounting, and by the customer's own accounting services, a certain accounting record was made. The negligent advice resulted in the opening of a tax procedure by the *Agencia Estatal de la Administración Tributaria* (AEAT), which denied the right to reserve for investments in Canary Islands due to non-compliance with the requirements related to the separate accounting. Dismissed in the administrative jurisdictional order the allegations of the client, he filed a civil claim. That claim was believed funded in Law by the SC because the adviser should not assume as real certain accounting and legal knowledge of the client's employees. These employees are in charge of complying with the formal requirements to which the right to the Reserve for Investments in Canary Islands is subject.

In the criminal jurisdiction order, the criminal responsibility in which the tax advisor may incur in the exercise of his profession is one of the most exciting topics that occurs in the legal field currently. An important factor is the publicity given to certain cases related to public figures (celebrities, sportsmen, etc.), the economic impact of some of the cases in which always appears the role of a tax advisor and, finally, the judgments of the Court of Justice.

The media impact occurs not only when the Courts have ruled about this problem, but also when they have not the opportunity to do it because no accusation had been made against the advisors. That is what has happened with the so-called Messi Case, which was ruled by the Supreme Court, Criminal Chamber, in its judgment n° 374/2017, of 24 May (rec. 1729/2016. Reporting Judge: Mr. Luciano Varela). The judgment ruled an appeal filed by the Lionel Messi lawyers against the ruling issued by the Provincial Court of Barcelona, in relation to the taxation of Messi's image

rights in 2007, 2008 and 2009, whose ownership was accrued in a company located in an offshore territory. The judgment states the Supreme Court's doctrine about that situation. The Court states its perplexity regarding the fact that neither the Public Prosecutor nor *Abogacía General del Estado* filed an accusation against the tax advisors who took part in the construction of the tax planning about Messi's image rights.

"Indeed, it is difficult to understand that the contracted tax advisors have been excluded from any accusatory concern by the Public Prosecutor office and the Abogacía General del Estado. But, such an unusual attitude of these accusations can not increase the undesirable result of adding to such eventual impunity that of the tax evader who has been accused in this criminal process" (Legal Foundation nº 6).

In the same Legal Foundation, it is declared that:

"...we can conclude that when the defendant goes to the professional office is not for receiving information about its tax liability and how complying it, but to be reported about how to avoid them because only from this design is understood that the acts materially executed by the defendant carry out the objective element of the crime".

And the Supreme Court continues adding that:

"Once again the appellant goes to the order made by the qualified as the prestigious office 'XXX', which he says designated as representative for the management of his tax liabilities. And that data, admitted by the judgment in first instance, purports to be enhanced with another assertion: YYY could not have known the illegality of the tax returns made by his tax advisors, because the illegality can only be known if the fact is related to a criminal norm, unknown for him.

In that rhetorical way, the appeal does not doubt in another affirmation: If a non-expert in Law resorts to specialists in tax matters to advise him, paying for it important fees, he does not act with indifference, nor has deliberately wanted to ignore what his tax liabilities were. Otherwise, he has done what he could do and what is socially appropriate.

2.- The data of the quantity of the fees is, in the best of cases, neutral. Even if the amount is not stated in the trial, it is clear that the professionals

can claim that it is high, even if the purpose of releasing the client is lawfully or unlawfully done. Even in this case, given the risk incurred by the tax advisor to be prosecuted, it seems reasonable to understand that he claims more quantity.

The rest of the argument lapses if one attends to the fallacy about equating the knowledge that a behaviour is illegal with the knowledge of the specific norm from which illegality derives. *One thing is to know that a tax duty is infringed and another one is to know HOW this goal is achieved. Ignorance about that "HOW" is what makes whoever intends that goal go to whoever illustrates the way to follow.*

...

The described situation by the appellant (going to the legal office of the tax experts) is not explained from the logic in the vein that the defendant was deliberately ignoring the situation. Rather the link of those data (knowing high economic perceptions in Spain that are freed from taxation in this country after stating acts and contracts unequivocally disguising the economic reality that they conceal) only leads by inference to an exclusionary conclusion of any other: *the experts are consulted because it is though by the client that they are experts in the content of the tax norm but also because it would be estimated by the former that they are, precisely because of this, experts in the possibilities of excluding their effectiveness.*

... And in that search, the taxpayer does not go to a delegation in the advisor. Collaboration is sought to participate in the goal with respect to which there is no doubt its illegality but only about the way of achieving. Without doubt for the defendant it is more profitable than the administrative mechanism, made available to common taxpayers by the tax Administration, with a voluntary nature: go to the help services in this regard by the tax Administration.

...

The motive requires that concurrent error should have been estimated in the defendant since the Public Prosecutor and the Abogacía General del Estado should have considered that in such an error the advisors also

incurred. In such a way it is inferred by the appellant because they did not make accusations against the tax advisors.

The perplexity of the appellant can be shared by this Court. And it is not correct to find coherence in this procedural strategy, which guarantees impunity to such professionals and founds the accusation to the appellant in the use of formulas that they created and provided to the defendant, even to manage its implementation. But the tax advisors impunity cannot be erroneously increased with its reiteration with respect to the defendant, without claudication of the duty to sanction the facts constituting a crime. (Legal Foundation n° 8).

Just about this sentence, in a recent work published in the Journal of the *Abogacía General del Estado*, the authors highlight that:

"The Hight Court has opened season: the criminal responsibility of the tax advisors whose clients avoid their tax duties should be audited. The issue is not trivial. From this judgment, so important in the investigation of tax crimes, will start to scrutinize the performance of the tax advisors: their role in the crime under investigation" (D.F. Blanco y M. Cabrera Galeano. "El delito contra la Hacienda Pública y el asesor fiscal". Revista Abogacía del Estado. N° 46. Enero 2018, the underline is our).

It is true that, as the authors point out, "in most cases the tax advisor plays a profitable and responsible role for the society to which he provides services". In that line, it has already pointed out by *the judgment of the Provincial Court of Cordoba of 11 May 2010* that "...it cannot be made fall into the advisor profession what some author has called an unbearable duty of examination on the intentions of the taxpayer... This doctrine was established by the Provincial Court of Barcelona, in judgment of 23 April 1993, and held that "it cannot be accepted that a person in his capacity of being a tax and accounting advisor assumes as a personal obligation the responsibility that everything he reflects in the books and declarations made for the companies in which he provides his services are a true reflection of the economic reality of the company by not having the necessary information to do it directly".

Regarding all the above-mentioned as true, it is also true that the social sensibility has changed, and the tax advisor's actions are already a focus of attention in the trials.

2. The authorship of the tax crime, strictly speaking, can only be imputed to the taxpayer of a tax liability defrauded

In accordance with the consolidated case law of the Criminal Chamber of the Supreme Court, the penal type of Art. 305 of the Criminal Code is based on an objective element characterized by being a crime of omission, constituting a breach of duty, which belongs to *special crimes*, which determines that it can only be committed by a taxpayer.

In that vein, it has been indicated by the judgment of the Supreme Court:

"The penal type is objectively constituted by:

a) An author characterized as a *tax debtor*. It is a "*special crime*" that only those who have this condition can commit it. This does not require that the author carry out the typical behaviour by himself.

b) An *aspect "essentially omissive"* because it *supposes the infraction of the duty to contribute*, which the doctrine classifies within the "mandates of determination", that lead classify the crime within the category of "law in blank".

c) but that is not limited to mere passivity, so it assumes any of the kinds of actions or omissions that the above-mentioned precept foresees. *The mere avoidance of the presentation of the mandatory tax declaration and its settlement, or the inaccuracy of it, is not enough, since the devalue of the action requires the deployment of "a certain misleading behaviour or artifice" functional to keep hidden to the tax Administration the existence of the taxable event..*

The existence of this element of mendacity is an essential characteristic to be able to appreciate the existence of a crime. Too often, the difference between crime and administrative offence is limited to the amount defrauded, so that if it exceeds 120,000 € there is a crime and if it is lower there is an administrative offence. Nonetheless, as recently stated by the Supreme Court in the same judgment, the existence of a crime requires not

only overcoming the punitive threshold -120,000 €- but also something else, so that for crime to exist, the concurrence of a series of objective characteristics of the penal type are required, which requires "the display of "a certain deceptive behaviour or artifice"...; [and] that this offence derives from that deceptive action, which excludes from the typicity the cases in which the behaviour of the subject does not prevent or significantly hinder the action of verification by the tax Administration for the effectiveness of collection, thereby differentiating itself from the mere administratively sanctioned offence".

d) that it requires a *result* constituted by the "economic damage for the Public Treasury" that will be typical if it reaches the amount established in the penal rule;

e) *this offence derives from that deceptive action, which excludes from the typicity the cases in which the behaviour of the subject does not prevent or significantly hinder the action of verification by the tax Administration for the effectiveness of collection, thereby differentiating itself from the mere administratively sanctioned offence"*(Legal Foundation n° 2).

Doctrine already consolidated, but in which some fissures begin to be appreciated:

1) In elements traditionally considered immutable. This is what happens, for instance, with the traditional conception that the figure of the continuing crime in tax crimes cannot be appreciated; a doctrine that reveals recent variations in the dissenting votes formulated in the aforementioned judgment, and

2) in the exclusion of typicity in cases in which "*the behaviour of the subject does not impede or significantly hinder the action of verification by the tax Administration for the effectiveness of the collection, thereby differentiating itself from the mere offence sanctioned administratively*".

So far, we have taken for granted that the subjective element of the crime must be present both in the administrative and criminal offences . This is how it is understood by the Spanish Central Economic-Administrative Court -Ruling of 20 July 2017: "There must be intentional and deliberate behaviour aimed at fraud in respect of which a sufficient degree of

seriousness may be proven...". The Supreme Court also requires that the behaviour of the subject "*prevent or significantly hinder the performance of verification by the tax Administration for the effectiveness of collection*" circumstance that, concludes, differentiates the criminal offence of the mere infringement sanctioned administratively.

The difference was mainly in the punitive threshold. What Supreme Court says adds an obvious degree of uncertainty about the criminal type's own objective element.

3. The Spanish Supreme Court does not admit the figure of the delegation and the consequences associated with it in the tax compliance

In the scholar doctrine, the possibility of admitting the delegation to a third party to comply with the tax duties of the delegator has been affirmed.

Bacigalupo notes:

"The rule is clear: while the fulfillment of the tax duty does not require an action "of own hand", the tax duty can be fulfilled through another. *When opting for this kind of compliance, the taxpayer fulfills the duty and, thus, does not act unlawfully, if he has delegated the compliance in a skilled person to do so.*

First of all, we must point out that in Spanish law the delegation is totally lawful. This was established by the Criminal Chamber of the Supreme Court in its judgment on 26 of March 1994, in which it was stated that "the legal system recognizes the exempting value of the responsibility to the delegation of the position of guarantor, when such delegation is made in skilled people for the function and who have the necessary means to carry out the tasks that corresponds to the duty to act". Art. 249 of the Corporate Enterprises Act, introduced by Law 31/2014, has the same basis as the judgment of the Supreme Court on 26 of March 1994. The requirements established by the abovementioned case law and by Art. 249 are satisfied when the fulfillment of the tax duty is delegated to a professionally competent tax advisor.

In the scope of the tax crime (Art. 305 Criminal Code) this delegation can reach, and in fact reaches, the cases in which the tax advisor not only advises on the applicable tax law, but also those cases in which the tax advisor acts as a voluntary representative of the taxpayer in the presentation of the corresponding tax declarations.

The problem that could arise in the case of the tax crime arises from its character of special crime, which would exclude the voluntary representative of the taxpayer from the circle of possible perpetrators of the crime, while this subject is not the taxpayer. The case law of the Supreme Court prior to the 1983 reform did not consider necessary a legal authorization to extend the responsibility to the representative. It was obvious, the Supreme Court should have understood, that the non-punishability of the representative was tantamount to decriminalizing the special crime itself. Notwithstanding, this solution offered obvious weaknesses from the perspective of the principle of legality (Art. 25.1 of the Spanish Constitution), as it lacks clear support in criminal law. The objections, however, have been overcome since the reform introduced by Organic Law 8/1983.

Currently the extension of the liability of the taxpayer to the voluntary representative is no longer problematic, as it is expressly contemplated in Art. 31 of the Criminal Code (acting on behalf of another). In such a way, the lawmaker has covered the objections based on the principle of legality that preceded the 1983 case law for acting on behalf of another. Art. 31 of the Criminal Code states the responsibility of the one acting. To put in other words: when he performs the typical conduct on behalf or (legal or voluntary) on representation of another, even if "the conditions, qualities or relationships that the corresponding figure of the crime requires in order to be an active subject of the same do not concur in him, if such circumstances occur in the entity or person in whose name or representation he works".

But the tax advisor should not always be considered as responsible, given, for example, that he may also have incurred any of the errors stated in Art. 14 of the Criminal Code. Besides, it seems clear that his conduct will not be

typical (i.e. it will be a neutral conduct) when its advice is based on an interpretation of the applicable Tax law, which is sustainable by any of the recognized methods of interpretation of the law, although the legal interpreted text admit other interpretations.

To sum up, the tax advisor cannot be held responsible as a participant (inductor or co-operator) if his performance does not exceed the limits of a socially appropriate exercise of his profession (as it concerns neutral actions).

Neither he can be considered an author when acting as administrator, on behalf of or as a voluntary representative of the taxpayer and provided that he has acted on the basis of a sustainable interpretation of the law by one of the acceptable interpretative methods.

This criterion has been established by the case law of the Supreme Court since 1999 in relation to the concept of *arbitrariness or injustice* of the judgment, of the judicial ruling or of an administrative ruling of a public official, of the crimes of judicial prevarication (Art. 446 Criminal Code) or the prevarication of a public official (Art. 404 Criminal Code). Actually, it is a general criterion that does not exhaust its significance in the crimes of prevarication, but it is decisive for any punishable act that has its basis in an interpretation of the law. It is evident that the tax advisor provides technical advice, whose foundation is an interpretation of the criminal law. To the extent that this interpretation is sustainable with the accepted criteria of interpretation of the law, his action must be considered a neutral action, and, for that reason, it will not be subsumable under the criminal type of the tax crime in Art. 305 of the Criminal Code" (Bacigalupo, E. "Cuestiones de la autoría y participación en el delito fiscal". Diario La Ley, nº 8715, 4 marzo 2016).

The position of the Supreme Court is radically opposite, as held in the judgment n. 374/2017: there is no *delegation*, at least in the so-called *horizontal scenario*:

"The terminological guile of the appellant in using the term 'delegation' can not make us forget the diversity of the cases in which the criminal action unfolds when it does so within the framework of a hierarchical and complex

economic and legal organization (activity of a company from which environmental damages derive) with respect to those others in which the plurality of participants develops horizontally (codelinquency).

In the first case, the creation of risk by the company, with a plurality of subjects, generally related to each other hierarchically, forces the search criteria of imputation to determine who of those is criminally responsible. Some authors propose the "competence criteria", ignoring purely formal criteria, and starting from the delimitation of organizational areas within the company. It would operate in this way with criteria like "trust" that justifies that the unavoidable "delegation" of those who are in a step in favor of subordinates, that translates into being excluded from criminal liability, if that trust is legitimate. Even when the criminal responsibility can be attributed in the specific cases thus typified to the legal entity, it can be exempted from that criminal responsibility. But, yes, when the trust in the manager acting for it precedes the precautions of Art. 31 bis 2 of the Criminal Code.

But when the plurality of subjects concurrent to the criminal act manifests itself in a kind of "horizontal association", outside the framework of a complex economic or legal organization, and that can give rise to plural criminal responsibilities, already of co-participation and of participation, the concept of delegation is strange. *The "distribution of functions" among the participants leads to the accumulation of criminals.* In no case exoneration of any.

It has been hypothesized that it is an *extraneus* who generates error in the taxpayer, who, as a result, breaches, without malice, the duty that bound him (Supreme Court judgment on 30 April 2003). To solve the liability of that *extraneus*, when the *intraneus* is absolved due to lack of malice, diverse theses have been drawn up from that of the sentence handed down. Among them the one that configures the crime, not as a breach of duty, but as a special domain crime. It would not matter so much who is bound by the unfulfilled duty, as who has the domain of the fact. Domain to which the *extraneus* would accede already by virtue of the representation conferred

on him by the obligated subject, or because he instrumentalizes the stranger in the relationship of duty.

The assumption of translation of the domain through representation is what the resource considers concurrent. Therefore, it considers that the application of Art. 31 of the Criminal Code shifts the responsibility to the stranger in whom the conditions of subject specially obliged to the payment of the tax do not concur.

But one thing is that representation by reason of Art. 31 of the Criminal Code can suppose a translation of the qualities demanded in the special subject, making him criminally responsible for the domain of the fact that he acquires, and another that the represented one is devoid such qualities and therefore, in case of representation, should be exempted from criminal liability. Obviously, if the features of the latter concur with respect his behaviour.

To the extent that the abovementioned responsibility is that of the represented party, the invocation of Art. 31 of the Criminal Code, that concerns precisely the person who cannot be a special subject of the type, is inadequate. Excluded from the debate in this case the situation of the advisor, the relationship of authorship of the subject to the fiscal duty evaded is predicated in relation to the typical conduct, referred to each author or intervener. Therefore, not in relation to the typical fact as an objectified unit because every subject, author or intervener, will respond criminally. The author will be charged for their relevant contribution of the risk, shared fact with the participants. This contribution allows to consider who makes it with his conduct as the author of the tax crime if gathering the typical characteristics of this crime (subject obliged in the tax relationship) effectively controls the complex of acts that culminates with the realization of the risk created.

Such domain of the criminal conduct does not disappear, as claimed by the appellant, by delegating actions on other subjects, if he retains the competence to collect the information of compliance by the delegate and if he can revoke the delegation.

The reference to the unavoidable demand for technical advice in complex companies and in the scope of action referred to certain duties, could lead to reflections in the field of culpability questioning the enforceability of a conduct different from that allowed by the author. But in no way in the scope of the concurrency examination of the objective element of the type” (Legal Foundation n° 2).

4. The participation of third parties in the commission of tax crimes.

Dominant doctrine: the tax advisor as necessary co-operator

Traditionally, the Spanish Supreme Court has qualified the conduct of the tax advisor who has played a decisive role in the consummation of the crime as necessary cooperation, beyond the cases in which such behaviour can be subsumed in the type of accomplice or inductor. The Supreme Court understands that authorship cannot be attributed as such because the tax advisor does not dominate the fact globally, but a part of it.

Logically, all the elements that condition the possible qualification as a necessary co-operator will have to concur, without the mere condition of tax advisor of a taxpayer being enough for this.

Sometimes, the so-called theory of scarce assets serves as the basis for the sentences as a necessary co-operator imposed on tax advisors in the Supreme Court judgments of 26 July 1999 and 16 February 2001.

In the first judgment, the Court considers that the participation of the tax advisor in the facts is fundamental and essential for the development of the fraude, since without his technical knowledge available to few people, it could not have been carried out given the great complexity of the operation. In the second judgment, the emphasis is placed on the fact that *“it is an effective cooperation with effective transcendence in the final result of the planned operation, which cannot be framed in the first paragraph of Art. 28 of the Criminal Code because for not being the accused taxpayer of any tax duty, but it does suppose the provision of an indispensable collaboration in the realization of the crime committed, included in paragraph b) of the second paragraph of the aforementioned article”*. In the same line, in the Supreme Court judgment of 21 December 2016, the tax advisor is

condemned as a necessary co-operator in the tax crime and as an author in the money laundering crime.

There is no condemnation when, as in the case decided by Supreme Court judgment of 30 April 2003, the author of the fraud had *"a broad domain of business activity since it had been devoted to it throughout his life and with remarkable success by the way. And, if it is logical the inference of the Court of instance according to which the accused knew at all times the meaning of the operations he carried out, either by himself or by inducing others to carry them out, it is equally true that he was fully aware of its illegality..."*. In short, the participation of the tax advisor was perfectly suppressible, since without it the result would have been the same.

The Supreme Court insists on the responsibility of the tax advisor, as a co-operator necessary, concluding in the judgment 494/2014 of 18 June, that: *"It is not true that the tax crime can only be committed by the taxpayer. It is enough to notice that this Chamber has come to condemn as a necessary co-operator of this crime a tax inspector who, participating in the plan devised to carry out frauds (...). The same idea is reflected in other precedents that have deemed necessary co-operator to the tax advisor who planned and designed the complex operation of concealment of benefits (judgments 1231/1999, 26 July and 264/2003, 30 March). (...). The law, in short, does not prevent the extraneous punishable in the intransigent crime itself. Therefore, the various forms of participation -inductors, necessary co-operators, accomplices- are admitted in this crime. It is rejected that this crime, therefore, can be committed exclusively by the taxpayer (judgment 274/1996 of 20 May)"*.

Only in very special cases has been held the tax advisor accountable as an author, provided that he had breached in a malice way his mandate without the knowledge of the represented party (judgment of the Zaragoza Provincial Court 397/2009, of 31 July).

This is the dominant doctrine in the case law field, generalized also in the are of the so-called "minor case law" (judgments of the Provincial Court of Madrid, of 11 April 2001, and Pontevedra, of 4 February 2016). This is a scope in which there have been some singular cases, such as the content of

the judgment of La Rioja Provincial Court, 21 October 2015, in which the tax advisor is condemned as a necessary co-operator, despite the acquittal of the taxpayers. In view of this paradoxical situation, the Court states:

The shareholders of 'Residencial Virgen del Rocio' delegated all the financial arrangements to their financial advisor Mr. Jesús Carlos, who, as we pointed out in the previous foundation, was the one who made the accounting of the sale of the property, and also the elaboration of the tax settlement of the Corporate Income Tax, with which it had a direct and effective participation in the tax evasion activity, fulfilling with it all the requirements demanded by the Criminal Code to be considered as an author by necessary co-operator".

In another judgment of the National High Court of 3 April 2013, (which is remarked in appeal by the Supreme Court judgment of 11 March 2014), the advisor was convicted as necessary co-operator in a tax crime, noting the the National High Court that *"the judgment 1159/2004, of 28 October, establishes that 'there is necessary cooperation when collaborating with the direct executor by providing conduct without which the crime would not have been committed."*

The non-imputation of the tax advisor is also clearly in some cases. Thus, the judgment of the Huesca Provincial Court of 3 July 2001 exempts from any criminal liability the tax advisor who, participating in the transfer of ownership of a series of assets, was unaware that these assets would later be confiscated:

"... the fact that the tax advisor of the defendants was not told that what they were really seeking was to prevent the creditors from locking the foreclosure on the real estate, explains that such tax advisor has not shared the passive legitimation of the criminal action with the defendants..."

Also, the judgment of the Cordoba Provincial Court of 11 May 2010 absolves the tax advisor and legal administrator, condemning the *de facto* administrator on the contrary. The reason is clear:

"...it should not be accepted that we are dealing with an advisory case properly, since advising implies by definition giving advice or opinion and here what Mr. Bartolome has done is little more than keeping the accounts

but not elaborating them from the beginning, since his mission was only receive what they sent from the office of Neumeses, and based on it elaborate and submit the corresponding statements, whose content cannot be held responsible”.

For the same reasons, the judgments of the Provincial Court of Alava of 18 July 2011, and Cadiz of 29 November 2013 are issued in an absolute sense. The latter highlights the impossibility of the so-called objective imputation and the necessary concurrence of an active conduct aimed at the consummation of the crime. Indeed, the advisor provided professional services for the company, but that alone is not enough, an active attitude towards crime is necessary.

“However, this does not mean that he knew that the invoices were false or mendacious nor does he imply participation in the tax fraud, since the taxpayer is responsible for his tax declaration regardless of the suspicion, which is not certain, that the tax advisor may harbor the criminal staging of the taxpayer, so that only when there has been an active cooperation in the crime, knowing, even inducing or advising on the criminal mechanics may speak of criminal liability in the counselor, but not when it limits itself to accounting for invoices or preparing tax declaration on the basis of the documents or invoices that are supplied to it, without it being required at least criminally a kind of control or control of the wills or intentions of those who use his professional services ”.

In short, in the case law it is considered that the tax advisor is a necessary co-operator, provided that the circumstances that favor such a qualification concur. This is also the thesis defended by the majority of scholars. In the well-known opinion of Córdoba Roda:

“The meaning of the terms of ‘defrauding by avoiding the payment of taxes’ leads to understand that such conduct is carried out by the taxpayer whether he personally makes the tax declaration, or if he entrusts a tax advisor or a representant who draws up and presents it. As to what should be the assessment of the conduct of the tax advisor and the representant, in the event that they act with awareness of the falseness of the declaration they present, obviously they cannot be classified as authors, for the reason

that in they do not give the condition required by Art. 305 of the Criminal Code. Hence, their conduct must be qualified as a *necessary cooperation* in the crime against the Public Finance, although the assumption of mitigating circumstance of Art. 65.3, since he is a necessary cooperator in which the condition, quality or personal relationship that supports the author's guilt does not apply. The judges or courts may thus impose a penalty lower in degree to that indicated for the tax crime by Art. 305" "Comentarios al Código Penal. Parte General" , pp. 366-367. Editorial M. Pons. 2011).

According to Córdoba:

- a) It is necessary to distinguish between co-authorship and necessary cooperation: for this it is not enough to resort to the theory of the domain of the fact, since each one of the co-authors in itself lacks the domain of the fact - for which the concurrence of the other co-authors requires. "*The necessary cooperator, unlike the co-author, does not assume a function to carry out the act as a whole, but to lend a contribution to a particular aspect*". (cit. p. 357). "The domain of the fact only occurs in the isolated author and in the group of authors in the co-authorship. It does not occur in each of the co-authors themselves, nor in the mediate author, since the instrument - tax advisor, representative ... - may decide not to carry out the fact" (cit. p. 358).
- b) "Cooperation must be for a specific crime. Any action that is not aimed at contributing to a specific crime does not constitute cooperation for the purposes of Art. 28 of the Criminal Code "(cit. p. 358).
- c) Cooperation must be necessary. This distinguishes it from complicit (cit. p. 358).

This is what differentiates the necessary cooperation from complicity.

As has been pointed out "*what distinguishes the necessary cooperator from the accomplice is not the domain of the fact, which neither have, but the importance or relevance of their contribution in the execution of the plan of the author or authors.*" (Comentarios al Código Penal, Juan Saavedra Ruiz (Dir.), Ed. El Derecho, Madrid. 2011, p. 167).

In this line the Supreme Court judgment of 7 May 2003 stated: "This Chamber has been declaring that the difference between complicity and the

necessary cooperation lies in the consideration of *the activity of the accomplice as secondary, accessory or auxiliary to the action of the principal author, as opposed to the condition of necessary to the production of the result of the behavior of the necessary co-operator*" (quoted in Córdoba, cit., p. 358).

d) When is cooperation necessary?

"... The investigation of whether cooperation was necessary, must certainly address in a concrete sense the approach of the individual subject, but this should not imply that acts whose need is purely imaginary in the mind of the author, attribute to cooperation the character of necessary. To operate like this, there would be a volatilization or dilution of the notion of necessity, which can not correspond to the meaning of the Law. Let's think, , for example, in a person with esoteric beliefs that conditions execution to the opinion of a sorcerer. Situation, of course, will be different if the subject makes the decision dependent on the agreement of the head of the organization. Naturally, in cases in which it is considered that cooperation is necessary, the responsibility of the cooperator will require that the act be carried out in full awareness of its relevance to the commission of the crime" (Córdoba, cit. , p. 359).

e) "Cooperation requires the concurrence of malice: awareness that one person contributes, through a necessary support, to the realization of a criminal act by another person. This is expressed in the case law: the theory of the so-called double intent (integrated by knowledge and the will of another performs a criminal act or omission ... and by the knowledge and will that the own action or omission is helping some way to the material author in his criminal accomplishment "). (cit. p. 360/361).

f) "It must be ruled out that cooperation can be carried out due to imprudence" (cit. p. 361).

"Given the possibility that it could be understood that in the hypothesis of carrying out a behavior that presents the characteristics of an imprudence and that is followed by the realization of an intentional crime by another person, what is given is not a cooperation, but the realization of a crime of imprudence ... "(Vinader case: journalist who publishes data of a series of

people who are then killed by ETA. There is no causal relationship - described as a crime of serious professional negligence- and the murder of those people”.

g) The treatment of authorship and participation in special crimes must comply with the rules on the non-retroactivity of the Criminal Law (Art. 2 of the Criminal Code) and the extinction of criminal responsibility for the lapse of limitation periods (Arts. 130 et seq. of the Criminal Code).

Against this doctrine Bacigalupo manifests with rotundity:

“... as long as the tax crime is understood as a crime of duty infringement, the distinction between action and omission is considered irrelevant. Applying the theory of *conditio sine qua non*, whose formulation coincides practically with the text of Art. 28 b) of the Criminal Code, *it is evident that to omit the fulfillment of a duty no help is necessary.*

In short: the distinction between necessary cooperation [Art. 28, b)] and unnecessary (Art. 29 of the Criminal Code) is meaningless in the crimes of omission and in the crimes of duty infringement; consequently, in the tax crime all participation in the form of cooperation will not be necessary. (cit.).

5. Conclusions

It is obvious that we have started a new phase in the repression of illegal conducts carried out by tax advisors. Hence, the relevance of making some observation about the content of such behaviors.

First of all, given the evident danger of the exercise of the profession and the consequences associated with it, it is worthwhile to obtain from the Legislator the necessary conceptual precision that prevents the aggravation of the already serious problem. This is especially necessary in an area in which - as is the case with crimes against the Public Finance- we are faced with criminal laws in blank, whose correct intellection requires the criminal judge to apply the content of tax laws. It is obvious that when the tax advisor acts in accordance with a reasonable interpretation of the rule, no problem should arise, since his action must be classified as a neutral action,

which entails the absence of fraud and the consequent inimputability of his action as necessary cooperator, as an accomplice or as inducer. In this point plays a relevant role Art. 14 of the Criminal Code and the consequences associated with it regarding the concurrence (or not) of the type error and the prohibition error.

What has happened in Spain with the obligation to declare the actives located abroad is just an example of what should not happen in this area. The Law that establishes such duty has been accompanied by a variety of provisions of the most varied stem that have noticeably blurred the straight intellection of the norm. The result of all this has been, in addition, the requirement of the Commission of the European Union to the Spanish Government to explain the reason for this legislation and, where appropriate, modify its scope, in order to make it compatible with the EU Law principle of free movement of capital.

Secondly, it is true that the case law of the Criminal Chamber of the Supreme Court has consolidated the absence of criminal continuity in the tax crime, which does not prevent certain discrepancies in two dissenting votes to the judgment of the Messi case.

The appeal urged the assessment of criminal continuity, which would mitigate the severity of penalties, invoking the effect of the fit of the facts in Art. 74 of the Criminal Code. For this purpose, the existence of a continuous tax declaration procedure was invoked, as well as the similarity with what happens in crimes against heritage.

Nonetheless, many of the members of the Court understand that it is not appropriate to assess the criminal continuity, given both the tenor of Art. 305.2 of the Criminal Code ("for the purposes of determining the amount ... will be defrauded in each tax period or declaration") and the principle of tightness. Furthermore, the Court understands that the principle of proportionality (which favors a reduction of the penalty as well as that which would apply if the existence of a continuing crime is estimated) is not violated given that the amounts defrauded are sufficiently important for the breach of the principle of proportionality can not be invoked.

Many conundrums in a matter in which traditionally the principle of legality had become the axis around which all judicial rulings were based. Things have changed a lot in recent years. On the one hand, the fact that the criminal law is referred to the tax law obliges the latter to a precision that does not always concur. On the other hand, the increasingly urgent tax collection requirements oblige the Tax Administration to comply with collection objectives that, on many occasions, have to be met at the cost of sacrificing principles traditionally considered immutable in the world of Law. The criminal prejudiciality and *the non bis in idem* principles are undergoing a reformulation that struggles with the traditional content of such principles (see the content of the judgment of the Court of Justice of the European Union of 20 March 2018, case C-524/15, *Luca Menci*)..

© Copyright Seast – Tutti i diritti riservati