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New question of constitutionality referred by the Supreme Court in relation to the tax on the value of electricity generation

GA_P Tax Area[1]

1. Background information

Since its incorporation into the Spanish tax system, both the possible unconstitutionality of the tax on the value of electricity generation[2] (IVPEE) and the possible infringement of EU legislation have been the subject of continuous debate. Among other aspects, taxpayers claim that this tax is unconstitutional on the basis of an infringement of the principles of equality, ability to pay and legislative precedence. At the same time, they consider that the configuration of the tax might appear to be contrary to EU legislation, in particular Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity and Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty.

In this regard, it is worth recalling that on 14 June 2016, the Supreme Court (Judicial Review Division) referred to the Constitutional Court a question of constitutionality in relation to

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[2] *Impuesto sobre el valor de la producción de la energía eléctrica.*

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certain articles of the Energy Sustainability (Tax Measures) Act 15/2012 of 27 December[3], which approved the aforementioned tax, for its possible infringement of the ability-to-pay principle enshrined in Article 31(1) of the Spanish Constitution.

In December 2016, the question of constitutionality was struck out by the Constitutional Court, contending that the Court of Justice of the European Union (CJEU) should previously rule on the conformity of this tax with EU law.

2. New question of constitutionality referred by the Supreme Court

The same Judicial Review Division of the Supreme Court, in its Order of 10 January 2018, instead of referring the matter to the CJEU for a preliminary ruling - as described in section 3 - has repeated its doubts as to the constitutionality of certain articles regulating the tax.

The Supreme Court has referred such doubts on the basis that the IVPEE could be taxing the same representation of wealth as the business activity tax[4] (IAE) and even the same taxable event, whilst appearing to lack the extra-fiscal purpose set out in its explanatory notes, namely the protection of the environment.

In this regard, as the court points out, the fact that the State approves a tax which, despite assigning it a purpose of protecting the environment, actually has an exclusively fiscal purpose, does not make it unconstitutional, even if it is technically flawed. Likewise, the court states that economic double taxation is not, per se, contrary to the ability-to-pay principle enshrined in Article 31(1) of the Spanish Constitution. However, the conjunction of all of the above might contravene the legal doctrine of the Constitutional Court concerning extra-fiscal taxes, so that "such a tax could be unconstitutional if it violates the principles, particularly the ability-to-pay principle, to which Article 31(1) of the Spanish Constitution makes conditional the exercise of the taxing power".

3. Question for a preliminary ruling from the CJEU

As indicated above, the Supreme Court has come to the conclusion that, with regard to the IVPEE, the Energy Sustainability (Tax Measures) Act 15/2012 does not present any problems of alignment with the EU's legal system.

[3] *Ley 15/2012, de 27 de diciembre, de medidas fiscales para la sostenibilidad energética.*

[4] *Impuesto sobre actividades económicas.*

The main basis for this conclusion is the impact in the present case of the judgment of the Court of Justice (First Chamber) of 20 September 2017 in Joined Cases C-215/16, C-216/16, C-220/16 and C-221/16 concerning a levy imposed by the Region of Castilla-La Mancha on wind power plants designed to produce electricity.

In this judgment, the CJEU concludes that the levy at issue, inasmuch as not imposed on the consumption of energy products or electricity, does not fall within the scope of Directive 2008/118, which does not, therefore, preclude the national legislation providing for the application of said levy.

The Order in question is not reasoned any further, which is why we believe that it will be in the Supreme Court's final judgment, once the Constitutional Court has reached a determination regarding the referred question of constitutionality, where the reasons which led the Supreme Court to not refer the matter for a preliminary ruling will be explained.

To this end, we should recall that even though courts are not required, in principle, to refer questions to the CJEU for a preliminary ruling, Article 267 of the Treaty on the Functioning of the European Union provides that "[w]here any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court".

Therefore, where the proceedings in which the question arises are brought before a court whose judgment is unappealable, the court would be required to refer said question for a preliminary ruling.

Finally, it is important to note that the CJEU has laid down criteria which allow a national court to not refer a matter for preliminary ruling, even if the judgment to be given is unappealable. Such criteria, listed below, are an exception to the general rule and must be interpreted restrictively:

(a) Where the question has already been the subject of a preliminary ruling in a similar case ('act eclaire').

(b) Where the correct application of EU law is so obvious as to leave no scope for any reasonable doubt ('act clair').