

Impact on directors of company debts and penalties under a sector-specific rule

In short, whether company payment contributions can be included in director liability (to company) claims.

ÁNGEL CARRASCO PERERA

Professor of Civil Law, University of Castilla-La Mancha
Academic counsel, Gómez-Acebo & Pombo

1. Supreme Court Judgment 3406/2025 of 9 July (ECLI:ES:TS:2025:3406)

In June 2012, the Spanish Tax Agency (the 'Tax Agency') notified the company *Malacitana de Ayudas a Instalaciones* ('MAI') of the commencement of checks and enquiries into their corporate income tax for the years 2007 and 2008 and value added tax for the second quarter of 2008. As a result of such checks and enquiries, the Tax Agency determined that the company *had to pay the sum of €284,499.42 (of which €97,989.86 corresponded to the financial penalty)*. On 6

February 2014, at an extraordinary general meeting, the filing of a director liability (to company) claim was approved. MAI, through its director, filed a liability claim against those who were directors in 2007 and 2008, the years in which the fraudulent conduct that led to an audit and subsequent penalty by the Tax Agency took place, *seeking an order for payment by the defendants of €284,499.42*.

The claim is upheld at first instance.

The *Audiencia* allows the appeal. After analysing the requirements for a director

liability claim, the appellate court found that there were circumstances that meant it should not have been upheld: “We must highlight a relevant fact. The only shareholders at the time of the tax fraud were the directors, and in this regard, the Supreme Court judgment of 12 January 2018 stated that “given that at that time they were all one and the same, as the sole three shareholders were also the three company directors, any irregularity that may have existed in the decision to sell the plots of land owned by the company in the manner in which it was done so that the shareholders could distribute the profits earned by the company with the lowest tax burden, *is not so much unlawfulness attachable to the directors as it is a decision taken by the shareholders*”. The same applies in the present case. The decisions taken with regard to the invoices that gave rise to the tax fraud *cannot be considered unlawfulness attachable to the directors, but rather to the company, given the total match between the owners of the share capital and the directors*; and should be considered not as an unlawful action by the directorship but by the company, to which the losses arising from the penalties and late payment interest applied by the Tax Inspectorate should be attached” (emphasis added).

The Supreme Court allows the appeal. The appealed judgment did not uphold the director liability claim because the conduct attached to the directors (negligent contracting with a company, incorrect book-keeping, etc.) should be attached to the company itself, as the intentions of the two shareholders were mingled with those of the two directors, since they were the same two persons. The appealed judgment invokes the Supreme Court’s Judgment no. 14/2018 of 12 January, without

taking into account the circumstances under consideration.

In the case of that judgment, the tax authority did not treat the transaction as favourably as the defendants had intended because the Tax Agency took the view that the first transfer was a related-party transaction that should be taxed at the actual value of the transferred assets (which, even so, was valued at less than the price actually paid for the capital increase pre-emption rights), and does not constitute harm to the company’s estate caused by malice or gross negligence, as required by Article 79 of the 1951 Public Limited Companies Act in its wording prior to Act 19/1989. And it is with regard to the distribution of the company’s profits among the three shareholders, who were also the three directors, that the Supreme Court understood that the act was properly that of the company and not of the directors, with this reasoning (extracted in part from the appealed judgment). Finally, the decision to distribute the profits earned by the company among all those who were shareholders at that time, even if in an atypical manner, in order to benefit from a favourable tax scheme, is not so much a decision specific to an action of the company directors as a decision of the shareholders.

Given that at that time they were all one and the same, as the sole three shareholders were also the three company directors, any irregularity that may have existed in the decision to sell the plots of land owned by the company in the manner in which it was done so that the shareholders could distribute the profits earned by the company with the lowest tax burden, “is not so much unlawfulness attachable to the directors as it is a decision taken by the shareholders”. *That doctrine, which, in view of those cir-*

cumstances and its content, understood that the act under consideration was not so much unlawfulness attachable to the directors as a decision taken by the shareholders, is not applicable to the present case. The conduct under consideration is an act of negligent management of the company, which has led to an inspection by the Tax Agency and a ruling in which, in addition to ordering the payment of what had been unduly evaded, a penalty was levied. The possible unlawfulness would be attachable to the directors insofar as the conduct falls within the scope of their own ordinary management of the company, which also includes proper book-keeping and compliance with the company's tax obligations. There is no similarity that would allow the legal rule set out in Judgment no. 14/2018 of 12 January, which justified not upholding the liability claim, to be applied to the present case. In that case, there was a desire on the part of the three shareholders, who were also the directors, to dispose of certain assets and distribute the profits earned in accordance with a tax scheme that they considered more advantageous. In the present case, we are dealing with management that the Tax Agency found to be negligent (in the manner of contracting with a third party and in the recording of those transactions), which evaded the satisfaction of tax obligations and also resulted in a penalty.

2. Commentary

§1. In such an important dispute, two seemingly contradictory Supreme Court rulings and a supposed legal rule as unstable as a sandcastle. Clearly, the 2025 judgment is unable to explain how this case differs from the 2018 judgment. The dividing line—which must then be specified, with unpredictable results—is whether the

conduct attached *prima facie* to the company is or is not as much unlawfulness attachable to the directors as as a decision taken by the shareholders. It appears that in the second case, the company has no recourse available to claim director liability and contribution for liability incurred by the company through the mediation — *and this is always the case*— of the governing body.

§2. The truly decisive factor in the difference, which is not emphasised at present, is that in 2018, a director liability claim could not be conceived because the company's estate had not suffered any harm when having its 'classification' changed from strategic to the correct one of related-party transaction.

§3. It is unclear whether the non-contribution rule depends solely on the fact that the directors at the time were the same as the shareholders at the time, or whether some other condition is required.

§4. While the above is important, it is not as important as the fact that this ruling *allows the company to claim contribution from the directors for penalties imposed by sector-specific (and criminal?) law*. Consider penalties arising from infringement of cartel *law*. There has been debate as to whether the company can pass on the penalty to its directors; whether this would essentially entail a universal passing-through that is incompatible with the idea of the entity having a distinct legal personality — and even more so if it is to be made a "criminal" (*cf.* Articles 31ter(2) and 116(3) of the Criminal Code); whether this "contribution" creates or destroys the appropriate incentives for regulatory compliance; whether it is possible for the company, which is acting with malicious

intent (within the malicious intent of the directors, which the former absorbs under the rule of representation), to claim in turn against those who are acting with malicious intent (*in pari causa turpe melior est conditio defendentis*). It is curious that administrative (and criminal) penalties cannot be covered by insurance but can be insured atypically by means of an action for contribution.

§ 5. This action for contribution would not be admissible if the sector-specific rule established that the same classed act or omission attached to the company and for which the company is penalised also constitutes a classed act or omission that allows the penalty to be independently passed on to the company's directors (cf. Art. 31 of the Criminal Code and Art.

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63(2) of the Competition Act). However, it would also not be possible when the sector-specific rule (in this case, Arts. 43(1) and 182(2) of the Taxation Act) declares these same directors to be liable in the alternative for the debt and the penalty, because a person liable in the alternative always has recourse against the main debtor (the company). Article 51(5) of the Consumer Protection Act expresses this in similar terms, but in a more confusing manner. In general, and for any type of debt, company directors who are "liable" for a company's tax debt always have a right to reimbursement *that cannot be offset by a director liability claim*.