

Tax Remark

The Supreme Court determines that it is not mandatory to file an appeal for reversal at the local level if the only ground for challenge is the unconstitutionality of the rule.

6th June 2018

The Second Section of the Third Chamber of the Supreme Court, in its recent Judgment of 21 May 2018, number 815/2018, has determined that it is not mandatory to file the compulsory appeal for reinstatement at the local level when the unconstitutionality of the law is exclusively discussed.

In order to analyze the importance of this pronouncement, it is necessary to recall the regulation of the review of the acts issued by the Local Revenue Agencies through administrative channels, which is framed in article 14 of the Revised Text of the Law Regulating Local Revenue Agencies (hereinafter, LRLRA). In this sense, it would not apply the regulation contained in the General Tax Law with respect to the review of administrative acts, which establishes that the remedy of reversal is optional.

The aforementioned article 14 of the LRLRA establishes that only the acts of application and effectiveness of taxes and other income under public law of local entities may be appealed against, and that no economic-administrative claim may be filed, and that it is mandatory, except in the case of acts dictated by the State Administration in the management of local taxes and in municipalities with a large population.

Once the appeal for reconsideration has been resolved, the administrative procedure is exhausted, and the contentious-administrative procedure may be brought before the courts. If we resort to article 25.1 of the Law on Contentious-Administrative Jurisdiction (hereinafter, LCAJ), we will find that the contentious-administrative appeal in relation to the acts of the Public Administration that put an end to the administrative route. Therefore, the logical interpretation would be that in order to be able to file such an appeal in advance, the administrative remedy must have been exhausted.

This is the interpretation that the jurisprudence had continuously given, declaring inadmissible the corresponding contentious-administrative appeals for failure to exhaust administrative remedies. However, the recent resolution establishes a new interpretation of articles 14 LRLRA and 25.1 LCAJ when what is alleged is only the unconstitutionality of the rule.



In view of the specific case of the Ruling that is the subject of this analysis, we find that the taxpayer appealed the settlement issued by the City Council of Cáceres in respect of the Tax on the Increase in Value of Urban Land (hereinafter, TIVUL), commonly known as municipal capital gains, directly before the courts, without having previously filed the mandatory appeal for replacement.

The only claim of the taxpayer was the unconstitutionality of Article 107 of the LRLRA, which regulates the taxable base of the TIVUL and which covered the settlement issued by the City Council. The Administrative Court No. 2 of Cáceres rejected the appeal, following the established case law, for not having exhausted the administrative remedies. After filing an appeal, the appeal is dismissed, and the sentence is appealed in cassation to the Supreme Court.

The judicial review had to be filed in accordance with the new regulation introduced by Organic Law 7/2015, so that in the preparatory document the existence of an objective interest in the formation of the jurisprudence had to be based on. The taxpayer raised the following legal question:

"If, when the unconstitutionality or illegality of the rules that cover the acts of application and effectiveness of the taxes and other income of local authorities under public law are exclusively discussed, matters on which the latter cannot rule because they lack the competence to do so, it is compulsory to exhaust the administrative procedure beforehand, filing an appeal for reconsideration, or if, in such cases, the interested party may directly file a contentious-administrative appeal."

In short, the taxpayer's argument was that the remedy of reversal that the City Council had to resolve was compulsory when the only legal issue alleged was the unconstitutionality of the law, a controversy in respect to which the City Council could not express itself. Therefore, to require the taxpayer to file a manifestly ineffective appeal to be able to exercise the jurisdictional action would violate the effective judicial protection contained in article 24 of the Spanish Constitution.

The Supreme Court finally upheld the appeal for annulment filed by the taxpayer and established a new interpretation of the articles referred to above, on the grounds that the appeal for annulment *should not become a "toll" that must inevitably be paid by the taxpayer before judicial protection can be provided*. In this sense, it fails to set the following interpretation:

"When the unconstitutionality of the legal provisions that cover the acts of application of taxes and other income under public law of the local entities is exclusively discussed, a matter in respect of which the local entities do not have the power to decide or to propose it to those who are competent to do so, and are constrained to apply the legal norm in question, it is not obligatory to file, as a precondition for the applicability of the subsequent contentious-administrative appeal, the corresponding administrative appeal provided for as mandatory".

Bearing in mind that Constitutional Court Decision 59/2017 declared the TIVUL's regulatory precepts unconstitutional insofar as they subject to taxation situations of non-existence of increases in value, if the reason for challenging the municipal capital gains is limited exclusively to the unconstitutionality of the rule, as a result of the recent Supreme Court Decision, it would be possible to directly file a contentious-administrative appeal without having to file a prior appeal for reversal.

This new interpretation could be extended to other situations in which the unconstitutionality of the rule or its incompatibility with Community law is disputed, such as in the case of the Tax on the Value of the Production of Electrical Energy, whose legality and compatibility with Community law has been disputed. Could it finally be accepted that it is not compulsory to lodge an administrative appeal (in this case, to exhaust administrative remedies, is it necessary to lodge an economic-administrative complaint) by exclusively alleging the illegality of the regulatory regulations, and would a direct contentious-administrative appeal be possible?

For your information and knowledge, you can refer to the Judgment in this [link](#).

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