

PRINCIPLE OF NON-RETROACTIVITY IN THE ECUADORIAN TAX LEGISLATION

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ABSTRACT

This article established the application of the constitutional principle of tax non-retroactivity, provided for in article 300 of the supreme norm, contrasted with the precept contained in article 3 of the Tax Code, which determines that tax laws will not be enacted with retroactive effect in detriment of taxpayers, in order to determine its scope; the way in which the Constitutional Court of Ecuador has applied it in specific cases; and, the determination of the tenth transitory provision of the Organic Law of Economic Development and Fiscal Sustainability After the COVID-19 Pandemic, which established a tax benefit with retroactive effect, opposing the Ecuadorian legal tax institutionalism. A cross-sectional research design was developed, with a descriptive scope, analyzing the manifestation of non-retroactivity in the internal legal system, qualitative, exegetical-legal methods were applied in terms of the grammatical interpretation of the constitutional and legal provisions related to the postulate of non-retroactivity in Ecuador. The results pointed to the impossibility of issuing tax regulations with retroactive effect for the benefit of the taxpayer, consequently it was concluded with the violation of the postulate in the issuance of the regulations currently in force, with their respective effects.

KEYWORDS

Non-retroactivity; retroactivity; legal certainty; validity; certainty; benefit; exemption.

INTRODUCTION

Article 300 of the Constitution of the Republic of Ecuador establishes the principles governing the tax regime, among which non-retroactivity stands out; Postulate that is embodied in a transversal way in Ecuadorian and universal legal regime, by means of which it is determined that the norms established in the legal system, regulate future budgets since they enter into force, without there being any possibility of regulating facts, acts or behaviors produced prior to the publication or effective validity of the law.

In effect, the rule in question prescribes that:

"The tax regime shall be governed by the principles of generality, progressiveness, efficiency, administrative simplicity, non-retroactivity, equity, transparency and sufficiency in tax collection." (CONSTITUTION 2008).

For its part, the Tax Code in relation to non-retroactivity in article 3, second paragraph, provides: *"Tax laws with retroactive effect shall not be issued to the detriment of taxpayers. Special fees and contributions shall be created and regulated in accordance with the law"* (TAX CODE 2005)

The tax rule in relation expressly indicates the prohibition of issuing rules that regulate the past, with greater reason if it is to the detriment of taxpayers, leaving on the other hand the possibility of thinking that if it is for benefit if it could be issued with retroactive effect, a situation that will be addressed later.

Based on the principle of non-retroactivity, an adequate legal scenario is developed for the exercise of human activity and public administration, which allows certainty in decision-making, the exercise of rights, compliance with obligations and knowledge of the precepts that regulate conduct sanctioned with a penalty.



The Organic Law of Economic Development and Fiscal Sustainability After the COVID-19 Pandemic, was published in the Third Supplement of the Official Register 587, of November 29, 2021, in its article 43 numeral 2 establishes the following:

Art. Article 43.- In Article 36, the following amendments shall be made:

2. Subsection 10 of subparagraph (d) shall be replaced by the following:

"The payment of the Inheritance Tax is exonerated to the beneficiaries within the first degree of consanguinity with the deceased. Nor will the tax be caused in the event that the beneficiary is one of the surviving spouses, provided that there are no children who can access the estate" (ECONOMIC DEVELOPMENT LAW, 2021).

The tenth transitional provision of the same law determines:

"Persons who must declare or pay values corresponding to the income tax originated in the capital increase from inheritances as a result of the death of their relatives between March 15, 2020 and December 31, 2021, will be beneficiaries of the exemption incorporated by this Law. This exemption does not give the right to refund or claim of any kind to those who have already made the payment of said tax" (ECONOMIC DEVELOPMENT LAW, 2021).

The reform introduced by the Economic Development Law in relation to income tax on income from inheritance, regulated by the Organic Law on the Internal Tax Regime, is the incorporation of an exemption from the tax for beneficiaries within the first degree of consanguinity with the deceased; and, another exemption for the case that the beneficiary is one of the surviving spouses, provided that there are no children who can access the hereditary estate.

If it is taken into consideration that the Organic Law of Economic Development and Fiscal Sustainability After the COVID-19 Pandemic, was published on November 29, 2021, the aforementioned tenth transitory provision establishes a retroactive effect to the exemption, it is more determined the date from which the benefit is considered, March 15, 2020.

MATERIALS AND METHODS

The design of the research is cross-sectional of descriptive scope because the principle of tax non-retroactivity and the way it manifests itself in the domestic legal system were analyzed; Likewise, it is correlational by virtue of the study related to the variables of non-retroactivity in tax matters and their exceptions. The qualitative and bibliographic research method was applied when reviewing books, articles, judgments and legal journals. At the theoretical level, the exegetical-legal method was applied in terms of grammatical interpretation of the constitutional and legal provisions referring to the subject. In the same way, the inductive-deductive method was applied, whose starting point was the provisions of the Magna Carta that determines the principles that regulate the tax regime, followed by the laws and other legal framework.

As it is a qualitative research, the regulations that integrate the current legal system in tax matters in Ecuador were taken as the population, determining as such the substantive rules on tax matters.

RESULTS

Article 11 of the Tax Code states that:

"Tax laws, their regulations and circulars of a general nature shall be in force from their publication in the Official Register, unless effective dates are established after it.

However, the rules that refer to taxes whose determination or settlement must be made for annual periods, as a purely declaratory act, will be applied from the first day of the following calendar year, and, from the first day of the following month, in the case of shorter periods" (TAX CODE, 2005)

The aforementioned provision confirms that the legal regime, whether these are laws issued by the National Assembly; regulations issued by the President of the Republic; ordinances created by the legislative bodies of the Decentralized Autonomous Governments; or, general provisions, issued by the highest authority of the tax administration, govern from their publication in the Official Register, even establishing that, if the norm determines a later date of validity, it must be considered for its effective validity, leaving aside the possibility of issuing rules with retroactive effect.



As can be seen from the citation of article 11 of the Tax Code, two rules of validity of the tax law can be distinguished, the first mentions that it enters into force from the publication in the Official Registry, an approach that does not generate further discussion, since it is only to warn the date of publication of the State newspaper to know that a tax rule has entered into force.

The second rule established in the law in relation provides that, in the case of taxes whose determination or settlement must be made for annual periods as a purely declaratory act, they will be applied from the first day of the following calendar year, in this regard it is necessary to point out that, the Organic Law of Internal Tax Regime in its article 7 states: *"The tax year is annual and includes the period from January 1 to December 31. When the activity generating the income begins after January 1, the tax year will be compulsorily closed on December 31 of each year"*, (ORGANIC LAW OF INTERNAL TAX REGIME, 2004),

As noted from the reading of the provision, income tax has an annual fiscal period or year, the same that goes from January 1 to December 31 of each year, so that if a person receives two or more inheritances in the financial year must consolidate the information in a single statement, to determine your income for this kind of income.

In this sense, income tax adapts to the second rule of validity in such a way that, the reform introduced in the Organic Law of Economic Development and Fiscal Sustainability After the COVID-19 Pandemic, published in the Official Registry on November 29, 2021, in relation to the introduction of income tax exemption for heirs in the first degree of consanguinity or surviving spouse, It went into effect on January 1, 2022, which is the first day of the following calendar year according to the rule. However, as provided for in Article 3 of the Tax Code, which in the relevant part prescribes that tax laws shall not be enacted with retroactive effect to the detriment of taxpayers, would presume that if it is for the benefit if they would have retroactive effect, in this regard it is necessary to indicate what the Constitutional Court has stated in this regard.

The Plenary of the Constitutional Court of Ecuador in session of April 6, 2016, decided in judgment No. 024-16-SIN-CC to partially accept the claim of unconstitutionality, raised with respect to the General Ordinance for the Collection of Special Contributions for Improvement to Beneficiaries of Public Works executed in the Canton Limón Indanza, published in the supplement to the Official Register No. 396 of March 2, 2011 and the first transitory provision of The ordinance in relation.

The decision adopted by the Constitutional Court is based on the provisions of article 300 of the Constitution of the Republic of Ecuador and article 3 of the Tax Code, stating in the relevant part the following:

"As can be seen, the doctrine establishes certain exceptional circumstances in which the retroactivity of the tax law can be considered, which are fundamentally linked to establishing tax benefits in favor of taxpayers (...) which allows to demonstrate the possibility of applying the criterion of retroactivity of the law in tax matters, provided that it is not harmful to its taxpayers" (JUDGMENT NO. 024-16-SIN-CC CONSTITUTIONAL COURT, 2016).

The sectional normative precept sets a tax, the special contribution of improvement tax, for the construction of works executed or concluded prior to the validity of the ordinance, generating a tax burden to past situations, which in other words would be a detriment to taxpayers at the discretion of the Constitutional Court of Ecuador, and therefore prevented from being applied retroactively and for this same fact, The precept contained in the first transitory provision was declared unconstitutional.

With respect to the possibility that the norm has retroactive effect, the Constitutional Court of Ecuador points out that it would be due to exceptional circumstances when the law establishes benefits in favor of taxpayers, however determining the exceptionality or the benefit can lead to confusion, the same constitutional control body despite enunciating this possibility does not indicate any case.

In tax matters the exemption consists of the release of the tax obligation, despite having fulfilled the budgets that give rise to the fiscal benefit, in some tax regulations they are associated as tax benefits, *verbi gratia* the second paragraph of article 6 of the Organic Law of Disabilities prescribes:



"The tax benefits provided for in this law will only apply to those whose disability is equal to or greater than that determined in the Regulations" (ORGANIC LAW ON DISABILITIES, 2012)

In the same judgment issued by the Constitutional Court of Ecuador, it states that: *"The Constitution of the Republic contains a series of rights for the benefit of persons with disabilities and older adults, in which even the tax field is specifically contemplated, in this sense it establishes as a constitutional norm benefits in their favor in terms of tax exemptions"*, when addressing the analysis of the first legal problem of the judgment, related to the violation of exemptions in the tax regime for older adults and people with disabilities, established in articles 37 numeral 5 and 47 numeral 4 of the Constitution of the Republic of Ecuador, for the issuance of the General Ordinance for the Collection of Special Contributions for Improvement to Beneficiaries of Public Works executed in the Canton Limón Indanza.

As can be corroborated with the criterion of the Constitutional Court, tax exemptions are benefits that are established in the regulations, in order to free the taxpayer from the tax, which are due to various reasons, as in the previous cases because they are people who belong to priority attention groups.

With regard to the exceptionality referred to by the Constitutional Court, to grant the law retroactive effect is the second difficulty that should be overcome, notwithstanding the analysis made to the first legal problem reviewed by the constitutional control body, which verifies an omission of the General Ordinance for the Collection of Special Improvement Contributions to Beneficiaries of Public Works executed in the Canton Limón Indanza, published in the supplement to Official Gazette No. 396 of March 2, 2011, since it does not contemplate the right to tax exemptions for the elderly and persons with disabilities, as expressed in the Constitution, it could be adapted to this exceptionality. For omitting in the ordinance issued by the Municipal Decentralized Autonomous Government of the canton Limón Indanza, the rights to tax exemptions of older adults and persons with disabilities established in the constitution and in the international instruments of which the Ecuadorian State is a party, the Constitutional Court in the sentence in relation to it, ordered the municipal entity to include this tax benefit in its ordinance within 30 days.

In this sense, it cannot be thought that a rule containing any exemption, which ultimately constitutes a benefit, should have retroactive effect, it is enough to imagine that in all existing taxes a new exemption is now established, to all taxpayers under the pretext of the pandemic and these must be applied retroactively to all taxpayers of tax obligations. Surely a discouraging panorama full of uncertainty would be created, in all light anarchic and inconceivable.

Thus, the tenth transitory provision of the Organic Law on Economic Development and Fiscal Sustainability After the COVID-19 Pandemic, which extends the benefit of exemption from income tax for income from inheritances to the past, that is, to March 15, 2020, contravenes the principle of non-retroactivity of the tax law, since it expressly determines an exception to the principle of non-retroactivity that has no foundation, since this law was published in the Official Register on November 29, 2021.

This type of provisions generate uncertainty and a legal panorama that does not provide guarantees of any nature to the administered, to think that tomorrow a rule can be established that modifies the established regime and that can be applied for the past, is a clear demonstration of affectation to the right to legal certainty.

On the other hand, Article 122 of the Tax Code establishes the following: *"It will be considered undue payment, which is made for a tax not established by law or from which there is exemption by legal mandate; the one made without the respective tax obligation having arisen, according to the assumptions that make up the respective generating event. Under the same conditions, undue payment shall be considered to be payment that which has been satisfied or demanded illegally or outside the legal measure"* (TAX CODE, 2005).

In the first place, it must be taken into consideration that the undue payment is a legal institution that recognizes the right of taxpayers to return securities that they have canceled to the creditor, when the budgets established in the norm are evidenced, in such a way that it constitutes a guarantee



for the reimbursement of values to citizens and that the State or the creditor entities of taxes do not count among their income with values that do not They correspond to him.

In the same way, in the case of an exemption as indicated in article 43 of the Organic Law on Economic Development and Fiscal Sustainability After the COVID-19 Pandemic, in the case of income tax on income from inheritances, for successors in the first degree of consanguinity and for the surviving spouse, The right to refund for undue payment is fully applicable, however the tenth transitory provision of the law in relation establishes a limitation to the right of refund of those who have already made the payment of said tax, it would be assumed that between March 15, 2020 until December 31, 2021.

The tenth transitional provision in relation, apart from establishing a retroactive effect, limits the right to refund of taxpayers who complied with the payment of the tax within the indicated period, contrasting with the legal institution of undue payment. That is to say, apart from contravening the tax legal institutionality, it contains a punishment for the complier of the law, since the persons who had the tax obligation of the income tax for income from inheritances, for the verification of the generating event, and extinguished their obligation with the payment are not entitled to reimbursement or refund; and, a prize for the omission or defaulter, since having arisen the tax obligation under the regime established within the period March 15, 2020 until before the entry into force of the Economic Development Law, without even submitting the declaration, or having presented it without making the payment, they were released from the obligation and payment, by effect of the exemption established after the verification of the operative event provided for by law. The situation described above violates the principle of equality enshrined in article 11 of the Constitution of the Republic of Ecuador, by which all persons are equal and will enjoy the same rights, duties and opportunities, in the case under study the unequal treatment received by taxpayers who are in similar tax conditions is evident.

DISCUSSION

Gustavo Adolfo Durango Vela, in the Research Report on the subject "The New Constitution, the Reform Law for Tax Equity in Ecuador and its Implications in the Legal Field", carried out at the Simón Bolívar Andean University Ecuador, in 2008, referring to the principle of non-retroactivity states: "*With great clarity, Art. Article 256 of the previous Constitution stated <tax laws shall not be enacted with retroactive effect to the detriment of taxpayers>. This principle of common law and contemplated in art. 7 of the Civil Code, that is to say that the law does not apply except for the future, is complicated when the previous Constitution empowers the legislator to create it with retroactive effect <for the benefit> of the taxpayer. Now I ask, could it not be that the fulfillment of general works by the State, would not also, in the last analysis, for the benefit of the taxpayer (?). I do not believe that this was the intention, but, in good time, this possibility has been ruled out in the new Constitution that is limited to the general effect of non-retroactivity already referred to.*"

Durango expressly states that, with the current Constitution, the possibility of considering that laws can be enacted with retroactive effect for the benefit of the taxpayer was extinguished, since the precept that established this possibility was repealed together with the Political Constitution of the State of 1998, therefore when only the principle of non-retroactivity was mentioned without further additions, Its application is understood in its common sense, that is, the laws govern for the future, they do not have retroactive effect.

José Vicente Troya Jaramillo in his Manual of Tax Law, like Durango points out: "*It has predominated, except in the illicit tax, the thesis that supports the non-retroactivity of tax rules, It is not reasonable to tax past economic capacities. The 1998 Constitution enshrined the non-retroactivity of the tax law, except when the new rule benefits the taxpayer. This solution of quasi-penal flavor no longer has validity, since the Constitution that governs, indicates in its Art. 300, that one of the principles of the tax regime is non-retroactivity*" (TROYA, 2014)

As Troya warns, the Political Constitution of the State of 1998 enshrined in its first paragraph the following: "*Only by legislative act of a competent body may taxes be established, modified or*



extinguished. No tax laws shall be enacted with retroactive effect to the detriment of taxpayers." (CONSTITUTION, 1998) While the Constitution of the Republic of Ecuador in force, as indicated above, only enunciates the principle of non-retroactivity as one of the postulates prescribed in its article 300, without stating that laws with retroactive effect will not be enacted to the detriment of taxpayers.

It should be noted that the phrase: "*tax laws shall not be issued with retroactive effect to the detriment of taxpayers*" has just been incorporated into article 3 with the Codification of the Tax Code No. 2005-09, published in Official Gazette No. 38-S of June 14, 2005, enshrining the constitutional precept of the Political Charter of 1998. currently repealed, so its precept does not conform to the constitutional provision in force in the Constitution of the Republic of Ecuador.

It is evident as the author points out that, based on the principle of non-retroactivity, the rules govern for the future, therefore constitute the guarantee of the certainty of the right, of certainty, determining an adequate panorama for the development of human activity, except in the case recognized in universal law, such as the benefit to the defendant or principle of favorability in this case of persons who have been convicted of the tax offense. obviously for the criminal field.

Article 7 of the Civil Code, in its first paragraph, despite the reforms introduced in the last constitutions, provides for the principle of non-retroactivity that is unchanged and in force: "*The law only provides for the future: it has no retroactive effect; and in conflict of a later law with an earlier one, the following rules shall be observed*" (CIVIL CODE, 2005).

Human activities are regulated by law, in this sense the members of society will fully know the legal consequences of their actions, sheltered under the mantle of the regulations previously established in such a way that they will fully distinguish the effect of their behaviors, precisely by the fact of having clear and previous rules.

The doctrine considered by the Constitutional Court in its judgment, is prior to the entry into force of the Constitution of the Republic of Ecuador year 2008, supreme norm that no longer contemplates the precept that would determine the possibility of establishing tax rules with retroactive effect for the benefit of taxpayers, however the constitutional control body, In addition, it states that Article 3 of the Tax Code is consistent with the provisions of Article 300 of the Constitution of the Republic of Ecuador, and cites the relevant part "*Tax laws shall not be issued with retroactive effect to the detriment of taxpayers*", an assertion that contradicts the current doctrine of Durando and Troya and the same text of the supreme norm in force.

It is evident that the legal and doctrinal basis used by the Constitutional Court is outdated, that is why it makes the mistake of pointing out the possibility of issuing tax laws with retroactive effect in favor of taxpayers, it is necessary to consider that since the validity of the current Constitution of the Republic of Ecuador, there is a new order to which all the actors of the legal work must adapt in such a way that the doctrine it must also correspond to the new regime.

The same Constitutional Court in Judgment No. 384-17-SEP-CC, dated December 13, 2017, issued in case 1632-15-EP, by filing an extraordinary protection action, to determine whether the judgment issued on September 15, 2015, by the Tax Litigation Chamber of the National Court of Justice, violates the right to legal certainty, established in article 82 of the Constitution of the Republic, has stated the following:

"In other words, the non-retroactivity of the law is a legal principle by which the possibility of a norm regulating situations past its entry into force is restricted. Therefore, the legal consequence of giving retroactive effect to a rule is, without a doubt, a violation of the right to legal certainty, since no person could act with certainty in not knowing that his past acts may cause future consequences that, at the time of carrying them out, were not known, a circumstance that would constitute a flagrant violation of the guarantees of stability, predictability and regulatory certainty". (JUDGMENT NO. 384-17-SEP-CC, 2017).

The criterion of the Constitutional Court in the ruling issued in the extraordinary protection action clearly establishes the scope of the principle of non-retroactivity in the sense of determining that, based on this postulate, the eventuality that a law can regulate events that occurred prior to its



entry into force is limited, and directly links it to the right to legal certainty through which the members of society can count on a legal system. legal of known effects and consequences.

Finally, the Constitutional Court in the aforementioned judgment states:

*"Finally, it is clear that tax laws apply to legal situations that occur during their validity, so any intention of wanting to apply retroactively a tax provision or norm, either through an administrative act or through a judicial decision, not only that it is expressly opposed to the constitutional principle enshrined in Article 300 of the Supreme Charter, but also entails a violation of the right to legal certainty, enshrined in article 82 of the *ibid*.*

To close, it is necessary to emphasize that, the Constitutional Court in the ruling openly mentions that even the exemptions established in the legal regime, the same ones that constitute a tax benefit, apply for the future, without any possibility that they can have retroactive effect, as well as all the minimum elements or contents that a tax law must enshrine for its effective application. To do so constitutes a violation of the right to legal certainty.

CONCLUSIONS

- The postulate of non-retroactivity of the tax law determines that the precepts of a norm will always govern for the future without the possibility of establishing a retroactive effect, with the exception of the Ecuadorian punitive regime due to the principle of favorability prescribed in the Constitution of the Republic of Ecuador;
- The retroactive tax reforms contravene the right to legal certainty, creating a scenario of uncertainty for the exercise and development of economic activities, causing insecurity in the taxpayer, even the tax advisor bewilderment of the anarchic evolution of the regulations;
- Tax exemptions are considered as a benefit of a tax nature, the same that consist of releasing from the obligation to those who have fulfilled the conditions that the law indicates to make the payment of the tax, the same that obey reasons of economic, public or social order, in relation to taxes must be established in a norm with the category of law, its creation or reform will always govern for the future;
- Modify or reform constituent elements of the tax such as taxable object, exemptions, deductions, rates, among other elements, on the established legal regime, will always govern for the future without any possibility that they may have retroactive effect.
- The tenth transitory provision of the Organic Law on Economic Development and Fiscal Sustainability After the COVID-19 Pandemic, published in the Third Supplement to Official Register 587, of November 29, 2021, which establishes is obviously retroactive since it regulates past events as the norm warns, consequently unconstitutional.
- The tenth transitory provision of the Organic Law on Economic Development and Fiscal Sustainability After the COVID-19 Pandemic, published in the Third Supplement to Official Register 587, of November 29, 2021, despite appearing to be a benefit for taxpayers that were configured within the tax obligation of income tax for inheritances, harms the income of the Ecuadorian State, constituting a prize for delinquent taxpayers, while taxpayers who did cancel their tax within the period indicated by the rule are not entitled to a refund for undue payment, demonstrated from the simple reading of the provision that it is a legal aberration.
- To believe that the retroactive reform does not affect individuals, on the contrary it benefits them, and that therefore there is no need to claim or file any action, is to allow the validity of unconstitutional laws that harm the State, and ultimately all Ecuadorians, therefore it is not a valid reason to allow its validity. The Director General of the Internal Revenue Service as well as the Attorney General of the State had to file the corresponding actions in this case.
- The Tenth Transitory Provision of the Organic Law of Economic Development and Fiscal Sustainability After the COVID-19 Pandemic, contains contradictory precepts, contravene the principle of equality, since for the same legal situation, inheriting in the period between March 15, 2020 and December 31, 2021, contains a differentiated treatment for those who did not pay



income tax on income from inheritances and for those who already did They have done, benefiting the former and harming the latter.

REFERENCES

- [1] *Constitution of the Republic of Ecuador, 2008*
- [2] *Tax Code, 2005*
- [3] *Organic Law on Economic Development and Fiscal Sustainability After the COVID-19 Pandemic, 2021*
- [4] *JUDGMENT NO. 024-16-SIN-CC CONSTITUTIONAL COURT, 2016*
- [5] *JUDGMENT NO. 384-17-SEP-CC, CONSTITUTIONAL COURT, 2017*
- [6] *Gustavo Adolfo Durango Vela, "The New Constitution, the Reformatory Law for Tax Equity in Ecuador and its Implications in the Legal Field", Universidad Andina Simón Bolívar Sede Ecuador, in 2008*
- [7] *José Vicente Troya Jaramillo, "Tax Law Manual" 2014*