Tax Coordination Between Regions in Spain – Role of the Courts

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Vienna, November 10th, 2010

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SUMMARY

1.- The Spanish Regional Financial System

1.1.- A historical approach

From its origins in the Middle Ages, the Kingdom of Spain has been an aggregation of territories with their own specific rules. However, in 1714, after a dynastic war, King Philip the fifth –Louis XIV's nephew– changed our tradition and made us adopt the French model of central administration.

During almost 175 years Spain has been a centralised country with no regional levels of power. A particular local level of power –the "*foral* territories" (from "*Fuero*", Rule)- has remained in the Basque provinces and Navarre. This specific system covers the Tax Power and has been recognized by the State –with a different scope in each historical period- until the present day (1st Additional Disposition-*disposición adicional* of the Spanish Constitution (Hereinafter CE).

In 1978 our Constitution created a plural, complex and de-centralized State with three levels of power (political, financial and legal) –central, regional (Autonomous Communities-ACs) and local (Provinces and Municipalities)- working in a coordinated way.

At that moment Spain was not a member of the European Community. The country had just emerged from a dictatorship and the Basque terrorism of ETA was blood-shedding (more than 100 murders in 1980), so it was not possible to describe in a totally clear way the competence distribution framework between the regions and the state. No one could guess the future.

Therefore the Constitution only enunciates some principles and rules (art. 150 CE), mentions some competences reserved to the State (art. 149 CE) and others that could be transferred to the ACs (art. 148 CE), and leaves the rest of the system to the Central and Regional Parliaments. In case of conflict, State Laws prevailed (art.

149.3 CE). So the coordination of Tax power has grown among conflicts of competences between the regional Governments and the central Government, and resolved by the Constitutional Court (hereinafter STC) in its Judgements.

When conflicts arose between the State and Regional Governments –not Parliaments- or with Local Entities –Provinces or Municipalities- the final resolution was competence of the Supreme Court (hereinafter STS) which also settled some leading cases.

One of the first issues ruled by the Democratic Parliament was the Coordination between the State and Autonomous Communities (hereinafter AC) on Financial Power, pursuant to the Organic Law on Autonomous Community Financing, 8/1980 (hereinafter LOFCA). This Law –as the Fundamental Laws of each AC (*Estatuto de Autonomía-Autonomy or Self-government Statutes*)- is a part of the Statutes known as "Constitutional Block": These State Statutes, even though they are not the Constitution, play a prominent role in the State's Constitutional Architecture because of their implications and function: to harmonize the assignment and organization of competences between the State and the ACs [RUBIO LLORENTE (1989)]. The State taxing power is only limited by the Constitution whereas the ACs taxing power is limited by the Constitution and the LOFCA, and their own Statutes of Autonomy

Beside this Legal Framework, the first wave of Statutes of Autonomy approved by Organic Laws began to create the financial relationships between the State and the ACs. The main organic tool for developing the system has been the Financial and Tax Policies Council (hereinafter CPFF), integrated by the Treasury Departments of each AC, the Finance Ministry and the Public Administration Ministry (art. 3 LOFCA). This Council does not have executive competences but it has been the administrative seat to debate issues, resolve conflicts and reach agreements that, afterwards, have been developed by Parliaments and Governments.

The CPFF has settled three temporary agreements to rule the incipient system (1987/1991; 1992/1996; 1997/2001). Although from the beginning –it was already

referred to by the Constitution as a financial resource for ACs (art. 157.1.a) CE)- the State has partially ceded their own taxes to the ACs (the first General Law on Ceded Taxes was passed on 1983), most of the revenues of the ACs during these years have proceeded from participations in state revenues and public debt. As the ACs increased their administrative competences their financial revenues grew.

This trend created an unbalanced system based on negotiation. The ACs had political, legal and administrative competences but no financial ones. They spent money but were not responsible for collecting it. They were subsidized by the State and had almost no own financial resources.

This framework changed between 1996 and 2001. Since then the quality and quantity of ceded competences on state taxes and revenues has dramatically grown, increasing the financial responsibility of the ACs.

In 2008, public expenditures managed by the State represented 22% of the public budgets, the Social Security 29% (with a specific and separate State-managed treasury); the ACs managed 36% of the public expenditures and the Local Governments 13%.

1.2. The Present Financial System

In 2001 Parliament passed a new and permanent system –until that date the models had a five year validity- that, with some changes adopted in 2009, seems quite a stable system.

A) The State

The role reserved to the State (General Finances and Public Debt -art. 149.1.14ª CE-) according to this system could be summarized in the following responsibilities:

a) Coordination of the entire system
b) Harmonization of the entire system

c) Compensation of the financial deficits between Regions
d) General Economic Policies
e) Jurisdictional control (Ordinary jurisdiction) and audit (Accountancy Court) of the entire system

B) The Autonomous Communities

The Constitution (art. 157) establishes that the ACs could be financed in several ways:

a) Taxes ceded totally or partially by the State; participation in State revenues; and surcharges on the State taxes.
b) Their own taxes, charges and levies.
c) Grants from a Territorial Compensation Fund and other State grants.
d) Utilities from their own endowment.
e) Public debt and loans.

Since 2001 revenues that come from the taxes ceded by the State are the most important chapter among all these ways (54,3%). As Table 1 shows, all taxes -except Corporation Tax, Non Residents Income Tax and some marginal excises- have been assigned, at one level or another, to the Regions.

There are three levels of assignment: rules, management and revenues. In some taxes –Gambling, Capital transfer, Inheritance and Gifts- almost every competence on them has been ceded. As for the Income Tax, the ACs receive 50% of the revenues and have some key competences, such as setting part of the tax scale or approving personal and family allowances, but they have almost no participation when it comes to managing the tax. If they receive a major part of their revenues from the VAT (50%) and Excises (58% or even 100%) they cannot pass rules on these taxes –with some exceptions on a particular Retail Fuel Sales Tax- and they do not participate at all in their management, once more with the exception of the Fuel Tax.

Table 1 - Ceded Taxes System And Its Evolution

	ACs' Legal Powers	ACs' Administration	REVENUE AVERAGE CEDED TO THE REGIONS			
	1996/2009		1993	1996	2002	2009
Income Tax	Yes	STA	15%	30%	33%	50%
Wealth Tax (since 2009, 100% tax credit)	Yes	STA/AC	100%	100%	100%	100%
Inheritance and Gifts Tax	Yes	AC	100%	100%	100%	100%
Capital Transfer Tax	Yes	AC	100%	100%	100%	100%
Stamp Duty Tax	Yes	AC	100%	100%	100%	100%
Gambling Taxes	Yes	AC	100%	100%	100%	100%
VAT	No	STA	-	35%	35%	50%
Excises (Oil, Tobacco, Alcohol)	No	STA	-	40%	40%	58%
Retail Fuel Sales Tax	Yes	STA/AC	-	100%	100%	100%
Vehicle Registration Tax	No	STA/AC	-	100%	100%	100%
Electricity Tax	No	STA	-	100%	100%	100%

Source: Own elaboration following Bosch, Durán (2008) Table 1.4

The ACs can impose their own taxes –with full power on their rules, management, revenues and appeals- but with certain limits:

a) They cannot set taxes already established by the State or the Local Governments (except with compensation of the financial losses in this last case);
b) They cannot set taxes on goods located outside their boundaries;
c) They cannot set taxes that could mean an obstacle to free market (commerce clause)

Even if these autonomic taxes do not represent an important chapter in their revenues (never more than 5%), a relevant number of these taxes –more than 40- have been set in the last 30 years and they have given the Constitutional Court a lot of work. Most of them are Environmental Taxes (water, emissions and waste, a field not explored before neither by the State nor by the Local Governments), but there are also Gambling Taxes and Taxes on Bank Deposits (Extremadura and Andalusia) and Large Shopping Areas (Asturias, Navarre, Aragon, Catalonia).

The third main chapter (38.3%) is State Grants. Following a not very perfect system of compensation, the State transfers revenues to ACs with less fiscal capacity in order to achieve a similar level of public services in the whole country. This is done through several Funds (Sufficiency, Cooperation, Territorial Compensation) that are financed by the richer ACs as a kind of solidarity contribution to the less developed Communities. This system is not well designed, for historical reasons, and, in fact, is a source of controversy. After the equalization mechanism, there are regions such as Catalonia, that being clearly over the medium in fiscal capacity (123) go under the medium (96) in general resources (Table 2)

Table 2 - Indices per capita of tax resources and of total resources, 2004

ACs	Tax Resources	Total General Resources
Balearic Islands	138	85
Madrid	138	87
Catalonia	123	96
Aragón	111	115
La Rioja	103	119
Cantabria	102	116
Asturias	99	113
Valencia	99	91
Castile-León	94	118
Galicia	84	113
Murcia	81	91
Castile-La Mancha	80	109
Andalucía	80	101

Extremadura	67	123
Canary Islands	42	96
Total	100	100

Source: Bosch, Durán (2008) Table 1.7

C) The Institutional Administration

The first version of the LOFCA already created a specific Administrative Body to guide the negotiations and agreements over the autonomic financial system: The Council for Fiscal and Financial Policies (art. 3 LOFCA), formed by the Administration Ministry, the Secretary of the Treasury and the Financial Councillors of each Autonomous Community, has only adviser competences but, at the end of the day, it is the forum where all the decisions about the system are taken.
It is very interesting to see how an Administrative Body, with only competences to advise, has indeed been the core of the system. All the agreements reached by this Body have become Law in Parliament.

The other specific Administrative Body to manage the system is the Board of Arbitration-*Junta Arbitral* (art. 23 LOFCA). This is not a permanent Body. It convenes *ad hoc* when there is a controversy between two ACs in order to determine the competence on a specific fact or taxpayer. The only permanent members are the President of the Board and the Secretary. The other members represent, in each case, the ACs in conflict and the State Tax Agency. Even if it is an Arbitration Body their decisions can be appealed in the ordinary jurisdiction.

Regarding tax management –assessment, auditing, collection- even if there are Autonomous Agencies, or Departments-*Consejerías*, with competences in ceded tax and, obviously, their own taxes, almost the entire system is managed by the State Tax Agency (*Agencia estatal de Administración tributaria*), part of the Department of the Treasury. The ACs have a representation on the Board of the Agency and there are procedures to achieve a good level of cooperation between the Agency and the Autonomous Governments.

D) The Foral Regimes

This is the so-called common regime, but it is not applied to the foral territories: Vizcaia, Guipuscoa, Alava and Navarre. One of them, Navarre, is also an AC. The other three are provinces that form the AC of the Basque Country.

Following a specific rule, the first additional disposition of the Constitution, these territories conserve a historic right to organize their own finances. The financial relationship between the State and these territories is ruled by two Agreements: one with Navarre (*Convenio*), the other one with the three provinces and the Basque Country (*Concierto*).

Each province has its own "Parliament" (*Junta General*) that pass tax and financial laws, similar to the State taxes because the Agreement establishes a high level of harmonization. The Government of each province (*Diputación*) manages all taxes and receives all the revenues. According to this Agreement, each month an instalment (*cupo)* –negotiated every five years- is paid to the State to compensate the expenses borne by the State. Navarre follows the same procedure.

It would be not a problem if the quota was proportional to the relative wealthy of these foral territories and there was no harmful fiscal competition, particularly in Corporation Tax. But the fact is that these regions do not contribute to the financial compensation system –the solidarity funds- according to their ability, and they pass laws with higher tax allowances to attract foreign investments or taxpayers from other Spanish regions.

There is also a Board of Arbitration-*Junta Arbitral that serves* to resolve controversies between the State and the *foral* territories about the competence of one or another jurisdiction on facts or taxpayers. And, finally, a Law of the Basque Country (3/1989, of May 30th) regulates the harmonization, coordination and collaboration between the three provinces: each one with the others and everyone with the Basque Government.

2.- The Constitutional Court Judgements

Throughout these thirteen years of financial relationships between the State and the ACs, and among the ACs themselves, the Constitutional Court has built a truly constitutional doctrine on the issue. The Court has set up three significant principles about financial relationships between the State and the Autonomous Communities:

- Sufficiency: The system must provide the ACs sufficient financial resources to develop their administrative competences (STC 13/2007)
- Coordination: The State has to ensure the coordination of the entire system while preserving unity in the diversity and avoiding contradictions and inefficiencies (STC 32/1983).
- Solidarity: The State must "ensure the establishment of an economic equilibrium, that is appropriate and fairly balanced among the various parts of Spanish territory" (STC 135/1992).

Along with these three essential principles, the Constitutional Court also developed three other principles related to the ACs' taxing power: Territoriality, Non-interference and Double Taxation Relief.

2.1. Autonomy and Sufficiency Principle

"The ACs shall enjoy financial autonomy to develop and enforce their powers" (art. 156 CE). It is evident that if a public entity is not free to decide where and how much money it spends on each policy, it does not have true political capacity.

The Constitution recognizes, and the Constitutional Court has declared many times, the complex nature of our political structure. This means that, in a framework of unity, the ACs need to have autonomy in order to implement their policies. But political autonomy means nothing without sufficient economic resources to develop and enforce administrative policies.

From the very beginning the Constitutional Court has defended these principles in the financial field (SSTC 32/1981, 14/1986, 45/1995, 96/2002). In a complex State, an administrative decentralization of substantive powers must be followed by a congruent financial decentralization. As the ACs exercise their powers, public financial rules and resources will not be the same around the Country, but this will not be a problem –in terms of equality- on condition that these differences are maintained at a proportional level and are justifiable (SSTC 37/1987, 150/1990, 14/1998, 104/2000). Autonomy implies diversity, and consequently a certain degree of inequality.

ACs are free to spend their resources as they wish as long as they do it on issues within their competences (SSTC 37/1987,14/1989). They cannot expand their administrative powers by spending money on policies that have not been transferred to them. However, if the State transfers a grant for a particular policy -for example, public infrastructures- (competence of the AC) the State can not check on which specific project the AC spends the money (SSTC 63/1986, 96/1990).

ACs do have taxing powers, but in order to enact a tax related to a particular public policy –environment, health, security,.- they would also need to have the power to rule on that specific policy. The Constitutional Court has called this requirement as the “double power principle”.

If the ACs are free to spend, they would also need to be responsible for their revenues. In other words, if the main part of the financial system consisted of grants, the system would not be congruent. The State would collect the taxes to transfer the revenues to the ACs. This happened during the first decades of the system; in the year 2000 the Constitutional Court begun to develop a doctrine (STC 289/2000) and Parliament promulgated laws (2001’system) increasing the responsibility of the ACs on their revenues. This tendency was called fiscal co-responsibility. It means, that not only the State, but also the ACs and the Local Governments, must be responsible for ruling and managing the tax system.

For many years the State did not assign any powers to the ACs to resolve claims on ceded taxes. It did not even recognize the ACs' ability to appeal resolutions by the Tax Administrative Courts in matters of ceded taxes, including when the applied rules were regional statues or regulations. The Constitutional Court (STC 192/2000) considered that the ACs had autonomy to appeal against these administrative decisions and the State could not appeal to the principle of coordination to deny this right.

The last reform of the LOFCA (2009), not only recognises the legitimate right of the ACs to appeal against ceded taxes by them, but it also empowers the ACs to participate in resolving ceded tax-related cases –in the administrative phase- while respecting the State's power to unify the administrative doctrine in the tax system (art. 19 LOFCA).

2.2. Coordination Principle

"The financial activity of the ACs shall be exercised in coordination with the State" (art. 2.1 LOFCA, and art. 156 CE). It is clear that, in a complex and shared system as the Spanish one, if the State and the ACs enact, manage and enjoy the revenues of almost the same taxes together, they have to exercise their powers in a coordinated way.

Only the State can have the specific power of coordination such as the power "to define the means and related systems that are necessary and sufficient to enable mutual information, technical uniformity in certain aspects and joint action of the State and the Autonomous Communities within the scope of their powers" (STC 45/1991) "avoiding contradictions and reducing inefficiencies that, to survive, would prevent or hamper the reality of the system" (STC 32/1983); "coordination of the Communities with the State Treasury is only one aspect of the conception of all taxes as a system or unitary structure, uniform, of course, without discriminations that cause inequality due to place of residence" (STC 135/1992).

The principle of coordination is in fact an expression of the principle of equality: “an inevitable dose of homogeneity requires by the unwavering demand for equality” (STC 19/1987).

In this sense the State has exclusive power on basic tax legislation. So, the common rules and procedures for all the taxes are the same for state, autonomous and local taxes; they are contained in the Basic Tax Law (*Ley General Tributaria* 58/2003, 18th December). This Law is a very powerful tool that allows coordination and harmonization of the entire system and it regulates “the institutions that are common to the different taxing systems” (STC 233/1999). According to a ruling handed down by the Constitutional Court, the State has the power “to regulate its own taxes as well as the general framework of the entire taxing system. It can also delimit the ACs’ financial powers with regards to those of the State” (STC 192/2000).

There are several financial policies that the State must coordinate:

a) The Public Debt emissions of the ACs (STC 11/1984);
b) The default interest rate in liabilities due to public Administrations that have to be the same for all the Treasuries and is fixed by the State (SSTC 14/1986, 81/2003);
c) The maximum increase of the wages paid to civil servants, because is part of the general economic policy (SSTC 96/1990, 235/1992);
d) The State can coordinate public policies on infrastructures when they are of general interest and investment is part of the general economic policy (SSTC 183/1988, 250/1988);
e) The State can exercise the tax powers ceded to the ACs when necessary in order to enforce European rules for fiscal harmonization (art. 19.2 LOFCA).

The first LOFCA (1980) already created a special Administrative Body to channel and ensure coordination between the regions and the State in financial matters

related to developing the regional financial system: the CPFF. The main changes and reforms, the ordinary management of the financial relationships, has been done within this Committee with the participation of all the ACs of common regime. Catalonia has often defended, and has approved in its Statute, a different way, founded on bilateral, instead of multilateral, agreements. But the Constitutional Court considers multilateral agreements as part of the system, mainly because it is based on taxes that have been ceded and participation in State revenues, on the principle that the main decisions must be the outcome of multilateral agreements by the Financial and Fiscal Policies Council, and not of bilateral agreements between the State and each AC (SSTC 104/1988, 14/2004, 13/2007, 31/2010). Even if this multilateral principle is applicable to those ACs having a common regime, financial relationships in *foral* regime are built on bilateral agreements.

2.3. Solidarity Principle

Even if each AC has the financial and administrative power to achieve its political objectives, the State has to guaranty a homogeneous level of public services around the Country. Thus, it is the role of the State to lay down policies that provide all citizens a homogeneous level of the basic services -health, education, social services- whichever AC they may live in.

This is only possible through an effective financial policy of solidarity, seeking to assign the resources where they are need (arts. 2 CE); leading the general economic policy (art. 131 CE) for a “fairer distribution of regional and personal income” (art. 40.1 CE) in order to achieve “an adequate and equitable economic balance between different parts of the territory” (art. 138 CE).

Of course, the ACs can lay down specific policies to balance the economic growth and prosperity within their jurisdiction without entering into contradiction or conflict with the general measures adopted by the State in this field (STC 150/1990). In such a case, the AC of Madrid had created a Solidarity Fund for Municipalities in order to afford more resources to towns with lower fiscal capacity. However, the

Constitutional Court has not always been ready to accept the power of financial supervision by the ACs over the Local Governments. The Court is inclined to consider that it is the State that has to establish and develop the specific financial rules of the Local Government without interferences by the ACs (STC 31/2010).

The Constitutional Court, when it has had to judge on autonomous subsidies to encourage investments in territories, has sometimes reasoned as the European Court of Justice (ECJ) does in State aid cases. The ACs cannot interfere in the interior market by subsidising the location of facilities in their territories, except when a specific situation of underdevelopment, natural conditions, etcetera, can justify this interference (STC 64/1990).

The most recent Constitutional Case on regional taxing power (STC 31/2010), its judgement on the Statute of Catalonia, contains an important decision about the principle of solidarity. Art. 206 of the Statute states that the order of the ACs after the equalization system –in terms of resources *per capita*- has to be the same as the order of ACs in fiscal capacity. The Constitutional Court does not declare this article unconstitutional, stating that it is only an expression of how the Constitution understands the principle of solidarity: the richest regions and persons have to contribute to improve the financial capacity of the disadvantaged but not to the point where the relationship is reversed after carrying out the compensation.

2.4. Territoriality Principle

The Constitution defines, and the LOFCA develops, three specific principles about the taxing power of the regions. According to the so-called territoriality principle, the ACs may not exercise their taxing power on goods, utilities or expenses located, originated or made outside their territories (art. 157.2 CE and 9 a), b) LOFCA).

Since the first time an AC exercised its taxing power to set up a tax, a debate began about the meaning and scope of the limits profiled in art. 9 a) and b) LOFCA. The Constitutional Court, understanding that a literal interpretation of these articles would lead to the denial of taxing powers to the ACs, has built a very restrictive doctrine: The Constitution bans the Regions from taxing goods located outside their boundaries, but not the "personal income of their residents, even if said income is obtained from goods located outside its territories" (STC 159/1990). This interpretation is probably acceptable if referred to art. 157.2 CE but not to art. 9 LOFCA. In a prospective new reform of this law it had to be amended to incorporate the mentioned constitutional doctrine. Meanwhile, the ACs have been setting up taxes on utilities and incomes originated outside their jurisdiction knowing that, in spite of the opinion of the Constitutional Court, there is no legal problem in doing so.

2.5. Non-interference Principle

The second principle is very obvious: "The ACs may, in no instance, enact fiscal measures that mean an obstacle to the free movement of goods or services" (art. 157.2 CE and, in the same sense, art. 139.2 CE). Arts. 2.1 and 9 c) LOFCA repeat the same idea, adding the free movement of persons. It is none other than the extension, at national level, of the European freedom of movements.

Since the very beginning of its activity, the Constitutional Court has also defended a very restrictive interpretation of this limit: Any regional fiscal measure could represent a general obstacle to freedom of movement, but this measure would only be unconstitutional "when it intentionally seeks to hinder traffic" (STC 37/1981).

At this moment, there is a case pending about a tax imposed by Extremadura on banking deposits. This case will be very interesting in terms of free movement of capital. In the meantime Andalucia is also approving a similar tax. Freedom of

establishment is also threatened by several regional taxes on large shopping areas (Asturias, Catalonia, Navarre and Aragon), also pending a constitutional decision.

There is a very interesting decision of the Constitutional Court (STC 96/2002) in relation to certain allowances established by the Basque provinces regarding Corporation Tax for non residents in the EU, but not for non residents in the rest of Spain. In this case the Court reasoned, as the ECJ does, that this kind of discrimination only could be acceptable if it would be "reasonable and proportionate" in comparison with its purpose. Finally the Court understood –*obiter dicta* in a very controversial decision [FALCÓN Y TELLA (2002), HERRERA MOLINA (2004)]- that these conditions did not exist. The object of the case were not the *foral* rules, but a State disposition (Additional Disposition-*Disposición adicional* 8th Law 42/1994) that extended these allowances to all European Non Residents except for those with residence in a Spanish non *foral* territory. The Constitutional Court understood that this disposition infringed the freedom of establishment.

Sometimes the ACs have exercised their taxing power on ceded taxes not respecting freedom of establishment, particularly on Inheritance Tax. For instance, limiting the application of a deduction for inheritance transmission of small business, to those enterprises with activities or that are located within the AC (Aragon, Canary Islands, Asturias, Murcia, Castile-La Mancha, Castile-Leon and Galicia). It would also be possible to judge these measures as an arbitrary discrimination, since they are neither objective, reasonable nor justifable [GARCÍA DE PABLOS (2010)]. But the Constitutional Court has not yet the opportunity to decide on these Laws.

2.6. Non double taxation Principle

This last principle has been debated many times in the Constitutional Court. According to the first version, ACs could establish taxes neither on taxable events (*hechos imponibles)* already taxed by the State (art. 6.2 LOFCA) nor on tax bases

(*materia imponible*) reserved by Local legislation to Local Governments (art. 6.3 LOFCA). There have been intense debates within the Constitutional Court, and in fiscal literature about the meaning, sense and scope of the art. 6.3 LOFCA which limits the power of the ACs [BORRERO (2010)]. The Court, with different arguments, has, in some cases accepted the taxes (SSTC 37/1987, 186/1993, 14/1998, 168/2004) and in other cases has rejected it, usually because the Court considered that the regional tax invaded the local tax bases (SSTC 49/1995, 289/2000, 179/2006). Eventually, the Organic Law 3/2009 changed the expression "tax bases" to "tax event" to close the discussion and to widen the taxing power of the ACs. This reform implies quite a significant legal change based on the Constitutional Court judgements with heavy consequences in the scope of the ACs' taxing power. The only thing forbidden by the Constitution is "to pay twice for the same tax event" (STC 233/1999).

The first time that the Constitutional Court handed down a decision building this principle was when Andalucía established a tax on underused lands. The Court reasoned that the ACs may not tax the same events already taxed by the State but they could, instead, charge the same tax bases from another point of view. In the case indicted, the tax event –underuse of a land- was not the same as the Wealth Tax –to possess assets and rights- so the tax was declared constitutional (STC 37/1987).

In this sense, what has happened with regional environmental taxes is paradigmatic. The Court has created a constitutional doctrine by reasoning that in order to charge a tax as environmental -something different from a consumption, sales, wealth or income tax- two features must be recognized in its structure: first, a certain level of earmarking to environmental policies; and, second, the possibility for the taxpayer to reduce liability by changing behaviours (SSTC 289/2000, 168/2004, 179/2006). Then, surely following these resolutions, the new environmental taxes, in force since 2000, used to be, to a certain level, earmarked and set down allowances –normally tax credits- for investments to reduce pollution. In some cases old taxes have been reformed in this sense. That has been the case of the Tax of Extremadura on

Installations with Impact on the Environment. With the case pending in the Constitutional Court, the regional Parliament reformed the tax to avoid a negative resolution. The Constitutional Court finally did declare the tax unconstitutional (STC 179/2006) but it had no effect because the tax had already been modified to accommodate its structure to constitutional requirements.

If it is true that ACs may not create new own taxes on events already occupied by the State, it is also true that they can establish surcharges on these taxes. However, from a fiscal policy point of view, only Madrid tried it –in 1983- but when the Constitutional Court accepted it (SSTC 64/1990, 256/1994) the surcharge had been abrogated. Today, it makes no sense to set up surcharges because the ACs have the power, rather the obligation, to set up part of the tax scale in the Income Tax. So, if they can increase –or decrease- tax rates, why would they prefer to set up a surcharge?

On the other hand, article 6.3 LOFCA allows the ACs to collect local taxes. But this prerogative has never been used because the law requires a financial compensation to local governments and it is evident that the debates about the fair quantity of the compensation would be endless.

3.- The Supreme Court Judgements

The Supreme Court does not play a specific role in delimiting the ACs' financial and taxing power, because it can only judge regulations or administrative decisions, not legislative acts. However, in 2004 it resolved a very controversial case between La Rioja and Alava because of the so-called Basque fiscal relief. The Supreme Court, on December 9th 2004, in an extremely controversial decision, declared illegal some fiscal incentives passed by the foral territories. How did the Supreme Court have jurisdiction on these dispositions? Until 2010, the rules approved by the foral bodies of the Basque provinces with taxing power (*Juntas Generales*) were not recognized as rules with rank and nature of law, rather as administrative regulations. Therefore,

the Court with authority to judge this kind of disposition, with nature of regulations, was the Supreme Court and not the Constitutional Court.

This makes no sense from a constitutional point of view. If the Constitution recognizes the power of the Basque provinces to set up taxes, and it is clear that taxes only can be established by law, the rules approved by the *Juntas Generales* can have no other nature than this: law established by a kind of Parliament. If these rules have a nature of law, the jurisdiction to judge them is held by the Constitutional Court. This opinion, defended by the authors [DE LA HUCHA (2006)] has finally been accepted by the law (Organic Law 1/2010). If the nature of law of the *foral* rules is not recognized, the Supreme Court will no longer have jurisdiction over *foral* tax rules. Only the Constitutional Court can judge *foral* tax rules.

On February 7th and October 22nd, 1998, the Supreme Court declared two tax *foral* rules (8/1988 and 28/1988) illegal because of their investment incentives. On December 9th 2004, the Supreme Court considered that the different rates and allowances in the Corporation Tax of Alava were a demonstration of inequality and could only be justified because it stimulated depressed regions or industries, with no breach of European Law on State aids. Truly, these were not good decisions because, as said before, if the ACs have recognized taxing power, there will be differences between them, without infringement of the unity or the equality principle except, if the diversity is unreasonable or disproportionate. In the future, this problem will no longer be raised before the Supreme Court, since this court no longer has jurisdiction to judge the legality of the *foral* tax rules.

4.- Conclusions

The main engine of our Regional Tax System has been the Spanish Parliament driven by the Nationalist Parties, particularly during periods of weak central governments. But, even in this framework, not a negligible number of legal changes or interpretation of rules have their origins in some significant cases settled by the Constitutional Court and the Supreme Court. For instance:

1.- The Constitutional Court (SSTC 192/2000,10/2003) has recognized the capacity of the Regional Governments to appeal judgements handed down by the Tax Administrative Courts (*Tribunales económico-administrativos*), which depend on the Ministry of Finance, on taxes ruled and managed by the Autonomous Communities. Now, the Organic Law 3/2009 recognizes the ability of the Autonomous Communities to set up Tax Administrative Courts with jurisdiction to resolve taxes cases, even on taxes ceded by the State (art. 20 LOFCA).

2.- There has been a long-standing and intense debate within the Constitutional Court and in fiscal literature about the meaning, sense and scope of the art. 6.3 LOFCA that limits the taxing power of the ACs to set up taxes on *tax bases* reserved by law to the Local Governments. The Organic Law 3/2009 has replaced this expression by *tax event* to close the discussion and widen the taxing power of the ACs.

3.- The art. 9 LOFCA, when read in a literary sense, would limit the taxing power of the ACs in such an extended way that this taxing power would become irrelevant. The Constitutional Court has extended regional taxing power so much through several decisions that have given this article a restrictive, and even forced, sense.

4.- In a highly controversial decision, the Supreme Court declared illegal certain *foral* tax rules (STS 9/12/2004). Five years later the Organic Law of the Constitutional Court was reformed to recognize the nature of law of the *foral* rules, bringing them under the jurisdiction of the Constitutional Court , thus avoiding further decisions of the Supreme Court about these kinds of rules.

5.- The Constitutional Court has imposed two conditions on regional environmental taxes for them to be considered as being compliant with the Constitution: a certain level of earmarking to environmental policies; and the possibility for the taxpayer to reduce liability by changing behaviour (SSTC 289/2000, 168/2004, 179/2006). New environmental taxes, enforced since 2000, to a certain level do earmark and set down allowances –normally tax credits- for investments to reduce pollution.

6.- Sometimes the Constitutional Court has arrived late or when the political events have dismissed the issue argued before the Court. This is what happened with the surcharges (STC 150/1990), considered constitutional by the Court but not used by the ACs who now have the power to change quite a number of State tax rates.

Selection of Acts and Regulations

- Spanish Constitution-*Constitución española* (CE), arts. 156, 157
- Organic Law 8/1980, Financing System for Autonomous Community - *Financiación de las Comunidades Autónomas* (last modification LO 3/2009) (LOFCA)
- Law 22/2009, 18th December, Financing System for Autonomus Community and Cities with Statute of Autonomy -*Sistema de financiación de las Comunidades autónomas de régimen común y Ciudades con Estatuto de Autonomía* .
- Law 25/2003, 15th July, Economic Agreement between the State and the Foral Community of Navarre - *Convenio Económico entre el Estado y la Comunidad Foral de Navarra*
- Law 12/2002, May 23th, Economic Agreement with the Basque Country Autonomous Community - *Concierto Económico con la Comunidad Autónoma del País Vasco*
- Laws 16 – 30/2010, July 16th, Ceding State Taxes to the different ACs-*Régimen de Cesión de tributos del Estado a las diferentes Comunidades Autónomas*.
- Financial and Tax Policies Council Agreement 6/2009, July, 15th.

Selection of Cases

- STC 32/1981, July 28th. Autonomy Principle
- STC 37/1981, February 12th. Neutrality Principle
- STC 11/1984, February 2nd. Coordination Power of the State on Public Debt of the ACs
- STC 32/1983, April 28th. Coordination Principle.
- STC 14/1986, January 31st. Coordination Power of the State to fix the default interest rate for all the Treasuries
- STC 63/1986, May 21st. Checking Power of the State on how an AC spends a particular grant
- STC 37/1987, March 26th. Non Double Taxation Principle. Tax of Andalucía on Underused Lands.
- STC 183/1988, October 13th. Checking the Power of the State on how an AC spends a particular grant
- STC 250/1988, October 20. Checking the Power of the State on how an AC spends a particular grant
- STC 14/1989, January 26th. Expending Power of the Government of the Balearic Islands
- STC 64/1990, April 5th. Solidarity Principle

- STC 96/1990, May 24th. Checking the Power of the State on how an AC spends a particular grant; Coordination Power of the State to set a ceiling on increments in public wages.
- STC 150/1990, October 4th. Taxing Power of the AC to set surcharges on State Taxes
- STC 45/1991, February 28th. Coordination Power of the State
- STC 13/1992, February 6th. Autonomy Principle
- STC 135/1992, July 5th. Solidarity Principle
- STC 235/1992, December 12th. Coordination Power of the State to set a ceiling on increments in public wages
- STC 186/1993, June 7th. Non Double Taxation Principle. Tax of Extremadura on Underused Pastures.
- STC 296/1994. Surcharges on State Taxes
- STC 49/1995, February 16th. Non Double Taxation Principle. Tax of the Balearic Islands on Lotteries.
- STC 68/1996, April 18th. Solidarity Principle
- STC 171/1996, October 30th. Coordination Principle
- STC 103/1997, May 22nd. Coordination Principle
- STC 14/1998, January 22nd. Non Double Taxation Principle. Tax of Extremadura on Underused Pastures.
- STC 233/1999, December 16th. Non Double Taxation Principle.
- STC 104/2000, April 13th. Local Government Participation in State Revenues.
- STC 106/2000, May 4th. Local Public Prices for Private Use of Public Goods.
- STC 192/2000, July 13th. Coordination Principle.
- STC 289/2000, November 30th. Balearic Islands Tax on Installations with Impact on the Environment.
- STC 62/2001, March 1st. Coordination Principle
- STC 24/2002, January 31st, Budgeting Principles and General Economic Policy
- STC 96/2002, April 25th. Autonomy Principle
- STC 81/2003 April 28th Coordination Power of the State to set the default interest rate for all the Treasuries
- STC 168/2004, October 6th. Non Double Taxation Principle. Tax of Catalonia on Risk Activities
- STC 179/2006, June 13th. Non Double Taxation Principle. Tax of Extremadura on Installations with Impact on the Environment
- STC 222/2006, July 6th, Budgeting Principles and General Economic Policy
- STC 13/2007, January 18th. Autonomy Principle and Solidarity Principle
- STC 31/2010, June 28th. Organic Law on the Statute of Catalonia

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