

TAX INSPECTION PROCEDURE

This scientific article forms part of the Project of investigation financed by the Counsel of Science and Technology of the state of Chiapas (COCyTECH). It also forms part of the project registered before the General Direction of Investigation and Graduate studies of the Autonomous University of Chiapas.

María de los Ángeles González Luna
mary_angely73@yahoo.es

Mirlo Matías de la Cruz
mirlomatias2003@yahoo.es.

University of Salamanca, Spain



ABSTRAC

This article evaluates and studies the inspection process with special emphasis on the issue of discretion and decision making that outline the powers of the Tax Administration. The latter, within diverse options established within the standards, opts for the best in order to make the best options available in order to obtain the tax debt or fiscal credit which is the obligation of the taxpayer. The standards that allow for the functioning of the taxes have to rely on legal concepts and discretionary powers, which enable it to act in one way or another depending on the circumstances.

Keywords: Administration, tax, tax inspection, procedures, powers.

DISCRETION IN THE WAYS AND FORMS OF THE INITIATION OF THE PROCEDURE INSPECTOR

The Administration, in order to meet the goals of the State, performs many acts of verification and investigation of taxes as described in Article 42 of the Tax Code of the Federation. In this sense, the law confers inspectors discretionary action regarding taxpayers obligations. Such acts must be issued in accordance with the general interest. Regarding the issue of acts of administrative authority the legality principle applies, that in accordance with Article 16 of the Federal Constitution provides that “no one may be molested in his person, family, home, papers, positions, except pursuant to a written order of a competent authority that provides grounds and legal motive procedural cause.” That is, the initiation of inspections is a discretionary decision (Arrijoja, 2005) and therefore must have a motivation and reasonable grounds that are not arbitrary.

In this sense, the procedure is initiated *ex officio*, (Quintana, 1997) since “The state cannot expect all contributors to express in good faith operative events that give rise to obligations in their charge, but rather, in view of its need to obtain revenue to carry out its purposes, develops a research activity through its administrative bodies to determine the operative events that have not been disclosed “.

However, problems arise when action creates an administrative decision affecting the taxpayer (Romero, 2012). That is, the Administration decides on the initiation of inspections based on the judgment of opportunity and always considers that there is evidence or likelihood of fraud. This is due to the great mass of taxpayers that the state has to check regarding the veracity of their statements. (Jiménez, 1993) states that “a factor that explains and constrains the behavior of the taxpayer regarding taxes in our country is ignorance, lack of knowledge and in some

cases illiteracy ... Moreover, every day there is an increase in the degree of complexity and technicalities of the tax system. “

In this sense the Administration has an important planning function. At this stage is when “activities whose implementation is deemed necessary are anticipated, methods are devised to carry out and identify the necessary means to facilitate decision-making.” However, for Mabarak (2007) “it is necessary that this power is better regulated in the laws that allow its exercise, to avoid abuse and misuse of power that far from benefiting taxpayers complicate their situation illegally.” Thus, the tax authorities have been attributed the discretion to formulate plans and inspection programs to prevent fraud and tax evasion, all in accordance with the public interest (Orena, 2006), also citing the limits of those powers, constitutional guarantees, and principles of legal certainty, equality and proportionality.

Common forms of initiation of the inspector procedure laid down in Article 134 of the Tax Code of the Federation indicate modes of inspector initiation procedures by personal notification or by certified mail, by mail or telegram, by courts, by edicts , and by instruction. In this regard, Article 14 of the Constitution requires that any act of disenfranchisement meets *the essential procedural formalities*. In addition to this, in report number 849/78 from November 1978, the Supreme Court of Justice of the Nation points out the essential formalities of any procedure and highlights as a first step to inform the concerned party on the initiation of the procedure, which translates always as a notification and leaves the party in a position to prepare his defense.

In other words, the taxpayer must have knowledge as to how the proceedings will take place in a duly reasonable and informed manner. Otherwise the interested individual rights are violated and judicial protection proceeds to be granted (Mancheco, 2009). However, Article 49 Section II of the Tax Code of the Federation does not provide for the delivery of pre-inspection visit subpoena, since “ for the visitors to present themselves to the place where

the diligence should occur, they will deliver the verification order to the one being visited, his legal representative, manager or whoever is present at the place being visited, indistinctly, and such person shall be given an explanation of the inspection visit”.

That is, the initiation of inspections takes place without notice when there is danger that the one being visited is absent or could perform maneuvers to prevent the onset or development of the due diligence. In this regard, the Judicial Weekly of the Federation (1999) of the Supreme Court of Justice of the Nation states: “Article 16 of the Constitution does not establish a requirement for home visits or inspections if they are preceded by a subpoena, rather they are issued in writing by a competent authority in the place to be inspected is expressed and the person in it is addressed, as well as the subject that the visit is pursuing, providing a detailed affidavit to that effect”.

DISCRETION AT THE START OF A HOME INSPECTION VISIT

Based on Article 16 of the Constitution, the Tax Code of the Federation (Article 42, Section III) empowers the Secretariat of Finance and Public Credit to practice visits to taxpayers, solidarity or responsible third parties related to them and review their accounting, real estate and goods. Thus, the practice of a home visit must be the result of a written order by a tax authority¹, to proceed immediately with the visit.

If a written copy of act is not given to the person being visited, the visit itself is constitutionally flawed and therefore has no legal value, resulting in violation of Article 16 of the Constitution. Consider Arrioja (2005) who states that the Government must

¹ The order written by the tax authority must contain certain prescribed formalities from articles 38 & 43 of the Federal Tax Code.

find and sanction “the true evaders, but also while avoiding injustice, threats, and the intimidation that sometimes tends to be truly grotesque and particularly abusive. The abuse of power never helps strengthen public awareness and respect for the authorities”.

Article 44, section II of the Tax Code of the Federation notes that prior to the summons and once the day has arrived and the time determined for the visit and his representative was not found at the location, the visit will begin with whomever is in the place that is being visited. This action exists because it cannot be admitted that the subject evades the action of the Treasury, with the attitude of not confronting the fiscal visit. However, with the same rule there are discretionary aspects which empower the inspection to proceed to insure accounting, when there is danger that the one being visited is absent or able to perform maneuvers to prevent the onset or development of the visit.

In connection with the examination of the accounts, there is a risk of misuse of power by the users because they are left with discretionary power to consider cases in which such risks exist. This discretion often jeopardizes the good relations that should exist between authorities and taxpayers, because users sometimes misuse these powers and proceed to securing the property although there is no proof or evidence that should motivate them to do so.

Locations for conducting home inspection visits

In order to verify, investigate and audit taxpayers, taxpaying institutions and those relevant to tax credit, the Tax Administration conducts exercises designed to verify and determine unpaid taxes or missing tax credits. Among its main objectives and powers is to work with other tax authorities in the fight against tax fraud (Valdez, 2009). The specific location stated in the tax law as to

where a home visit should take place is enveloped in discretion when considering various cases. The provisions are manifested in article 43 of the Tax Code of the Federation, which states that: In the visit order, in addition to the requirements of Article 38 of this Code, it should specify: “The place or places where the visit must be made. The increased number of places to visit shall be notified to those who are visited. “ This leads to the conclusion that the discretion to choose the place or places or increasing the number of home inspections is deposited exclusively and unilaterally in the hands of the Tax Administration.

The places that must be applied by a single home visit are usually the aforementioned offices and other establishments and places where the business is located, or where activities or goods subject to taxation are exploited. The entry of officials in places of inspection, which does not necessarily have to be established and registered offices, may be in different places determined by the Tax Administration Service. The Tax Administration has discretion to practice any inspection activity, especially for recognizing offices, goods, facilities and holdings, by means of whatever actions are deemed necessary and related; and to provide for the application of a method of derivation of tax liability ².

This is done with the purpose of making affordable tax credit to those it is due. The implementation of home visits is therefore subject to the administrative discretion of the Tax Administration Service. The enforcement officers, in exercising their functions, should be considered agents of the tax authority, have the powers of authorities and can enforce administrative or criminal liability, as well as to those who oppose, resistant or in contempt thereof.

² Responsibility could arise in subsidiary or joint manner, where the responsible prosecutors are individuals or legal entities established by law in certain circumstances, and they are required to meet tax obligations which initially were not theirs but the principal debtors.

The administrative authorization prior to entry into a residence

The sixteenth paragraph of Article 16 of the Constitution empowers the administrative authority to implement visits to taxpayers. In practice, the acts of the Tax Administration are issued and executed without prior judicial authorization. That is, the aforementioned constitutional article entitles the Tax Administration to conduct home inspection. This action, which takes place at the home of taxpayer, must observe two formalities. The first is that the act must be issued by the competent authority and second, which usually is not seen in the home visit, is the presentation of the foundation and motivation of said act.

Searches and home visits are different. The first is applied by the commission of a criminal act or criminally liable offense, and results in the apprehension of persons or confiscation of objects that lead to the commission of a crime. The second is applied by the exposure of evidence of tax liability. The home inspection visit, according to Article 16 of the Constitution, should also be subject to the formalities prescribed in searches.

In order for an administrative act not to be unconstitutional, it must be founded and motivated, and therefore provides the criterion upheld by the Judicial Power of the Federation, Appeal under review 8280/67. The reasoning is that there is a rule applicable to the case and that the motivation is in that case under special circumstances, are obvious and have particular reasons or immediate causes that must be taken into consideration for the issuance of the act and that there remains a connection between the detached circumstances and applicable law.

Article 16 does not mention a formality but rather refers to all constitutional formalities prescribed for searches. Among them, the guarantee of inviolability of the home is protected by the Constitution, and for exceptions this inviolability can only be admitted by order of a judicial authority. This has caused several

controversies and doctrinal positions, but the Supreme Court of Justice of the Nation has not clarified such controversies.

The court only establishes the requirements that must be completed in the reports that are prepared for the occasion of the home visit, and in order to have real legal support it must meet the requirements of Article 16 of the Constitution. That is, acts that have been made in the presence of two witnesses who are proposed by the one being inspected, or in his absence or refusal, designated by the tax authority.

With the above, the omission or absence of a real application of the formal requirements laid down in Article 16 of the Constitution is deducted in the development of inspection visits. This results in the Tax Code of the Federation giving the tax authorities an initial procedure that may violate the guarantee of inviolability of the home. In addition, the tax law does not distinguish between offices and private homes. Unlike Article 18 of the Spanish Constitution which guarantees the inviolability of the home and provides that entrance to it can only be by the court or by consent of the owner, except in the case of a flagrant crime. This is also established in Article 113 of the Tax Code. In our Mexican law, a legal jewel is found (an appeal trial) against the abuse of power or violation of rights.

The secondary law, or the Tax Code of the Federation in Articles 85 and 86, gives tax authorities the discretion to conduct inspections and enter the inspected home. In case of opposition to the home visit, they can impose financial penalties to those being reviewed, in addition to tax offenses that may arise. In another sense it is tolerated that visits occur, given the principle of enforceability which supposedly covers the act of domiciliary visit by the Administration, but the principle contains in itself administrative discretion-unlike in the Spanish Tax Administration, it is not conferred the power to enter the constitutionally protected house, except in established cases and which should consequently meet constitutional requirements.

The days and business hours for inspection home visit

The temporal scope on tax audits also has certain indeterminate findings, especially when referring to specific days and times in which to practice. The discretion of the Tax Administration is notorious as to when certain days and business hours should be noted. The above is to review the effectiveness and enforceability of the act of the home visit itself, but also for administrative discretion giving a sense of vulnerability to those being visited.

The legal uncertainty promoted by the vagueness and indeterminacy of the concepts derived from Article 13 of the Tax Code of the Federation are purely discretionary, since “The tax authorities, regarding the practice of home visits, administrative enforcement proceedings, notification and provisional seizures, may enable legal holidays when the person who is to practice the visit performs activities for which they must pay contributions on non-working days or hours. A visit that began in working hours and days can continue on non-working days or hours. “ Also, section IV of Article 44 gives authority to the Tax Administration to implement measures related to holidays and restart others that were suspended, subverting to the right to legal security of the constitutionally administered supervision.

The tax authorities have the discretion to extend the number of places where that may use discretion for home visits and to increase the number of visits applied to taxpayers. Added to this is the time domain- the prerogative to have after hours of work, which usually develops within the administrative offices. This, by a mirroring effect, leads the inspector to endless problems resulting from labor charges for overtime payments to employees, as well as subtracting and diverting attention from the company, focusing on the visit or visits to which the taxpayer is subject, suffering a detriment in productivity and business growth.

Early termination of the home inspection visit

Within this mode of termination of the home visit are some discretionary aspects mentioned in Article 47 of the CFF “The provisions of this paragraph shall not apply where it appears to the tax authorities that the information provided in the terms of Article 52-A of this Code by the public accountant who has been advised is not sufficient to meet the fiscal situation of the taxpayer “ which, gives the tax authorities of personal judgment about the fiscal situation of the taxpayer.

These personal prosecutions by tax authorities have no parameter or legal guidelines prescribed by law that can be adjusted and generate motivations on no real or legal basis. With the anterior, the Tax Administration has discretionary aspects as manager of the tax credit. Even in the event that the one who is visited presents financial statements audited by an authorized accountant, or in the event that a delay has occurred in the presentation of documents or time restricted decisions requiring a public accountant, tax authorities have the power to continue the home visit and raise a conclusive certificate about the new reality. This represents a disproportionality and legal disadvantage in relations between the tax authorities and taxpayers.

FINAL ACT

Article 46 of the Tax Code of the Federation clearly establishes the rules that tax representatives must follow during the course of a home visitation. It also points out the different types of records that may arise and various legal statements for the taxpayer, such as: partial reports, final reports and additional reports. Partial minutes are kept for the inspection visit which reflect circumstances, acts or omissions of the Tax Authorities for the taxpayer- considering (DE LA GARZA, 2006) that “... partial

or supplementary proceedings can be reported in which facts, omissions or circumstances of a specific nature, or knowledge that occurs during the development of a visit or after it has finished are stated “.

The final report is one that is made at the end of the home visit and where the results are stated. That is, the final report is the final step in a home visit. Within it can be found compliance or otherwise regarding tax liability, which is determined and compiled to regularize the fiscal status.

Additional records are made after the realization of the final report, and are made when the authority finds some areas, events or situations that were not reviewed or audited by the visitors and merit inspection in order to regularize the tax situation of the taxpayer. However, if new tax measures arise it will be necessary for the authority to issue new clearly marked orders; otherwise it violates Article 16 of the Constitution since it involves the exercise of powers of verification, inspection and inquiry in home visits.

Consequently the lack of signature on any of the pages invalidates the act since it did not fulfill the requirement by law. It should be stressed that that the faculty enjoyed by visitors to make assessments of the above documents and assessments of taxpayers situations. Likewise, in home visits there is also the discretion enjoyed by the visitors, with regard to early conclusion of a home visit.

Judicial review of administrative discretion

The control of the legality of discretionary acts of the administration is done through the courts. In accordance with Article 104 of the Constitution, the judicial authorities are responsible for settling disputes between the governed and the Treasury. Notwithstanding, Article 125 of the Tax Code of the Federation states: “The applicant may choose to challenge an act through

the use of revocation or promote directly against that measure, a judgment in the Federal Court of Fiscal and Administrative Justice”. In the same vein (Fix Zamudio 1972) states that it is important that the legality of the acts of the administration is controlled through administrative remedies, since this resource is a repressive process that provides the one being managed direct legal means of protection of their rights.

Thus, the Administration should support their action against individuals on the legality of their actions, otherwise a violation of the rights of the citizens originates- for violating the law or lack of application of the due provision, whose resolution can only be known in the courts. Article 103 Section I of the Federal Constitution states: “The courts of the Federation shall settle any dispute arising: I. laws or acts of authority that violate individual rights”. The Constitution provides for the protection of the rights and legitimate interests of citizens without, in any case, may occur helplessness.

In accordance with Articles 103 and 107 of the Constitution which deduces the prohibition of arbitrariness of public authorities to establish that the courts control the actions of the Administration, and that this acts in accordance with the general interest. Thus, Article 107 Section V of the Constitution provides: The appeal against final judgments or awards and resolutions until the end of the trial, whether the violation is discussed during the procedure or sentence are promoted to the corresponding Circuit Court under the division of powers established by the Organic Law of Judicial Power of the Federation in the following cases: b) In administrative matters, when requested by private individuals, bring to an end judgments and decisions handed down by administrative or judicial tribunals not serviceable to any recourse, trial or ordinary means of legal defense”.

In accordance with the rule of law, the administrative act must be controlled jurisdictionally, verifying that the acts issued by the government meet the general interest. The importance of

constitutional tax principles of legality and legal certainty for all acts of authority, administrative or judicial, requires the Federal Constitution.

The principle of legal certainty in its negative aspect is reflected in the prohibition of arbitrariness, preventing the Administration discretion to decide on the issues that must be established by law. Thus, legal certainty is manifested as the substance of various public rights enforceable and payable to the State and its authorities.

The principle of legality -in its two aspects: policy and application- should be inferred from the joint interpretation of the second paragraph of Article 14 of the Constitution “No one shall be deprived of life, liberty or property, possessions or rights without a trial before previously established courts in which due process is observed and in accordance with the laws issued before the fact “. The law allows the constitutional defense to be performed when there are constitutional violations. In this sense, the rule of law limits the administrative action of the law. Thus, the first paragraph of Article 16 of the Constitution “No one shall be molested in his person, family, home, papers or possessions, except by written order of a competent authority that provides grounds and legal procedural cause” - these principles will be applicable to both the administrative procedure and administrative acts that comprise it.

The First Appellate Court on Administrative Matters of the First Circuit (Judicial Weekly of the Federation [SJF] 1917, p.64) has argued that Article 14 of the Constitution protects the right to a hearing held by citizens, arguing that: “When the payment of a tax depends on assessments, appraisals, exercising the discretion of authorities, or generally any element that the legislature has not given and must determine the tax authority in accordance with the precise and specific guidelines that indicate that legislature, while not excessive or discretionary, nor its unilateral administrative will, in these cases, the obligation to contribute to

public expenditure, is no longer entirely determined by the law itself, and the authorities must respect the guarantee to a hearing.

As there is no legal basis for the authorities to exercise economic and coercive power to all legislative control, setting taxes in an amount not derived from a single legal text, but must come specified by an act of the tax authority. “The taxpayer has the opportunity to inconformity, and to appeal the act issued by the Administration. In this regard the (Supreme Court of Justice of the Nation [SJF] T. XXIX, p.669) states that “the administrative authorities have no powers other than those expressly granted to them by law, and when they dictate a determination that is not properly grounded and motivated by any law, it must be deemed as a violation of the guarantees contained in Article 16 of the Constitution”.

Article 16 of the Constitution provides assurances to foundation and motivation, preventing individuals from being defenseless. Motivation is required by that article and expressed in the (Bulletin of jurisprudential Information [BIJ], 1963, p. 417) “externalize relative considerations to the circumstances of facts that the authority made to establish the suitability of concrete legal case to a hypothetical scenario”.

The principles of legality and legal certainty demand that the administrative authorities comply with the requirements at the moment of interfering with an nuisance act by authorities. That is, the resolutions issued by the Administration must be properly grounded and motivated, noting the legal rules and assumptions that are found in the special law, resulting in the match between the circumstances of the case and the legal foundation.

REFERENCES

Amparo en revisión 8280/67. Augusto Vallejo Olivo, 24 de junio de 1968;

Arriola Vizcaíno, A., 2005, *Derecho Fiscal*, Themis, México.
Boletín de Información Jurisprudencial, de 2 de octubre de 1963,
2ª Sala, p. 417.

Código Fiscal de la Federación

Constitución Española

Constitución Política de los Estados Unidos Mexicanos

De La Garza, S., 2006, *Derecho Financiero Mexicano*, Edic.
27º, Porrúa, México.

Fix-Zamudio, H., 1972, *Introducción al Estudio de los Recursos Administrativos, en Estudios de Derecho Público Contemporáneo*, UNAM, México.

Ley General Tributaria 58/2003

Mabarak Cerecedo, D., 2007, *Derecho Financiero Público*, Mc Graw Hill, México.

Semanario Judicial de la Federación, 1917-1965, Pleno, 1ª parte.

Semanario Judicial de la Federación, Novena Época, Tomo X, diciembre de 1999, tesis 139/99.

Semanario Judicial de la Federación, V ÉPOCA, T. XXIX.