

Scope of the right against self-incrimination in the context of tax penalty proceedings

The Supreme Court will once again rule on the scope of the right not to incriminate oneself in tax penalty proceedings and on the use that the tax authority may make of the information provided in prior enquiries.

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By Order 4422/2024 of 10 April, the Supreme Court has allowed an appeal in cassation to proceed in which the court will have to address the scope of the fundamental right not to incriminate oneself in tax penalty proceedings regarding the use of information provided under compulsion in prior inspections.

The matter in question is one of the most controversial aspects in inspections and penalty proceedings and is framed within the existing relationship between the powers of the Inspectorate to gather information in the course of an inspection and taxpayer rights and safeguards governing penal-

ty proceedings, which include the aforementioned right against self-incrimination.

Within the specific scope of an inspection, Article 142 of the Taxation Act (LGT), referring to tax inspection powers, provides that an inspection is carried out "... by examining documents, ledgers, principal and auxiliary accounts, files, invoices, supporting documents, correspondence with tax implications, computerised databases, programmes, registers and computer files relating to business activities, as well as by inspecting goods, elements, undertakings and any other background data or information that must be provided to the Authority or that is necessary for the enforcement

of tax obligations”. It thus establishes the duty of taxpayers to attend to the Inspectorate and to duly collaborate in the performance of its functions.

To ensure taxpayer compliance with these obligations of information and collaboration, Article 203 LGT classifies any resistance, obstruction, excuse or refusal to comply with tax inspections as a serious default, and paragraph 6 of the said article provides for specific penalties, depending on the type of default, in those cases where the taxpayer is subject to an inspection.

It is clear, therefore, that the provision of information and documentation requested in a tax inspection takes place under compulsion, responding to an obligation where non-compliance may lead to the imposition of penalties.

In this context, the question that arises is the use that can be made by the tax authority of the information obtained under this information obligation in the subsequent exercise of a different power, such as the power to impose penalties, without contravening the taxpayer’s right against self-incrimination.

In this regard, one should recall Article 178 LGT, which refers to the principles of the power to impose tax-related penalties, establishing that this power “shall be exercised in accordance with the principles governing the same in public authority matters, with the qualifications established in this law”. For its part, the Constitutional Court already recognised in its Judgment 18/1981 of 10 June 1981 – a well-established stance today- that criminal law principles could be transferred to the sphere of tax penalties, including amongst those principles the right against self-incrimination (as an instrumental safeguard of the rights of defence regulated in Article 24(2) of the Spanish Constitution), intimately connected with the right to the presumption of innocence and one of its manifestations, which consists of placing the burden of proof on the prosecution.

The Supreme Court has already had occasion to refer to this matter in its Judgment of 23 July 2020 (app. no. 1993/2019), repeated in other subsequent judgments, in which its fifth point of law set out the following interpretative criteria:

- Constitutional case law, in line with the interpretation given by the European Court of Human Rights, has unequivocally determined that the right against self-incrimination “pre-supposes that the authorities make their case without resorting to evidence obtained by coercive methods or pressure against the will of the accused person”.
- The right against self-incrimination has two aspects or manifestations: on the one hand, it manifests itself as the right of any accused person not to provide self-incriminating information demanded by the public authorities; and, on the other hand, the right not to have information that the person has been compelled or induced to provide in the course of any proceedings used against such person as a basis for a subsequent criminal conviction or administrative sanction. To this second manifestation, in particular, the Constitutional Court referred in Judgment no. 54/2015 of 16 March, in which it referred to the case law of the European Court of Human Rights which establishes that the safeguard of non-self-incrimination in the tax sphere would mean that information obtained under compulsion cannot be relied on as evidence in subsequent proceedings, even if such information had been provided before being accused.

However, the cassation appeal allowed to proceed by the Order of 10 April 2024 must go further in the analysis of this matter. Here, in the course of the previous inspection, the taxpayer had provided invoices issued which the tax inspectorate considered to be false or falsified after verifying, in the course of its checks and enquiries, the absence of human and material resources to carry out

the declared business activity. On the basis of this information, the Authority imposed the relevant penalty for committing the infringement provided for in Article 201(3) LGT, i.e., for failing to comply with invoicing obligations by issuing invoices with false or falsified data.

In its appeal, the taxpayer invokes the right against self-incrimination on the basis of the case law of the European Court of Human Rights. However, the *Audiencia Nacional*, in its Judgment of 6 February 2023 (app. no. 762/2018), which gave rise to the cassation appeal allowed to proceed by the Order of 10 April 2024, rejects the taxpayer's appeal on this point. Thus, after analysing the case law evolution of both the European Court of Human Rights and the Constitutional Court on the scope of the right against self-incrimination, the *Audiencia Nacional* considers that, in the case in question, the provision of the invoices derived from a legal obligation and concludes that it was not the mere provision of the invoices that triggered or gave rise to the imposition of the penalties, but rather the discrepancy between the documents provided and the taxpayer's corporate, commercial and employment reality, having established that it lacked the material and human resources to carry out the activity for which it issued the invoicing documents. Therefore, "it is not possible to establish an automatic link between the request for information relating to compliance with tax obligations, whether material or formal, and the infringement of the right not to incriminate oneself for the consequences that this documentation or these requests may have in a subsequent penalty procedure".

The Supreme Court Order of 10 April 2024 is of particular interest, as it examines the existing case

law - both in Europe and in our Constitutional Court - on the scope of the right against self-incrimination in tax penalty proceedings. And, following this analysis, the Supreme Court concludes that certain questions, such as those that follow below, are of interest for the formation of case law:

- On the one hand, whether the fact that the obligations to issue, keep and produce to the tax authority certain documentation and information - such as invoices - are legally required means that this information is excluded from the protective sphere of the right against self-incrimination, even if it has been provided under compulsion in an inspection.
- And, on the other hand, whether the right against self-incrimination also extends to data or information which, although necessary, is not sufficient in itself to justify the imposition of the penalty or whether, on the contrary, this right only covers the non-provision or non-use in penalty proceedings of directly self-incriminating information.

In our opinion, this order follows the path of case law (which has been open for some years now) that has been delimiting and safeguarding the rights of taxpayers in penalty proceedings and the due separation between these and the prior inspection. It will therefore be necessary to await the ruling on the appeal in cassation which, whatever the conclusion, must necessarily establish additional criteria for the interpretation and delimitation of the scope of the right not to incriminate oneself in tax penalty proceedings and the use that the tax authority may make of the information provided in prior enquiries.

The obligation to cooperate with the Inspectorate and the right against self-incrimination in penalty proceedings