Supreme Court qualifies the *double tap* doctrine: payment possible in new proceedings after quashing of measure on substantive grounds

The Supreme Court, in judgments of 3 and 5 April 2024, qualifies its previous case law and strengthens the *double tap* doctrine, admitting the possibility of issuing a new notice to pay – initiating, as the case may be, new proceedings – after a notice to pay has been completely set aside on substantive grounds.

ROCÍO ARIAS PLAZA
ADRIÁN BOIX CORTÉS
REMEDIOS GARCÍA GÓMEZ DE ZAMORA
Tax Litigation Team, Gómez-Acebo & Pombo

SATURNINA MORENO GONZÁLEZ
Professor of Public Finance and Tax Law
Academic Counsel, Gómez-Acebo & Pombo

According to settled doctrine of the Supreme Court, a tax authority may issue a new notice to pay in the execution of a decision or ruling quashing a previous notice, provided that the right to regularise a tax position by means of the appropriate payment has not expired. This legal doctrine, commonly known as the *double tap* doctrine, is based on the principles of tax justice and administrative efficacy (Arts. 31(1) and 103(1) of the Spanish Constitution).

When addressing the quashing of an administrative measure, it is necessary to differentiate between the formal or material nature of the defect determining the quashing, as well as its partial or full scope. When the quashing has taken place due to formal defects, the proceedings may be rolled back in order to remedy the procedural flaws that have caused a denial of defence for the taxpayer. The rolling back of proceedings is also allowed in order to integrate checks and enquiries "when the investigation is incomplete and, for reasons not exclusively attributable to the public body, the essential elements to decide on a settlement of payments are lacking" (Supreme Court Judgment of 29 September 2014, app. 1014/2013). However, the rolling back of proceedings is not a suitable procedure for correcting substantive or material defects in notices to pay. In this regard, in a recent

case where we submitted this argument, the Valencian High Court of Justice concluded that the absence of proof of fulfilment of the prerequisite for the contested administrative measure constitutes a substantive defect, so that the proceedings cannot in any case be completed by way of a rollback when such a situation of absence of proof is owing exclusively to the public body.

However, the fact that, when an administrative measure is quashed for substantive or material reasons, there is no right to roll back proceedings does not prevent the tax authority, once a notice to pay has been quashed in administrative or judicial proceedings, from issuing a new notice, provided that its powers are not time-barred.

As an exception, in the field of penalties, the procedural aspect of the *non bis in idem* principle prevents a new measure from being operated when a penalty has been completely quashed for substantive or material reasons, with respect to the same person, facts and grounds (Supreme Court Judgment of 11 April 2014, app. 164/2013).

Until now, some of the judgments handed down by the Supreme Court on this matter have stated that, when the quashing of the administrative measure is due to substantive or material reasons, "it is only possible [for the public body] to issue, without carrying on again the proceedings and without completing the relevant investigation, a new measure in accordance with the law while its powers are still alive" [Supreme Court Judgments of 19 November 2012 (app. 1215/2011) and of 15 June 2015 (app. 1551/2014)]. Based on this, it could be concluded that the public body, in the execution of the administrative decision or court ruling, can correct the material or substantive defect within the same proceedings in which the quashed measure was operated, but without carrying out new enquiries and without initiating a new limited check or inspection. This conclusion, reached in different court rulings (for example, *Audiencia Nacional* Judgment of 19 April 2023, app. 692/2018), is considered to be incorrect in the recent judgments of the Second Section of the Third Chamber of the Supreme Court of 3 and 5 April 2024 (app. 8287/2022 and app. 96/2023).

A brief overview of the facts at the origin of both judgments is in order:

— In the first, the Central Tax Tribunal had set aside a notice to pay value added tax addressed to the conveyor of real estate affecting his right to deduct such tax borne on the purchase, in view of the tax authority's failure to prove a foreseeable use of the property in the acquiring entity incompatible with the correct waiver of the exemption. The Central Tax Tribunal rejected that the error committed, given its material nature, could be cured by the rollback of proceedings ordered by the Regional Tax Tribunal. The tax authority then initiated a new partial inspection to prove the foreseeable use of the property. The Central Tax Tribunal and the *Audiencia Nacional* confirmed that the second notice to pay was correct.

— The second judgment stems from the Supreme Court Judgment of 2 July 2020 (app. 1429/2018) in which it was determined that the tax authority had incorrectly used the power of characterization provided for in Article 13 of the Taxation Act. Following this, a new inspection was initiated which ended with a new notice to pay on the basis of the existence of the simulation provided for in Article 16 of said act. The applicant raised an enforcement motion against said notice, which was dismissed by the High Court of Justice of Andalusia.

Although the facts giving rise to both judgments are different, one of them dealing with a case of enforcement of a tax tribunal decision, while the

other deals with a case of enforcement of a judgment, the first of the questions of interest for the formation of case law to be answered in both appeals is essentially the same: whether the tax authority, in those cases in which, by virtue of a tax tribunal decision or a court judgment notices to pay are fully quashed on substantive grounds, may initiate a new inspection on the same tax items and periods and with the same scope and extent as the previous inspection, and issue a new notice to pay after conducting the aforementioned new inspection.

The Supreme Court answers in the affirmative. The fact that in previous rulings it has stated that a tax authority may issue a new notice to pay without conducting the proceedings again and without completing the relevant investigation, "in no way means that it may not initiate new proceedings and carry out the necessary acts of investigation within the same in order to finally operate a "new measure in accordance with the law while its powers are still alive", thus avoiding repeating the same error that led to the quashing of the first notice to pay. The proper reading of this statement is that the tax authority may not return to the same proceedings and complete the necessary acts of investigation, as this is only permitted in cases of annulment due to formal defects, but not when the notice to pay has been set aside due to a substantive defect, given that in these cases the tax authority is not prevented from initiating new proceedings and issuing again a notice to pay, with the limits referred to above".

Second notice to pay may be issued after new proceedings

Likewise, the Supreme Court points out that, unlike in cases of partial annulment for substantive reasons, in cases of complete annulment of the notice to pay for the same reasons, the tax authority fulfils its obligation to execute the decision or ruling by means of the execution decision confirming the complete annulment of the notice to pay. The new notice to pay subsequently issued, following the initiation of a new inspection if deemed necessary, does not constitute an enforcement of that decision or ruling, but the exercise of the power that rests with it. Therefore, the new notice to pay is not subject to the rules on time limits for enforcement, the limits being that the administrative power is not time-barred (a limit that is difficult to apply, given that the quashing of notices to pay due to relative nullity interrupts the limitation period), the *reformatio in peius* and recidivism or persistence in the same error.

Lastly, in application of the general principle of preservation of steps and formalities provided for in Article 51 of the Common Administrative Procedure Act (Law 39/2015) and, in particular, Article 66(2) of the Administrative Review Regulations (RD 520/2005), of preferential application in tax matters, the tax authority "may incorporate in the new proceedings the steps and formalities not affected by the grounds for annulment". This same principle of preservation of steps and formalities not affected by the grounds for annulment makes a specific agreement in this respect by the body declaring the annulment unnecessary, and also prevents any defect of annulment arising from the incorporation in the new proceedings of the documents that make up the electronic case file for issuing the new notice to pay.

In short, the Supreme Court, in the aforementioned judgments of 3 and 5 April 2024, recognises, as it did previously, the power of the tax authority to issue a second notice to pay after the complete or complete annulment of the first for material or substantive reasons; but expressly admits the possibility of initiating new proceedings and carrying

out the necessary investigative acts within it. In this way, it qualifies its previous case law and reinforces the double tap doctrine, giving precedence to the principles of tax justice and administrative efficacy over those of legal certainty and judicial protection.

However, some important questions remain unanswered, such as what should be the treatment of late payment interest in these cases and, in particular, what should be the content, scope and actions carried out in the new proceedings. On this last question, the Supreme Court is not entirely clear and limits itself to stressing that the contested administrative action is in accordance with the law because "the new proceedings have not followed a verification route completely distant from the previous one, but have limited themselves to carrying out the necessary actions to issue another notice to pay to replace the one set aside". It would have been desirable to be more specific on this point, but we understand that this assertion makes it possible to object to new administrative actions that are different from those carried out in the framework of the previous proceedings and not affected by the defect of relative nullity, limiting the actions of the new proceedings to what is strictly necessary to issue a new notice to pay in accordance with the law.

In any case, the main difficulty posed by this legal doctrine lies in the excessive length of tax disputes, limiting the right of citizens to have their affairs dealt with impartially and fairly within a reasonable time (Art. 6(1) of the European Convention on Human Rights, Arts. 41(1) and 47 of the Charter of Fundamental Rights of the European Union and Art. 24.2 of the Spanish Constitution).

We will have to pay attention to case law developments in the response to the cassation appeals currently pending before the Supreme Court (Orders of 28 June 2023 (app. 24/2023) and 21 September 2023 (app. 9137/2022)).