

SEPARATION OF POWERS

-- Questionnaire --

SPANISH REPORT

1. Relationship between the Parliament and the Tax Authorities: The influence of the tax authorities on tax legislation

1.1. Does your Government have legislative competence on tax matters?

To answer this question it is first necessary to point out that in accordance with sections 31.3 and 133 of the Spanish Constitution (hereinafter CE), the principle of legality governs tax matters. This constitutional principle requires that when a tax is created and its basic features regulated, it should be included in a legal rule, formally a law. These laws must be passed by Parliament, which has competence over legislation. The principle of legality on tax matters is a feature of the principle of democracy which requires that the people's representatives grant their consent regarding new taxes and upon whom lies sovereignty regarding any changes and it is they who must decide on the basic features (*No taxation without representation*). This principle is also considered essential to the separation of powers.

The Constitutional Court considers that the principle of legality covers not only the creation of taxes but also the regulation of the basic features (Judgements from the Constitutional Court 37/1981, 6/1983, 179/1985, 19/1987). Generally speaking, the basic features of a tax are considered to be those related to identifying taxes (taxable object, taxpayers) and also those related to quantifying it (taxable income, tax rate, total tax). The taxpayer's rights and guarantees against the Tax Administration are also covered by the principle of legality.

In accordance with the CE (section 87) legislative competence belongs to the government, congress and senate¹. The Spanish parliament or "*Cortes Generales*" has two chambers: the *Congreso de los Diputados* (congress) and the senate. Both are elected in secret, direct votes by universal suffrage, but the senate aims to represent the regions, which however has not been completely achieved.

The Government's legislative competence is based on "*proyectos de ley*" or bills. It is by far the most common way of passing new laws. Legislative initiative from the *Cortes Generales* -*Congreso de los Diputados* and senate- is carried out through a "*proposición de ley*" (white paper) and these initiatives are rather common. However the immense majority of cases are either rejected or withdrawn. This occurs in all matters, but in tax matters it is even more frequent.

There is a third way to change legislation, the so-called "*iniciativa popular*" (public initiative) which requires over 500,000 certified bona fide signatures to be presented. However, taxation is among the matters excluded by section 87 CE, so public initiative in tax matters is impossible.

¹ The Autonomous Communities in Spain, or "regions" may also request the government or parliament to present legislative initiatives.

As regards the principle of legality, it is worth noting that according to Spain's Constitutional Court this principle is "flexible" or "relative" which means a formal law must govern the basic aspects of a tax but the development regulations and other "non essential" features may be established by other legal rules issued by the executive powers, i.e., the government. Among this type of features are those related to procedures, periods, place of payment... This regulatory power, which is always inferior to a law, is called *potestad reglamentaria* (power of making secondary statutory rules). *Reglamento* is the name given to the general legal rules passed by the government. Spain's Inland Revenue may also pass an *Orden Ministerial* (regulation belonging to tertiary legislation) regarding taxes. In this case, which is specifically provided for by law, a law may be developed directly through an *orden ministerial*. These regulations are rules for developing and executing laws and logically belong to tax matters². The relationship between laws and regulations in tax matters is one of subordination, development and their complementary features in regulations regarding the law.

Section 8 of Act 58/2003, 27 December, General Taxation (hereinafter LGT), much criticised by most experts, lists the features which must be included by law. This legal regulation does not imply specifying the principle of legality since a law does not bind the lawmaker in the future, only the Constitution can do so. But it does have an effect of producing what is known as "*preferencia de ley*" (law takes preference). Once a rule reaches the level of a law and regulates an issue, although this issue is not covered by the principle of legality, its regulations may not be amended by a *reglamento* since a *reglamento* may never contradict or amend a rule at the level of a law. Thus when regulated by law this law must always regulate the matter, except when the lawmaker specifically separates this matter from the legal rank, allowing it to be regulated by rules inferior to laws. But as mentioned above this effect is not the result of the principle of legality but of the hierarchy of legal sources.

It is also worth pointing out that in Spain the state, autonomous communities and local authorities hold powers over taxation and therefore over regulatory powers in tax matters. However, while the state and regions' legislative power is developed respectively through the *Cortes Generales* and regional parliaments and the executive power through their respective governments, and in municipalities –the most important local authority – it is just one authority, the Municipal Plenary session, which holds both executive and normative powers. Furthermore local authorities, unlike the state and regions, do not hold legislative powers, but powers to introduce regulations. Given the current principle of legality in tax matters this means that local authorities in general and municipalities in particular may not create taxes in a completely independent manner. The existence of a local tax requires a rule with the category of a law to previously create the tax and regulate its basic features for the council to later be able to demand this tax and regulate certain aspects through municipal byelaws (equal to regulations).

² This is accepted by Spain's Constitutional Court's judgements 37/1981, 6/1983, 79/1985, 60/1986, 19/1987, 99/1987)

Therefore in Spain state and regional tax laws are passed by the *Cortes Generales* and the regional parliaments respectively. Both the national and regional governments may pass regulations to develop these laws. Municipalities may not pass laws but byelaws (*Ordenanzas*) –equal to regulations – to develop laws³. These laws enable each council to set, for instance, the amount to be paid for local taxes between the maximum and minimum stipulated by law. This allows local taxes to vary to a certain extent in each municipality.

Finally it is important to point out one peculiarity of the Spanish regulatory system taken from the Italian Constitution: according to the CE (section 86), in cases of extraordinary or urgent necessity the government may pass rules equal to Laws. These are the so-called *Decretos-Leyes* (decree laws): laws passed by the government. These laws, as mentioned previously, may only be passed in cases of extraordinary and urgent need and must also be immediately validated by the Congress or processed as a bill through the procedure of urgency.

There are some matters which may never be regulated by a *Decreto-Ley*: the legal system of the basic State institutions, rights, duties and freedoms of citizens contained in Part 1 CE, the system of Autonomous Communities, or the general electoral law. The issue here lies in the fact that the duty to pay taxes (section 31 CE) falls within Part 1 CE and despite this the government has passed many *Decretos-Leyes* on tax matters.

Several of them have been contested in the Constitutional Court since it was deemed that the government did not have powers to pass this kind of measures on tax matters. Thus Constitutional Court case law has changed over the years.

It first considered that *Decreto-Leyes* concerning tax matters were acceptable provided they do not create taxes or regulate any basic features (Constitutional Court Judgement 6/1983). That is, the aspects of tax covered by the principle of legality may not be regulated by a *Decreto-Ley*, but a *Decreto-Ley* is acceptable in other aspects. The Constitutional Court's position was rightly criticised by some authors who considered that in cases like these it was unnecessary to pass a *Decreto-Ley* since a *reglamento* would suffice. It would only be useful in cases of the aforementioned preference of law, i.e. the case in which a matter is already regulated by law though this was not strictly indispensable from the viewpoint of the principle of legality. If this occurs, the aforementioned matter may not be changed by a rule inferior to law -a *reglamento* for example- which would lead to a phenomenon known as a *congelación de rango* or freezing of rank.

The Constitutional Court later changed its position (Constitutional Court

³ According to Spain's Constitutional Court the reason why these local authorities may not establish their own taxes, despite the fact that the municipal plenary sessions are groups voted by universal suffrage—i.e., they have democratic legitimacy—, is that the “unified tax system in all the national territory is an unavoidable requirement for equality for all Spaniards” (Judgement from the Constitutional Court 19/1987). However, this argument is not applicable for the Autonomous Communities which are allowed to create their own taxes through regional laws.

Judgement 182/1997) and considered a *Decreto-Ley* was acceptable in tax matters as long as it did not substantially alter the taxpayer's rights. The *ratio decidendi* of this judgement lay in the fact that since Part 1 of the CE excluded regulating the rights, duties and freedoms of the citizens by *Decreto-Ley*, what it aims to avoid is major changes being made to these by the government, but if this action, such as a *Decreto-Ley* does not cause relevant changes it would be acceptable according to the CE. This new position is clearly more in line with the sense of excluding certain matters from regulation by *Decreto-Ley*, but makes it less predictable and less clear from a legal security perspective, in which case a *Decreto-Ley* may or may not imply a substantial change for taxpayers. A case by case analysis of the Constitutional Court will be necessary. Spain's Constitutional Court has nevertheless kept a tolerant position as regards *Decretos-Leyes* on tax matters⁴, especially when considering whether there is an "extraordinary and urgent need".

In addition to these *Decretos-Leyes* there is another possibility that the government may pass regulatory acts equivalent to laws. These are *Decretos Legislativos* (Consolidation bills passed by the government) (section 82 CE), also taken from the Italian Constitution. In this case it is the Parliament in Madrid (the *Cortes Generales*) which delegates competences to the Government to pass rules with the category of laws. To achieve this they must pass a *Ley de bases* (law governing the basis) which provides the scope of the powers delegated and the basis the government must respect. The aim is normally to pass a text drafted in accordance with the basis set by the Cortes or to authorise the government to rewrite several already existing legal texts and compile them into just one. So, for instance, the aim is not to create new norms but to standardise already existing ones. A rewritten text has been passed like this by government Legislative Decree in the current law on Corporate Tax.

Following the above, as to whether the Spanish government has legislative competence on tax matters the answer is yes:

- most laws passed are draft bills presented by the government
- in certain conditions it may pass *Decretos-Leyes* on tax matters
- it may pass Consolidation bills if the Cortes have previously delegated their powers

It also holds powers over regulations so it may pass legal norms inferior to the law which may develop and complement it.

The same may be said of the Autonomous Community governments, though in some regions –albeit few- it is not foreseen that they may pass *Decretos-Leyes*.

1.2. Does your Government draft tax bills proposals and present them to Parliament?

The answer is included in the comments to question 1.1, and it is yes.

1.3. In case your answer to 1.1. and 1.2. is positive:

⁴ In the 1990's an average of two decree-laws were passed per month, most of them concerning tax matters.

1.3.1 Does your Government usually exercise that competence?

As mentioned above almost all tax bills are passed as an initiative of the government (of Spain or the Autonomous Communities) and Draft Bills are often used in tax matters.

1.3.2 Does your Parliament passively accept the draft bills provided by tax authorities or does it discuss them in detail and introduce changes to them?

It mostly depends on majorities and the relative position of political parties in the Madrid parliament and regional parliaments. If the governing party has an absolute majority in both Parliaments the bill is often passed with few changes. When the government needs parliamentary support if it does not have a majority, what normally happens is they reach agreements with other political parties and in tax matters amendments and changes to the government's initial bill are usually demanded.

Since tax matters are complex and difficult to understand by most MPs, the bills and proposals of tax laws are usually studied, amended and passed by a Committee (section 75 CE). Indeed, there is a Committee of Economy and Inland Revenue which has competency over tax matters and tax law initiatives are usually discussed in depth by this Committee.

1.4. How does the literature in your country and your domestic Courts interpret the situation as you described it in 1.3. ?

Courts do not pass judgement on these matters and simply interpret the law, not their suitability or how they are passed. The only court that can do this is the Constitutional Court when deciding if the use of a bill on tax matters is constitutional or not or to decide on the extent of the principle of legality in tax matters.

Authors generally disapprove of the overuse of the *Decreto-Ley*. Most believe that its use is quite constitutional but should be reserved for really exceptional cases not as a means to get round the lengthy parliamentary procedures for laws.

2. The meaning of legal indeterminacy in tax matters

2.1. Is your domestic tax legislation vague, when defining the tax object, tax subject and/or tax base, leaving a large margin for discretion, or, is it, on the contrary, very detailed, avoiding indeterminate concepts?

It is necessary to distinguish between laws which regulate state or regional taxes and the state law which regulates local authority taxes.

As regards the latter, state law leaves some margin for discretion to the councils so that they may exercise their tax powers through municipal byelaws (regarded as *reglamentos*). We must recall that local authorities have no legislative power and therefore may not pass laws. This degree of discretion allows councils to specify some aspects related to the amounts of taxes and thus exercise their powers to collect taxes.

In cases regarding the laws which regulate state or regional taxes, the

regulation is generally quite specific. Despite this, or sometimes precisely due to it, doubts arise as to how to interpret the laws, whether a certain case is or is not included in the law, or cases where several different possible interpretations are possible. Unclear legal concepts are also used, such as, for example "the normal market value" (arm's length principle)

2.2. How do you/does the literature in your country evaluate the use of both techniques in tax legislation?

Techniques in tax legislation are often highly criticised: changes in the laws are quite frequent indeed, so much so that interpreting whether which law was in force and applicable to a specific case is sometimes rather complicated. The tax legislator also usually acts in response to tax avoidance or evasion and therefore his rules are mostly a response to specific cases and not general ideas. This means that tax regulations are often difficult to interpret by laymen and sometimes even experts. It is also rather difficult to keep up to date with all the latest tax changes. All this is detrimental to the necessary legal security, which is also a constitutional value (section 9.3 CE)

This has led to several authors demanding a simplification of tax regulations and recommending several ways in which to achieve this⁵.

2.3. Are there independent domestic Courts obliged to control the constitutionality of tax legislation?

The only court which may control the constitutionality of tax laws is the Constitutional Court, which is not part of the jurisdiction or judicial power.

When any doubts arise as to the constitutionality of a law, the other courts which are part of the judicial power, must present an "issue of constitutionality" before the Constitutional Court for it to decide.

The constitutionality of the regulations below laws may be controlled by any court.

2.4. Is legal indeterminacy considered to be unconstitutional/ has a tax rule ever been declared unconstitutional due to legal indeterminacy?

In principle a law will only be unconstitutional due to indeterminacy if what it does is leave a basic aspect of a tax "blank" and refer its regulation to secondary statutory rules, for instance, a *reglamento*. The principle of legality requires basic aspects of a tax to be included formally in a law and if its basic aspect is not regulated directly and refers it to a secondary statutory rule then it would be unconstitutional.

This case was argued for example in the regulation contained in section 10 of Act 43/1995, 27 December, on Corporate Tax⁶, regarding taxable income of

⁵ For instance, Cubero Truyo, A. M., *La Simplificación del ordenamiento tributario (desde la perspectiva constitucional)*, Madrid: Marcial Pons, 1997; C.I.A.T. *Simplificación tributaria*, Madrid: Instituto de Estudios Fiscales, 1988; García Novoa, C., *El Principio de seguridad jurídica en materia tributaria*, Madrid: Marcial Pons, 2000.

⁶ The wording in the current section 10 of the Real Decreto Legislativo 4/2004, 5 March, whereby the reformed text of the Corporate Tax Act is identical.

Corporate Tax. One sector of experts believed it was unconstitutional since it referred to the accounting profits and in Spain this is a norm equal to a secondary statutory rule which regulates accounting which must be made by companies in detail. Despite these arguments an appeal or issue of unconstitutionality was never considered regarding this.

Other kinds of indeterminacy which may arise from laws would not be a reason for unconstitutionality per se.

3. The consequences of legal indeterminacy in tax matters

3.1. In case of legal indeterminacy not considered to be unconstitutional, who has the final word regarding the interpretation of the rule – the tax authorities or the domestic Courts?

Spain is a country whose system is based on rule of law (section 1 CE) and all citizens and public powers are bound by the Constitution and legal provisions (section 9.1 CE). The Administration is specifically and fully subject to subordination to the law (section 103.1 CE).

Interpreting the laws is part of the legal duty exercised exclusively by the Courts of Justice (section 117 CE and section 5 of the Organic Law 6/1985, 1 July, of Judicial Power).

Interpreting the rules is therefore competence of the Courts of Justice.

3.2. Is there a constitutional basis for either the tax authorities or the domestic Courts having the final word on interpretation of indeterminate legal rules?

The answer to this question was provided in the previous section.

3.3. Is legal indeterminacy normally fulfilled by regulations, administrative rulings and/or case law?

In certain cases tax laws establish the general rules which are later developed and specified by the *reglamentos* passed by the government. This occurs, for instance in the case of Income Tax. Section 7.I) of Act 35/2006, 28 November, on Income Tax which declares exemptions from income tax for “important prizes for art, literature and science with the conditions laid down by the regulations”. Section 3 of the Income Tax Regulation⁷ lays down the conditions whereby these prizes are regarded as exempt⁸.

Statutory rules are compulsory for citizens and binding for the courts.

Another quite different issue is that regulations –whether on a statutory level or law– may lead to different interpretations. In these cases the Tax Office or the management of the Inland Revenue (*Agencia Estatal de Administracion*

⁷ Royal Decree 439/2007, 30 March.

⁸ In addition to other conditions this article demands that the prize giver may not make use of or be involved in exploiting the work(s) for profit, the prize must be awarded for works completed or activities conducted prior to the contest, the contest must be national or international and must be announced in the Official State Journal or the Regional Government's Journal and at least in one newspaper which is widely distributed nationally, etc.

Tributaria) often pass regulations on how to interpret these for the Administration. These regulations are provided for in section 12.3 LGT, and are compulsory for the tax administration agencies and published in the official journal. These regulations are not equal to a statutory law and do not change the legal code. They are orders given within the Administration with no external effects.

Sometimes these regulations have led to an obligation being established for taxpayers. In cases such as these, courts have declared them to be null and void⁹.

One option which may be used by the taxpayers in cases of indeterminacy is to submit a written query to the tax administration regarding the applicable tax regime in a certain case (sections 88-89 LGT). The Administration must reply within six months. Once the reply has been issued it is binding for the Administration in charge of applying taxes, but not for the taxpayer, despite knowing that if he chooses another system different from the Administration this will lead to a dispute. It is also interesting to highlight the criterion established in the reply to the query will also be applicable to any other taxpayer who is involved in identical acts and circumstances. Replies to the queries are published on the Spanish Inland Revenue's (*Agencia Estatal de Administracion Tributaria*) website¹⁰.

One of the most frequent cases of indeterminacy is the value of assets or securities, since laws tend to refer to their market value. To avoid possible future problems or to at least ascertain the value the Administration places on a certain asset or security in advance the taxpayer may apply to the tax administration, when this is provided for in the law of a certain tax, to decide and provide in advance a binding valuation for tax reasons and incomes, products, assets, expenses and further features which affect debts related to tax (section 91 LGT).

The aim of these possibilities provided for taxpayers is to reduce the extremely high rate of ongoing disputes between the tax administration and taxpayers which has brought Contentious-Administrative courts, competent to judge tax matters, almost to a standstill.

3.4. Are administrative rulings binding to the taxpayer and/or the Courts?

As mentioned above they are binding only to the Administration. They are therefore not binding to taxpayers or Courts, but since these rulings are public, taxpayers are aware of the tax administration's opinion and may opt to follow them and avoid problems with the Administration or follow their own criteria, knowing that this will lead to a dispute with the Administration.

As regards the Courts, they are only subject to the rule of Acts and the *reglamentos*, not the Administration's interpretative regulations and are free to interpret the rules by following certain opinions set by case law from the High Court (*Tribunal Supremo*) and High Courts of Justice (*Tribunales Superiores de*

⁹ For instance, Madrid's High Court of Justice's judgement of 16 June 1994

¹⁰ www.aeat.es

Justicia) in each autonomous region.

4. Relationship between the Tax Administration and the Domestic Tax Courts:

4.1. Do your domestic Courts control application of tax law by your Tax Administration?

Yes, one of the tasks of the courts of justice is to control the orders issued by the Tax Administration whenever these are appealed against by an individual.

4.2. Do your domestic Courts, in their case law, take into account rulings and binding information emerging from your Tax Administration?

Rulings and binding information emerging from the Tax Administration are not binding to the Courts. In some cases they are mentioned by the Courts not as a principle to be followed but as an example.

This is different for civil servants from the Tax Administration who act as expert witnesses in courts. In this case Courts usually follow the reports of these expert witnesses since they are normally considered to be reliable.

4.3. Does your Tax Administration take into account the domestic courts case law and/or the ECJ case law when applying the law?

The Administration is fully aware of the judgements passed by domestic courts, but even in cases when lower courts apply already known case law, if this is contrary to the Administration's criteria, the Administration will continue to appeal in the high courts against the rulings made in the lower courts, so much that some authors have even pointed out that when this occurs the Administration should be sentenced to pay court costs.

Regarding ECJ case law Spain's tax Administration is more cautious, and has even urged legislation to be changed following rulings from the ECJ. This was the case of thin capitalisation regulated under section 20 of Corporate Tax Law, amended after the ruling from the ECJ 12th December 2002 Lankhorst-Hohorst GmbH, As. C-324/00 –despite the fact that well-known members of Spain's tax administration had defended in writing the Spanish regulations on thin capitalisation were not contrary to European law¹¹. Also the tax regime regarding dividends was amended following a ruling issued by the ECJ 7th September 2004, Petri Manninen, As. C-319/02.

4.4. Is there a principle of reciprocal observation of the interpretation of tax law by the Tax Administration and domestic Courts?

No, there is no such principle, nor is it used in practice.

The Courts need not follow the principles of the Tax Administration and indeed don't usually do so and the Tax Administration does not actually follow the

¹¹ SANZ GADEA, E., "La subcapitalización", in Estudios financieros. Revista de contabilidad y tributación, no. 206, 2000, pp. 3-48 defended the Spanish regulation prior to the aforementioned ECJ judgement. Following this judgement the same author criticised it harshly and insisted on the compatibility of Spain's regulations with European Law in Medidas antielusión fiscal, Documentos del Instituto de Estudios Fiscales, num. 13, 2005, pp. 1-221, accessible on Internet http://www.ief.es/Publicaciones/Documentos/doc_13_05.pdf

Court principles if it considers them to be against its interests.

4.5. Is your Tax Administration legally bound to the decisions of supreme courts and/or the ECJ?

In principle yes, but what usually occurs is that it attempts to obtain case law in favour of its opinions despite having to appeal to higher courts to achieve it.

4.6. Does your Tax Administration circumvent your domestic courts' case law?

As mentioned above, when the domestic court case law goes against it, Spain's Tax Administration continues to fight the cases in higher courts to try to achieve rulings in line with its views.

In exceptional cases the Tax Administration urges the government to introduce changes to the law to counterbalance case law or to accept it and immediately set in statutory law what has been established by case law.

One peculiarity exists in Spain regarding appeals on tax matters.

Tax Administration orders may be appealed against as all the Administration's orders, before the Administration and if no favourable resolution is achieved then one may use the Courts of Justice. There is no specific Tax Jurisdiction in Spain and the Tax Administration's orders are heard by the so-called "*Jurisdicción Contencioso-Administrativa*" which decides on all claims brought against the Administration.

However, prior to using these courts the taxpayer must use the so-called "*Tribunales Económico-Administrativos*" if he wishes to appeal against any order issued by the Tax Administration and file his claim. Despite their name they are not really courts, and do not form part of the judicial power. They are Administration agencies formed by different members of the Tax Administration and other civil servants who are independent from the rest of the Tax Administration (sections 83.2 and 228.1 LGT). Claims in these courts are administrative appeals not judicial proceedings. However, they still belong to the Administration and their opinions usually reflect those of the Administration, but not always. These courts have the advantage that one need not attend them with a lawyer or solicitor, and it is therefore much cheaper than other Courts¹². There are Regional *Tribunales Económico-Administrativos* and one Central *Tribunal Económico-Administrativo*, which presides over the more important cases and the appeals presented (voluntarily by the taxpayers prior to using the Courts of Justice) once the Regional Courts have passed judgement.

These courts have often been criticised by some authors who mostly consider them to be an unnecessary obstacle against using the true Courts of Justice which are really independent, especially due to the long appeal process.

However, when the Central "*Tribunal Económico-Administrativo*" passes a

¹² The difference is that tax matters are so complex that most taxpayers need a specialist lawyer or at least a tax adviser to file claims before the *Tribunales Económico-Administrativos*.

judgement¹³ which the General Director of Taxes –the managing director of the Tax Administration- disagrees with, the General Director of Taxes may use the so-called "exceptional recourse to unify opinions" (*recurso extraordinario para la unificación de doctrina*) (section 243 LGT). If this exceptional recourse is used the Special Court to Unify Opinions is convened which is made up of the President of the Central *Tribunal Económico-Administrativo*, who will preside over this tribunal with three other members, the Director General of Taxes, the Director General of the State Inland Revenue Service (*Agencia Estatal de Administración Tributaria*), the Director General or Head of the Department of the Tax Office who reports to the agency that has passed the order contained in the resolution in the appeal and the President of the Taxpayers Defence Committee. The resolution passed by this court will be binding for the *Tribunales Económico-Administrativos* and the rest of the tax administration.

This possibility has been in force since 2004, and has been harshly criticised by authors who consider that if the Tax Administration disagrees with the opinions of the "*Tribunales Económico-Administrativos*" it should use the Courts of Justice which are competent to interpret the rules and not hold a kind of "council of wise men" representing the parties involved to try to force the "*Tribunales Económico-Administrativos*" to adopt their opinions.

5. Relationship between different legal sources (legal pluralism):

5.1. How do your Parliament, Tax Administration and Courts react before the different legal sources in tax matters (tax treaties and other treaties, EC Treaty, secondary law and soft law)?

There are several reactions.

The parliament usually bears in mind and respects both International Treaties and European Law (both Treaties and secondary law). If it fails to do so it is mainly due to ignorance. The answer to this is different when this involves soft laws. Though these are known, if they are considered to be seriously contrary to Spanish interest or if other states ignore the soft law cases may arise where the soft law is not taken into account. However, the general rule is to respect soft law.

The Administration can do nothing more than respect International Law and European Law since Spain's Constitution highlights their position regarding the hierarchy and their introduction in domestic law. As regards soft law, the same answer applies as in the case of the parliament.

The courts of justice are somewhat different. Despite Spain being governed by the principle of *iura novit curia*, in many cases either International or European laws are directly cited or courts fail to apply them due to ignorance. This ignorance also affects their position in the hierarchy of sources of Law. Spain's courts are more used to applying domestic law and usually show certain reluctance regarding rules of a diverse source. It must be recalled that Spain joined the EU relatively recently and was isolated internationally for many years. However this reluctance and ignorance is generally limited to senior judges and

¹³ As these are not really courts they pass resolutions not judgements.

this is becoming less and less common as new generations more familiar with the laws join the courts.

5.2. How is the hierarchy of different tax legal sources recognized by the constitution and the different domestic powers (Parliament, Tax Administration and Courts)?

The CE is the supreme rule of all regulations, and section 95.1 states "the conclusion of an international treaty containing stipulations contrary to the Constitution shall require prior constitutional amendment". Based on this section it was discussed whether Spain's signing of the Treaty whereby a European Constitution was created (Rome Treaty 2004 which failed to prosper following its rejection by France and the Netherlands) required a previous constitutional reform. The conclusion was that such a reform was unnecessary.

As regards International Treaties, section 96 CE states that:

"1. Validly concluded international treaties, once officially published in Spain, shall be part of the internal legal system. Their provisions may only be repealed, amended or suspended in the manner provided for in the treaties themselves or in accordance with the general rules of international law."

As regards European Law, pre-eminent principles are peacefully accepted by the Parliament, the Tax Administration and the Courts and with immediate effect though sometimes, as mentioned above, some senior judges seem to be unaware of these principles. There is no specific recognition of these principles in the CE.

The law is subordinate in hierarchy to the CE and Treaties, and below it come the *reglamentos*.

The Constitution does not specifically include this regulatory hierarchy but it is peacefully accepted by the parliament, Tax Administration and Courts, bearing in mind the points mentioned above.

Despite knowing and accepting this hierarchy, all the Administration not only the Tax Administration, tends to support ideas included in *reglamentos* above what is laid down by law. This leads to affected individuals challenging the *reglamentos* in Court for being against the law, because they set higher limits than those included in it among other reasons and it is not uncommon for courts to declare some *reglamentos* null and void for being against the law or for exceeding their authority in developing it (*ultra vires*).

5.3. Does the taxpayer have access to different legal remedies that assure him/her effective protection of his/her rights granted by tax treaties, EC law and domestic law, or are those legal remedies in fact limited to protection of rights granted by domestic law?

Taxpayers have access to an array of legal remedies that assure effective protection for their rights. However Spanish cases, not only those regarding tax matters, do not usually reach the ECJ.

This is due to two reasons.

One, often both the taxpayers and their lawyers or advisers are unaware of the rights granted by Tax treaties or secondary EC law. As pointed out above, Spain joined the EU relatively recently and the impact of EC Law has been rather unknown until lately. This has changed in recent years, especially with the knowledge of International Tax Law among jurists and advisors.

However, Spanish courts are somewhat reluctant –unlike the courts in other countries – to consider prejudicial issues since some senior judges consider the action of the ECJ as interference in their duties, so few Spanish cases reach the ECJ. It should be pointed out however that some years ago there was a discussion about whether the aforementioned tax courts "*Tribunales Económico-Administrativos*" could file prejudicial issues before the ECJ and it has since been clarified that these administrative agencies may do so.

II

Please answer the following questionnaire, which aims at confirming your answers in I

1. Relationship between the Parliament and the Tax Authorities: The influence of the tax authorities on tax legislation

1.1. Does your Parliament control tax authorities in an efficient way?

No

1.2. Do tax authorities influence tax legislation to a major degree?

Yes

1.3. Does your Parliament

a) Usually accept the bills provided by tax authorities?

Yes

b) Refuse the bills provided by tax authorities?

Sometimes

c) Improve the bills provided by tax authorities?

Sometimes

1.4. Is your Parliament able to discuss the bills thoroughly?

Yes

1.5. Is there sufficient knowledge of tax law in Parliament?

No

1.6. Are tax rules often so vague, that tax authorities have to fill the gaps themselves by administrative regulations?

Sometimes

1.7. Have tax authorities the competence to typify and fill out the legal gaps without control by the Parliament?

Never

2. Relationship between the Parliament and the Domestic Tax Courts

2.1. Are there independent (Tax) Courts in your country entitled to control legislation?

Only the Constitutional Court

2.2. If “yes”, do they control tax legislation: 0 ex ante or 0 ex post?

2.3. Are Courts competent to clarify whether a specific written tax rule is compatible with constitutional standards?

Yes, if they are statutory regulations

2.4. If a high Court is convinced that a specific tax law violates constitutional standards, is the court in this case allowed to ignore the law?

No

3. Relationship between the Tax Administration and the Domestic Tax Courts

3. 1. Are there independent (Tax) Courts in your country, obliged to control your Tax Administration?

Yes

3.2. Are your domestic Courts bound to administrative regulations/orders/rulings? If "no", do the courts follow them in fact?

Sometimes, but rarely

3.3. Are first instance Court decisions on a tax case, normally accepted by the Tax Administration (i.e. do they not try to appeal against the decision)?

Sometimes, but rarely

Please report statistics if available!

3.4. Is a final judicial decision on a single tax case, followed by the Tax Administration not only in this case but also in all other similar cases?

Sometimes

3.5. How does the Tax Administration react when it is convinced that the final judicial decision is wrong or not "acceptable" because, e.g., it is too expensive for the public?

a) Does it accept the (from their point of view) wrong decision?

Sometimes

b) Does it try in another similar case to convince the Court to decide in a different way?

Very often

c) Does it try to influence the Parliament to change the law?

Very often

d) Does it make sure that the Internal Revenue Service will not follow this decision in similar cases?

Sometimes

e) Does it try “to hide” such a decision, e.g., not publishing the decision with the result that the Internal Revenue Service does not know this decision?

Never

Incidence of tax issues in Cases heard at the Contentious Administrative Courts

	1998	1999	2000
TS (High Court)	Unavailable	Unavailable	Unavailable
AN (Audiencia Nacional)	24.1%	41.6%	18%
TSJ (High Court of Justice)	16% (6% local and 10% rest of taxes)	20% (3% local and 17% other taxes)	30% (2% local tax regimes and 22% other taxes)