



## Legislative Inclusion of an Anti-Abuse Clause in the Administrative Act for Violations of the Principle of Legality

Master Mario Eric Anaya Arteaga<sup>1</sup>, Dr. Martin Vivanco<sup>2</sup>,  
Vargas, Dr. Josefina Morgan Beltran<sup>3</sup>

<sup>1</sup>Student of the Doctorate in Fiscal Sciences and the Master in Taxes, director of Legal Intelligence, Accounting Tax.

<sup>2</sup>Doctor in Technological Management and Innovation and Director of the Faculty of Accounting and Administration of the Autonomous University of Querétaro. [cpmartinvivanco@hotmail.com](mailto:cpmartinvivanco@hotmail.com)

<sup>3</sup>Research Professor at the Autonomous University of Querétaro, Orcid :0000-0002-6338-6209

**\*Corresponding Authors:** Master Mario Eric Anaya Arteaga, Student of the Doctorate in Fiscal Sciences and the Master in Taxes, director of Legal Intelligence, Accounting Tax

**Abstract:** This research work is based on preventing the taxpayer from being subjected to a violation of his subjective public rights, human rights in general and sometimes being in a true state of defenselessness by the tax authorities. The foregoing can occur due to various circumstances or modalities, from the misinterpretation or rather the interpretation that the tax authorities in Mexico make in their favor, of the legislation, as well as the misuse of their faculties and powers that the same legislation, agreements, regulations, etc. They grant them, many times they do it through the misuse or improper use of legal figures or institutions when carrying out their administrative acts, other times simply by not doing what the law requires them to do in a mandatory manner, that is, both in action behaviors and omission, but always violating the principle of legality. It is a documentary study in relation to the analysis of the articles of the Legislation in Mexico.

### 1. INTRODUCTION

The principle of legality that we are going to refer to in this investigation is not the one that we commonly know or that the jurists have defined as the one that the authority can only do what the law allows and the individual everything that the law does not prohibits, but we are going to refer to it as that consisting of knowing the true reason for its normative creation and understanding the spirit of the law, in other words, knowing that reasoned relationship between the creation of the law and the purpose for which it was created.

The type of research for its purpose will be applied because it is intended to achieve a change in the legislation, due to its level of depth it will be exploratory when analyzing a topic that has not been analyzed in depth, due to the nature of the information it is a qualitative investigation, of the means to obtain the data will be documentary and field, for the manipulation of variables it will be non-experimental, the inductive method will be applied.

### 2. BACKGROUND

Tax collection in a country is essential for the survival of its members and for the subsistence of a rule of law, since the times that society left nomadism and saw the need to live in society, a leader of the community, who will organize coexistence and the satisfaction of collective needs, in terms of De la Garza: "The pursuit of the common good constitutes the very reason for being of the public powers, which are obliged to act recognizing and respecting its essential elements and according to the postulates of the respective historical situations"(De la Garza, 2008)

### 3. THEORETICAL FRAMEWORK

The community organization was taking shape with the constitution of certain forms of State and government, but since then there was a taxation system and authorities with powers and faculties over citizens or taxpayers, to demand compliance with tax obligations, it is necessary mention that the tax

system has always been repressive, as Dino Jarach affirms when mentioning that "The tax is a pecuniary benefit, the object of a relationship whose source is the law, between two subjects: on the one hand, the one who has the right to demand the benefit, the creditor of the tribute, that is to say the State or the other public entity that effectively, by virtue of a positive law, has that right, and on the other hand the debtor, or the debtors, who are obliged to fulfill the pecuniary benefit" (Jarach, 2005).

The tax legal relationship (tax authority and taxpayer) is found in a plane of supra subordination, this means that the active subject of it, which is the tax authority, is above the passive subject, which is the taxpayer, therefore Therefore, it enjoys a series of faculties and powers to make taxation effective, ranging from the collection itself, which is the first moment of the financial activity of the State (De la Garza, 2008), through the control for correct compliance and even the coercive collection in case of non-compliance, even criminalizing the conduct of the taxpayer, as stated (Jarach, 2005) by : "Violations of material or formal tax law regulations by taxpayers sometimes constitute criminal offenses, the sanction of which in certain cases is criminal punishment. common, in other cases a special penalty, characteristic of tax law, the surcharge."

As can be seen, there is a lot of talk about the repressive side of the tax authority. The Federal Tax Code (Código Fiscal de la Federación, 2019) in the section on infractions and sanctions establishes the legal and economic consequences for the taxpayer when he fails to comply with his tax obligation, that is, when performs prohibited conduct or omission of mandatory conduct ranging from fines, cancellation of digital stamps and in the part of fiscal crimes they establish prison sentences and we begin now if we talk about the repair of the damage caused to the treasury by the taxpayer in article 92 and are confirmed in the National Code of Criminal Procedures (CNPP).

This does not mean that the taxpayer does not enjoy certain subjective rights that the tax authority must obey and comply with, but at no time do we see what happens if the tax authority commits any irregular or illegal action, although it is true, since 1982 with the enactment of the Federal Law of Responsibilities of Public Servants, (LFFRSP) which had in title III the administrative responsibilities and in title IV of the patrimonial registry of public servants, both repealed, by the constitutional reform in 2015 to articles 109 last paragraph and 113 second paragraph, which speaks for the first time of a "responsibility of the State for the damages that, due to its irregular administrative activity, it causes to the assets or rights of individuals, will be objective and direct. Individuals will have the right to compensation in accordance with the bases, limits and procedures established by law" (CPEUM) and with it also the birth of the new General Law of Administrative Responsibilities (Ley General de Responsabilidades Administrativas) in 2016.

The objective of the General Law of Administrative Responsibilities (Ley General de Responsabilidades Administrativas) among others, according to its article 2, section II, is: " II. Establish the serious and non-serious administrative offenses of Public Servants, the sanctions applicable to them, as well as the procedures for their application and the powers of the competent authorities for that purpose .

In the search for the rest of the Law in question, irregular or illegal administrative acts by the tax authorities are not specifically mentioned, classifying the conduct of public servants in non-serious and serious administrative offenses, all related to misconduct. within the same public administration and corruption or illicit enrichment, to mention a few, but not in conduct towards the citizen or taxpayer.

Considering that in 2004 the Federal Law of Patrimonial Responsibility of the State was born, (LFRPE) regulating the second paragraph of article 113 of the Constitution, which aims to "establish the bases and procedures to recognize the right to compensation to those who, without legal obligation to bear it, suffer damage to any of their assets and rights as a result of the irregular administrative activity of the State", pointing out the reparation of both patrimonial and moral damage, compensation, the procedure for claiming it, as well as the attendance of officials, but we still do not know if the illegal behaviors of the tax authorities are regulated in this rule.

Finally, it is necessary to comment that with the entry into force of the Federal Law, the Contentious Administrative Procedure was (LFPCA) established in 2005, recognizing the existence of a subjective right and condemning the federal public entity to pay compensation for the damages caused by its

public servants, officials or administrative units, establishing the procedure of the demand and the sentences for such concepts, which continues to leave between said if the tax authorities enter the object of this law and mainly in what cases.

The uncertainty generated over time by the illegal action of the authority, not only by not obeying what the law requires or doing what the law allows with the essential formalities of the procedures, but also by the improper use of legal institutions abusing the law, cheating the law, sometimes even abusing their power by carrying out atypical illicit acts as well described (Atienza & Ruiz Moreno, 2000), violating what in this work will be called the true principle of legality, establishing a regulation in any of all the laws mentioned, proposing directly in the Fiscal Code of the Federation, the direct and objective origin of the payment of the duality of patrimonial and moral damages as defined (Maciá Gómez, 2015) by the current irregular of the fiscal authority.

#### **4. METHODOLOGY**

The actions of the authorities in general, specifically that of the prosecutors, are not always in accordance with the law. Within the legal tax relationship, the tax authorities, being the active subject of the same, enjoy a number of faculties and powers that largely violate the subjective rights of taxpayers, violating among many principles, the one that in this investigation we will call it the true principle of legality.

Considering the acts of the authorities to be presumably legal, they abuse this presumption by committing a series of atypical crimes by abusing the law, cheating the law and abusing power, but basically misusing the legal institutions, violating the principle of legality, which for this work will be understood as the non-obeying of the regulations with the objective for which they were created, that is, they are used for a different purpose for convenience or to affect the subjective rights of the taxpayers, appearing in a Legal start because the laws allow it but not with the purpose that they occupy or violating in the background a greater provision that is a principle.

What would be the benefits in the legal-tax relationship if the abusive or illegal acts of the tax authorities were re-characterized to the best benefit of the taxpayer, as well as sanctioned by repairing the patrimonial and moral damage caused to the taxpayer?

What would be the impact on confidence in the authorities and on collection, if an anti- abuse clause was imposed on the tax authorities in Mexican legislation when they incorrectly use their powers or legal entities in violation of the principle of legality?

##### **General objective**

Propose the existence in the legislation from the constitutional and administrative spheres, as a human right, that the authority cannot carry out interpretations other than those that the law in its spirit wanted to regulate, taking advantage of the abuse of the right, fraud of the law or abuse of power for their own benefit, affecting or harming the taxpayer, by improperly performing administrative acts and in the event that atypical conduct is carried out, then they are sanctioned either by re-characterizing the administrative act that generates the greatest benefit to the taxpayer or even generate a consequence to the authority or the payment to the taxpayer of a repair of the damage or compensation, because, in a state of law, it is an obligation to provide the taxpayer with legal certainty in the actions of the tax authorities.

##### **Specific objectives**

- Define what is the legality in the administrative act and what is the true principle of legality.
- Identify when an act of the fiscal authority violates Legality and when the true Principle of Legality.
- Investigate and document the patrimonial and moral damage that has been caused to taxpayers by the illegal acts of the tax authorities.

- Establish the mechanisms to re-characterize the administrative act that generates the greatest benefit to the taxpayer, as well as quantify the patrimonial and moral damage caused to the taxpayers, including sanctioning the public servant who commits the illegal act.
- Analyze and verify if, with the proposed regulation, it is possible to eliminate institutions such as PRODECON, avoiding unnecessary expenses for the executive, since they are no longer necessary in a state of law, where the legality of the acts of the fiscal authorities prevails and provides with them legal certainty to taxpayers.

**5. RESULTS**

The Inter-American Center of Tax Administrations itself (Educiat, 2022) has indicated in its course that the tax administration must promote an ethical environment for officials, establishing clear processes and providing them with sufficient means and mechanisms to eliminate possible integrity gaps. On the other hand, the administration, through its effective and efficient actions, must promote the taxpayer's trust by facilitating and demanding compliance with their tax obligations and allowing them to exercise their fiscal citizenship. The tax official must fulfill his obligations in an irreproachable manner and comply with the legal framework that applies to the tax administration, always attending to the mission, vision and institutional values. For his part, he must assist and guide the citizen from the vocation of service and public attention, never forgetting that the official is the guarantor of the civil rights of citizens. The taxpayer must fully comply with their tax obligations in order to finance public policies, acquiring permanent fiscal awareness. For his part, he must respect the physical and moral integrity of the official by not attacking his person in any way.

On the other hand, the future of modern tax administrations is marked “not only by the commitment to permanent improvement in the performance of their tasks, but also by the explicit commitment to the constitutive values of their institutional ethics”. If a tax administration does not demonstrate integrity in all of its policies and practices, taxpayers will not trust it. When taxpayers have doubts about the ability of the tax administration to provide a fair, transparent and law-based service, they will be less likely to voluntarily comply with their tax obligations.

Compared for practical purposes with Chile and Spain with Mexico, it is particularly observed that the percentages of non-acceptance to cheat in the payment of taxes exceeds 58%, data obtained from the World Values Survey ( World Values Survey ) (Inglehart, 2021) and surprisingly, in this comparison, Mexico is not the largest, contrasting in a special way that on the one hand cheating is not justified, but on the other hand there is a wide level of distrust in the government, transcending as we have said in a significant degree of tax evasion. Doerrenberg and Peichl (2013) found that the degree of progressiveness of tax systems is related to higher tax morale in OECD countries. On the other hand, in a laboratory experiment, Castro and Rizzo (2014) found that individuals are more likely to avoid paying taxes altogether if they find themselves in an inequitable tax system between the different socioeconomic strata and there is distrust in the government. .

World Values Survey.(Inglehart, 2021)

Q180.- Justifiable: Cheating on taxes				
Cross by -- Change --				
Display Show Column % (all responses)				
	TOTAL	ISO 3166-1 numeric country code		
		Chile	Mexico	Spain
Never justifiable	50.4%	54.8%	46.1%	52.9%
2	11.3%	9.3%	12.4%	11.4%
3	8.2%	6.1%	9.5%	8.2%
4	5.0%	6.2%	5.2%	3.8%
5	7.6%	8.2%	9.6%	4.1%
6	4.5%	6.6%	4.3%	2.9%
7	2.5%	2.1%	2.7%	2.5%
8	3.9%	3.5%	3.9%	4.3%
9	2.0%	1.0%	1.6%	3.3%
Always justifiable	3.1%	1.1%	3.7%	3.8%
Don't know	1.4%	0.9%	1.1%	2.3%
No answer	0.2%	0.4%	-	0.5%
(N)	(3,949)	(1,000)	(1,739)	(1,210)
Mean	2.84	2.62	2.98	2.81
Std Dev.	2.56	2.30	2.58	2.72
Base mean	(3,884)	(987)	(1,721)	(1,176)

Selected samples: Chile 2018, Mexico 2018, Spain EVS

In this sense, the perception of citizens is identifiable, not to justify in a special way the cheating in the fulfillment of fiscal obligations, where in Mexico it reaches 58.5%, Chile 64.1% and Spain 64.3% leading in contrast as a consequence in a impact on tax morale, these factors undoubtedly help to understand other important phenomena such as tax evasion, avoidance and fraud, pointing out that the obligation of citizens to contribute to public spending is not exclusive to a single country, but considering that in all cases the government as part of each State is responsible for meeting the needs of the population, for this the necessary resources are generated jointly by the citizens through the contributions they must deliver and by its part the State in the efforts that must be made or to obtain complementary income through state companies or even the indebtedness Therefore, that is, the government should act in an ethical and moral manner at the 3 levels of the State's economic activity, from collection, through administration to the application of resources.

Currently, the fact of not paying taxes is popularly considered an act of cunning rather than an infraction or crime or simply contrary to law and morality, in general people come to think that those who do not pay are more intelligent than that if they do, many others find a variety of justifications for non-compliance or for conscious evasion, in Mexico failure to pay is due not only to fiscal policies but also to a social and cultural phenomenon, tax morale and corruption, where cheating in the payment of taxes seems justifiable in a large portion of the population, however, on the part of the authority it also seems that the best authority is the one that achieves its collection, inspection or denial goals of the Taxpayers' rights, equally regardless of the means to achieve it, including carrying out the atypical illicit acts that we have mentioned so much and which comes with all knowledge. cognitive and volitional act, that is, with all the intention of harming the taxpayer.

So then the moral, ethics, values and tax culture of the citizen and the tax authorities, are essential elements in compliance, in a nutshell, the integrity of people, where the personality of a subject must have at least acceptable ethical conduct. , to be able to belong to a social group , this is achieved through the moral values achieved through correct education, a behavior of compliance with all the rules , including fiscal ones, knowing in advance that paying contributions should transform us into a better Country, which by the perception of the citizens is not visualized like this and therefore they justify their evasive, evasive or fraudulent acts , as well as the authorities believing that by the mere fact of collecting or controlling more they achieve a higher income to the public treasury but does not consider or visualize that it is creating resistance to the voluntary payment of contributions, distrust in its actions and that it generates to a justification for the evasion that we already discussed.

From the perception of citizens, it is common for people to resist paying their tax obligations at first, but it also increases the probability that this idea will multiply in the population through shared communication, the above is like this because through this experience, the payment of taxes is presented as a necessary evil whose usefulness and purpose is unknown or denied, but as has already been mentioned it has been due to a lack of tax culture, a bad idiosyncrasy in the payment of taxes but much stronger is the cause of bad government, the misapplication of resources and mistrust in the government and in the actions of tax administrations, legislators and even judges, as shown by the survey in which Mexico is compared with Chile and Spain in which to observe that Mexico has 53.8% of zero trust in the government and of the 3 the country that trusts its government the most is Chile, indicators like this connote the justification precisely of cheating on taxes, data also obtained from the World Values Survey ( World Values Survey ) (Inglehart, 2021).

## **6. CONCLUSIONS**

The actions of the tax authorities are not always in accordance with the law and on more than one occasion violate the principle of legality, not only when the authority does not do what the law requires or what it allows according to the procedures, but also when in the use of its powers and in the exercise of its presumptions, it misinterprets the tax laws for its benefit and to the detriment of the taxpayers, abusing the institutions or legal figures that the legislation itself establishes.

This abuse is carried out by the tax authorities by carrying out atypical crimes such as abuse of rights, fraud of the law and abuse of authority, which generates great distrust in taxpayers and therefore a decrease in tax collection when feeling terrified. for the abuses incurred by the authorities by being in a higher hierarchical degree in the legal tax relationship.

Due to the foregoing, we find the need to include in Mexican legislation an anti- abuse clause of the tax authorities so that in cases, either administratively or judicially, the performance of these atypical illicit acts by the tax authorities is verified. characterize the one that generates the greatest fiscal benefit for the taxpayer and/or the authority is sanctioned with the reparation of moral and patrimonial damage caused to the taxpayer by the illegal acts of the authority.

In the tax aspect, great attention must be paid to the feelings of the Mexican when complying with the constitutional obligation established in Art. 31 F-IV to contribute to public spending in a proportional and equitable manner as dictated by the tax laws, said obligations they are of a substantive nature and that it is the main fiscal obligation specifically of payment and others of a formal nature that consist of presenting notices, declarations and others, coinciding that the more people we contribute, the more possibilities of collective development and what we have called the common good, Today, a large number of people consider that tax avoidance is justified in paying taxes for various reasons, including corruption, high tax rates, lack of transparency, accountability and impunity of officials and politicians. and the abuse of the tax administrations and in general what we have called the tax authorities; Regardless of the means by which said objective is achieved, mere tax evasion, tax avoidance with the support of the abuse of the right or fraud of the Law or even to the extreme of committing acts typified in the crime of tax fraud.

The “must be” of the legal tax relationship is that the Tax Officer fulfills his functions and powers in an irreproachable manner, in accordance with legality and with broad institutional values and invaluable ethics; For its part, the Taxpayer must comply with its tax obligations, making tax payments in accordance with the Law and finally, the Tax Administration must have a commitment to generate values in institutional Ethics, since the Tax Administration demonstrates integrity in its policies and practices. it gives a broad confidence to the Taxpayer and that provokes the voluntary compliance of their tax obligations, therefore, the behavior and ethical conduct of the Tax Administration constitutes a fundamental basis in the promotion of compliance by taxpayers.

Tax Culture has been defined as the “set of values, beliefs and attitudes shared by a society regarding taxation and observance of the laws that govern it. This translates into a behavior manifested in the permanent fulfillment of the tax duties based on reason, trust and the affirmation of the values of personal ethics, respect for the law, citizen responsibility and social solidarity of the taxpayers” which must bring together a correct action of the tax authorities based on legality and in favor of the taxpayer being able to fulfill their tax obligations correctly and without abuse of authority.

We assert the foregoing because the actions of the tax authorities are not always in accordance with the law and on more than one occasion violate the principle of legality, not only when the authority does not do what the law requires or what it allows. in accordance with the essential formalities of the procedures, but also when in the use of its powers and in the exercise of its presumptions it misinterprets the tax laws for its benefit and to the detriment of the taxpayers, abusing the institutions or legal entities that legislation itself establishes.

This abuse is carried out by the tax authorities by carrying out atypical crimes such as abuse of rights, fraud of the law and abuse of authority, which generates great distrust in taxpayers and therefore a decrease in tax collection when feeling terrified. due to the abuses incurred by the authorities when they are in a higher hierarchical degree in the legal tax relationship, said acts are obviously malicious with all the intention of harming the taxpayer lacking ethics and moral principles with the aim of achieving collection goals among other purposes plus.

The consolidation of correct ethics and morals in the tax administrations brings with it trust in the governed for the fulfillment of their tax obligations, since the response to the low levels of corruption in the tax administration and greater tax awareness is the consolidation of a culture of integrity that has generated greater awareness in citizens about the fulfillment of their duties, but also about the demand for their rights, hence it is reprehensible and an anti- abuse clause is proposed for the tax authorities in the issuance of their administrative acts In Mexican legislation, it could be in the Fiscal Code of the Federation or in the Federal Law of Taxpayer Rights, so that in cases, either administratively or judicially, the performance of these atypical illicit acts by the tax authorities is verified. illegal is recharacterized to the one that generates the greatest tax benefit to the taxpayer The authority is sanctioned and/or sanctioned with compensation for moral and patrimonial damage caused to the taxpayer by the illegal acts of the authority.

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#### **AUTHORS' BIOGRAPHY**



**Mario Eric Anaya Arteaga**, is an Accountant, Major in Law, has a Diploma in Tax Contributions, a Minor in Tax Law, a Master's Degree in Taxes, a Master's Degree in Tax Law, a Doctorate in Tax Sciences, Professor virtually and face-to-face in the Faculty of Accounting and Administration, of the Autonomous University of Querétaro, speaker at national level on labor, social security and tax matters, vice-president of the “Asociación de Fiscalistas del Estado de Querétaro A.C.”, member of the “Comisión Fiscal de la Asociación Nacional De Fiscalistas.Net”. Member of the Board of Directors of the National Chamber of Commerce, Services and Tourism of Querétaro. And he is director and founder of the corporate “Inteligencia Jurídica Fiscal Contable S.C.”



**Dr. Martín Vivanco Vargas**, Doctor in Technological Management and Innovation, Director of the Faculty of Accounting and Administration and research professor at the Autonomous University of Querétaro



**Dr. Josefina Morgan Beltrán**, Research Professor of the Autonomous University of Querétaro, head of the postgraduate division of the Faculty of Accounting and Administration, Doctor of Administration with post-doctorate in Education, member of the National System of Researchers level I (SNI), member of the Program for Professional Development Teacher (PRODEP) and the National Association of Accounting and Administration Faculties and Schools (ANFECA).

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